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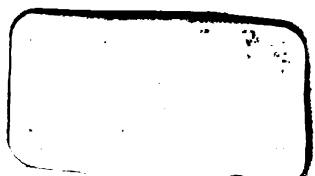
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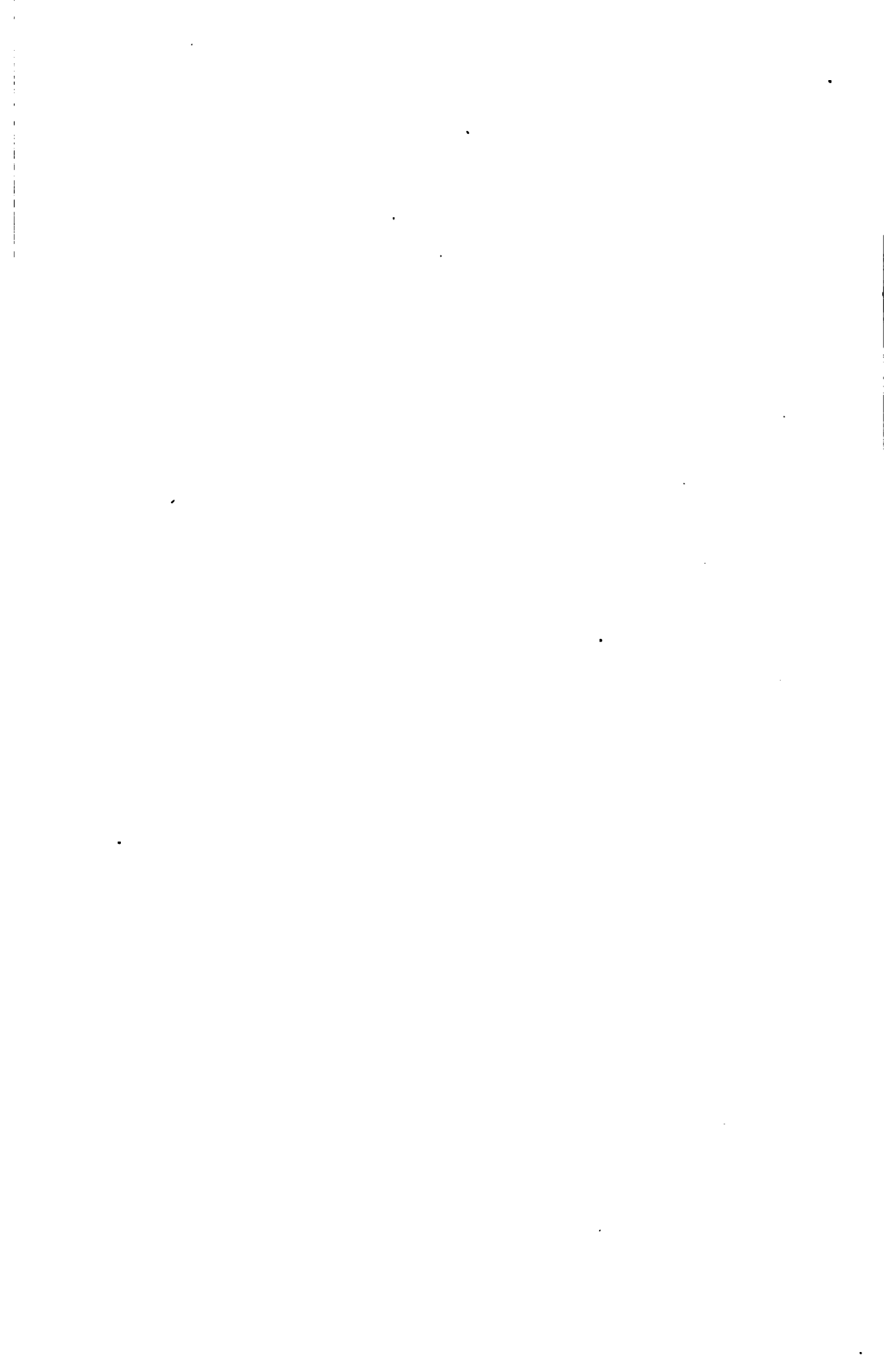
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ANNOTATED

NEW SERIES.

NORTH CAROLINA SUPREME COURT.

D. A. HELSABECK

v.

S. G. DOUB, Admr., etc., of Margaret J. Reed, Deceased, Appt.

(167 N. C. 205, 83 S. E. 241.)

Witness — transactions with persons since deceased — wife of plaintiff.

1. A woman is not rendered incompetent to testify in an action by her husband to recover for services rendered to a person since deceased, by a statute making one incompetent to testify as to a transaction with a person since deceased if he is interested in the event.

For other cases, see Witnesses, I. c, in Dig. 1-52 N. S.

Limitation of actions — services to be compensated at death.

2. Under a contract to render services for compensation to be made at the death of the person served, the statute of limitations does not begin to run until the death occurs.

For other cases, see Limitation of Actions, II. b, in Dig. 1-52 N. S.

(November 5, 1914.)

APPEAL by defendant from a judgment of the Superior Court for Forsyth County in plaintiff's favor in an action brought to recover the value of services rendered by plaintiff to defendant's intestate. Affirmed.

Statement by Allen, J.:

This is an action to recover the value of certain services rendered by the plaintiff to the intestate of the defendant. During the

Note. — For competency as a witness of the husband or wife of a party to an action involving a decedent's estate, see annotation following this case, post, 2.
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progress of the trial, the wife of the plaintiff was permitted to testify, over the objection of the defendant, that the defendant's intestate agreed with the plaintiff to pay for the services, and that payment was not to be made until after death. The defendant excepted. The defendant requested his Honor to charge the jury that the plaintiff could not recover for services rendered more than three years before the commencement of the action. This was refused, and the defendant excepted. The defendant pleaded the three-year statute of limitations. There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Messrs. Jones & Clement and Lindsay Patterson, for appellant:

Evidence in reference to the contract of boarding and maintaining the intestate was not competent as coming from the wife of the plaintiff, as she was a party interested in the event of the action.

Linebarger v. Linebarger, 143 N. C. 231, 55 S. E. 709, 10 Ann. Cas. 596.

An express contract must be upon some mutual agreement between the parties thereto, and there could be from this evidence only an implied contract to pay for any services rendered upon a quantum meruit.

Miller v. Lash, 85 N. C. 59, 39 Am. Rep. 678.

Messrs. Watson, Buxton, & Watson, for appellee:

The court did not err in receiving the testimony of plaintiff's wife.

Bradsher v. Brooks, 71 N. C. 322; Hall v. Holloman, 136 N. C. 34, 48 S. E. 515.

There was a special contract and understanding between defendant's intestate and plaintiff that he was to take care of her as long as she lived and take his payment out of her estate after her death, with no special contract as to price. He had no cause of action until after her death. Therefore, his

claim for more than three years was not barred by the statute of limitations.

Miller v. Lash, 85 N. C. 54, 39 Am. Rep. 678; Freeman v. Brown, 151 N. C. 115, 65 S. E. 743.

Allen, J., delivered the opinion of the court:

The evidence of the wife as to the contract between the plaintiff and the intestate of the defendant was objected to under § 1631 of the Revisal, upon the ground that, while not a party to the action, she was interested in the result. The language of the statute is, "interested in the event," and this is held in Jones v. Emory, 115 N. C. 163, 20 S. E. 206, and in Sutton v. Walters, 118 N. C. 495, 24 S. E. 357, to mean a "direct, legal, or pecuniary interest." In this sense the wife had no interest, as, upon a recovery by the plaintiff, no right growing out of the married relationship would attach to the money recovered.

In the case of Bradaher v. Brooks, 71 N. C. 322, the plaintiff brought an action to recover the amount of a certain bond which the defendant had collected and had not paid to the testator, his father-in-law, and the defendant's wife, the daughter of the

testator, was held to be a competent witness to prove that her husband, the defendant, offered to pay her father the money, but was told by him to keep it, as he intended it as an advancement to himself and the witness; and this was approved in Hall v. Holloman, 136 N. C. 34, 48 S. E. 515.

The case of Linebarger v. Linebarger, 143 N. C. 231, 55 S. E. 709, 10 Ann. Cas. 596, is not in point, because the property in controversy was land, and the wife's inchoate right to dower attached immediately upon the recovery by her husband.

We are therefore of opinion that the wife was a competent witness, and that her evidence was properly received.

The exception to the refusal to charge the jury that there could be no recovery for services rendered three years prior to the commencement of the action is fully met by the cases of Miller v. Lash, 85 N. C. 54, 39 Am. Rep. 678, and Freeman v. Brown, 151 N. C. 115, 65 S. E. 743, holding that, where services are rendered upon an agreement that compensation is to be made at death, the amount does not become due until death, and that the statute of limitations does not begin until that time.

We find no error.

Annotation—Competency as a witness of the husband or wife of a party to an action involving a decedent's estate.

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(c) Interest of wife in real action by husband, 23.

c. Rule where competency is dependent upon character of testimony offered, 25.

d. Wife's separate estate, 27.

e. Community property, 28.

I. Introduction.

At common law a party to a civil ac-

tion was incompetent to testify therein.¹ This exclusion was based upon the interest of the party in the litigation. In addition to the parties, other interested persons were likewise held incompetent as witnesses.² It was also a rule of the common law that husband or wife was incompetent as a witness for the other.³ This operated to exclude the testimony of one spouse whether the other was a party to the action or was merely interested therein.⁴ The rule which rendered incompetent parties and persons interested is very closely connected with that which excluded the spouse of a party or person interested. In fact, as pointed out below,⁵ interest was one of the reasons for excluding the spouse. It is necessary to a correct understanding of the cases upon the question under annotation, however,

¹ Greenl. Ev. 16th ed. § 328b, c; 1 Wigmore, Ev. § 575.

² Ibid.

³ 1 Greenl. Ev. 16th ed. §§ 333c, 334, 335.

⁴ 1 Wigmore, Ev. § 606.

⁵ Subd. II.

to keep in mind that the rules are not the same.

The common-law rule disqualifying parties and persons in interest has been very materially modified by statute; in fact wholly abrogated, with one very common exception, in a majority of jurisdictions. Under the exception above referred to, which is still preserved, a party or person interested is incompetent to testify in an action involving a decedent's estate. Likewise, the common-law rule disqualifying the husband or wife of a party or person in interest has been very materially modified by statute. Because of the close connection between these rules, a modification of the rule as to interest has been urged as effecting a modification of the rule as to competency of husband or wife. This question so far as actions involving decedents' estates are concerned, together with the general question of the competency of the husband or wife of a party in an action involving a decedent's estate, is the subject of investigation in this note.

The note is confined in general to the competency or incompetency as dependent upon the marital relation. The spouse may be disqualified on some other ground. For example, some statutes make the assignor of a claim against an estate incompetent, or a person who acted as an agent in transactions with a person since deceased. Other statutes disqualify the person from, through, or under whom the interested party claims. The husband or wife may, of course, be interested because of some pecuniary interest apart from the marital relation. In such cases the competency of the husband or wife is not dependent upon the marital relation, but upon the fact that he occupied the relation of agent, assignor, etc., and the cases have accordingly been excluded.

Again, the competency of husband or wife has arisen in cases in which the statute relating to decedent's estate was held not to apply because of the character of the action. The question under annotation presupposes that the action is such as is contemplated by the statute. Therefore, cases in which the ultimate question may have been as to competency of a spouse of a party are excluded where the decision rests upon a ground that would have been equally applicable if the witness had been a party. As shown in the note in 51 L.R.A. (N.S.) 187, there is a decided conflict of authority as to whether the statutes of

this class apply to controversies over succession to decedents' estates. Of course, if a decision holding the husband or wife of a party to such a contest a competent witness is upon the ground that the statute does not apply to such contests, it is of no value on the question now under annotation.

So, again, if the decision admitting the testimony of the husband or wife of a party to an action is upon the ground that the testimony does not fall within the class prohibited by statute, such as testimony concerning a personal transaction with the decedent, or testimony on behalf of the party, or any other of the prohibited kinds of testimony, the case is of no value on the present question.

Other questions which are of interest in connection with the subject of this note have been treated in previous notes in this series of reports.⁶

Under the statutes affecting the question under annotation, theoretically it is first necessary to determine whether or not the common-law disqualification has been removed; second, assuming that the common-law disqualification has been removed, is the spouse disqualified under the statute disqualifying parties and persons in interest in the actions stated? As a practical matter, many courts do not separate these theoretical steps as above stated, but consider the statutes as a whole. Even where the steps are separated, it is not necessary for the purposes of this note to determine the exact extent to which the common-law rule has been abrogated as affecting the competency of husband or wife as witnesses for each other generally, but only so far as such competency is affected in actions involving decedents' estates.

⁶ On competency of husband or wife as witness for or against the other as to transactions prior to marriage, see *Moore v. State*, 67 L.R.A. 499.

On husband and wife as witnesses in action for wife's libel or slander, see note to *Morgan v. Kennedy*, 30 L.R.A. 521.

On admissibility against one spouse of evidence of facts revealed by a physical examination of other spouse who would be an incompetent witness, see *Edwards v. State*, 49 L.R.A. (N.S.) 563, and note.

On exclusion of testimony of witness against decedent on ground of interest, see *Eisenlord v. Clum*, 12 L.R.A. 836, and note.

On competency of interested witness to testify as to transactions with deceased in which he did not participate, see *Mollison v. Rittgers*, 29 L.R.A. (N.S.) 1179, and note, and *Griswold v. Hart*, 42 L.R.A. (N.S.) 320, and note.

That the common-law disqualification has been removed, at least so far as it affects the competency of husband or wife in such actions, may be safely assumed for present purposes, in cases where the court considers it necessary to find some statutory disqualification. If the common-law rule is in force, the spouse of a party is disqualified even in the absence of statute.

Assuming that the common-law rule is not in force in a certain jurisdiction, and passing over the statutes relating to decedents' estates which make an express provision as to the competency of husband and wife, we come to the statutes which make no such express provision. These statutes may be roughly divided into three general classes: First, those which merely disqualify a party to the action; second, those which disqualify not only a party to such an action, but also persons interested; and, third, those which merely disqualify interested persons. In determining the competency of the spouse of a party to such an action or of a person interested therein, the question arises under these statutes whether the spouse is disqualified by reason of the fact that the other spouse, being a party or person interested in the action, is disqualified. In some jurisdictions the courts have deemed it necessary to state that the husband or wife of a party to such an action is not a party or party in interest. Under the two latter forms of statute, there is the additional question whether the spouse of a party to such an action or of a person interested therein is himself or herself a person interested within the meaning of the statutory provision.

Some statutes, however, do not make a party or person interested incompetent as to all testimony, but only as to testimony of a certain character. Under such statutory provisions the competency of a spouse is not determined in all instances by the determination of whether he is an interested party. If he is determined not to be, his competency, so far as the present note is concerned, is determined in the affirmative under the ordinary statute in which there is no further disqualification, but if he is determined to be an interested person, his competency then depends upon the further question of whether the testimony offered comes within the prohibition of the statute. If it does fall within such prohibition, the spouse is incompetent; but if it does not, he is competent so far as the present question is concerned. In other words, L.R.A.1917A.

to make a spouse incompetent under such a statute, he must be an interested person and the testimony offered by him must be within the prohibition of the statute.

These questions have been stated thus generally so that the reader may have at the outset a comprehensive view of the questions involved. The forms of statutes are almost as numerous as the jurisdictions, but in the main they fall within the classes above stated. Their details and exact forms are discussed below. It should be remembered that the competency of the spouse of a party or person interested in actions involving decedents' estates is now almost wholly a statutory question. Any investigation of this question in a particular jurisdiction should therefore begin with the contemporary statute. This note has to do only with judicial interpretation of statutes. There may be provisions in the statute in any particular jurisdiction that have not reached the courts, or it may be that the statute has been changed since the last judicial interpretation.

II. Theory of common-law rule.

The first question reached in determining the competency of the husband or wife of a party or person interested in an action involving decedents' estates is whether or not the common-law rule prevails. If it does, the spouse is incompetent.⁷ Thus, it is held that if a wife

⁷ *Abbott v. Clark* (1847), 19 Vt. 444, holding the wife of an administrator an incompetent witness in an action by him on a claim for rent due the estate, in which he would have been incompetent.

The wife of an heir of a decedent is not a competent witness in an action to determine the validity of a will. *Carpenter v. Moore* (1871) 43 Vt. 392.

The husband of one who has an interest in a suit in trover for the conversion of hay, by reason of being an indemnitor of the defendant therein, is not a competent witness. *Banister v. Ovitt* (1892) 64 Vt. 580, 24 Atl. 1117.

The wife of a residuary legatee and devisee in the will of a decedent is incompetent as a witness in an action against the estate for services rendered. The residuary legatee and devisee is stated to be a party in interest, because, the estate being solvent, a recovery would directly diminish the sum he would otherwise take under the will. *Westcott v. Westcott* (1896) 69 Vt. 234, 39 Atl. 199.

Wheeler v. Wheeler (1874) 47 Vt. 637, holding incompetent the husband of an heir who, though not a party to the record, was interested in the result of a suit against

is interested in a suit by reason of being entitled to dower in the event of its termination in a certain way, the husband is an incompetent witness;⁸ or if she is interested as an heir of a decedent in an action brought by the administrator, the husband is incompetent.⁹ If, on the other hand, the spouse of the person whose competency is in question is not interested, the person is not incompetent by reason of the marital relation.¹⁰ This incompetency exists not because there is anything distinctive in this respect in actions involving decedents' estates, but because the common-law rule excluding the spouse of a party or person interested applies to all actions.

the estate which involved the charging of another heir with advancement. *Davis v. Davis* (1875) 48 Vt. 502, holding the wife of an administrator incompetent in a suit against him.

The incompetency of the wife in an action against her husband on a note which had been acquired by the plaintiff from the estate of the deceased payee is assumed in *Sanborn v. Cole* (1891) 63 Vt. 590, 14 L.R.A. 208, 22 Atl. 716, and it is also held that the wife is not a competent witness to show herself within an exception to the general disqualification.

The court in *Re Valentine* (1896) 93 Wis. 45, 67 N. W. 12, after holding that legatees, devisees, and heirs at law are all parties to a proceeding to establish a lost will, holds the husband of a residuary legatee an incompetent witness to testify to the possession of a will by the testatrix the day before she died, the court stating that the "admission of his testimony under such circumstances and for such a purpose is contrary to the well-established general rule, which precludes a husband or wife from being a competent witness for or against the other in an action or proceeding to which such witness is not a party."

On the theory that the executor of a will is not beneficially interested therein, his wife was held competent as an attesting witness in *Re Lyon* (1897) 96 Wis. 339, 65 Am. St. Rep. 52, 71 N. W. 362.

Swift v. Martin (1885) 19 Mo. App. 488 (husband of a distributee who was interested in an estate incompetent in an action by the administrator of the estate).

In *Bieber v. Boeckmann* (1897) 70 Mo. App. 503, one whose wife was a beneficiary of a fund created by a decedent was held an incompetent witness in an action by the administrator of the decedent to recover the fund. "The person held an incompetent witness in this case was the trustee of the fund, it having been given him by the decedent in her lifetime for the purpose of distribution according to her directions after her death. The incompetency, however, is based upon the fact that he was the husband of the beneficiary of the fund, and L.R.A.1917A.

The common-law rule as to the competency of the husband or wife of a party to or person interested in an action has remained unmodified in but few jurisdictions. A correct understanding of the form of statute necessary to modify the common-law rule as it bears upon the subject of investigation in this note requires a knowledge of the foundation of the rule. The basis of the rule has been stated in various ways, but these statements may be summed up under two heads: First. The unity of person and consequent identity of interest; Second. The public policy of protecting inviolable the confidence of the marital

not upon the reason that he was a defendant to the action.

The reasons for the decisions and the references to statutes are entirely lacking or so meager in the Missouri cases that it is impossible to determine with any degree of certainty anything beyond the mere result. See, *infra*, notes 46-49, for Missouri cases subsequently to the Statute of 1899.

In *Malaun v. Ammon* (1854) 1 Grant, Cas. (Pa.) 123, the wife of an administrator was held incompetent in an action against him in trespass on the case.

⁸ *Snyder v. Snyder* (1814) 6 Binn. (Pa.) 483, 6 Am. Dec. 493. This is held true although the husband has released any interest his wife would be entitled to receive during his life, the court stating that the husband cannot release that which may accrue after his death; that there remains, therefore, an interest in the wife which she may either convey or release by immediate deed, provided her husband joins her.

A similar decision appears in *McComb v. Dillo* (1819) 5 Serg. & R. (Pa.) 304, relying upon the *Snyder Case*.

This common-law rule has been modified by statute in Pennsylvania, but the operation of the statute has been excluded in actions involving decedents' estates. See *Taylor v. Kelly* (1875) 80 Pa. 95, *infra*, notes 25 et seq.

⁹ *Pringle v. Pringle* (1868) 50 Pa. 281.

¹⁰ The wife of one who signed an appeal bond for an administrator in an action against the estate was held not incompetent on account of the interest of her husband, in *Rutland & B. R. Co. v. Lincoln* (1857) 20 Vt. 206. The rule of this case was held not applicable in determining the competency of the wife of an heir who, although not a party to a contest over the validity of an instrument offered as a will, was interested therein, the court stating that a judgment in such a case is conclusive upon all the heirs alike, whether they are parties to the suit or not; consequently the competency of the wife of such an heir is subject to the same rule of exclusion as applies in case he is a party of record. *Carpenter v. Moore* (1871) 43 Vt. 392.

relation.¹¹ A distinction has been made, however, between testimony "for" and testimony "against" the other spouse, it being held that the only ground of excluding testimony "against" the other is the ground of public policy.¹²

It is the theory of some cases that a statute simply removing the disqualification of interest does not render husband and wife competent on behalf of each other.¹³ This leads to a somewhat anomalous situation in some cases. For example, the husband or wife of a person who at common law would have been incompetent on account of interest is still incompetent, although the interested spouse is rendered competent by a statute removing the disqualification of interest.¹⁴ It has been urged that the

husband of a party is a person interested within the meaning of a statute removing the disqualification of interest, and therefore competent; but this has been denied.¹⁵ The public policy to maintain the marital relation inviolable has been held not removed by a statute making husband and wife competent "as other witnesses," when the statute is taken in connection with another statute removing interest as a disqualification except as to parties and persons interested in actions involving decedents' estates.¹⁶

That a statute making interested persons competent cannot be construed to make the husband or wife of a party competent by implication is stated by Wigmore in his treatise on Evidence,

¹¹ *Saffold v. Home* (1894) 72 Miss. 470, 18 So. 433; *Clements v. Marston* (1872) 52 N. H. 31; *Foley v. Loughran* (1897) 60 N. J. L. 464, 38 Atl. 960, 39 Atl. 358; *Carpenter v. Moore* (Vt.) supra; *Kilgore v. Hanley* (1886) 27 W. Va. 451.

In *Rice v. Keith* (1869) 63 N. C. 319, the court states that "the exclusion of husbands and wives was based on grounds of public policy, and not upon interest." It was accordingly held in this case that a statute providing that no person offered as a witness shall hereafter be excluded from giving evidence by reason of incapacity from "interest" did not remove the common-law disqualification as to husband or wife.

Snyder v. Snyder (1814) 6 Binn. (Pa.) 483, 6 Am. Dec. 483. The court, after stating that an interest in the suit remained in the wife, states that "a husband thus circumstanced is an incompetent witness, not because of interest, but because of the policy of the law which excludes husband and wife from testifying where the rights of either are concerned. Much of the happiness of society depends on the intimacy of husband and wife. The law considers them as one, and will not suffer their union to be broken or even put to hazard by testifying against each other. As to testifying for each other, it would be so manifestly improper that there needs no argument on the subject."

It is stated in *Pringle v. Pringle* (1868) 59 Pa. 281, that nothing is better settled than that "wherever the wife is interested the husband cannot be a witness,—not on the score of his interest, for he may preclude himself from any by a release, or may have done so by a settlement to her separate use, but entirely on the ground of public policy."

But in *Taylor v. Kelly* (1875) 80 Pa. 95, it is stated that, prior to the enactment of a statute removing the common-law disqualification in certain instances, "both interest and policy excluded husband and wife from testifying for and against each other."

And in *Bitner v. Boone* (1889) 128 Pa. L.R.A.1917A.

567, 18 Atl. 404. the court states that, "notwithstanding the remark of Mr. Justice Sharswood in *Pringle v. Pringle* (1868) 59 Pa. 288, to the contrary, we think this rule of exclusion is founded upon the twofold consideration of interest and policy."

It is stated in *Re Valentine* (1896) 93 Wis. 45, 67 N. W. 12, that the exclusion of the testimony of a husband or wife of a party is not on the ground of interest, but of public policy.

¹² *Kilgore v. Hanley* (1886) 27 W. Va. 451; see *Freeman v. Freeman*, infra, note 35.

¹³ *Swift v. Martin* (1885) 19 Mo. App. 488; *Bieber v. Boeckmann* (1897) 70 Mo. App. 503; *Rice v. Keith* (1869) 63 N. C. 319.

Notwithstanding the North Carolina court had held in *Rice v. Keith* (1869) 63 N. C. 319, that a statute removing the disqualification as to interested parties merely did not remove the disqualification as to husband and wife, in the subsequent case of *Bradsher v. Brooks* (1874) 71 N. C. 322, this court held competent the wife of a defendant in an action by an executor to recover property claimed to belong to his decedent, the court stating that "the old idea that the legal existence of the wife is merged into that of the husband belongs to the past in North Carolina, so far at least as her rights of property are concerned." And in subsequent North Carolina cases the common-law rule is treated as abrogated. The North Carolina Statute of 1883, § 588, expressly provides that the husband or wife of a party is competent, and a similar statute may have been in effect at the time of the decision in *Bradsher v. Brooks*.

Kilgore v. Hanley (1886) 27 W. Va. 451 (incompetent for or against).

¹⁴ *Swift v. Martin* (1885) 19 Mo. App. 488; *Bieber v. Boeckmann* (1897) 70 Mo. App. 503.

¹⁵ *Re Imboden* (1907) 128 Mo. App. 555, 107 S. W. 400, see infra, note 48.

¹⁶ *Kilgore v. Hanley* (W. Va.) supra.

vol. 1, § 619, to be the rule sustained by "almost every court before whom the question was raised." Some jurisdictions are cited by this author to the contrary, and the contrary seems to be the theory of some courts under statutes providing that a witness shall not be incompetent on account of interest.¹⁷ Other statutes, in addition to removing the disqualification as to interest, make all persons competent as witnesses except as provided in the section relating to actions involving decedents' estates. This is held to remove the common-law disqualification as to husband and wife.¹⁸ Still other statutes under which the common-law disqualification has been treated as removed make all persons competent witnesses, including parties.¹⁹

In some of the jurisdictions in which a removal of the disqualification of interest is treated as removing the disqualification of husband or wife, the necessity of eliminating the ground of public policy is recognized,²⁰ but in others no very clear theory is expressed. It is conceivable that, even though these

courts should admit that the common-law rule was founded on public policy as well as interest, they should take the view that public policy has changed in this regard so as to warrant a judicial change of the rule. It seems clear that, if a general statute removing the disqualification of interest removes the disqualification of husband or wife, a statute which disqualifies on account of interest in actions involving decedents' estates likewise renders incompetent husband and wife. But if, in addition to the general statute removing interest as a disqualification, the public policy with reference to husband and wife has changed, there is reason for holding that the statute disqualifying on account of interest in actions involving decedents' estates does not reinstate the disqualification. A difference in the wording of the two statutes might require this construction also.

In some jurisdictions the question presents no difficulty, because of an express provision in the statute declaring the husband or wife competent.²¹ An abrogation of the common-law rule is

¹⁷ Section 4007 of the Alabama Code of 1907, which is the same as § 1794 of the Code of 1897, provides that there shall be "no exclusion of any witness because he is a party or interested in the issue tried except that no person having a pecuniary interest in the result of the suit or proceeding shall be allowed to testify against the party to whom his interest is opposed as to any transaction with or statement by the deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person at the time of such transaction or statement acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced," except upon certain conditions not material to the present question.

See *Bradsher v. Brooks* (1874) 71 N. C. 322.

¹⁸ *Butler v. Phillips* (1906) 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204. A statute rendering husband and wife incompetent to testifying for or against each other was repealed by the General Statutes rendering all person competent as witnesses. The history of legislation is reviewed, and the court concludes that "it is manifest that it was the intention of the legislature . . . to entirely remove the disqualification theretofore resting upon husband and wife on account of the marriage relation or . . . on account of public policy."

It is the theory of *Bitner v. Boone* (1889) 128 Pa. 567, 18 Atl. 504, that the common-law rule was removed by the statute so as to allow husband and wife to testify in favor of each other, but not against each L.R.A.1917A.

other except as stated in the statute. See, *infra*, note 29, for discussion contained in this case.

¹⁹ *Shafer v. Dean* (1870) 29 Iowa, 144, declares all persons, including the parties to actions, to be competent witnesses for or against each other. See subsequent Iowa statute, note 97.

The Montana statute provides that "no person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding as a party thereto or otherwise." *Shober v. Jack* (1879) 3 Mont. 351.

²⁰ *Butler v. Phillips* (1906) 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204, see *supra*, note 18.

²¹ *Arizona Rev. Stat. of 1887*, § 1863, provide that "no person shall be incompetent to testify . . . because he is a party to a suit or proceeding or interested in the issue tried," etc. Section 1864 provides that "the husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications, . . . but neither can be examined for or against the other without the consent of the other," etc. Following this is § 1865, which provides that "in an action by or against executors, administrators, or guardians in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward," . . . and the provisions of

effected by a statutory provision that husband and wife shall be competent witnesses for each other in all civil cases;²² and, to a limited extent, is effected by a statute making husband and wife competent witnesses for or against each other in cases which would not lead to a violation of the marital confidence.²³ As stated above, no exhaustive discussion of the removal of the common-law rule has been attempted in this note. Only a sufficient number of cases passing upon that question have been discussed to present the theory of that rule and the form of statute necessary to its removal.

III. Statutory rules.

a. In general.

Coming now to the competency of the husband or wife of a party to an action involving decedents' estates under the statutes enacted on that subject,

this section shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent." These statutes are construed as abrogating the rule of the common law in *Miller v. Miller* (1901) 7 Ariz. 316, 64 Pac. 415.

The Massachusetts statute involved in *Howe v. Howe* (1868) 99 Mass. 88, is stated to have expressly removed all objections to the competency of the husband of one of the parties on the ground of the marital relation.

By § 5 of the New Jersey Statutes of 1874, the husband or wife of a party interested is made competent and compellable to give evidence the same as other witnesses, except in certain specified cases. *Foley v. Loughran* (1897) 60 N. J. L. 464, 38 Atl. 960, 39 Atl. 358. This is the same as Statute of 1896.

The New York Code of Civ. Proc. 1877, § 828, provides: "Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness by reason of his or her interest in the event of an action or special proceeding, or because he or she is a party thereto or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended."

Section 588 of the North Carolina Code of 1883 provides that "in any trial or inquiry in any suit, action, or proceeding, . . . the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, . . . shall, except as hereinafter stated, be competent and compellable to give evidence as any other witness on behalf of any party to such suit, action, or proceeding."

In *Guillaume v. Flannery* (1906) 21 S. D. L.R.A.1917A.

it appears that some cases treat the statutory provisions as a whole. These statutes are of various forms, and various rules are announced. Actions involving decedents' estates are by some statutes excepted from the operation of general provisions rendering husband and wife competent witnesses. This leaves the common-law rule in force, and husband or wife is incompetent in such an action. Attention is called again at this point to the statements in the introduction, *supra*, I., outlining the scope and limitations of the question under annotation.

Under a statutory declaration that the provision rendering competent the husband or wife under certain conditions shall not apply to suits in which executors, administrators, or heirs are parties, except in special cases, the spouse of a party to such an action, not within any exception of the statute, is incompetent.²⁴

1, 108 N. W. 255, the statute provided that "no person offered as a witness in any action . . . shall be excluded or excused by reason of such person's interest in the event of the action, . . . or because such person is a party thereto, or because such person is a husband or wife of a party thereto, or of any person in whose behalf such action . . . is brought, prosecuted, opposed, or defended, except as hereinafter provided." It was then provided that in civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered for or against them, neither party nor his assignor nor any person who has or ever had any interest in the subject of the action adverse to the other party, or to his testator or intestate, shall be allowed to testify against such other party as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party.

²² The Mississippi Code of 1871, § 760, admitted husband and wife as witnesses for each other "in all civil cases." *Saffold v. Horne* (1894) 72 Miss. 470, 18 So. 433. The Code of 1880, § 1601, and the Code of 1892, § 1739, provided that "husband and wife may be introduced by each other as witnesses in all cases, civil or criminal."

²³ *Clements v. Marston* (1872) 52 N. H. 31. The court concludes by stating that "allowing the wife to testify for or against her husband in any case where a stranger would have been a competent witness seems to be the rule now, and in that view of the case nothing should be excluded except something that is strictly confidential, and not only so, but communicated in strict marital confidence."

²⁴ *Hunter v. Lowell* (1874) 64 Me. 572 (husband incompetent in action by executor

An early Pennsylvania statute removing the common-law disqualification in certain cases, but containing a proviso that it shall not apply to actions against decedents' estates,²⁶ is held to take such cases out of the statute, and in effect leave the common-law rule in force.²⁶ Consequently, the husband or wife of a party or person interested is incompetent.²⁷ But it is otherwise if the interest which disqualified has been assigned.²⁸

Likewise, under a later Pennsylvania statute²⁹ removing the common-law dis-

qualification with certain exceptions, among which is that neither the surviving party to a thing or contract in action with a party since deceased, nor any other person whose interest shall be adverse to the right of the decedent, shall be a competent witness, though it is admitted that the common-law rule has been modified so as to allow the husband and wife to testify in favor of each other, but not against the other, except as stated in the statute, it has been held that the husband or wife of a party to such an action is incompetent by rea-

on a note of wife, to prove the defense of payment); *Berry v. Stevens* (1879) 69 Me. 290 (wife incompetent in action against her husband on note); *Hubbard v. Johnson* (1885) 77 Me. 139; *Hallowach v. Priest* (1915) 113 Me. 510, 95 Atl. 146.

This apparently is the holding in *Jones v. Simpson* (1871) 59 Me. 180, where a husband was held an incompetent witness in an action by his wife against an administrator for medicines furnished the defendant's intestate.

See Indiana decisions, *infra*, note 36.

²⁶ *Taylor v. Kelly* (1875) 80 Pa. 95. The statute here involved declared that "no interest nor policy of law shall exclude a party or person from being a witness in any civil proceeding: Provided this act shall not alter the law as now declared and practised in the courts of this commonwealth, so as to allow husband and wife to testify against each other, nor counsel to testify to the confidential communication of his clients". . . . "This act shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead, excepting in issues and inquiries *devisavit vel non* and others respecting the right of such deceased owner between parties claiming such right by devolution on the death of such owner."

²⁷ *Taylor v. Kelly* (Pa.) *supra*. The court states that "we must not overlook the fact that all competency imparted to any witness by the enacting clause of the 1st section is entirely taken away by the proviso in case an executor is a party to the action. It would be no more clearly in the face of the statute to hold that husband and wife may testify against each other than that they may testify in their own favor when an executor is a party to the action, to events which transpired during the life of the testator. Each is prohibited by the same expressive language. The same clause in the enactment made both husband and wife equally competent. The same prohibition in the proviso made them both incompetent to testify in behalf of each other when an executor is a party."

Bitner v. Boone (1889) 128 Pa. 567, 18 Atl. 404 (dictum).

A contrary construction was put upon this statute in *Dellinger's Appeal* (1872) L.R.A.1917A.

71 Pa. 425, where the wife and husband of a son and daughter of a decedent were held competent witnesses for the son and daughter upon a claim against the decedent's estate, on the theory that they had no personal interest in the controversy and were not parties to it. It is stated: "They were not to be excluded unless they fall within the first clause of the proviso prohibiting a husband or wife from testifying against each other. The witnesses being neither parties nor interested, their exclusion could rest only on the ground of policy. But this policy is removed by the enactment which declares that no policy of law shall exclude a person from being a witness in any civil proceeding, while the exception to the enactment does not embrace a husband and wife called to testify for each other. . . . The second clause of the proviso evidently applies to parties or interested persons, and not to those who had at law been excluded from policy alone." The court in *Bitner v. Boone* says of this case that the construction placed upon the act in question in it was not that ultimately placed upon it in *Taylor v. Kelly*.

²⁷ *Taylor v. Kelly* (1875) 80 Pa. 95, holding the husband and wife of a daughter and son of a decedent incompetent witnesses in an action against the executor for boarding the decedent for a number of years previously to his death.

See *Dellinger's Appeal*, note 26.

²⁸ The husband of an heir who had assigned all her interests in the estate, and had therefore become a competent witness, was likewise held a competent witness in *Brant v. Deanison* (1885) 1 Sadler (Pa.) 62, 5 Atl. 869, in an action by the administrators of the decedent to recover certain mortgaged premises.

²⁹ *Bitner v. Boone* (1889) 128 Pa. 567, 18 Atl. 404. The statute provided that no liability for costs nor right of compensation, nor any interest in the question, "nor any other interest or policy of the law," shall in any civil proceeding, etc., render any person incompetent as a witness, except as provided in § 5 of the same act. Section 5 of the act provides in clause (b) that neither husband nor wife is competent to testify to confidential communications made to the other, unless the privilege is

son of the incompetency attaching to the other, who is a party or is interested.³⁰ The court states of a wife who was not a party to the thing or contract in action, that she was not therefore incompetent on that ground, but asks, Was "she a person whose interest is adverse within the meaning of the Act of 1887? Can she be considered a competent witness, when upon the ground of interest her husband is incompetent?" Continuing, the court states that "if the husband must be excluded on account of interest, so also must his wife be excluded on account of her unity of interest with him. Although each may not be said to have any direct interest during coverture, she has, nevertheless, an indirect

interest derivative from her husband, and so presently joined with his as, at all periods in the history of the law, placed her in the attitude of an interested person in cases where her husband's rights came into controversy. . . . If the legislature had intended to change the law in this respect against the theory of both the common and the statute law and the habits of centuries, it is reasonable to suppose that the change would not have rested upon any mere implication, but would have been expressed in plain words."³¹ If the spouse who is a party or is interested is not incompetent, the other spouse is not.³²

Under a statute which, instead of

waived; and in clause (c) that neither is competent to testify against the other except in certain cases, which are specified. It is stated that from this it is clear that the husband and wife may testify each in favor of, but not against, the other, as heretofore, except as stated in clause (b). In clause (e) it is provided that where any party to a thing or contract in action is dead, etc., and his right thereto or therein has passed either by his own act or the act of the law to a party on the record who represents his interest in the subject in controversy, the surviving or remaining party to such a thing or contract shall not, nor shall any other person whose interest shall be adverse to the said right of said deceased, be a competent witness to any matter occurring before the death of the decedent.

³⁰ *Bitner v. Boone* (Pa.) supra; *Winings v. Hearst* (1901) 17 Pa. Super. Ct. 314, holding incompetent the wife of a plaintiff in an action in assumpsit against the executor or administrator of a decedent, to recover compensation for services rendered the decedent in his lifetime.

Daisz's Appeal (1889) 128 Pa. 572, 18 Atl. 414, holding the husband of a daughter of a decedent incompetent in a hearing upon the account of the executor to determine whether the daughter was entitled to certain real estate.

Sutherland v. Ross (1891) 140 Pa. 379, 21 Atl. 354, holding the wife of the grantor in a deed an incompetent witness in an action by him in ejectment against a subsequent grantee of the land, where the grantor was incompetent because of the death of his grantee. The claim of the plaintiff in ejectment in this case was that the deed was a forgery.

Campbell v. Brown (1897) 183 Pa. 112, 38 Atl. 516, holding the husband of a daughter and heir of a decedent incompetent in an action by his wife against another heir to recover property claimed by the other heir as a gift from the ancestor.

Myers v. Litts (1900) 195 Pa. 595, 46 Atl. 131, holding the wife of a lessee incompetent in an action in trespass to re-

cover damages for the alleged wrongful removal and sale of stock and farming implements, against an agent of the lessor, the lessor having died before the trial.

Berger v. Berger (1910) 44 Pa. Super. Ct. 305, holding the wife of the defendant incompetent in an action by an administrator for a reassignment of stock in a building and loan association.

In *Burke v. Burke* (1913) 240 Pa. 379, 87 Atl. 960, an action of ejectment between heirs, in which the validity of a certain deed of their ancestor was involved, one of the heirs, a daughter, was urged as a competent witness on the theory that she had filed a disclaimer for certain technical reasons, and the court held that the disclaimer was not sufficient to render her a competent witness, but stated that, even if it had been sufficient, she was incompetent to give the testimony sought to be elicited from her in this case, because her husband was a defendant and the writ was served on him and he joined the other defendants in entering the plea of not guilty, and by reason of his incompetency, his wife also was incompetent.

Smith's Estate (1889) 8 Pa. Co. Ct. 29, holding the husband of an executrix and residuary legatee under the will of a decedent an incompetent witness in regard to a claim against another estate.

An inferior court in Pennsylvania in the case of *Levan v. Bickel* (1885) 5 Pa. Co. Ct. 610, held the husband of a defendant a competent witness in an action by executors on a contract, although the husband was joined as defendant with his wife. There is no opinion, so it is impossible to tell the theory of this case.

³¹ *Bitner v. Boone* (1889) 128 Pa. 567, 18 Atl. 404.

³² *Hoffer's Estate* (1893) 156 Pa. 473, 27 Atl. 11, holding the wife of a claimant against an estate a competent witness where the claimant himself was competent, because of the character of the testimony offered not coming within the prohibition of the statutes. The husband was executor in this case, but no point is made of this fact.

merely providing that the husband or wife of a party to a civil action is competent to give evidence, provides in one section that the husband or wife of a party is competent to give evidence the same as "any other witness," and in another section that a witness shall not be excluded because he is interested or because he is a party, except that no party nor person interested in the event shall be examined as a witness in actions involving decedents' estates and in certain others,—the husband or wife of a party to an action by the personal representative of a decedent is held incompetent as a witness to testify on behalf of the other.³³ The court³⁴ reasons that the latter section of the statute "removes the incompetency of parties or persons on account of interest in the event of the action or suit except as to personal transactions or communications had with a deceased person," but it "leaves the competency of the witness as to cases mentioned in the exception just as it was at the common law." After referring to the section that declares a husband or wife competent to give evidence "the same as any other witness," the court continues: "Both of these are enabling statutes in derogation of the common law, and therefore are to be construed strictly. . . . Giving them a fair and reasonable construction, it is plain that the legislative intent was, by the 23d [latter] section, to remove the disqualification of interest as to all witnesses except as to personal transactions had with deceased persons, and as to these the common-law rule is left in full force; and by the 22d [former] section, it was intended to make the competency of the husband and wife the same as other persons' in all re-

spects except as to confidential communications. That is, they are made competent to testify for or against any party in an action or suit the same as other persons, but they cannot testify to matters as to which other witnesses similarly situated would be incompetent." According to the latter section, "other witnesses who are interested in the event of the action cannot testify in regard to personal transactions had between the witness and a deceased person against the administrator of such deceased person." The interest of husband and wife being identical, where the one is disqualified by reason of interest in the action or suit, the other is for the same reason disqualified. In a subsequent case³⁵ the court, in commenting upon the earlier case, states that "that decision was based not upon the interest of the wife in the claim of the husband to be determined by the suit, but upon the common-law doctrine of the unity of husband and wife and the identity of their interests, and upon the policy of the law to preserve this doctrine for the safeguarding of the marital relation. The following proposition is clearly deducible from the decision of that case; viz., That if one consort is forbidden by § 23, chap 130, Code, to give testimony in regard to a personal transaction or communication had with a decedent, because of his or her being a party to or interested in the result of the suit, the other consort is also denied the right to testify. The denial of the right rests on two grounds; viz., (1) If the testimony offered would be in favor of the other consort, it is excluded on the ground of identity of interest of husband and wife; and (2) if the testimony is ad-

Walls v. Walls (1897) 182 Pa. 226, 37 Atl. 850, holding the husband of a daughter of the decedent competent in an action by the personal representative upon a promissory note, where the husband and wife had executed a release of all interest in the estate; the court stating: "It is too plain for argument that the release was an absolute discharge and surrender of all interest in that estate, and therefore establishes her competency as a witness, and by consequence that of her husband."

³³ *Kilgore v. Hanley* (1886) 27 W. Va. 451, holding the wife of a defendant an incompetent witness on behalf of her husband in an action by an administrator upon a note belonging to the decedent's estate.

Freeman v. Freeman (1912) 71 W. Va. 303, 76 S. E. 657, and *Bailey v. Bee* (1913) 73 W. Va. 286, 80 S. E. 454, holding the husband of an heir and party to the con-

test of a will an incompetent witness as to the testamentary capacity of the testatrix. The testimony was held not ground for reversal in the latter case, as jury found against the side in behalf of which it was admitted.

The West Virginia statute as to removing the disqualification of interest provides that the husband or wife of any party to a civil action or suit shall be competent to give evidence the same "as any other witness," on behalf of any party to such action, excepting as to confidential communications.

³⁴ *Kilgore v. Hanley* (W. Va.) supra.

³⁵ *Freeman v. Freeman* (1912) 71 W. Va. 303, 76 S. E. 657, holding the husband of an heir in a will contest incompetent to testify as to the mental condition of the testator.

verse to the interest of the other consort, it is excluded on the ground of public policy."

Some statutes expressly provide that when husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded. In accord with this direct provision, the spouse of a party who is incompetent in an action involving heirs, devisees, or personal representatives, is also incompetent.³⁶

Other statutes modify the common-law rule to the extent of providing that, in actions which might have been

brought by or against the wife if she had been unmarried, either, but not both, husband and wife may testify. Where the wife is incompetent in an action by virtue of another statute making a person incompetent to testify for himself as to certain matters in actions involving decedents' estates,³⁷ it has been held that, the wife not being competent, the husband is incompetent.³⁸

Whatever may be the theory as to whether a removal of the disqualification of interest³⁹ removes the disqualification of husband or wife, a subsequent provision in the statute may deter-

³⁶ Creighton v. Hoppis (1884) 99 Ind. 369. This case is not sufficiently reported to determine the exact nature of the action, but apparently it was an action by a grantee against the widow and heirs of the grantor to recover possession of property, the defendants claiming that the deed was in fact a mortgage. The wife of the plaintiff was apparently offered as a witness and held incompetent.

Terry v. Davenport (1916) — Ind. —, 112 N. E. 998, holding the husband of a defendant in an action to quiet title in which the wife filed a cross complaint claiming title to portions of the land, incompetent to testify to transactions between the wife's ancestor and plaintiff's devisor.

In Walker v. Steele (1889) 121 Ind. 436, 22 N. E. 142, 23 N. E. 271, the wife of the guardian of an infant, who was defendant in an action by the personal representative of an estate to set aside a transfer of a certain note and mortgage to him, and have them declared assets of the estate, was conceded to be incompetent to testify for her husband, but was claimed to be competent for his codefendant,—a contention that was denied.

The statute involved in the foregoing case, § 501 of the Revised Statutes of 1881, provided that when the "husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded." Although the Statute of 1881 was in force, and governed the case of Williams v. Riley (1882) 88 Ind. 290, this particular section seems to have escaped the attention of the court in that case, and it was accordingly held that the wife of the defendant in an action on a promissory note by the heirs of the holder of the note was competent to prove that she was present when a payment was made upon the note which reduced it as claimed by the defendant. The court, in referring to the law relating to the competency of husband and wife as witnesses, states that husband and wife are no longer incompetent witnesses for or against each other, except that neither of them is allowed to testify in relation to a communication made by the other. The evidence involved in this case not being a communication, the wife was held competent.
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³⁷ The substance of the Kentucky statute is stated in Bright v. Swinebroad (1899) 106 Ky. 737, 51 S. W. 578, to be that "no person shall testify for himself concerning any verbal statement or any transaction with or any act done or omitted to be done . . . by one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living and who . . . heard such statement or was present when such transaction took place or when such act was done or omitted to be done," and except in other cases immaterial in this note. A statute relating to husband and wife in effect provided that in actions which might have been brought by or against the wife if she had been unmarried, either, but not both, husband and wife may testify.

³⁸ Bright v. Swinebroad (Ky.) supra. The action was one by the wife against her husband as trustee, the executors of the payee of a note, and the makers of the note, the wife claiming that the payee had given the note to her husband as trustee for her, and asking that it be collected and the proceeds paid to her. The answer of the husband admitted the substantial facts as stated in the plaintiff's petition, and upon the trial the husband was offered as a witness to certain transactions which were claimed to have taken place between the wife and the decedent. It is stated by the court that "upon a careful consideration of the authorities and the reason of the law, we are of opinion that the husband could only testify as to such transactions as the wife could have testified to if the same had been within her knowledge." The wife being incompetent to testify to the conversations or transactions had with the decedent or to the promises made by him, the husband was held likewise incompetent. No point is made of the fact that the husband was a party to the proceeding.

³⁹ Treleaven v. Dixon (1886) 119 Ill. 548, 9 N. E. 189. The statute provides that "no person shall be disqualified as a witness in any civil action, suit, or proceeding except as hereinafter stated, by reason of his or her interest in the event thereof as a party or otherwise." In the 2d section it is provided in what cases the disability is not removed, as follows: "No party to

mine the competency in so far as it is involved in actions against decedents' estates. In Illinois it is provided in a subsequent section that the husband or wife shall not, by virtue of the general statutory provision removing the common-law disqualification, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, except in certain cases in which they may

testify for or against each other in the same manner "as other parties may under the provisions of this act."⁴⁰ The word "party" is held to have a well-defined meaning in the statute, distinguishable from the word "person," and to be confined to meaning a party to a suit⁴¹ or a party in interest in the suit. A party to an action involving a decedent's estate not being competent, the spouse of a party is also incompetent.⁴²

any civil action, . . . or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf by virtue of the foregoing section when any adverse party sues or defends as the . . . executor of any deceased person," etc. It will be noticed that this statute renders the party incompetent, and not merely incompetent to testify to certain matters.

⁴⁰ *Treleaven v. Dixon* (Ill.) supra. In the chapter containing the sections shown above in note 39, there follows § 5, which provides that "no husband or wife shall by virtue of § 1 of this act be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the neglect of the husband to furnish the wife with a suitable support, and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce, and except also in actions upon policies of insurance of property so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband,—in all of which cases the husband and wife may testify for or against each other in the same manner as other parties may under the provisions of this act."

⁴¹ *Treleaven v. Dixon* (Ill.) supra. The same argument was advanced in *Mueller v. Rebhan* (1879) 94 Ill. 142, but the court does not make its conclusion clear on this point. The theory of the *Mueller* Case is different from that of the *Treleaven* Case. See *infra*, note 45.

⁴² *Crane v. Crane* (1876) 81 Ill. 165 (husband of plaintiff incompetent to testify in an action against the widow and heirs of a grantee of the wife, to set aside the deed on the ground of duress and undue influence); *Warrick v. Hull* (1882) 102 Ill. 280 (mortgagor incompetent to testify in an action by his wife against the executor of the estate of the mortgagee, to enjoin a L.R.A.1917A.

proposed sale of the property on the ground that she had not acknowledged the deed so as to release her homestead rights).

Treleaven v. Dixon (1886) 119 Ill. 548, 9 N. E. 189, holding a husband incompetent to testify in an action by the wife against the executors and trustees of an assignee of a mortgage given by the husband and wife upon her property, to set aside a sale of the property on the ground that the time for payment of the note secured by the mortgage was extended by a contract between her husband and the assignee without her consent after the maturity of the note, the trust deed thereby released and extinguished as a security. The fact of an extension was put in issue by a denial, and the only witness by whom the contract is claimed to have been proved was the husband of the complainant. This case expressly overrules *Marshall v. Peck* (1878) 91 Ill. 187, and must be considered as overruling *Corderoy v. Hughes* (1880) 6 Ill. App. 401, which relies upon *Marshall v. Peck*.

Way v. Harriman (1888) 126 Ill. 132, 18 N. E. 206, holding the husband of the daughter of a decedent an incompetent witness to prove a contract by which the decedent conveyed certain personal property to the daughter in consideration of care and support, in an action by other heirs to compel an accounting of this property and distribution according to the intestate laws.

Shaw v. Schoonover (1889) 130 Ill. 448, 22 N. E. 589, holding the husband of a daughter of an intestate an incompetent witness with reference to a verbal agreement between his wife and the intestate by which the intestate was to convey land to the wife, in a crossbill filed by the wife in an action in partition, to compel the execution of the deed in accordance with the agreement. The husband was a party to the action in partition as was also his wife as heir, but upon the crossbill filed by the wife the court points out that his wife was suing not as heir for her inheritance, but was claiming to be an owner of certain of the property involved in the partition action by virtue of a contract; that the real defendants in this crossbill were her brothers and sisters.

Shovers v. Warrick (1894) 152 Ill. 355, 38 N. E. 792, holding the husband of the plaintiff an incompetent witness in an action by her against the executors, devisees, and heirs of the father of her former hus-

It is the theory of some cases that the statute relating to the competency of witnesses in actions involving decedents' estates does not apply to the determination of the competency of witnesses in all will contests,⁴³ but where it does apply the spouse of a party is incompetent to testify.⁴⁴

A construction more in accord with the language of the statute was given in an early case⁴⁵ in this jurisdiction, but its reasoning has been disregarded. Section 5 of the statute set out in note 40 herein is stated to necessarily imply "that the language of § 1 was intended

band, to compel the specific performance of an agreement between the former husband and his father whereby the father agreed to sell and convey to the former husband certain land, the plaintiff having inherited the land upon the death of her former husband.

Stodder v. Hoffman (1895) 158 Ill. 486, 41 N. E. 1082, holding to be an incompetent witness the husband of a defendant in an ejectment suit by some of the heirs at law against others, among whom was the wife, who claimed the real estate in question to have been held in trust for her by her father, and also to have been included in a devise to her.

Mann v. Foerein (1897) 166 Ill. 446, 46 N. E. 1119, holding to be an incompetent witness the husband of plaintiff in an action brought against the executor of an estate upon a promissory note alleged to have been executed by the decedent.

Heintz v. Dennis (1905) 216 Ill. 487, 75 N. E. 192, holding incompetent the husband of a child by a second marriage who claimed to be the equitable owner of certain property standing in the name of her mother, and who sought to have removed as a cloud thereon the claim of an heir of the mother by a former marriage. It was, however, held in this case that there was sufficient evidence to sustain a decree for the plaintiff without the evidence of the husband.

Jones v. Abbott (1908) 235 Ill. 220, 85 N. E. 279, holding incompetent the wife of the executor of a will in an action by the heirs of the decedent seeking to set it aside and to have a partition of the real estate and other relief.

Gillam v. Wright (1910) 246 Ill. 398, 138 Am. St. Rep. 243, 92 N. E. 906, holding incompetent the husband of an heir of the father in an action by the heirs of the mother to set aside a deed of a homestead from the mother to the father.

Lines v. Willey (1912) 253 Ill. 440, 97 N. E. 843, holding that the husband of a grantee was an incompetent witness as to a conversation he had with the grantor, in an action by the heirs of the grantor to set aside the deed.

Giffert v. McGuern (1893) 51 Ill. App. 387, holding the husband of a defendant in an action by the executor of an attorney for attorneys' fees an incompetent witness I.R.A.1917A.

by the legislature to be used in a sense so broad as to admit husband and wife to testify for or against each other as other witnesses, in all cases except in so far as the act should otherwise provide." Section 5 of the act contains a limitation and an exception to the limitation. In the limitation husband or wife is rendered incompetent to testify for or against the other as to any transaction or conversation occurring during the marriage. In the exception there are excepted from this limitation certain specified cases in which the husband and wife may testify for or against each

for his wife. The action was brought against both the husband and wife, but the husband was not served, the judgment was obtained before the justice against the wife only, and she appealed to the superior court, where the question as to his competency as a witness arose.

Hamilton v. Chaffee (1910) 158 Ill. App. 54, holding that the husband of a remainderman is an incompetent witness in an action upon a claim against the executors of the life tenant for waste.

Platt v. Williams (1912) 175 Ill. App. 1, holding incompetent the wife of an executor who was also an heir, in an action by another heir to compel the executor to account to the estate for money which he claimed as a gift from the ancestor.

In *McGooden v. Bartholic* (1907) 132 Ill. App. 392, where a wife who was a party to a proceeding in equity against the heirs of a mortgagee to cancel the mortgage was decided to be an incompetent witness in her own behalf, it was stated that she was not a competent witness to testify to anything in behalf of her husband, unless she was competent to testify in her own behalf.

On the contrary, the husband of an heir of an intestate not a party to the suit was held a competent witness on behalf of the administrator in an action on a note given by the intestate, in *Graves v. Safford* (1891) 41 Ill. App. 659; but there is no discussion.

⁴³ See *supra*, subd. I.

⁴⁴ The wife of the plaintiff in a bill against a devisee to set aside a will upon the alleged grounds of mental incapacity and undue influence is incompetent to testify. *Bevelot v. Lestrade* (1894) 153 Ill. 625, 38 N. E. 1056.

Pyle v. Pyle (1895) 158 Ill. 289, 41 N. E. 999, holding that the husband of an heir and devisee whose interest was adverse to that of the executors and other devisees was an incompetent witness in a bill to set aside the will.

Smith v. Smith (1897) 166 Ill. 488, 48 N. E. 96, holding to be incompetent as a witness the husband of one of the collateral heirs who filed a bill contesting the will of a decedent against the executor and the widow, who was devisee of the estate.

⁴⁵ *Mueller v. Rebhan* (1879) 94 Ill. 142.

other in the same manner as other parties. Applying this to the competency of husband or wife as a witness for the other, it follows that husband or wife is competent unless offered as to a transaction or conversation occurring during the marriage, in which event he is incompetent unless the case falls within one of the exceptions specified in the statute, and in that case he may testify as other parties. To justify the construction finally placed upon this statute, it would seem necessary that it provide that "no husband or wife shall, by virtue of § 1 of this act, be rendered competent to testify except as other parties may under the provisions of the act."

In Missouri an express statute following the general one removing disqualification by reason of interest as a party or otherwise provides that husband or wife shall not be disqualified as a witness in certain specified suits by or

against the other.⁴⁶ This would seem to exclude them as witnesses in any other than the specified cases. The references to statutes in the cases in this jurisdiction are entirely lacking, or so meager that it is impossible to determine the basis of the decision. In the earlier cases the husband or wife, as the case may be, is held incompetent.⁴⁷ The husband or wife of one interested though not a party to such an action is held incompetent though the estate which descends to his wife becomes her separate estate.⁴⁸ On the contrary, it has been held in a late case in this jurisdiction that the husband of one of the principal beneficiaries under a will and a defendant in an action to contest the will is a competent witness as to the sanity of the testator, where the property acquired by the will would become at once the separate estate of the wife.⁴⁹

⁴⁶ Section 4652 of the Revised Statutes of 1899 provides that "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity by reason of his interest in the event of the same as a party or otherwise; . . . provided that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead or . . . insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him." Section 4656 provides that "no married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases: to wit.

. . . And no married man shall be disqualified as a witness in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party," in certain specified cases. Apparently this was not the first statute of this kind in this state.

⁴⁷ *Forrister v. Sullivan* (1910) 231 Mo. 345, 132 S. W. 722 (wife incompetent in action in specific performance by husband against heirs and devisees of vendor); *Oliver v. Johnson* (1911) 238 Mo. 359, 142 S. W. 274 (husband incompetent in action by wife in specific performance against heirs and devisees of vendor). Both parties were held to have been correctly allowed to testify so far as competent in rebuttal; but there was no discussion.

In *Norvell v. Cooper* (1911) 155 Mo. App. 445, 134 S. W. 1095, the husband of an heir of the decedent was held incompetent in an action against the estate of the decedent upon a promissory note alleged to have been signed by him. It was finally held in this case, however, that the objection to the competency of the husband had

been waived. The court states that the "disqualification of the husband is not removed by the statutes in the circumstances of this case."

⁴⁸ *Tucker v. Gentry* (1902) 93 Mo. App. 655, 67 S. W. 723. It is stated that the argument that because the estate of the decedent which descended to the witness's wife under the statute became her separate estate, the husband has no such interest as would disqualify him as a witness, would be good perhaps if the statute which governs the rights of married women changed the entire relation that existed between husband and wife at common law, but unfortunately for the plaintiff's contention it does not.

Re Imboden (1907) 128 Mo. App. 555, 107 S. W. 400, holding the husband of the legatee under the will of a decedent an incompetent witness in an action against the executor of the estate by one claiming to be the widow of the decedent; the court stating that the husband had "only a contingent interest in the estate, and was not a competent witness by reason of any interest he had in the matter in controversy or in the estate of Imboden, and was therefore not competent to testify in behalf of his wife."

Hyde v. Honiter (1913) 175 Mo. App. 583, 158 S. W. 83. A distributee under the statute of the state has the right to appeal on the theory that he is one of the real parties in interest. His interest is such as to disqualify the wife.

⁴⁹ In *Ray v. Westall* (1916) 267 Mo. 130, 183 S. W. 629, the court states that "it does not appear from the record that . . . [the wife] was present at any of the times referred to by her husband when he observed the acts and conduct of testator. He was not asked to state any conversation he had with testator or any other person. He was simply called upon

b. Where common-law rule is treated as no longer in force.

1. In general.

Where the disqualification of the common law as to husband or wife is treated as having been removed, it becomes a question whether a statutory disqualification has been placed upon the spouse of a party by the statutes relating to actions involving decedents' estates. Where there is an express statutory provision as to husband or wife, this is easily determined.

Under an early New York statute which expressly provided that the husband or wife of a party to an action or of a person interested who, under the general section disqualifying a party to the personal transactions with deceased persons, could not be examined concerning such a transaction, could not be examined concerning the same transaction or a like transaction between the witness and the deceased person, the husband of a mortgagor who joined his wife in the mortgage was held incompetent to testi-

fy in an action by the executor of the mortgagee to foreclose the mortgage against the husband and wife and a grantee of the land, the court stating that, inasmuch as the wife would have been precluded by the general statute from testifying in behalf of the grantee, the successor to her title, as to a personal transaction between herself and the deceased, her husband was equally incompetent to testify in behalf of her grantee to the same transaction, or to a like personal transaction between himself and the deceased.⁵⁰

Other statutes expressly relating to husband and wife make them incompetent only as to certain testimony.⁵¹

Where there is no express statutory provision, the question becomes one of construction. The statutes in this regard may be divided into three classes: First. Those merely rendering incompetent, parties to actions involving decedents' estates.⁵² The husband or wife of a party is not excluded by a statute which merely excludes the other party or opposite party.⁵³ A statute provid-

to express his opinion as a nonprofessional witness, based upon what he observed while in the presence of testator. We find nothing in our statutes, nor in the provisions of the common law construed in connection with the statutes, which would preclude Mr. Westall from testifying as he did in behalf of all the defendants to this action."

⁵⁰ *Whitehead v. Smith* (1880) 81 N. Y. 151. This section of the statute was subsequently repealed.

And see *Indiana* statute, *supra*, note 36.

A wife whose husband was held incompetent to testify was accordingly held incompetent under this statute, in *Waver v. Waver* (1878) 15 Hun (N. Y.) 277.

⁵¹ See *Iowa* cases, *infra*, III. c.

⁵² *Miller v. Miller* (1901) 7 Ariz. 316, 64 Pac. 415. The statutory provision was to the effect that "in any action by or against administrators in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statements made by the intestate, unless called to testify thereto by the opposite party, or required to testify thereto by the court; and the provisions of this section extend to and include all actions by or against heirs or legal representatives of the decedent, arising out of any transaction with such decedent."

See *Maryland* statute set out in *Trahern v. Colburn*, *infra*, note 55.

⁵³ *Howe v. Howe* (1868) 99 Mass. 88 (husband held competent); *Cotherman v. Cotherman* (1885) 58 Mich. 465, 25 N. W. 467 (wife held competent); *Foley v. Loughran* (1897) 60 N. J. L. 464, 38 Atl. 960; 39 Atl. 358.
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It has been stated in a case in which the administrator of the deceased payee of a note is suing the wife of the principal, that, the husband not being a party, a statute prohibiting a party from testifying when the other party is an administrator, unless the latter elect to testify, has no application. The action was in fact against the husband and wife in this case, but the husband was defaulted and the wife defended on the ground that the note was in fact the husband's and she was surety for him. It is stated that his competency as a witness was no more affected by the statute above mentioned than it would have been if the action had been against the wife alone upon her several promise. *Chase v. Pitman* (1898) 60 N. H. 423, 43 Atl. 617.

In *Marx v. Marx* (1916) 127 Md. 373, 96 Atl. 544, a husband who was an heir and devisee of an estate was held a competent witness in an action by his wife against the executor to recover for services rendered, the court denying the contention that the husband and wife are so connected that a verdict in favor of the wife would result to the benefit of the husband, and that for such reason he should be regarded as one of the parties to the suit. It is stated that to hold the husband incompetent to testify as to transactions between his wife and the decedent in such a suit would be extending the meaning of the evidence act, § 3, article 35, of the Code of 1912, beyond that heretofore given it, and also that such a construction of the act would be unwarrantable.

In *Graham v. Alexander* (1900) 123 Mich. 168, 81 N. W. 1084, the decedent and his

ing that no "person" shall testify where the adverse party is executor, etc., has been construed to exclude only parties to the suit.⁵⁴ It has been held that the husband of a woman who is suing through him as next friend is a competent witness. He is stated not to be

a party within the meaning of the statutory provision rendering incompetent a party to a contract with a person since deceased.⁵⁵

Second. Those which render incompetent not only parties, but also persons interested.⁵⁶ The spouse is not a

wife made the wife of the defendant a gift of a bond for money; this bond was paid in the lifetime of the decedent, but the defendant gave his note for the amount under circumstances which were held to make the note without consideration. The wife of the defendant was a witness in making out this defense, and it was claimed that she was incompetent, her testimony relating to facts which were in some part within the knowledge of the decedent. In holding her competent the court states that she is not the opposite party to this action within the meaning of the statute; it is true she assigned the bond to her husband, but no recovery on the bond is sought. In the controversy as it relates to the note and the recovery thereon she is no more concerned than is the wife of any litigant in the result of a suit to which he is a party.

In *Clements v. Marston* (1872) 52 N. H. 31. The wife in this case, who had acted as the husband's agent in transactions with a decedent, was held competent to testify in a suit against the administrator.

The rule of this case is applied in *Chase v. Pitman* (N. H.) supra, where, in an action against the husband and wife upon a promissory note, the husband was defaulted and the wife defended on the ground that the note was in fact the husband's and she was surety for him, and the competency of the husband as a witness was involved. The husband is treated as not being a party.

A husband who was a party defendant with his wife in an action by executors to recover possession of a tract of land, in which his wife for a plea filed a bill in equity praying for the specific performance of a parol contract made with the plaintiff's testator for the conveyance of the land to her, was held a competent witness in favor of his wife, although the executors did not elect to testify and although the husband, being a party to the action, could not be a witness for himself. *White v. Poole* (1906) 74 N. H. 71, 65 Atl. 255.

⁵⁴ *Shafer v. Dean* (1870) 29 Iowa, 144. Apparently the Iowa statute was subsequently changed. See subsequent Iowa cases cited in III. c, infra.

In *Cadwalader v. Pyle* (1915) 95 Kan. 337, 148 Pac. 655, where a statute relating to actions involving decedents' estates originally began with the words, "no party shall be allowed to testify," but was subsequently changed to read, "no person shall be allowed to testify," the court states that this change suggests a purpose to extend the rule to witnesses who are not parties, but a contrary inference can be

drawn from the fact that, in defining the subject as to which the witness is disqualified, the statute still retains the phrase, "to any transaction or communication had personally by such party with a deceased person;" but the court does not definitely decide the question.

A statutory provision that "no person" shall be allowed to testify under the provisions of the statute removing the common-law disqualifications generally, when the adverse party is the representative of a deceased person, is stated in *Stewart v. Budd* (1888) 7 Mont. 573, 19 Pac. 221, not to make interest a disqualification. It is stated, however, in this case that, assuming that interest does work a disqualification, the wife of the plaintiff in an action against an administrator upon a promissory note is not disqualified, since her interest is too remote and contingent.

⁵⁵ *Trahern v. Colburn* (1884) 63 Md. 99. The statute here declared that where an original party to a contract or cause of action is dead, or where an executor or administrator is a party to the suit, neither party shall be admitted to testify on his own offer or upon the call of his co-complainant or codefendant otherwise than now by law allowed, unless a nominal party merely.

⁵⁶ *Butler v. Phillips* (1906) 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204. The statutory provision was "that no party to any civil action . . . or person directly interested in the event thereof shall be allowed to testify therein . . . by virtue of the foregoing section, when any adverse party sues or defends as the . . . administrator . . . of any deceased person." The "foregoing section" referred to in this quotation is the general statute making persons, with certain specified exceptions, competent witnesses, and providing that "neither parties nor other persons who have an interest in the event of an action or proceeding shall be excluded."

Madson v. Madson (1897) 69 Minn. 37, 71 N. W. 824. The statute provided that "it shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein or concerning any conversation with or admission of a deceased or insane party or person, relative to any matter at issue between the parties."

Section 829 of the New York Code of Civil Procedure of 1877 provides that "upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness, in his own behalf or interest, or in behalf of the

party within the meaning of such a statute.⁵⁷

Third. Those which merely render incompetent interested persons.⁵⁸ A variation of this latter class is found in some statutes prohibiting a person from testifying for himself against the estate of a deceased person. Such a statute does not prohibit a husband or wife from testifying for the other.⁵⁹ It has been held under this statute that a party is a competent witness if he has no interest in the claim.⁶⁰ And this rule has been applied to render competent the husband of the real party in interest, where the husband, although joined as defendant,

disclaimed any interest in the property in controversy.⁶¹ And in one case a husband who joined his wife as plaintiff was held competent.⁶²

2. Is spouse of a party disqualified because of disqualification of party.

Under the first form of statute above enumerated and the first part of the second making a party to such an action incompetent, there arises the question whether, by reason of the fact that the party to such an action is incompetent, the spouse of the party is likewise incompetent. The majority rule is that a husband or wife of a party to an action

party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person," etc.

Section 590 of the North Carolina Code of 1883 provides that "upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator, or survivor of a deceased person."

The South Dakota Statute, Rev. Code Civ. Proc. § 486, provides that "neither party . . . nor any person who has or ever had any interest in the subject of the action adverse to the other party, or to his testator or intestate, shall be allowed to testify," etc. *Guillaume v. Flannery* (1906) 21 S. D. 1, 108 N. W. 255.

⁵⁷ *Madson v. Madson* (1897) 69 Minn. 37, 71 N. W. 824.

⁵⁸ See Alabama statute, *supra*, note 17.

Wylie v. Charlton (1895) 43 Neb. 840, 62 N. W. 220. The statutory provision here is as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness," except in certain enumerated cases.

⁵⁹ *Saffold v. Horne* (1894) 72 Miss. 470, 18 So. 433. The wife of plaintiff was held a competent witness in an action in partition in which plaintiff claimed by deed from the ancestor. The answer of the heirs in this case denied the delivery by their ancestor of the deed under which the plaintiff claimed, and asked cancellation thereof.

Spivey v. Walton (1914) 107 Miss. 56, 64 So. 937 (husband of an heir held competent in action by heir of a devisee to probate will, to testify to competency of testator).

In *Barry v. Sturdivant* (1876) 53 Miss. L.R.A.1917A.

490, the actual holding is that a wife who is an executrix, and who has allowed a claim of her husband against the estate, is competent to testify thereto upon the settlement of her final account. It is stated that if she is considered as testifying in behalf of the original owner of the demand, then, while it is true that she speaks as to matters occurring in the lifetime of the deceased, she is testifying about transactions which took place between the deceased and another person in which she is not interested. If, on the other hand, she is considered as testifying in support of her own final account, then she would be testifying in reference to a demand which, so far as she is concerned, originated after the death of the deceased in the course of administration,—a matter as to which she is expressly made competent by a Code provision.

⁶⁰ *Hedges v. Aydelott* (1871) 46 Miss. 107. But in the subsequent case of *Reinhardt v. Evans* (1873) 48 Miss. 230, where a party had assigned his claim against an estate after the institution of the suit, and the suit was being prosecuted by the assignee, the assignor was held an incompetent witness.

⁶¹ *Rushing v. Rushing* (1876) 52 Miss. 329. The court states that the cases of *Hedges v. Aydelott* and *Reinhardt v. Evans* are in conflict, but distinguishes those cases from the case at bar by stating that in the latter case the husband never had any interest in the subject-matter of the controversy, whereas in each of the others the nominal plaintiffs were the original owners of the claims sued on. By the Code provision in this state husband and wife were competent witnesses for each other in civil cases.

⁶² *Ellis v. Alford* (1886) 64 Miss. 8, 1 So. 165. A husband was permitted to testify in an action in chancery against the heirs of a decedent asking for the cancellation of a deed of the wife's interest in the ancestral estate, on the ground that a description of one tract of land thereby conveyed was fraudulently inserted in the deed; that the deed was made while the wife was still a minor, and that she had never ratified it.

is not incompetent by reason of the incompetency of the spouse who is a party.⁶³ It is pointed out in one case in which the statute rendered a party incompetent merely where the other party is a personal representative, etc., that the testimony of all persons is not excluded; that the theory of the statute is that, as the deceased cannot give his version of the transaction, neither shall the surviving party. Further, it is stated that the same reasons which apply to the spouse who is a party do not apply to the other spouse, since the knowledge of the latter is independent of that of the party.⁶⁴ It is stated in another case that the statute does not in terms prohibit the husband or wife of a party from testifying concerning a matter as to which the party is incompetent, and there is no principle which would so prevent.⁶⁵ Public policy does not require the exclusion of the spouse under such circumstances.⁶⁶

But a contrary rule prevails in some jurisdictions.⁶⁷ And in others the contrary is made the rule by statute.⁶⁸

Where the common law is modified only to the extent of providing that in certain actions by the wife either, but not both, husband and wife may testify, it has been held, where the wife is incompetent to testify in an action involving decedents' estates, that the husband is likewise incompetent.⁶⁹

A second question has been raised under such a statute, that is, whether the spouse is a party in interest.⁷⁰ This question is so closely connected with the question whether a spouse is a person interested within the meaning of statutes expressly excluding parties interested, that its discussion is taken up in that connection.

In applying the rule that the husband or wife of a party is not disqualified because of the disqualification existing against the party, no point has been made of the form of action in which the question arose. It has been most frequently applied in proceedings to obtain the allowance of a claim against a decedent's estate, or to recover on such a claim.⁷¹ It also has been applied in ac-

⁶³ *Miller v. Miller* (1901) 7 Ariz. 316, 64 Pac. 415; *Butler v. Phillips* (1906) 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204; *White v. Christopherson* (1909) 46 Colo. 46, 102 Pac. 747; *Shafer v. Dean* (1870) 29 Iowa, 144; *Cotherman v. Cotherman* (1885) 58 Mich. 465, 25 N. W. 467; *Foley v. Loughran* (1897) 60 N. J. L. 464, 38 Atl. 960, 39 Atl. 358.

In *Cadwalader v. Pyle* (1915) 95 Kan. 337, 148 Pac. 655, where the husband of a defendant was offered as a witness, and there was some question as to whether the statute providing that no "person" shall be allowed to testify in certain actions involving decedents' estates included the wife, the court states that, even if the statute "should be interpreted as applying to persons who, although not parties, will be affected by the result of the action, we cannot regard the disqualification as extending to a witness who is interested only by virtue of being the husband or wife of a defendant against whom a personal judgment is sought."

⁶⁴ *Shafer v. Dean* (1870) 29 Iowa, 144.

⁶⁵ *Miller v. Miller* (1901) 7 Ariz. 316, 64 Pac. 415.

The husband of one of the heirs of an estate was held a competent witness in an action by a creditor of another heir against the widow, who was administratrix, to compel her to render an account of her administration of the estate and to give security as required by law. *Boisse v. Dickson* (1879) 31 La. Ann. 741. The holding in this case is approved in the subsequent case of *Starns v. Hadnot* (1893) 45 La. Ann. 318, 12 So. 561, in holding competent, as against the other heirs, the testimony of the husband of an heir in an L.R.A.1917A.

action by the heirs by a former husband against the heirs by a later husband, for an accounting of property claimed to have been owned by the common ancestor.

See *Williams v. Riley* (1882) 88 Ind. 290, *supra*.

⁶⁶ *Butler v. Phillips* (Colo.) *supra*; *Saf-fold v. Horne* (1894) 72 Miss. 470, 18 So. 433.

⁶⁷ See *Illinois, Pennsylvania, and West Virginia decisions, supra*.

An objection to the competency of the wife of an executor who was a defendant in an action for board of his decedent was sustained, and the testimony excluded, in *Bradley v. Kent* (1886) 7 Houst. (Del.) 372, 32 Atl. 286; but there is no discussion.

⁶⁸ See early New York statute, *supra*.

⁶⁹ *Bright v. Swinebroad* (1899) 106 Ky. 737, 51 S. W. 578, see *supra*.

⁷⁰ *Laird v. Laird* (1897) 115 Mich. 352, 73 N. W. 382. The court does not set out the statute involved in this case (3 How. Stat. § 7545; Act No. 121, Pub. Acts 1895). But in 3 Compiled Laws of Michigan, 1897, § 10212, the Michigan statutes in this regard provides that "when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." This decision is followed in Michigan cases subsequently to 1897, without any change in the statute being mentioned.

⁷¹ *Butler v. Phillips* (1906) 38 Colo. 378, 88 Pac. 480, 12 Ann. Cas. 204 (wife of claimant allowed to give material testimony

tions by a grantee against the administratrix and heirs of the grantor to correct a deed.⁷²

3. Is spouse a person interested.

(a) In general.

Where the statute relating to the competency of witnesses in actions involving decedents' estates disqualifies parties or persons interested, it becomes a question whether the husband or wife of a party is a person interested within the meaning of the statute so as to be disqualified. A very similar question has arisen in a jurisdiction which does not make interest a disqualification; the court considering the question whether the husband or wife of a party is a party in interest.⁷³

In order that interest work a disqualification, it is necessary that there be a pecuniary interest in the result of the suit.⁷⁴ It has been stated that it must be pecuniary, direct, immediate, and not uncertain, contingent, remote,

in favor of her husband); *White v. Christopherson* (1909) 46 Colo. 46, 102 Pac. 747 (wife of claimant permitted to testify in support of claim); *Shafer v. Dean* (1870) 29 Iowa, 144 (wife held competent); *Cotherman v. Cotherman* (1885) 58 Mich. 465, 25 N. W. 467 (wife who entered items of account held competent); *Re Riker* (1915) — N. J. —, 94 Atl. 622 (wife competent to testify in support of husband's claim and decedent's agreement to pay for services for which claim was filed).

In *Foley v. Loughran* (1897) 60 N. J. L. 464, 38 Atl. 960, 39 Atl. 358, an action by the husband to recover for boarding children of the decedent, the wife was held competent to testify to certain conversations which she had with the decedent, and certain transactions with him, in relation to the board and nursing of the children. The engagements were made by the decedent with the wife, and it was as to these engagements with him that she was permitted to give evidence. Some of the conversations were in the presence of the husband, the plaintiff; others were with the wife alone. This case is approved and followed in *Wooster v. Eagan* (1916) — N. J. L. —, 97 Atl. 291, in an action for services, engagements for which were made between the decedent and wife.

⁷² *Miller v. Miller* (1901) 7 Ariz. 316, 64 Pac. 415 (action by wife—husband allowed to testify to conversation with grantor in his lifetime).

⁷³ Michigan. See cases *infra*, subd. III, b, 3 (c).

⁷⁴ *Steele v. Ward* (1883) 30 Hun, (N. Y.) 555.

⁷⁵ *Madson v. Madson* (1897) 69 Minn. 37, 71 N. W. 824. See *Stewart v. Budd* (1888) 7 Mont. 573, 19 Pac. 221, *supra*. L.R.A.1917A.

or merely a possible interest.⁷⁵ Mere personal interest does not disqualify.⁷⁶ The mere fact of the relationship does not disqualify the spouse.⁷⁷ A husband is not disqualified because he may become beneficiary under his wife's will, or because, if she dies intestate he would succeed to her personal property subject to the payment of debt.⁷⁸

It is the theory of some cases that the common-law disqualification, in so far as it falls within the language of the statute, is retained; but a statute confining the disqualifications to persons having a "direct legal interest" in the action has been held to show an intention on the part of the legislature to admit testimony of some persons having interest not direct or not legal, which at common law would have excluded them.⁷⁹

The wife is not interested within the meaning of these statutes so as to render her incompetent, in the ordinary action by her husband against an estate;⁸⁰ nor is the husband interested in such a

⁷⁶ *Dean v. Dean* (1913) 13 Ga. App. 798, 80 S. E. 25.

⁷⁷ *Meyers v. Meyers* (1904) 141 Ala. 343, 37 So. 451.

⁷⁸ *McCurry v. Purgason* (1915) 170 N. C. 463, 37 S. E. 244.

⁷⁹ *Wylie v. Charlton* (1895) 43 Neb. 840, 62 N. W. 220.

⁸⁰ The wife of a plaintiff in an action against the administrator of his father's estate to recover for services is competent to testify to an agreement between the parties by which the decedent agreed to pay the plaintiff for taking care of him. *Meyers v. Meyers* (1904) 141 Ala. 343, 37 So. 451.

In an action by the husband against the administrators of a decedent's estate, upon a note executed by the decedent, it is stated obiter in *Glover v. Gentry* (1893) 104 Ala. 222, 16 So. 38, that the wife of the plaintiff would be a competent witness for her husband in the suit, had the note never been transferred to her as was claimed. It was decided, however, that the note had been transferred to the wife; therefore she was a party in interest.

A wife was not a party in interest in an action for damages for breach of a land contract. *Dunn v. Dunn* (1901) 127 Mich. 385, 86 N. W. 801.

See *Stewart v. Budd* (1888) 7 Mont. 573, 19 Pac. 221.

The wife of a plaintiff in an action against a decedent's estate to recover for board and lodging furnished the decedent is not an incompetent witness. *Hageman v. Powell* (1906) 76 Neb. 514, 107 N. W. 749. The principal question in this case, however, was whether the wife, who was also an heir of the estate, was disqualified by reason of that fact.

suit by his wife.⁸¹ The wife is not interested in a suit brought by a personal representative against her husband;⁸² nor is the husband interested in such an action against his wife.⁸³

But where husband and wife treat money earned by them as property in common, the husband is interested in the event in an action by his wife to recover for services rendered the defendant intestate, so as to render him incompetent.⁸⁴

The circumstances of the individual

The wife of a plaintiff in an action against the administrator of a mortgagee of the plaintiff, to determine whether or not the entire sum stated in the mortgage had been paid over to the mortgagor is not interested in the subject of the action, within the meaning of such a statute. *Guillaume v. Flannery* (1906) 21 S. D. 1, 108 N. W. 255.

See *HELSABROCK v. DOUB*, ante 1.

⁸¹ *McCurry v. Purgason* (1915) 170 N. C. 463, 87 S. E. 244, holding a husband who consented to the wife rendering the services which were the subject of the suit, and to her recovery for her own separate benefit, a competent witness for her. The husband was a party, but no point was made of this fact.

The husband of a plaintiff in an action against the administrator of his deceased mother's estate is a competent witness on behalf of his wife. *Adams v. Dennis* (1906) 76 Neb. 682, 107 N. W. 865.

A husband is a competent witness for his wife as to what had taken place between himself and a decedent, in an action by the wife against the personal representatives of the decedent to recover money paid by her upon an oral contract for the sale of land, which the decedent had breached. *Fogal v. Page* (1891) 37 N. Y. S. R. 280, 13 N. Y. Supp. 656. The husband in this case had himself paid the money for and on account of his wife.

It is stated in *Hall v. Hilley* (1912) 139 Ga. 13, 76 S. E. 566, that the court did not err in "permitting the husband of the plaintiff to testify as to the terms of the contract made between his wife and Shindlebower, the husband testifying that he took no part in making such contract, but consented for his wife to make it. . . .

The objections urged to the testimony were: (a) 'As the basis of the said contract was services of the wife and children while living with the husband, which services belonged to him, and his consent to such arrangement being necessary to the consummation of said contract renders him an interested party to the contract to such an extent as to disqualify him as a witness after the death of Shindlebower.' (b) 'That the testimony showed that under the facts of this case said witness had such an interest in the result of this suit as to disqualify him as a witness under the Evidence Act of 1889.'"

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case may render the spouse incompetent. For example, the husband of the holder of a note claimed to have been indorsed by the decedent is not a competent witness to prove the same, where it appears that the note was given to the wife, in whose name the husband conducted business in the same manner as if it were his own business, the title to the same being simply in the name of his wife to evade the payment of his creditors.⁸⁵ The incompetency in such a case, however, is not due to the marital relation.

The husband of a plaintiff in an action on a partnership note against the administrator of a deceased partner in a firm of which the husband was a member was held in *Hixson v. Rodbourn* (1901) 36 Misc. 19, 72 N. Y. Supp. 42, to have an interest in the event of the action as husband, since the claim belonged to the wife and neither as agent nor husband could he be said to be an interested party. But the appellate division (1901) 67 App. Div. 424, 73 N. Y. Supp. 779 held the husband a person interested because of the partnership relation and the fact that a payment made by him was claimed as removing the bar of the statute of limitations.

⁸² The wife of a defendant in an action by an administrator upon a note due the decedent is a competent witness under the Nebraska statute, as to conversations had with the deceased. *Parker v. Wells* (1903) 68 Neb. 647, 94 N. W. 717.

The wife of a defendant in an action by the administrator to recover property claimed by the defendant as a gift from the decedent is competent to testify. *Foster v. Murphy* (1906) 76 Neb. 576, 107 N. W. 843.

The wife of a defendant in an action by the executor to recover property claimed to belong to his decedent's estate is a competent witness to prove any transaction between the testator and her husband. *Bradsher v. Brooks* (1874) 71 N. C. 322. This case is approved in *Hall v. Holloman* (1904) 136 N. C. 34, 48 S. E. 515, where the husband of an administratrix is stated to have no interest in the event thereof, and therefore to be a competent witness in an action by the administratrix to recover property belonging to the decedent.

The wife of the defendant in a suit brought by an administrator for the recovery of property is not incompetent to testify to an alleged transaction between the defendant and the decedent, by the terms of which the defendant acquired title to the property in dispute. *Dean v. Dean* (1913) 13 Ga. App. 798, 80 S. E. 25.

⁸³ See *Cadwalader v. Pyle* (1915) 95 Kan. 337, 148 Pac. 655, *supra*.

⁸⁴ *Scheu v. Blum* (1910) 136 App. Div. 592, 121 N. Y. Supp. 122, see *infra*, "Community property."

⁸⁵ *Re Neufeld* (1906) 50 Misc. 215, 100 N. Y. Supp. 444.

(b) Interest of husband in real actions by wife.

In real actions additional questions are involved. Whether a husband is competent to testify in an action by the wife for the recovery of real estate depends upon the nature of the estate which he will acquire if the wife is successful. Under a statute giving the husband no use or other rights in the lands of his wife, and empowering her to dispose of her lands by last will so

as to prevent descent to him at her death, he has no such interest as will render him incompetent as a witness.⁸⁶ Such expectation as he may have upon the death of his wife without having disposed of her lands does not make him incompetent. This is true where such an estate of the husband is called an estate by curtesy. If the wife may convey the property, and thereby deprive the husband of any interest therein, without his consent, his estate by curtesy does not disqualify him.⁸⁷

⁸⁶ *Henderson v. Brunson* (1904) 141 Ala. 674, 37 So. 549 (action by the wife against the heirs of a grantee to cancel a deed of conveyance on the ground that it had been given as security for her husband's debt, and was therefore void under a statute).

Hardy v. Killingsworth (1911) 174 Ala. 322, 58 So. 965 (equitable action by a wife to perpetually enjoin the execution of a judgment in ejectment obtained by a grantee from the trustee in bankruptcy of the complainant's vendor, in which the case turns upon whether the complainant paid the agreed purchase price in full before the commencement of the proceedings in bankruptcy).

In an action in statutory ejectment by a wife against the heirs of her grantor, her husband, who received the deeds from the grantor, is competent to testify that, at the time he received the deeds, the grantor instructed him to place them on record. The issue in the case was whether or not there had been a delivery of the deeds. *Napier v. Elliott* (1912) 177 Ala. 113, 58 So. 435.

In *Griffin v. Earle* (1890) 34 S. C. 246, 13 S. E. 473, the court expressed an opinion that the husband was not a person interested.

In *Pyle v. Pyle* (1895) 158 Ill. 289, 41 N. E. 999, in which objection was made to the competency of the husband of an heir and devisee in a contest over the will of the decedent, such husband being made a party to the proceedings, it is stated that if the only objection to his competency had been his interest in the result of the suit, since his interest by way of an inchoate right of dower was uncertain, remote, and contingent, and not a present, certain, invested interest, it would seem that such objection would not have been well taken, either at common law or under the statute.

The husband of a contestant of a will disposing of real and personal property, who was an heir of the decedent, was held not an incompetent witness by reason of a disqualification against a person having "any interest in the subject of the action," in *Ekern v. Erickson* (1916) — S. D. —, 157 N. W. 1062.

See *White v. Poole* (1906) 74 N. H. 71, 65 Atl. 255.

⁸⁷ *Hiskett v. Bozarth* (1905) 75 Neb. 70, 105 N. W. 990. The right by curtesy is stated to be distinguishable from the right L.R.A.1917A.

by dower in this, that curtesy may be defeated by the deed of the wife, without the consent of the husband. The statute is changed in the jurisdiction. See *Holladay v. Rich* (1913) 93 Neb. 491, 140 N. W. 794, *infra*, note 89.

The husband of the plaintiff in an action to set aside the probate of a will is not incompetent because, if the will should be set aside, he would become a tenant by the curtesy in property to which his wife, the plaintiff, would succeed. *Spindler v. Gibson* (1902) 75 App. Div. 444, 78 N. Y. Supp. 320.

The husband of a mortgagor is competent to testify on behalf of his wife in an action by the executor of the mortgagee to foreclose the mortgage. *Hungerford v. Snow* (1909) 129 App. Div. 816, 114 N. Y. Supp. 127. The husband was a party, but this fact is not considered in this connection.

Leary v. Corvin (1899) 29 Misc. 68, 60 N. Y. Supp. 563, holding the husband competent in an action by the wife to establish a trust. Reversed on other grounds in (1901) 63 App. Div. 151, 71 N. Y. Supp. 335.

Re *Percival* (1913) 79 Misc. 567, 141 N. Y. Supp. 180, holding the husband competent upon objections to the account of an executrix filed by the legatees under the will to determine whether there had been a gift of a mortgage to the wife which would result in clearing up her real estate and in giving the husband a contingent life estate in the premises as tenant by the curtesy.

Re *Clark* (1886) 40 Hun (N. Y.) 233. The husband of an heir of a decedent is competent to testify upon the contest of a paper writing proposed as his will.

Bowen v. Sweeney (1892) 63 Hun, 224, 17 N. Y. Supp. 752, holding the husband of a devisee named in an instrument alleged to be the will of a decedent, to be competent to give evidence in an action brought for the partition of the land by one claiming to be interested therein as tenant in common, against certain of defendants including the wife of the witness, who claimed title under the alleged will.

Cooper v. Monroe (1894) 77 Hun, 1, 28 N. Y. Supp. 222, holding the husband of a defendant who claimed title to land in an action in ejectment under an oral agreement with the decedent, not to have such an interest as would disqualify him. The

But if the husband acquires a present interest in the property which prevents the wife making a conveyance of any part thereof except with his consent, such spouse is interested in the result of the case, and therefore incompetent.⁸⁸ This is true where such right is denominated "curtesy."⁸⁹

husband was a party to the action, but no point is made of this fact.

The husband of a mortgagor who was a party defendant to an action in foreclosure by an executor of the holder of the mortgage debt was held not to have such an interest in the event of the action as to preclude his giving testimony in the defendant's behalf. It is stated that although a party defendant, he was not necessarily so. *Humphrey v. Sweeting* (1895) 92 Hun, 447, 36 N. Y. Supp. 967.

A husband who has given a deed of land to another who deeds back to the wife, the deed to the wife not being recorded until after the husband's grantee has given a mortgage on the premises, is a competent witness in an action brought by the wife to cancel and set aside the mortgage on the ground that it was given without consideration. *Wilson v. Munoz* (1884) 6 N. Y. Civ. Proc. Rep. 71.

Hudkins v. Crim (1908) 64 W. Va. 225, 61 S. E. 166. According to this court, in West Virginia the husband has no curtesy initiate as at common law, as that is abolished by statute, and a husband relic has no curtesy until after his wife's death in his wife's separate real estate. This case is practically overruled in *Freeman v. Freeman* (1912) 71 W. Va. 303, 76 S. E. 657, on the theory that husband or wife is an incompetent witness in an action involving a decedent's estate in which the other is a party.

Contra: *Devinney v. Corey* (1889) 1 Silv. Sup. Ct. 148, 5 N. Y. Supp. 289. This decision was affirmed without opinion by the court of appeals in (1891) 127 N. Y. 655, 23 N. E. 254, but it seems unlikely that the court of appeals considered the competency of the husband. See New York cases *supra*.

⁸⁸ *Lowe v. Lowe* (1901) 83 Minn. 206, 86 N. W. 11, holding the husband an incompetent witness in an action by his wife to determine adverse claims to real estate, where, should the wife be successful in the litigation, she would be prevented from making a conveyance of any part thereof except by the husband's consent, by virtue of a statute containing a provision that any conveyance or contract for the sale of real estate or any interest therein by a married woman, except certain mortgages, leases, and releases, shall not be valid unless the husband joins with the wife in such conveyance or contract.

⁸⁹ The statute involved in *Hiskett v. Bozarth* (1905) 75 Neb. 70, 105 N. W. 990, *supra*, note 87, was afterward changed so as to give the husband a right of curtesy L.R.A.1917A.

(c) *Interest of wife in real action by husband.*

In a real action by the husband, the wife is generally held an interested person because of her dower rights in any lands acquired by the husband.⁹⁰ Likewise she is interested where, in addition to dower rights, she would acquire a

which cannot be defeated by the deed of the wife without the consent of the husband. Under this statute the husband is accordingly held incompetent. *Holladay v. Rich* (1913) 93 Neb. 491, 140 N. W. 794. The action in *Holladay v. Rich* was by one who claimed to be a prior grantee against a subsequent grantee and the holders of notes which had been taken by the grantor in payment of the purchase price, to have the subsequent conveyance set aside and her title quieted in the land, or, if the deed to the subsequent grantee was held valid, to require the holder of the securities to turn them over to her.

A husband who was the agent of his wife, and who had an interest by reason of his marital relation in real estate sought to be recovered by his wife in an action in ejectment, was held incompetent to testify to transactions had between himself as such agent and a remote grantor of the defendant, who was dead at the time the testimony was offered, in *Hollingsworth v. Barrett* (1905) 28 Ky. L. Rep. 280, 89 S. W. 107.

See *Pepper v. Broughton* (1879) 80 N. C. 251, *infra*, note 94.

⁹⁰ *Wyllie v. Charlton* (1895) 43 Neb. 840, 62 N. W. 220. It is stated that, while the estate thus acquired is not one in possession, it is such a present vested interest of a legal character, and creates such a direct legal interest in an action to establish title in her husband, as falls within the inhibition of the statute. It is further stated that the object of this statute is to prevent a party testifying against the representatives of a deceased person, where the interest of such party in the result of the action is of such a character as to hold out a temptation to perjury to such an extent as to run counter to the policy of the law. *Steele v. Ward* (1883) 80 Hun (N. Y.) 555.

The wife of a defendant in an action brought by another heir to partition an estate is incompetent to testify in support of a contract between her husband, the defendant, and the common ancestor, upon which he rests his claim of title to the entire property. *Eckert v. Eckert* (1897) 13 App. Div. 490, 43 N. Y. Supp. 353.

The wife of one of testator's next of kin, a party to an action to determine the validity of an instrument offered for probate as a will, is incompetent to testify concerning personal transactions and communications with the testator, where the testator left real estate which, except for the will, would descend to his heirs at law and the witness, as the wife of an heir at

homestead in lands acquired by the husband as a result of the action.⁹¹

But the dower estate of the wife has been held insufficient to make her a party in interest.⁹² In other actions by a husband involving real estate, the wife has been held a competent witness without anything being said as to dower.⁹³

law, would have an inchoate right of dower therein. *Roche v. Nason* (1905) 105 App. Div. 256, 93 N. Y. Supp. 565, affirmed without reference to this point in (1906) 185 N. Y. 128, 77 N. E. 1007.

The wife of a devisee in a proceeding to determine the validity of an instrument offered as the last will and testament of a decedent, who, if the will is valid, acquires an inchoate right of dower in real estate devised to her husband, is incompetent. *Re Weed* (1911) 143 App. Div. 822, 127 N. Y. Supp. 966, affirmed without opinion in (1912) 204 N. Y. 611, 97 N. E. 1118.

Erwin v. Erwin (1889) 18 N. Y. Civ. Proc. Rep. 11, 7 N. Y. Supp. 365, holding the wife of a plaintiff incompetent in an action for the specific performance of an oral agreement to convey land.

In *Hoffman v. Hoffman* (1892) 44 N. Y. S. R. 660, 18 N. Y. Supp. 387, the wife of a defendant who claimed title in an action by another for the possession of land was held to be a party interested on account of the inchoate right of dower which she would acquire, should her husband be successful upon his claim.

In *Farnsworth v. Ebbs* (1874) 5 *Thomp. & C.* (N. Y.) 1, 2 *Hun*, 438, a wife who participated with her husband in negotiating a loan and joined with him in executing a mortgage to secure it, and who was made a party to an action in foreclosure, but did not answer, was held a party in interest.

Linebarger v. Linebarger (1906) 143 N. C. 229, 55 S. E. 709, 10 *Ann. Cas.* 596, holding the wife of one of the caveators of a will, who was one of the heirs at law and who would become the owner of an undivided interest in the real estate should the will be defeated, an incompetent witness because of her interest. This case relies on *Pepper v. Broughton* (1879) 80 N. C. 251, where the husband of the sole legatee and devisee in a will was held incompetent; but apparently the husband in this case was a party.

An early surrogate decision, *Scherrer v. Kaufman* (1882) 1 *Dem.* (N. Y.) 39, to the contrary, is of course overruled by the later cases. The reasoning of the court, however, is interesting. The wife of the son of a decedent was examined as a witness upon a contest over a paper alleged to be a last will and testament. In holding the witness competent because she was not interested in the action, the court states that "the husband of the witness is not now seised of the real estate to which the present contention in part relates. And he may never become seised of the same or of any part of it. For aught that has yet appeared, it may hereafter be necessary, indeed, to devote the entire estate of the decedent to the payment of his debts. . . . A wife's L.R.A.1917A.

dower interest attaches when the husband becomes seised of real property, and not before. It cannot be said with propriety that she has, until then, even an inchoate right."

⁹¹ *Laird v. Laird* (1897) 115 *Mich.* 352, 73 N. W. 382. It is stated that if the agreement is sustained, the wife secures homestead and dower rights, of neither of which she can be deprived except by her own voluntary act; that if the legal title is in the husband, he cannot convey it or deprive her of possession; she can hold possession during her life; she is therefore a party in interest within both the letter and spirit of the law, and her testimony must be excluded from consideration.

In *Chaddock v. Chaddock* (1903) 134 *Mich.* 48, 95 N. W. 972, the testimony of the complainant's wife as to a conversation with the decedent was held properly excluded in an action against other heirs to restore a destroyed deed conveying the land, or, failing in this, to enforce specific performance of a land contract claimed to have been made with the decedent for the land covered by the deed. A deed had been made out and was retained by the deceased in his possession and control, and was destroyed by him.

Ayres v. Short (1905) 142 *Mich.* 501, 105 N. W. 1115. Testimony of complainant's wife as to matters equally within the knowledge of deceased was excluded.

Apparently in the two latter cases a homestead would have been acquired, though this is not clear.

⁹² A wife is not an interested person within the meaning of this provision in a statute, so as to render her incompetent to testify in an action by her husband to determine adverse claims to real estate, where the land in question is not the homestead of the plaintiff and if he secures title to it as the result of the action his wife will have merely an inchoate interest therein. *Madson v. Madson* (1897) 69 *Minn.* 37, 71 N. W. 824. Such an interest is not direct and certain, but contingent and uncertain, for it is only in the event that she survives her husband that she will acquire any direct and certain interest therein.

⁹³ In an action by an administrator to enforce a vendor's lien against a grantee of his decedent, the wife of the grantee, not having been shown to have any pecuniary interest in the transaction between her husband and the intestate, was competent to testify as to the amount of payments made by him. *McCall v. Hall* (1913) 192 *Ala.* 191, 62 *So.* 68.

See *Forrister v. Sullivan* (1910) 231 *Mo.* 345, 132 S. W. 722; *Oliver v. Johnson* (1911) 238 *Mo.* 359, 142 S. W. 274, *supra*, note 47.

The determination that the spouse is an interested person does not determine the ultimate question of competency under all statutes. Some statutes make an interested person incompetent only as to certain testimony. It therefore becomes necessary after determining the spouse to be an interested person, to determine whether the testimony offered is within the prohibited class. If, on the contrary, it is determined that a spouse is not an interested person, he is not rendered incompetent by such a statute, and it is not necessary to consider the character of his testimony.

Seemingly a different construction has been placed upon such a statute. It has been held, after holding the husband of one who was propounder of one instrument as a will and caveator of another, not disqualified on account of marital interest (and so far as appears in the opinion not disqualified because of interest on any other ground), that the husband was disqualified because his testimony related to a personal transaction with the deceased.⁶⁴ There is little discussion of the question however.

It is true in some instances that no question is raised as to the character of the testimony offered, even in jurisdictions in which only testimony of a certain character is prohibited on the part

of an interested witness. Consequently, when it is determined that the witness is interested, he is held incompetent.⁶⁵

c. Rule where competency is dependent upon character of testimony offered.

As pointed out in the preceding subdivision, under statutes making interested parties incompetent only as to certain testimony,⁶⁶ the ultimate question of competency is not settled by determining the husband or wife to be an interested person within the meaning of the statutes. The spouse is still not incompetent unless the testimony offered is within the prohibited class. The same question arises in statutes which expressly relate to the husband or wife of a party, and provide that the husband or wife of a party to such an action is incompetent only as to certain testimony.⁶⁷ The most common character of testimony which is prohibited in these statutes is that denominated a personal transaction or communication between the witness and the deceased person.⁶⁸ The competency of the spouse of a party under such a statute depends upon the character of the testimony offered. The spouse is incompetent under such a statute if the testimony offered be within the statutory prohibition.⁶⁹ If it is not

⁶⁴ *Pepper v. Broughton* (1879) 80 N. C. 251, the husband was a party, but his marital interest is considered apart from the fact. The statute in force is not set out nor referred to.

⁶⁵ *Scheu v. Blum* (1910) 136 App. Div. 592, 121 N. Y. Supp. 122.

⁶⁶ See *New York* statute, *supra*, note 56; *West Virginia* statute, *supra*, III, a.

See *Bright v. Swinebroad*, *supra*, note 37. See provision of *New Hampshire* statute, *supra*, note 23.

⁶⁷ *Johnson v. Johnson* (1879) 52 Iowa, 586, 3 N. W. 661. The statute provided that "no party to any action or proceeding, nor any person interested in the event thereof, . . . and no husband or wife of any said [such] party, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, . . . against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of such deceased person. . . ."

⁶⁸ See *Iowa*, *New York*, and *West Virginia* statutes, *supra*.

⁶⁹ *Roche v. Nason* (1906) 105 App. Div. 256, 93 N. Y. Supp. 565, affirmed in (1906) 185 N. Y. 128, 77 N. E. 1007, but without reference to this point.

Re Weed (1911) 143 App. Div. 822, 127 N. Y. Supp. 968, affirmed without opinion in (1912) 204 N. Y. 611, 97 N. E. 1118, holding the wife of the chief beneficiary and pro-L.R.A.1917A.

ponent of a will, who would have an inchoate right of dower in real estate devised to her husband, incompetent to testify as to communications with the decedent or transactions with him, in an action to determine the validity of the instrument offered as a will.

Where a wife is offered as a witness to a conversation between her husband and the decedent, which took place while she was present in the same room, the testimony relates to a transaction or communication between the witness and the deceased person," although she took no part in the conversation. *Erwin v. Erwin* (1889) 54 Hun, 166, 7 N. Y. Supp. 365. The court states that it seems plain that the wife "was a party to that transaction within the spirit and meaning of the statute, although she was not named as a party to the agreement. The arrangement was wholly a family affair, and [it] was manifestly intended that the farm should be a future home for the . . . [husband] and his family,—a gift by the . . . [decedent] to his son [the husband] in the nature of an advancement, with an understanding that the title should be secured to the donee by a provision in the last will and testament of the donor. It was a term of the arrangement or agreement that, at some time in the future, the title to the premises should be conveyed to the plaintiff, and whenever that should take place, then, by operation of law, the witness would

within the statutory prohibition, the witness is not incompetent.¹⁰⁰

Some statutes make an interested person an incompetent witness in his own

have an inchoate right of dower in the premises, which would have a pecuniary value of which she could not be deprived without her consent." The wife was therefore held an incompetent witness. A similar decision appeared in *Hoffman v. Hoffman* (1892) 44 N. Y. S. R. 660, 18 N. Y. Supp. 387, with reference to testimony of the wife that she heard a conversation between her husband and the decedent, his father, in reference to the property which was the subject of the action.

A similar conclusion was arrived at in *Eckert v. Eckert* (1897) 13 App. Div. 490, 43 N. Y. Supp. 353, as to the competency of a wife who, in an action in which her husband was claiming title to real estate, testified to a conversation between her husband and a decedent; the court stating that the wife was manifestly as much interested in the conversation she attempted to relate as was her husband, and although she testified that she did not participate therein, such statement was virtually nothing more than her own conclusion, which was subsequently modified upon cross-examination, and that it was scarcely credible that the wife, who had an interest in the subject-matter of the conversation between her husband and his father, did not give expression to her wishes, and thus to some extent at least take part in the conversation.

Farnsworth v. Ebbs (1874) 5 Thomp. & C. (N. Y.) 1, 2 Hun, 438, holding a conversation in which husband and wife and one who had loaned money for which a mortgage was taken participated, a personal transaction or communication with the wife, when she was offered as a witness.

Testimony concerning the mental condition of a testator, given in a will contest, was held to relate to a personal transaction between the witness and deceased so as to exclude the husband of a contestant in *Freeman v. Freeman* (1912) 71 W. Va. 303, 76 S. E. 657, approved in *Bailey v. Bee* (1913) 73 W. Va. 286, 80 S. E. 454.

Erusha v. Tomash (1896) 98 Iowa, 510, 67 N. W. 390.

And in *Samson v. Samson* (1885) 67 Iowa, 253, 25 N. W. 233, the husband of an heir, who was present during the greater part of a transaction between his wife and decedent, and who at his wife's request joined her in an undertaking to the decedent, was held a party to the transaction, and therefore incompetent. The husband was also a party to the action, but no point is made of this.

James v. Fairall (1914) 168 Iowa, 427, 148 N. W. 1029, holding the wife of an heir in a contest by another heir to set the will aside incompetent to testify as to declarations of the testatrix that certain of the heirs were trying to induce her to make a will cutting the plaintiff out.

Muir v. Miller (1891) 82 Iowa, 700, 47 N. W. 1011, 48 N. W. 1032.
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¹⁰⁰ *Steele v. Ward* (1883) 30 Hun (N. Y.) 555, holding the wife of one of the contestants of a will competent to testify to actions, conduct, and sayings of the testator which do not amount to a personal transaction or communication with deceased.

Johnson v. Johnson (1879) 52 Iowa, 586, 3 N. W. 661. In an action by an heir to have an annuity provided for by the decedent declared a lien upon land deeded to the defendant, the wife of the defendant was held competent to testify in regard to the contract and arrangement between the defendant and his father.

Samson v. Samson (1885) 67 Iowa, 253, 25 N. W. 233, holding the wife of an heir competent in an action by the administrator against this heir and others to recover property belonging to the estate, to prove the circumstances under which the property was delivered by the decedent to her husband.

Auchampaugh v. Schmidt (1889) 77 Iowa, 13, 41 N. W. 472, holding the wife of a defendant in an action by an administrator upon a note competent to prove that the defendant executed the note as surety; overruling the second appeal in this case holding to the contrary (1887) 72 Iowa, 656, 34 N. W. 460. The testimony of the wife in this case was to an alleged transaction between the decedent and her husband, at which she was present, but not to a transaction between the decedent and herself.

Allison v. Parkinson (1899) 108 Iowa, 154, 78 N. W. 845, holding the husband of a daughter competent in an action by her against the executor of her father's estate to recover for board and care, to testify to a verbal agreement between the daughter and the decedent by which the latter was required to pay for board and all services he should require.

Lucas v. McDonald (1905) 126 Iowa, 678, 102 N. W. 532. The wife of an assignee of a certificate of deposit is competent to testify to the circumstances under which the payee in the certificate transferred the same to her husband as a gift, in an action by the husband against the bank to recover upon the certificate, in which action the administrators of the estate of the original payee intervene, alleging that at the time of the transfer the payee was not of sound mind.

Dillivan v. German Sav. Bank (1910) — Iowa, —, 124 N. W. 350, holding the wife of a grantor incompetent to prove that the grantee assumed a mortgage upon the land conveyed, in an action by a son of the grantee after her decease to recover the land, which had been sold by the mortgagee upon foreclosure, the grantor having been made a party to that suit.

In *Erusha v. Tomash* (1896) 98 Iowa, 510, 67 N. W. 390, where a husband and wife were parties to a proceeding in pro-

behalf or interest merely. In order that a husband be incompetent under such a statute, it is necessary not only that he be interested, but he must be testifying in his own behalf.¹⁰¹

What amounts to a personal transaction with a decedent, or what is testimony on behalf of the witness, is of course beyond the scope of this note, as that question is the same as to prohibited witnesses other than the husband or wife

of a party. Consequently, only the holdings in the individual cases as to what constitutes such transactions are given in the notes.

d. Wife's separate estate.

In passing upon the competency of the husband as a witness, the fact that the wife's separate estate is involved is considered in some cases.¹⁰² The husband is held to have no direct legal interest in

bate to obtain the return of money alleged to have been paid on a note, to an administrator by mistake, the wife was held competent to testify as to certain occurrences between her husband and the decedent during his lifetime, at the time payments were made on the note. As to an indorsement which she made at the request of the decedent, she was held incompetent, as this was in the nature of a personal transaction with the decedent.

A widow who is suing, as administratrix of her deceased husband's estate, the guardian of her deceased husband's father, an insane person, for board rendered him by the decedent in his lifetime, may testify as to the contract for board between her deceased husband and the father. *Lines v. Lines* (1880) 64 Iowa, 600, 7 N. W. 87.

In *Dettmer v. Behrens* (1898) 106 Iowa, 585, 68 Am. St. Rep. 326, 76 N. W. 853, a testatrix left with her will a warranty deed regularly signed and acknowledged by her, conveying certain real estate to a grantee therein named. A clause of the will evidently related to this deed in the language that it should be delivered upon the payment by the grantee of a stated sum, which should be done within one year after the death of the testatrix. The executor therein named refused to qualify, and the grantee named in the deed was appointed administrator with the will annexed. On his application showing the payment of the sum required by the will, the court ordered the clerk to deliver the deed to him, and this was accordingly done. In an action by a claimant against the estate of the testatrix to have the land sold and the proceeds applied in payment of her claim, the wife of the grantee in the deed was held competent to testify to a conversation between her husband and testatrix to the effect that the husband purchased the property of the testatrix for an agreed consideration, part of which was paid during the life of the testatrix in board and nursing and the remaining part was the sum so required by the will to be paid.

The husband of an heir and devisee, who is an attesting witness to the will, cannot be disqualified under this statute on the theory that he is the husband of a party interested in establishing the will and that his testimony relates to a personal transaction between the decedent and himself, at least where it is not necessary under the laws of the jurisdiction that a testator should proclaim or state to the subscribing

witnesses that the instrument is his will, since in such a situation it is wholly unnecessary that there should be any personal transaction between the testator and the subscribing witnesses. *Bates v. Officer* (1886) 70 Iowa, 343, 30 N. W. 608.

The court in *Cochrane v. Breckenridge* (1888) 75 Iowa, 213, 39 N. W. 274, held the wife of a defendant in an action by the legal representatives of a decedent to restrain trespassing on real estate, incompetent to give evidence tending to show a purchase by the defendant and payment for the real estate, the court stating that this was a personal transaction with the deceased and the evidence was clearly incompetent. It is stated in the subsequent case of *Erusha v. Tomash* (1896) 98 Iowa, 510, 67 N. W. 390, that it must be presumed that both husband and wife took part in the transaction in controversy in *Cochrane v. Breckenridge*, although it is stated that the facts are not set out with sufficient fullness in the *Cochrane* Case to show that the conclusion reached is applicable to the *Erusha* Case.

Kerr v. Yager, 158 Iowa, 69, 138 N. W. 905.

¹⁰¹ *Hixson v. Rodbourn* (1901) 67 App. Div. 424, 73 N. Y. Supp. 779.

The husband of a plaintiff was held a competent witness in an action against the assignee of a bond and mortgage assigned by the executors of the mortgagee, under a statute the obvious purpose of which was to exclude evidence by a party interested in the event of a suit, of any transaction or communication with a deceased by which such event may be determined in favor of such witness. *Griffin v. Earle* (1890) 34 S. C. 246, 13 S. E. 473. The action in this case was brought by the wife to have the mortgage declared void on the theory that it was executed as security for her husband's debts, and it is stated that the husband could not possibly promote his interest by his testimony, since, if he had any interest at all, it was equally balanced, for if, by his testimony, the plaintiff would be relieved from liability on the bond and mortgage, then the husband would be clearly liable for the money borrowed by him and used for his own purposes. The husband was offered to testify to the transaction between himself and the deceased mortgagee.

¹⁰² In an action in partition brought by certain heirs of a decedent, in which it was sought to set aside a deed executed by the

the result of an action against the personal representative of a decedent upon a promissory note which is the wife's separate property, so as to render him incompetent under a statute disqualifying one with a direct legal interest in such an action.¹⁰³

e. Community property.

Where the husband is party to a suit against the personal representative of a decedent, as representing the community interests of himself and wife, and the object of the suit is to secure a tract of

land for the community estate, the wife is an incompetent witness within the rule excluding parties.¹⁰⁴ Likewise, the husband is incompetent in an action by the wife to recover real estate which will become community estate.¹⁰⁵ Or if a recovery of money is sought by the husband which will become a part of the community estate, the wife is incompetent; ¹⁰⁶ or in case of a suit to recover money of a husband, in which a judgment would bind the community estate, the wife is incompetent.¹⁰⁷

decedent to part of the property, it was held in *Grindle v. Grindle* (1909) 240 Ill. 143, 88 N. E. 473, that the husbands of female heirs were competent witnesses for the reason that the litigation was concerning the separate property of the wife. It is further held in this case, however, that the heirs themselves were competent for the reason that the action was not within the statute disqualifying them in certain actions involving decedent's estates.

Missouri case cited in notes 48, 49, supra.

¹⁰³ *Gillette v. Morrison* (1879) 9 Neb. 395. 2 N. W. 853.

¹⁰⁴ *Simpson v. Brotherton* (1884) 62 Tex. 170. The court here refused to give what it denominated a narrow or contracted construction of the word "party," which would confine it to the very persons named on the docket as parties, but held that the object of the act excluding parties from testifying as to transactions, with deceased persons would be defeated by allowing one to testify to such transactions, who was as fully interested in the result of the suit as any of the persons named as parties upon the record.

¹⁰⁵ *Tannehill v. Tannehill* (1914) — Tex. Civ. App. —, 171 S. W. 1050. The Texas act (Act 33 Legislature, p. 61) enlarging the property rights of married women was urged as a ground for the competency of the husband on the theory that it made the property the separate property of the wife. In answer to this the court states that, while the recent amendment referred to gives the wife control over her separate property and over the rent from her separate real estate, it nevertheless does not change the character of such rents so as to make them the wife's separate property. They continue to belong to the community estate, and the husband therefore is the owner of a one-half interest therein. It follows he has a very substantial interest in the wife's separate land, and such an interest as to make him a party within the L.R.A.1917A.

meaning of the statute forbidding one to testify to transactions with the deceased in a suit by or against heirs.

¹⁰⁶ *Wells v. Hobbs* (1909) 57 Tex. Civ. App. 375, 122 S. W. 451, holding the wife of a plaintiff incompetent in an action against the executor of a decedent to recover for services.

Whitney v. Priest (1901) 26 Wash. 48, 66 Pac. 108, holding the wife of a physician an incompetent witness in an action by him against an administrator to recover compensation for services to the decedent, the court stating that she is equally interested in the result of this action and must necessarily be said therefore to be a party in interest. The statute in the jurisdiction disqualified a "party in interest."

See *Scheu v. Blum*, supra, note 95.

¹⁰⁷ *Paddock v. Lewis* (1896) 13 Tex. Civ. App. 265, 35 S. W. 320.

In *Hedges v. Williams* (1901) 26 Tex. Civ. App. 551, 64 S. W. 76, where an action had been brought against the assignee of an insurance policy assigned to secure him for money loaned the insured, by the widow of the insured after his death to recover the excess of the amount of the policy over the debt, the wife of the defendant was held an incompetent witness on the theory that the husband was representing the community interest of himself and wife in the suit, and she was as much a party thereto and her interest as much affected as if her name had appeared among the parties to the suit.

It is said obiter in *Newton v. Newton* (1890) 77 Tex. 508, 14 S. W. 157, that a wife would be incompetent in an action by a legatee against her husband upon a promissory note, where the effect of a judgment against her husband would be in effect a judgment against the community property, but in this case the legatee was held not to be within the provisions of the statute making certain parties incompetent in actions involving decedents' estates. W. A. E.

ARKANSAS SUPREME COURT.

FIREMEN'S INSURANCE COMPANY,
Appt.,
v.

R. L. LAREY.

(— Ark. —, 188 S. W. 7.)

Insurance — on property held in common — sale by one tenant — effect.

Insurance on property held in common is not avoided as to one tenant in common by a sale of the interest of the other tenant, under a clause in the policy making it void if any change takes place in the interest, title, or possession of the subject of insurance.

For other cases, see *Insurance*, III. c, 1, b, in Dig. 1-52 N. S.

(McCulloch, Ch. J., and Wood, J., dissent.)

(July 3, 1916.)

A PPEAL by defendant from a judgment of the Circuit Court for Miller County in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Webber & Webber, for appellant:

The insurance on the property was avoided as to plaintiff by the sale of the interest of the tenant in common.

Arkansas F. Ins. Co. v. Wilson, 67 Ark. 553, 48 L.R.A. 510, 77 Am. St. Rep. 129, 55 S. W. 933; Richards, Ins. p. 351, note 1; Germania F. Ins. Co. v. Home Ins. Co. 144 N. Y. 195, 26 L.R.A. 591, 43 Am. St. Rep. 749, 39 N. E. 77; Elliott, Ins. § 266; Ostrander, Ins. p. 23, § 7; 19 Cyc. 753q.

The policy here is indivisible, the contract being entire.

McQueney v. Phoenix Ins. Co. 52 Ark. 257, 5 L.R.A. 744, 20 Am. St. Rep. 179, 12 S. W. 498; Phoenix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Ostrander, Ins. §§ 23 et seq. p. 80.

Plaintiff was bound by the surrender of the policy.

Elliott, Ins. § 298, p. 301; Kooistra v. Rockford Ins. Co. 122 Mich. 626, 81 N. W. 568.

Mr. J. M. Carter, for appellee:

Blocker's sale of his undivided one-half interest did not avoid the policy under the condition set out relating to change of interest, title, etc.

Note. — As to provision in policy of fire insurance against alienation or change of interest, title, or possession as applying to interest of cotenant, see annotation following this case, post, 32.
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May, Ins. § 74; Perry v. Mechanics' Mut. Ins. Co. 11 Fed. 478; Ostrander, Ins. pp. 310, 314; Vance, Ins. § 161, pp. 449, 450; Hobbs v. Memphis Ins. Co. 1 Sneed, 444; Hoffman v. Aetna F. Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; Dix v. Chicago City Ins. Co. 22 Ill. 272; Hartford F. Ins. Co. v. Ross, 23 Ind. 179, 85 Am. Dec. 452; Allemania F. Ins. Co. v. Peck, 133 Ill. 220, 23 Am. St. Rep. 610, 24 N. E. 538; Blackwell v. Miami Valley Ins. Co. 48 Ohio St. 533, 14 L.R.A. 431, 29 Am. St. Rep. 574, 29 N. E. 278; West v. Citizens' Ins. Co. 27 Ohio St. 1, 22 Am. Dec. 294; Angell, Ins. 187; Cowan v. Iowa State Ins. Co. 40 Iowa, 551, 20 Am. Rep. 583; Burnett v. Eufaula Home Ins. Co. 46 Ala. 11, 7 Am. Rep. 581; Royal Ins. Co. v. Sockman, 15 Ohio C. C. 105, 8 Ohio C. D. 404; Manley v. Insurance Co. of N. A. 1 Laus. 20; Shuggart v. Lycoming F. Ins. Co. 55 Cal. 418; Lockwood v. Middlesex Mut. Assur. Co. 47 Conn. 553; Royal Ins. Co. v. Martin, 192 U. S. 155, 48 L. ed. 380, 24 Sup. Ct. Rep. 247; Lampassas Hotel & Park Co. v. Phoenix Ins. Co. — Tex. Civ. App. —, 38 S. W. 361; Pomeroy v. Aetna Ins. Co. 86 Kan. 214, 38 L.R.A. (N.S.) 142, 120 Pac. 344, Ann. Cas. 1913C, 170.

Hart, J., delivered the opinion of the court:

R. L. Larey sued the Firemen's Insurance Company to recover upon a policy of fire insurance. The facts material to a determination of the issues raised by the appeal are as follows: C. M. Blocker and R. L. Larey were tenants in common of certain lots in the town of Fouke, Miller county, Arkansas, each owning an undivided one-half interest therein. There were two store buildings located on the lots. On the 1st day of April, 1915, C. M. Blocker applied to the Firemen's Insurance Company for a policy on said buildings in the sum of \$800 for the period of one year. The policy was issued to C. M. Blocker and R. L. Larey, and, among other conditions, provided that the policy should be void "if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise," etc.

Blocker had no authority from Larey to insure his interest in the property, but as soon as Larey found that the insurance had been taken on the property, he ratified the act of Blocker and agreed to pay his part of the premium. The policy was issued on a credit, but the agent who issued it had au-

thority to issue policies on a credit, and both Blocker and Larey were well known to him. Blocker sold his interest in the property to Mrs. F. L. Duke, and, on the 15th day of May, 1915, the agent canceled the policy. The property was destroyed by fire on June 12, 1915. Larey did not know that Blocker had sold his interest in the property until after the fire occurred, and had not authorized him to make a sale thereof. The court directed the jury to return a verdict for Larey in the sum of \$300, being one half of the policy, and from the judgment rendered the insurance company has appealed.

It is contended by counsel for the defendant that the contract for insurance was an indivisible one, and that the policy became void when Blocker sold his interest to Mrs. Duke. They claim that this act violated the provision of the policy quoted in the statement of facts against a sale or change in title of the subject of the insurance. In the first place, they contend that this necessarily results from the principles laid down in *McQueeney v. Phoenix Ins. Co.* 52 Ark. 257, 5 L.R.A. 744, 20 Am. St. Rep. 179, 12 S. W. 498, and *Phoenix Ins. Co. v. Public Parks Amusement Co.* 63 Ark. 187, 37 S. W. 959. In the first-mentioned case the policy was issued upon a residence and frame house which was used for rental property. A gross sum was named in the policy as the premium, and the amount of the policy was apportioned as follows: \$600 upon the residence and \$400 upon the frame house held to let. The same person owned both houses. The court held that the contract was entire, and that the effect of the apportionment of the amount of insurance on the different subjects insured was to limit the extent of the insurer's risk, upon each item, to the amount named. In the last case the policy stipulated for a single premium and covered the contents of a livery stable. The insurance was separately apportioned to three classes,—the horses, the vehicles, and the harness, etc. It was held that the contract was entire, the contract and risk being indivisible, and that if the policy was rendered void as to part of the carriages by reason of the insured's misrepresentation of his title, the entire policy was avoided. We do not think the rule laid down in those cases is controlling here. In giving effect to language, regard must be had to its purposes. The generality of the language employed must be restricted to the reason and object of its use by the parties. In the cases referred to, the same person owned all the property insured. The premium was gross, and there was not only no apportionment between the different items of property insured, but the title to the insured property was in the same per-

son. The two houses in the *McQueeney* Case were situated at a distance from each other, and a separate valuation of the houses was placed in the policy to apportion the loss in case one of the houses burned and the other did not during the life of the policy.

The title to tenants in common in insurance is separate. There is no unity in title, but only unity of possession. In the instant case it is conceded that the agent who wrote the policy had the authority to issue policies and to issue them on a credit. He lived in the same county with Blocker and Larey, and knew them both personally. The policy was not issued to Blocker and Larey as partners, but as tenants in common. Hence the agent must have known that they did not occupy the premises themselves, but were renting them out. The contract was one in its nature and purpose susceptible of apportionment; and, when the intention of the parties, as gathered from the language of the contract, and the subject-matter of the insurance, is considered, we think there is nothing in the nature or the terms of the contract which makes it indivisible. There is considerable conflict of authority as to the question whether the change in the personnel of a partnership, or the assignment of one partner's interest, is within the meaning of fire insurance policies which provide that the policy shall be void in case of any sale or transfer of the property, or change of title or possession. A much greater number of the decisions hold that the transfer by one partner of his interest in the property insured to another member of the firm is not such a change in the title thereto as would violate conditions in a policy against transfer, change, or alienation of the property or interests therein. See case note in 21 L.R.A. (N.S.) 422; *Pierce v. Nashua F. Ins. Co.* 50 N. H. 297, 9 Am. Rep. 235; *Lockwood v. Middlesex Mut. Assur. Co.* 47 Conn. 553; *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337. The reason given is that such a condition is inserted in the policy for the benefit and protection of the company against the risks of having careless or improvident persons substituted in the place of the original parties with whom they contracted. An assignment by one partner to another is obviously not within the principle or notice on which the condition is founded. Such a change does not affect the risk, because no new party is brought in contractual relations with the insurers. The rule is different where a sale is made by one partner to a third person. In such cases a new person is brought into contractual relation with the insurance company. This is so because every partner owns the whole partnership property, sub-

ject to the equal ownership of every other partner. When one partner sells his interest to a third person, such purchaser does not become a tenant in common with the other partners in any specific goods, but acquires only the interest his vendor had, which is his share of the residence after the affairs of the firm are settled and the debts paid including debts due from the firm to a partner. 30 Cyc. 605. Again, the same author says that the interest of a partner in the firm's assets is not that of a tenant in common, or of a joint tenant at common law. It is the share to which he is entitled under the partnership contract after the firm's debts and the partners' equities are adjudged. 33 Cyc. 444. See also *Parsons, Partnership*, 4th ed. p. 137. Tenants in common are such as hold by several and distinct title, but by unity of possession, because none knoweth his own severalty, and therefore they all occupy promiscuously. 2 Cooley's Bl. Com. 4th ed. *191. On the other hand, as Lord Hardwicke said, each member of a partnership is seised per my et per tout of the common stock and effects.

It follows that when one partner sells his interest to a third person, a new party with whom the insurance company did not contract is introduced. Such a change affects the risk because a new party is brought into contractual relations with the insurance company. In the case of a sale by a tenant in common of his interest to a stranger, the contract of insurance as to him or his vendee is at an end, under a contract of insurance containing a provision like the one in question as to change of title. The contract as to the remaining tenant in common, however, is not affected by the sale. This is so because, under the sale, no stranger is brought into contractual relation with the company. There is no unity of title whatever between tenants in common, and a contract made by an insurance company with them is necessarily subject to apportionment, and is therefore a divisible contract. We think this rule is in accordance with reason and justice. To illustrate: In the present case, Blocker sold his interest in the property insured to Mrs. Duke. Under the clause of the policy under consideration there was a change in his title to the property, and the contract was ended as to him. Mrs. Duke could not be brought into contractual relationship with the company without its consent, and, under the clause in question, there was not only no consent, but the insurance was avoided as to her. All this, however, had nothing to do with the contract in regard to the interest of Larey. His interest was not in any way affected by the sale of Blocker's interest to Mrs. Duke. In case of L.R.A.1917A.

a loss by fire, neither he nor Mrs. Duke could share with Larey in the insurance collected by him. There would be no temptation to Mrs. Duke to destroy the property, not only because she could not share in any recovery had by Larey, but she also lost her undivided one-half interest in the property insured.

The judgment will be affirmed.

McCulloch, Ch. J., dissenting:

The ownership of the insured property was separate, Blocker and appellee, Larey, being equal tenants in common, but the contract of insurance was joint and indivisible. The stipulation in the policy was that "if any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance, or if the policy be assigned before a loss, unless otherwise provided by agreement indorsed hereon or added hereto, the entire policy shall be void."

It is undisputed that Blocker sold his undivided interest in the property to Mrs. Duke without obtaining the consent of the insurance company. There is a sharp conflict in the authorities on the question of the divisibility of a policy of insurance which provides for the payment of a gross sum as premium, but insures different items of property. This court has held that such a contract is indivisible, and that a breach of a portion of the contract avoids the entire policy. *McQueeny v. Phoenix Ins. Co.* 52 Ark. 257, 5 L.R.A. 744, 20 Am. St. Rep. 179, 12 S. W. 498; *Phoenix Ins. Co. v. Public Parks Amusement Co.* 63 Ark. 187, 37 S. W. 959. In the opinion in the *McQueeny* Case, the conflict in the authorities on the subject was distinctly recognized, and, after a full discussion of the question and a review of the authorities, the court deliberately took the position that the contract was indivisible, and many cases were cited in support of that rule. In concluding the discussion, the learned judge who wrote the opinion said: "We can see no good reason why a contract, which, if made between individuals, would be entire, should be divisible if made between an individual and an insurance company."

The same rule was announced in the later case of *Phoenix Ins. Co. v. Public Parks Amusement Co.* where the policy was on different items of personal property, but reciting an entire consideration, and Judge Battle, speaking for the court, said: "The contract of insurance was entire and indivisible. Being void as to a part of the property insured, it is void as to all. It was all exposed to one risk, and the consideration for the policy was a specified sum. The fact that separate amounts of in-

insurance were apportioned to separate items or classes of property did not make the policy divisible. The contract and risk being indivisible, the contract is entire, and any breach which renders it void as to a part of the property affects it in the same manner as to the remainder."

The authorities on this question are still irreconcilably in conflict; but, as our court has deliberately taken a position on the question, it ought not to be changed except by the lawmakers. If the policies in the two cases just referred to were entire, it would seem, for a stronger reason, that the policy involved in the present controversy is entire and indivisible. There was a single premium paid, and the contract was to pay a gross sum to both of the beneficiaries jointly in the event of the destruction of the property. It makes really a stronger case of indivisibility of the contract than where the policy apportions a separate sum on each item of the property insured. There is not a single feature of this policy which separates it into parts, for it mentions the two beneficiaries jointly, provides for a gross premium and for a gross sum to be paid in case of loss. There is nothing upon which the idea of divisibility can rest. The fact that the two beneficiaries owned separate interests does not, it seems to me, at all affect the entirety of the contract.

It will be observed, also, that the language of this contract, which is a standard

form of policy, is unusually emphatic in providing that the entire contract should be void. Many of the authorities lay down the rule that that particular language renders every portion of the contract void, even though it be treated as a divisible contract; and, in those states where the contrary view is taken from that this court has decided upon the question of the divisibility of the contract, hold that where the stipulation is that the entire policy shall be void, it renders the contract indivisible, so as to make it void in the case of a breach of the terms with respect to any part of the contract. 2 Cooley, Briefs on Ins. p. 1913; *Germania F. Ins. Co. v. Schild*, 69 Ohio St. 136, 100 Am. St. Rep. 663, 68 N. E. 706; *Home Ins. Co. v. Connelly*, 104 Tenn. 93, 56 S. W. 828; *Germier v. Springfield F. & M. Ins. Co.* 109 La. 341, 33 So. 361; *McWilliams v. Cascade F. & M. Ins. Co.* 7 Wash. 48, 34 Pac. 140; *Martin v. Insurance Co. of N. A.* 57 N. J. L. 623, 31 Atl. 213.

It seems to me, however, that this case is entirely controlled by the two decisions of this court referred to, and that we are making a radical departure from the doctrine announced in those cases in holding that this contract was divisible, and that one of the beneficiaries could recover for his separate interest.

Wood, J., concurs in the views here expressed.

Annotation—Insurance: provision against alienation or change in interest, title, or possession as applying to interest of cotenant.

The rationes decidendi in cases presenting this question are practically identical with those which underlie the decisions as to the effect upon insurance of transfers of partnership interests. These interests, while not strictly those of cotenants, resemble them too much to be disregarded here. Of these partnership cases, those which consider the effect of transfers between partners and transfers by one or more partners to third persons who enter the firm have been discussed in notes to *Beebe v. Ohio Farmers' Ins. Co.* 18 L.R.A. 482, and *American Steam Laundry Co. v. Hamburg-Bremen F. Ins. Co.* 21 L.R.A. (N.S.) 442. The same conflict there noted exists among the cases considering transfers by cotenants.

Where the transfer has been from one cotenant to another, the prevailing view is that a policy of fire insurance, taken out by the cotenants before the

transfer, remains valid as to the full amount of the policy.

A sale by one cotenant to the other of the former's interest in the building insured does not avoid the policy under a provision of the insurance company's charter that "when any house or building insured under the provisions of this act shall be alienated by sale or otherwise the policy shall thereupon be ipso facto void." *Lockwood v. Middlesex Mut. Assur Co.* (1880) 47 Conn. 553. "The alienation here contemplated," said the court, "is a sale by the insured to a party not insured. Any transfer of interest between the parties insured by the policy is not an alienation within the meaning of the charter. By such a transfer no new party, with whom the defendants did not contract, is introduced, but simply the interest of those who did contract is changed. Such a change does not affect the risk,

whether partial or extending to the entire interest, so long as no new party is brought into contract relations with the insurers. If a party parts with his entire interest, the insurance as to him ceases, and the purchaser, if a stranger to the policy, is not insured; if before a party to the policy, the insurance inures to his benefit. The object of this provision doubtless was to guard against fraud,—to prevent the policy from becoming a mere gaming contract by remaining as a valid instrument in the hands of one who is no longer interested in the property, and to secure to the insurers contracting parties of their own choosing. No one of these purposes is defeated by the alienation in this case."

Where the legal title to the property stood in the names of the insured and three others, a provision in the policy against change in interest, title, or possession of the property insured was not violated by the execution of a quitclaim deed from such others to the insured, conformably to an understanding between them calling for such conveyance, should they be unable to pay within a certain time their agreed shares of the purchase price of the property. *Wich v. Equitable F. & M. Ins. Co.* (1892) 2 Colo. App. 484, 31 Pac. 389. The court said: "We are unable to see how it can be claimed by the company that the change in the title constituted a diminution of the interest on the property insured, or a diminution of the motive which the insured may have had to be vigilant in the care of his property. The title subsequently acquired was the title upon which the company acted when it issued the policy. . . . The evidence does not show that the risk was in any way increased or made more hazardous by the change of title. On the contrary, it shows that the circumstances under which the policy of insurance was issued, the belief and understanding upon which the company acted, were fully perfected, and that the hazard and risk were identically the same as when the party paid his premium and secured his policy."

A transfer by two of the three brothers who owned the property insured as tenants in common, to the third brother and cotenant, did not invalidate the insurance under a provision in the policy that it shall be void in case any change takes place in the occupation, location, title, interest, or possession of the property insured without notice to and permission from the insurance company; and the grantee may therefore, for a L.R.A.1917A.

loss occurring after the transfer, recover in a suit brought by himself alone the whole amount of such loss, both on account of the interest originally owned by him, and on account of the interest his brothers conveyed to him. *Royal Ins. Co. v. Sockman* (1898) 15 Ohio C. C. 105, 8 Ohio C. D. 404.

In *Hoffman v. Aetna F. Ins. Co.* (1865) 32 N. Y. 405, 88 Am. Dec. 337 (a case of a transfer between partners), the court, reviewing the New York cases, said that it was quite apparent that there was in that state a distinct preponderance of judicial authority against the recognition of the sale by one to another of the assured as a cause of forfeiture within the meaning of a proviso that the policy shall be null and void if the property shall be sold or conveyed.

Nor is there anything which militates against this conclusion in *Howard v. Albany Ins. Co.* (1846) 3 Denio (N. Y.) 301; or *Murdock v. Chenango County Mut. Ins. Co.* (1849) 2 N. Y. 210, where it was held that the conveyance by one of two cotenants to the other of all his interest in the property insured, after the insurance, but before the loss, prevents the maintenance at common law of a joint action on the policy.

The opposing view, viz., that such a transfer avoids the policy as to the interest transferred, finds support in a dictum in *Buckley v. Garrett* (1864) 47 Pa. 204, where the court said that it is not to be doubted that a transfer from one tenant in common to his cotenant is within the prohibition of a policy that declares that alienation by sale or otherwise shall render the policy void so far as it relates to the part sold or transferred.

A dissolution of a partnership and a division of its goods so that the parties are to hold their shares separately and distinctly, while not strictly a sale of the goods, operates as a change of title within the meaning of a provision in a policy of fire insurance on the partnership property that, "in case of any transfer or change of title in the property insured by this company, such insurance shall be void and cease." *Dreher v. Aetna Ins. Co.* (1853) 18 Mo. 128.

Where one cotenant insured his undivided one-half interest in the property, and afterwards a judgment in partition was rendered whereby the insured became the owner of a particular half of the property in severalty, this was a change of title preventing any recovery on the policy, the by-laws of

the insurance company providing that "when the title of any property insured shall be changed by sale, mortgage, or otherwise, the policy shall thereupon be void." *Barnes v. Union Mut. F. Ins. Co.* (1863) 51 Me. 110, 81 Am. Dec. 562.

But until a sale in a partition suit has been confirmed by the court, it cannot be said that the interests of the insured have changed within the meaning of a provision in the policy insuring the "heirs" of a specified person, that the policy shall be void if the said property shall be sold or conveyed, or if the interests of the parties be changed in any manner, whether by act of the parties or by operation of law. *Terpenning v. Agricultural Ins. Co.* (1878) 14 Hun (N. Y.) 299.

In so far as *FIREMEN'S INS. CO. v. LAREY*, ante, 29, holds that the sale of the interest of a tenant in common to a stranger avoids the insurance as to the interest transferred, it is in accord with *Shuggart v. Lycoming F. Ins. Co.* 55 Cal. 408, where the transfer of the interest of one partner to a third party is held to discharge the insurance company from liability as to the interest transferred, the policy providing that it should be void "if the property be sold or transferred, or any change takes place in title or possession." The insurance company's voluntary payment to the other member of the original partnership of one half of the amount of the loss relieved the court in the

case last above cited from the necessity of deciding whether the policy was valid as to his interest, or was entirely avoided by the transfer.

A general assignment for creditors, made by one partner after a loss, naming the other partner and a third person as assignees, releases the insurer from all liability where the policy provides that, in case of any assignment, transfer, or termination of the interests of the insured, or of any claim under the policy, either by sale or otherwise, whether prior or subsequent to any loss or damage, without the written consent of the company, the policy shall thenceforth be void and of no effect, and any liability of the company upon such claim shall thenceforth cease. *Dey v. Poughkeepsie Mut. Ins. Co.* (1857) 23 Barb. (N. Y.) 623.

In addition to the partnership notes referred to at the beginning of this discussion, the following notes in this series should be consulted: Mortgage as effecting change of title or interest in insured property, 38 L.R.A. 562; Sale of insured property by judicial proceedings as change in title, interest, or possession, 24 L.R.A. (N.S.) 807; Judgment as change of interest or title, or violation of provision in insurance policy requiring sole and unconditional ownership, 50 L.R.A. (N.S.) 1164; Effect on fire insurance of appointment of receiver for insured, 19 L.R.A. (N.S.) 643.

W. W. N.

MASSACHUSETTS SUPREME JUDICIAL COURT.

MARY E. HANLON, Admr., etc., of Joseph Dow, Deceased,
v.

FREDERICK LEYLAND & COMPANY,
Limited.

(223 Mass. 438, 111 N. E. 907.)

Conflict of laws — action for death — where maintainable.

An administrator may maintain an ac-

Note. — As to right of foreign or domestic representative to maintain action for death of decedent under a statute of another state which provides that the action shall be brought by the personal representative, see annotation following this case, post, 37.

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tion in the courts of the state of his appointment to recover damages under Lord Campbell's Act for the wrongful death of his intestate, although the death occurred in a foreign jurisdiction where the statute was enacted, and the statute does not provide for the survival to him of any right of the decedent, but gives him a new right of action for the benefit of the next of kin. *For other cases, see Conflict of Laws, I. c. 2, in Dig. 1-52 N. S.*

(March 10, 1916.)

R EPORT by the Superior Court for Suffolk County for the determination of the Supreme Judicial Court, after an order overruling a demurrer to the declaration, in an action brought to recover damages under Lord Campbell's Act, for the death of plaintiff's intestate, alleged to have been caused

by defendant's negligence. Order affirmed and case remanded.

The facts are stated in the opinion.

Messrs. Moulton, Loring, & Bigelow, for plaintiff:

Plaintiff, as administratrix, can maintain an action under Lord Campbell's Act for the death of her intestate.

Walsh v. Boston & M. R. Co. 201 Mass. 527, 88 N. E. 12; Tiffany, Death by Wrongful Act, 2d ed. § 196; Hudson v. Lynn & B. R. Co. 185 Mass. 519, 71 N. E. 66, 16 Am. Neg. Rep. 366; Davidsson v. Hill [1901] 2 K. B. 606, 70 L. J. K. B. N. S. 788, 49 Week. Rep. 630, 9 Asp. Mar. L. Cas. 223, 85 L. T. N. S. 118, 17 Times L. R. 614; Read v. Great Eastern R. Co. 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, L. R. 3 Q. B. 555, 18 L. T. N. S. 822, 16 Week. Rep. 1040; Seward v. The Vera Cruz, L. R. 10 App. Cas. 59, 54 L. J. Prob. N. S. 9, 52 L. T. N. S. 474, 33 Week. Rep. 477, 5 Asp. Mar. L. Cas. 386, 49 J. P. 324.

Lord Campbell's Act is compensatory, and not penal.

Hudson v. Lynn & B. R. Co. 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366; Carey v. Berkshire R. Co. 1 Cush. 475, 48 Am. Dec. 616.

As Lord Campbell's Act is clearly compensatory, and there is no reason why it should not be enforced here by comity, the demurrer should be overruled.

O'Regan v. Cunard S. S. Co. 160 Mass. 356, 39 Am. St. Rep. 484, 35 N. E. 1070; Electric Welding Co. v. Prince, 195 Mass. 242, 81 N. E. 306; Stone v. Old Colony Street R. Co. 212 Mass. 459, 99 N. E. 218.

Messrs. Blodgett, Jones, Burnham, & Bingham and Charles L. Favinger, for defendant:

At common law the death of a human being is not the subject of an action for damages, either in England or in this commonwealth.

Baker v. Bolton, 1 Campb. 493, 10 Revised Rep. 734; Sherlag v. Kelley, 200 Mass. 232, 19 L.R.A.(N.S.) 633, 128 Am. St. Rep. 414, 86 N. E. 293.

Lord Campbell's Act did not cause a right of the decedent to survive; it created an entirely new cause of action, based on new principles.

Blake v. Midland R. Co. 18 Q. B. 93, 118 Eng. Reprint, 35, 21 L. J. Q. B. N. S. 233, 16 Jur. 562; Pym v. Great Northern R. Co. 2 Best & S. 759, 121 Eng. Reprint, 1254; 4 Best & S. 396, 122 Eng. Reprint, 508, 8 L. T. N. S. 734, 32 L. J. Q. B. N. S. 377, 10 Jur. N. S. 199, 11 Week. Rep. 922; The Vera Cruz, L. R. 9 Prob. Div. 96, 53 L. J. Prob. N. S. 33, 51 L. T. N. S. 104, 32 Week. Rep. 783, 5 Asp. Mar. L. Cas. 270; Seward v. The Vera Cruz, L. R. 10 App. Cas. 59, L.R.A.1917A.

54 L. J. Prob. N. S. 9, 52 L. T. N. S. 474, 33 Week. Rep. 477, 5 Asp. Mar. L. Cas. 386, 49 J. P. 324; Mulhall v. Fallon, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439; Read v. Great Eastern R. Co. 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, L. R. 3 Q. B. 555, 18 L. T. N. S. 822, 16 Week. Rep. 1040; Com. v. Hartnett, 3 Gray, 450; Pratt v. American Bell Teleph. Co. 141 Mass. 225, 55 Am. Rep. 465, 5 N. E. 307.

Plaintiff cannot maintain this action in this commonwealth, because Lord Campbell's Act does not provide for the survival of any right of the deceased.

Richardson v. New York C. R. Co. 98 Mass. 85; Littlewood v. New York, 89 N. Y. 30, 42 Am. Rep. 271; Whitford v. Panama R. Co. 23 N. Y. 465; Howarth v. Lombard, 175 Mass. 570, 49 L.R.A. 301, 56 N. E. 888; Davidsson v. Hill [1901] 2 K. B. 606, 70 L. J. K. B. N. S. 788, 40 Week. Rep. 630, 85 L. T. N. S. 118, 9 Asp. Mar. L. Cas. 223, 17 Times L. R. 614; Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121; Walsh v. New York & N. E. R. Co. 160 Mass. 571, 39 Am. St. Rep. 514, 36 N. E. 584; Walsh v. Boston & M. R. Co. 201 Mass. 527, 88 N. E. 12.

Crosby, J., delivered the opinion of the court:

This is an action brought by the administratrix of Joseph Dow, late of Boston, deceased, to recover damages for his death, caused by the alleged negligence of the defendant, by reason of which he was drowned in English waters.

The plaintiff, who has been duly appointed administratrix of the estate of the deceased in this commonwealth, brings this action for the benefit of the wife and four minor children of the intestate. The action is founded upon Stat. 9 & 10 Vict. chap. 93, enacted in 1846, and known as Lord Campbell's Act. The act, so far as material, is as follows:

"That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

II. And be it enacted, "that every such action shall be for the benefit of the wife, husband, parent, and child of the person

whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

The case comes before us on a report made by a judge of the superior court, who overruled a demurrer to the plaintiff's declaration. The report recited that "by agreement of the parties the following decisions of the English courts may be referred to in the construction of chapter 93 of the Statutes of the United Kingdom of Great Britain and Ireland, 9th and 10th Victoria, with the same force and effect as if pleaded in the declaration."

The decisions referred to are then recited.

The inquiry is therefore presented whether the plaintiff, in her capacity as administratrix, can maintain an action upon the statute in the courts of this commonwealth. It is plain that our courts have jurisdiction of the parties. An action to recover damages for a tort is a personal action, and is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found, and this is true whether the remedy sought to be enforced exists under the common law or is given by statute. The English statute obviously is not penal, but remedial, for the benefit of the persons injured by the death. *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; *Walsh v. Boston & M. R. Co.* 201 Mass. 527, 88 N. E. 12. The statute, like others similarly phrased, does not create a cause of action which accrued to the plaintiff's intestate in his lifetime, and which survived and passed to his personal representative. The personal representative of the deceased is simply a nominal plaintiff. The damages recovered do not become part of the assets of the estate or liable for the debts of the deceased, but are distributed among the persons described in the statute. The statute expressly authorizes the action to be brought in the name of the personal representative who has been appointed as such by our court. In *Walsh v. Boston & M. R. Co.* supra, this court said at pages 529 and 530 of 201 Mass.: "The fundamental question is whether there is a substantive right originating in one state and a corresponding liability which follows the person against L.R.A.1917A.

whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced ex comitate in another state, unless there is a good reason for refusing to enforce it."

No contention is made that the statute is objectionable because contrary to public policy or good morals, or that its enforcement would be unjust or calculated to injure the state or its citizens, but it is contended by the defendant that as the act does not provide for the survival in the personal representative or in the heirs or next of kin of any right of the decedent, that the action cannot be maintained by the personal representative of the deceased in this commonwealth. The defendant relies upon *Richardson v. New York C. R. Co.* 98 Mass. 85. It is true that that case held that an administratrix, appointed in Massachusetts, could not maintain an action in our courts to recover for the death of her intestate upon a New York statute which, like Lord Campbell's Act, did not give any right of property which passed as assets of the deceased to the administratrix. It is also true, as the defendant argues, that the case of *Higgins v. Central New England & W. R. Co.* supra, dealt with a Connecticut statute under which the cause of action went to the administrator by survival. The same was true of the New York statute upon which action in *Walsh v. Boston & M. R. Co.* supra, was brought. Lord Campbell's Act fixes the liability where the death is due to negligence. It further declares who shall receive the damages when recovered, and expressly designates the personal representative of the deceased as the person who may bring the action. It is difficult to see on what principle the plaintiff should be denied her right to maintain the action here and be compelled to secure her remedy in the English courts. We are of opinion that a plaintiff should not be precluded from maintaining an action upon a statute of a foreign country or of another of the United States, to recover damages for the death of a person, solely because no right of property under the statute is vested in the deceased which survives to his personal representative. Whatever the rights the plaintiff may have acquired under the English statute, she should be permitted by comity to enforce in our courts, in accordance with the trend of modern decisions. *Higgins v. New England & W. R. Co.* supra; *Sargent v. Sargent*, 168 Mass. 420, 47 N. E. 121; *Mulhall v. Fallon*, 176 Mass. 266, 268, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; *Walsh v. Boston & M. R. Co.* supra; *Dennick v. Central R. Co.* 103

U. S. 11, 26 L. ed. 439; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48, 38 Am. Rep. 491; Story, Conf. L. 8th ed. § 625, note (a).

In *Walsh v. Boston & M. R. Co.* 201 Mass. 527, 88 N. E. 12, it was said by Knowlton, Ch. J., speaking for this court, at page 533 of 201 Mass.: "The case of *Richardson v. New York C. R. Co.* has been materially modified if not overruled by the decision in *Higgins v. Central New England &*

W. R. Co. supra, in conformity with the more liberal practice that now prevails."

We are of opinion that the decision in *Richardson v. New York C. R. Co.* cannot now be regarded as a binding authority so far as it holds that an action to recover damages for death cannot be maintained upon a statute similar to that under consideration, for the reason that no property right survived to the personal representative of the deceased.

The judgment will be, order overruling demurrer affirmed, and case remanded to the Superior Court for a trial upon the merits.

So ordered.

Annotation—Right of foreign or domestic representative to maintain action for death of decedent under a statute of another state which provides that the action shall be brought by the personal representative.

Earlier cases on this question are collected in notes to *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 211, and *Connor v. New York, N. H. & H. R. Co.* 18 L.R.A. (N.S.) 1252.

As to duty of courts of one state, under the full faith and credit provision of the Federal Constitution, to entertain an action for death, arising under the statute of another state, see note to *Dougherty v. American-McKenna Process Co.* L.R.A. 1915F, 955.

And as to jurisdiction of action for death under statute of another state, as affected by penal or remedial character of statute, or differences between *lex loci delicti* and *lex fori* as to character of damages, see note to *Rochester v. Wells, F. & Co. Express*, 40 L.R.A. (N.S.) 1095.

For notes on other phases of conflict of laws in relation to action for death or personal injury, see Index to L.R.A. Notes, under the title, "Conflict of Laws."

The decision in *HANLON v. FREDERICK LEYLAND & Co.* ante 34, sustaining the right of an administrator appointed at the forum to maintain an action for wrongful death in another jurisdiction, under Lord Campbell's Act, or a similar statute, giving the right of action to the personal representative of the deceased, appears to be in accord with the weight of authority, as shown by the cases in the earlier notes on this question.

In *Walsh v. Boston & M. R. Co.* (1909) 201 Mass. 527, 88 N. E. 12, which is cited in *HANLON v. FREDERICK LEYLAND & Co.*, it was held that an administrator appointed in Massachusetts, the domicil of the deceased, could recover for negli-

gent killing of the intestate in New York, under a statute of the latter state providing that the executor or administrator of a decedent survived by husband, wife, or next of kin, could maintain an action for a wrongful act causing the death, against one who would have been liable in an action in favor of the decedent if death had not ensued, the damages recovered being exclusively for the benefit of the husband or wife and next of kin, to be distributed as unbequeathed assets after payment of debts and expenses of administration. The court regarded the case as governed by the decision in *Higgins v. Central New England & W. R. Co.* (1892) 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534 (set out at pages 197 and 198 of the note in 56 L.R.A.), holding that a similar action might be maintained for negligent killing in Connecticut, under a statute of that state. The court stated that the statute of New York had been changed since the decision in *Richardson v. New York C. R. Co.* (1867) 98 Mass. 85 (set out in note in 56 L.R.A. 197), and that the latter case had been materially modified, if not overruled, by the decision in the *Higgins Case*, in conformity with the more liberal practice now prevailing; also that the tendency of the later decisions has been toward a broader comity in the enforcement of rights created by the legislation of sister states.

So, the right of an administrator appointed in Massachusetts, to maintain an action in the Federal court in that state for death arising under the Kentucky statute providing that an action for wrongful death shall be prosecuted

by the personal representative of the deceased, and that the amount recovered, less funeral expenses and costs of administration and recovery, shall be for the benefit of the kindred of the deceased in a certain order, was impliedly sustained in *Southern P. Co. v. De Valle Da Costa* (1911) 111 C. C. A. 417, 190 Fed. 689, the court considering chiefly the question whether such a death claim constitutes assets for the purpose of the appointment of an administrator. It was said: "The ordinary rule limiting the authority of an administrator to the state of his appointment in many states has been relaxed in actions for causing death, on the ground that the personal representative is rather a trustee for the beneficiaries named in the statute than an ordinary administrator; that he is rather a nominal party than the real party in interest; and that his authority is that of a nominal plaintiff. Without questioning these decisions or the reasons assigned for the recognition of a foreign administrator in such cases, we are of the opinion that cases which support the right of a foreign administrator to maintain the suit are not inconsistent with the right to take out letters of administration in the residence of the defendant."

And in *Hoyt v. Ogden Portland Cement Co.* (1911) 185 Fed. 889, an administrator appointed in New York, the domicile of the decedent, was permitted to maintain an action in the Federal court in that state for wrongful death occurring in Utah, the court saying that it had been repeatedly held that an administrator appointed in New York, of a decedent resident of that state, injured by negligence, and dying in another state, having a statute similar to that in New York, might maintain an action on such statute in the circuit court of the United States of the district where the decedent resided and the administrator resides.

The right of an administratrix appointed in Oklahoma, who had qualified also in Arkansas, to maintain an action in the latter state for the death of the intestate in Oklahoma, under the Oklahoma statute, for the widow and next of kin, was sustained in *Midland Valley R. Co. v. Lemoyne* (1912) 104 Ark. 327, 148 S. W. 654, the court apparently regarding the action as maintainable by the plaintiff as administratrix in Oklahoma, or as ancillary administratrix in Arkansas, it not appearing in which capacity she sued.

But in *Couture v. Dominion Fish Co.* L.R.A.1917A.

(1909) 19 *Manitoba L. R.* 65, it was held that an administrator appointed in Manitoba, the domicile of the decedent, could not maintain an action in that province for wrongful death of the intestate in the Northwest Territories of Canada, under a statute of the territories providing for an action for wrongful death by the executor or administrator, for the benefit of the wife, husband, parent, child, brother, or sister of the deceased, as the administrator contemplated by the statute was one appointed as such under the laws of the territory, and not a foreign administrator. The plaintiff in this case relied on the decision of the United States Supreme Court in *Dennick v. Central R. Co.* (1880) 103 U. S. 11, 26 L. ed. 439 (set out in the note in 56 L.R.A. on p. 214), holding that a New York administrator could maintain an action in the Federal court in New York for death under the New Jersey statute; but the judges distinguished the *Dennick* Case on the ground of the peculiar powers of the Federal courts of this country, and of dissimilarity in respect to the beneficiaries between the Canadian statute in question and the statutes of New York and New Jersey, in that the latter statutes, it was said, created a cause of action for the benefit of those entitled in case of intestacy, and the right of action was, in effect, a part of the estate, whereas the Canadian statute created an entirely new right of action in the administrator, for the benefit of certain parties who would have no interest in case of intestacy.

It was intimated, however, in *Couture v. Dominion Fish Co. (Manitoba)* supra, that, under a Canadian statute, an executor or administrator appointed in the locus delicti could have maintained the action; and it was said that such an executor or administrator acts in a special capacity as the party entitled to sue for damages accruing to certain relatives of the deceased, and not as an ordinary executor or administrator, enforcing rights which inured to the deceased.

Couture v. Dominion Fish Co. (Manitoba) supra, was approved and followed in *Johnson v. Canadian Northern R. Co.* (1909) 19 *Manitoba L. R.* 179, where the cause of action arose in Ontario, and it was held that the term "administrator" in the statute of that province permitting actions by the administrator for wrongful death referred only to an administrator appointed in Ontario.

In a few cases decided since the

preparation of the earlier notes, the question has arisen as to the right of a foreign administrator to maintain the action. And this right has generally been sustained in the recent cases, although sometimes under special circumstances, and in some instances, for example, in Ohio and Missouri, under special statutes expressly giving the foreign representative the right to sue.

It was held in *Knight v. Moline, E. M. & W. R. Co.* (1913) 160 Iowa, 160, 140 N. W. 839, that a foreign administrator, without qualifying under the Iowa statute, might sue in that state for wrongful death of the intestate in Illinois, under the Illinois statute providing that the action shall be brought by the personal representative for the exclusive benefit of the widow and the next of kin, where there was no property or creditors or beneficiaries of the estate of the decedent in Iowa, and no administration had been taken out or claimed in the latter state. It was said: "It is the general rule that a foreign administrator cannot maintain an action in this state to recover the assets of the estate until he qualify as such in accord with the provision of § 3306 of the Code.

. . . This is a general rule which is recognized in practically all jurisdictions. The underlying reason for it is that no state will allow property within its jurisdiction to be so appropriated by a foreign administrator as to destroy the opportunity of its own citizens to enforce their claims against it. To this rule some exceptions are recognized by some courts. It has been quite frequently held that, where a foreign administrator has a right of action as a mere trustee for the benefit of particular beneficiaries, he may maintain such action in such capacity. This exception rests in part upon the theory that the cause of action in such a case is not a part of the assets of the estate, and that therefore the resident creditors of the decedent within the state are in no wise affected. . . . It is quite clear

. . . that the damages sought are not assets of the estate in the ordinary sense that resident creditors have claims thereon. There might, however, be next of kin residing in this state. Whether their interest would operate against the right of a foreign administrator to sue is a question which we do not find discussed in the cited authorities. . . . Whether a foreign administrator as a mere trustee may, as a matter of right, in any case, sue in our courts upon a cause of action arising outside of this L.R.A.1917A.

state, is an abstract question upon which the members of the court are not at the present time wholly agreed. We are agreed, however, upon the concrete question before us. There was neither property nor creditors nor beneficiaries of the estate of the nonresident decedent in this state. No administration was taken out or claimed by anyone. The cause of action sued on arose in Illinois and under the special statute of that state. It had never accrued to the decedent in his lifetime. Under the statute it accrued to the administrator as trustee for the widow and child. We see no fair reason, therefore, why, in such a case, the foreign administrator should not be recognized in our courts to sue as the undisputed trustee for the beneficiaries of the cause of action. If there were administration pending here, or if there were property or cause of action subject to administration here, a different question would be presented."

And under the Ohio statute providing that a foreign executor or administrator may prosecute an action in any court in the state in his capacity as such, in like manner and under like restrictions as a nonresident is permitted to sue, it was held in *St. Bernard v. Shane* (1915) 135 C. C. A. 399, 220 Fed. 852, reversing (1913) 201 Fed. 453, that an administratrix appointed in Michigan, the domicil of the decedent, could maintain an action in the Federal court in Ohio on a cause of action given by the Illinois statutes for wrongful death in the latter state, notwithstanding the provision of the Illinois statute that no action shall be brought or prosecuted in that state to recover damages for death occurring outside of the state, and the provision of the Ohio statute that a right of action by wrongful death, arising under a statute of another state, may be enforced in Ohio "in all cases where such other state . . . allows the enforcement in its courts of the statute of this state of a like character." The court considered the latter provision as not binding on the Federal court in Ohio, stating that the rule that a transitory right of action is enforceable in the Federal courts having jurisdiction of the subject-matter and the parties, whether given by the common law or a state statute, not penal, is a rule of general law, and that, assuming that the legislature intended that the limitation imposed by the statute should apply to actions in the Federal courts, it had no power in that regard.

In *Brown v. Chicago & N. W. R. Co.*

(1915) 129 Minn. 347, 152 N. W. 729, it was held that an administratrix appointed in Iowa, where the negligent killing occurred, could maintain an action therefor in Minnesota, under the Iowa statute providing that all causes of action shall survive and suit may be brought notwithstanding the death of the person entitled thereto, and that, when a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased; but that, if the deceased leaves a husband, wife, child, or parent, such damages shall not be liable for the payment of debts.

In an action by an administrator appointed in Wyoming, for the negligent killing in that state of the intestate, the court, in *Kelly v. Union P. R. Co.* (1910) 141 Mo. App. 490, 125 S. W. 818, stated that, under the laws of Wyoming, an action is given to the administrator for the death of his intestate, caused by the negligence of another, the sum recovered to be distributed to those entitled to his estate, and that, by the laws of Missouri, such an action accruing in another state may be brought in Missouri by the administrator appointed in the state where the action accrued; citing *Mo. Laws* 1905, p. 95. It was said also that the administrator is a mere trustee, to maintain an action for the benefit of those entitled to the damages.

And in *Voris v. Chicago, M. & St. P. R. Co.* (1913) 172 Mo. App. 125, 157 S. W. 835, where an action was brought by an administrator appointed in Iowa for the negligent killing in that state of a resident of Missouri, the court said that the statute of Missouri permitted the foreign administrator to sue, citing §§ 1737 and 1738, Rev. Stat. 1909; that he was a trustee, and was authorized to sue for the damages, not for the estate, but for the parties entitled to the judgment.

It should be observed that the present note includes only cases which have considered the question of the right of a foreign or domestic representative to maintain the action, and that there are a number of cases not included for the reason that this question was not considered in them, although the action was by an administrator (whether foreign or domestic does not always appear), under the statute of another state in which the wrongful death occurred. As illustrative of this class of cases which are excluded, see, among others, the following: *Southern R. Co. v. Decker* (1908) 5 Ga. App. 21, 62 S. E. 678 (action by administrator for death under the Alabama statute held maintainable in Georgia, as against the objection that the statute was penal and repugnant to the public policy of the forum); *Fitzgerald v. Cleveland, C. C. & St. L. R. Co.* (1909) 151 Ill. App. 32 (action under statute of Indiana, where the wrongful act occurred, held maintainable by an administratrix in Illinois, where the death occurred, notwithstanding the provision of the Illinois statute that no action shall be brought in that state for damages for wrongful death occurring outside of the state); *Wheeler v. Southern R. Co.* (1916) — Miss. —, 71 So. 812 (action by administrator for benefit of the mother of the deceased, an illegitimate child, held maintainable under the statute of Tennessee, the question considered being whether the mother was the next of kin, for whose benefit the statute provided the action might be brought); *Hill v. Boston & M. R. Co.* (1914) 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714 (action by administrator for negligent killing in Massachusetts held maintainable as against the objection that the Massachusetts statute was of a penal nature, and not enforceable in New Hampshire).

R. E. H.

NEW YORK COURT OF APPEALS.

RE WILL, ETC., of EGBERT B. SEAMAN, Deceased.

FRANCES P. S. OAKLEY, Appt.

EGBERT B. SEAMAN et al., Respts.

(218 N. Y. 77, 112 N. E. 576.)

Will — condition against marriage — specified individual.

1. A provision in a will directing that the share of a child of testator shall be

held in trust, and the income only paid to her until the death of a specified individual, if she marries him, or remains unmarried, is not void as against public policy. For other cases, see *Wills*, III. g, 4, in *Dig.* 1-52 N. S.

Same — inciting to crime — validity.

2. A provision in a will that the share of a child of testator shall be held in trust

Note. — As to validity and construction of conditions in restraint of marriage with a certain person or a particular class of persons, see annotation following this case, post, 44.

until the death of a specified person, if the child should marry him, or remain unmarried, is not invalid as inciting to the killing of the person named.

For other cases, see *Wills*, III. g, 4, in *Dig.* 1-52 N. S.

(April 25, 1916.)

APPPEAL by contestant from an order of the Appellate Division of the Supreme Court, First Department, affirming a decree of the Surrogate's Court for New York County, admitting to probate the will of Egbert B. Seaman, deceased, and declaring certain provisions of the will valid, in a proceeding for the probate of said will. Affirmed.

The facts are stated in the opinion.

Mr. Leo Fassler, for appellant:

The conditions limiting the absolute gift and the trust created for the benefit of Frances Oakley are illegal on the ground of public policy, as being equivalent to putting a price upon the head of a person and offering an inducement for the termination of his life.

Story, Contr. § 675; Jones v. Randall, Cowp. pt. 1, p. 37, 98 Eng. Reprint, 954; Ruse v. Mutual Ben. L. Ins. Co. 23 N. Y. 516; Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316; Lord v. Dall, 12 Mass. 115, 7 Am. Dec. 38; Fuller v. Metropolitan L. Ins. Co. 70 Conn. 647, 41 Atl. 4; Golden Rule v. People, 118 Ill. 492, 9 N. E. 342; Franklin L. Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Metropolitan L. Ins. Co. v. Elison, 72 Kan. 199, 3 L.R.A. (N.S.) 934, 115 Am. St. Rep. 189, 83 Pac. 410, 7 Ann. Cas. 909; Union Cent. L. Ins. Co. v. Hilliard, 63 Ohio St. 478, 53 L.R.A. 462, 81 Am. St. Rep. 644, 59 N. E. 230; Corson's Appeal, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213.

The express trust created by the testator,

As to the validity of devises or bequests conditioned upon divorce or separation, or limited upon its continuance, see annotation to *Re Gunning*, 49 L.R.A. (N.S.) 637, and the subsequent cases of *Dusbiber v. Melville*, 51 L.R.A. (N.S.) 367, and *Daboll v. Moon*, L.R.A.1915A, 311.

Other annotation of possible collateral interest may be found in a note to *Sullivan v. Garesche*, 49 L.R.A. (N.S.) 605, on "Validity of provision in restraint of marriage as affected by fact that the gift to which it relates is to a daughter or other female relative," which contains a general discussion of the question of the validity of conditions in general restraint of marriage; and see, on the same question, the subsequent case of *Meek v. Fox*, L.R.A.1916D, 1194:

—a note to *Re Holbrook*, 2 L.R.A. (N.S.) 545, as to validity of provision for person while unmarried;
L.R.A.1917A.

who designated the life of his enemy to measure the duration of the trust, is void as contravening public policy.

Personal Property Law, § 11; *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. 368; *Crooke v. Kings County*, 97 N. Y. 421; *Bailey v. Bailey*, 97 N. Y. 460; *Re New York, L. & W. R. Co.* 105 N. Y. 89, 59 Am. Rep. 478, 11 N. E. 492; *Clay v. Wood*, 153 N. Y. 194, 47 N. E. 274.

Where a gift of personal property is coupled with a condition hostile to public policy, the condition is void and the gift is absolute, as though it had been made unconditionally.

1 Roper, Legacies, p. 757; 2 Jarman, *Wills*, 6th Am. ed. pp. 13, 15; 2 Williams, *Exrs. & Admsrs.* 7th Am. ed. p. 572; 2 Redf. *Wills*, p. 285.

A testamentary gift of personal property, made dependent upon conditions precedent, which become impossible of performance, vests and becomes absolute, as though the bequest had been made unconditionally.

Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225; *Re Butterfield*, 133 N. Y. 473, 31 N. E. 515; *Rice v. Barrett*, 102 N. Y. 161, 6 N. E. 898; *Benedict v. Webb*, 98 N. Y. 460; *Holmes v. Mead*, 52 N. Y. 332; 2 Williams, *Exrs. & Admsrs.* p. 570; 2 Redf. *Wills*, p. 287; 2 Jarman, *Wills*, 6th Am. ed. p. 15; 1 Roper, Legacies, p. 755; 40 Cyc. 1694; *Re Haight*, 61 App. Div. 310, 64 N. Y. Supp. 1029.

Mr. William W. Robison, with Messrs. Eldlitz & Hulse and Harry N. French, for respondents:

The trust created by the fourth, fifth, sixth, and seventh paragraphs of the will is in all respects a proper and valid trust.

Crawford v. Russell, 62 Barb. 92; *Banker v. Coons*, 40 App. Div. 572, 58 N. Y. Supp. 47; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Fowler v. New York Indemnity Ins. Co.* 26 N. Y. 422; *Wright v. Mayer*, 47 App.

—a note to *Knost v. Knost*, 49 L.R.A. (N.S.) 627, on "Validity of condition in restraint of marriage as affected by fact that a breach entails only a partial forfeiture;"

—a note to *Re Fitzgerald*, 49 L.R.A. (N.S.) 615, on "Provision in restraint of marriage in a deed or will as a condition or a limitation;" and see, on the same point, *Meek v. Fox*, supra;

—a note to *Lowe v. Doremus*, 49 L.R.A. (N.S.) 633, on contracts in restraint of marriage.

As to equitable relief against forfeiture of estate by reason of breach of a condition against marriage, see note to *Maginnis v. Knickerbocker Ice Co.* 69 L.R.A. 833, at p. 858.

As to the validity of a condition for a reverter in case of marriage, in a conveyance of real estate, see *Gard v. Mason*, L.R.A. 1916B, 1077.

Div. 604, 62 N. Y. Supp. 610; *Shedlinsky v. Budweiser Brewing Co.* 163 N. Y. 437, 57 N. E. 620; *Dunham v. Hastings Pav. Co.* 56 App. Div. 244, 87 N. Y. Supp. 632; *Brien v. Stone*, 82 App. Div. 450, 81 N. Y. Supp. 597; *Cohen v. Berlin & J. Envelope Co.* 9 App. Div. 425, 41 N. Y. Supp. 345.

Willard Bartlett, Ch. J., delivered the opinion of the court:

This controversy relates to the validity of certain provisions in the last will and testament of Egbert B. Seaman, deceased, late of the city of New York, who died on the 27th of June, 1914. By his will, which was executed on February 15, 1912, he devised and bequeathed his entire estate to his executors and trustees to pay the net income thereof to his wife, Maria T. Seaman, during her life. Upon the death of his wife, or upon his own death, in case she died first, he directed his executors and trustees to divide the principal of his estate into three equal shares, one of which he devised and bequeathed to his son Egbert B. Seaman, Jr., absolutely; the second share to his daughter Carrie L. Eidlitz, absolutely; and the third share to his daughter Frances P. Oakley, widow of John B. H. Oakley, absolutely, "provided, however, that at the time of my decease my said daughter Frances P. Oakley shall be married to some person other than one Leo Fassler who now resides in the city of New York and is there engaged in the practice of law, or provided that at the time of my death the said Leo Fassler is dead."

The will further provides in the fourth paragraph thereof that in the event that the testator's daughter Frances P. Oakley is unmarried at the time of his death and the said Leo Fassler is then living, or she is married to the said Leo Fassler, his trustees shall retain the said third share in trust, to pay over the net income thereof to his daughter Frances P. Oakley during her natural life. The fifth, sixth, and seventh paragraphs of the will are as follows:

"Fifth. Should my said daughter, Frances P. Oakley, marry the said Leo Fassler, then upon her death, either with or without issue her surviving and leaving the said Leo Fassler her surviving, I hereby give, devise and bequeath the portion of my estate held in trust for my daughter, Frances P. Oakley, as aforesaid, and direct my trustees to pay over and distribute the principal thereof, in equal shares, to my son, Egbert B. Seaman, Jr., and to my daughter, Carrie L. Eidlitz, to him, to her, their heirs, executors, administrators and assigns, absolutely and forever; and in the event that either or both of them shall have predeceased my said daughter, Frances P. L.R.A.1917A.

Oakley, leaving issue him or her surviving, I give, devise and bequeath the share which the parent would have received to such issue, share and share alike, per stirpes and not per capita.

"Sixth. In the event that my said daughter, Frances P. Oakley, should marry the aforesaid Leo Fassler, and should survive him as his widow, then upon his death, leaving her surviving, I give, devise and bequeath and direct my trustees to pay over and deliver to my said daughter, Frances P. Oakley, the principal of the trust created for her benefit, to her and her heirs, executors, administrators and assigns forever, absolutely and without reserve.

"Seventh. In the event that my said daughter, Frances P. Oakley, remains unmarried and survives the said Leo Fassler, then upon the death of the aforesaid Leo Fassler, leaving her unmarried and surviving, I direct and empower my trustees to pay over and deliver to my said daughter, Frances P. Oakley, the principal of the trust created for her benefit, to her and her heirs, executors, administrators and assigns forever, absolutely and without reserve."

Upon the proceedings in the surrogate's court for the probate of the will, Mrs. Frances P. Oakley was represented by Mr. Leo Fassler, who contended that the will was invalid and illegal "as being equivalent to putting a price on the head of a person and offering an inducement for the termination of his life, and as such being contrary to public policy." The surrogate's court held that the testamentary provisions to which objection was thus made were in all respects valid, and admitted the will to probate. The decree of that court has been affirmed by the appellate division.

There is no doubt that, under the terms of Mr. Seaman's will, the principal sum of the one third of his estate, which is to be held in trust for the benefit of his daughter, Mrs. Oakley, cannot go to her absolutely as long as Mr. Fassler lives. She contends upon the present appeal, or rather Mr. Fassler contends in her behalf, that the conditions designed to prevent her marriage with him are void as against public policy, because they put a price upon his life; because they violate the natural and inalienable rights of Fassler to security of life and liberty; and because they are in derogation of rights secured to his person by the Constitution of the United States and the Constitution of New York. We are unable to perceive how they violate any constitutional right of Mr. Fassler; but the point that the conditions in restraint of marriage with him are invalid is intelligible, and one which the appellant is entitled to have considered.

Conditions in general restraint of mar-

riage were regarded at common law as contrary to public policy, and therefore void. *Hogan v. Curtin*, 88 N. Y. 162, 42 Am. Rep. 244.

Notwithstanding the doubt intimated in the prevailing opinion in *Robinson v. Martin*, 200 N. Y. 159, 93 N. E. 488, we think this rule still prevails in New York. In the case cited it was held that the will under consideration did not in fact contain any condition in general restraint of marriage. At common law, however, there was no prohibition against testamentary conditions in restraint of marriage with particular classes of persons or specific persons. "Conditions not to marry a Papist," says Mr. Jarman, "or a Scotchman; not to marry any but a Jew, . . . have also been held good." 2 Jarman, Wills, 6th ed. p. 47.

In the present case the condition is designed to prevent the marriage of the testator's daughter with a particular individual who is named in his will; and such prohibitions have not only received the sanction of judicial authority, but we think may be justified by sound reasoning. In *Graydon v. Graydon*, 23 N. J. Eq. 229, Chancellor Zabriskie held that a condition imposed upon a bequest to a son of the testator that it should be void if, within a stated time, he should marry a daughter of a person named in the will, was not unlawful as a restraint upon marriage; and this although it required the son, if he would obtain the bequest, to break an engagement of marriage into which he had entered before he knew of the provision in his father's will, and, indeed, before the will was executed. "It is the duty of the courts," said the chancellor, "to favor this or any other legal means which a father may adopt to enforce the authority which the law, for wise purposes, has given to him over his minor children, and that regard for his wishes and counsel in the more important concerns of their lives after maturity, which the untrammelled testamentary power conferred by our law is calculated to secure." In *Cowley v. Twombly*, 173 Mass. 393, 46 L.R.A. 164, 53 N. E. 886, the will under consideration by the court established a trust for the benefit of the testator's son, and provided that it should not continue for more than ten years after he should cease to be the husband of the person who was then his wife, but that, upon the termination of the trust by the death or divorce of his wife and the expiration of ten years, or of less than ten years if the son should so elect, he should have all the trust property as his own forever free from any trust and in fee. It was contended that the trust was void because it was against public policy, as tending to L.R.A.1917A.

break up the marriage relation between the testator's son and the son's wife. The supreme judicial court of Massachusetts, speaking through Mr. Justice Barker, said: "The scheme of the trust no more tended to induce the son improperly to procure a divorce between himself and his wife, than to induce him to procure her death. Either event would give the son an estate which otherwise he could not have. . . . There is no more likelihood or presumption that a divorce will be wrongfully brought about by one of the parties to a marriage in order to secure property, than that a death will be so occasioned. A testator no more offends public policy by simply making his bounty contingent upon the occurrence of a divorce than of a death."

This language clearly implies that no legal objection exists to the action of a testator who makes the realization of a gift dependent upon the death of some other person than the final donee.

In *Daboll v. Moon*, 88 Conn. 387, L.R.A. 1915A, 311, 91 Atl. 646, a testamentary gift conditioned to take effect upon the death of the wife of the donee, or if he should obtain a divorce or become separated from her at the end of a year, or should marry a good, respectable woman within the year, was held not to be void as against the public policy of the state. In the case cited the gift was to vest in a son of the testator, one Willard B. Moon, upon the death of his wife or upon his divorce from her, or upon his permanent separation from her. The court was asked to hold that the condition upon which the legacy was to vest was void as against public policy, with the result of making the gift absolute, so as to vest in the donee without performance of the condition. The court declared that this would be directly contrary to the express intent of the testator, who did not intend that the gift should vest in Willard unless he became separated from his wife by her death or a divorce, or in some other way. "Where it is possible that the condition may be legally performed, it will not be presumed that the testator intended an illegal performance. The present gift was upon alternative conditions, one of which was the death of Willard's wife. It will not be presumed that the testator, in the absence of express language was directing or intended that his son should procure his wife's death." Applying this language to the case at bar, it is not to be assumed for a moment that it was the intention of Mr. Seaman to incite his daughter to bring about the death of Mr. Fassler. It might just as well be presumed in every case of a devise for life to one person, with a remainder over to another, that the remain-

derman would be thereby induced to compass the death of the life tenant. This would wholly disregard the legal presumption that men do not commit criminal offenses. *Bradish v. Bliss*, 35 Vt. 320.

The position of the appellant in the present proceeding is simply this: She asks us to invalidate a portion of her father's will because its tendency is to incite her to take the life of the gentleman whom she has selected to represent her interests in this court as her counsel. Such a contention would hardly merit serious consideration were it not for the fact that it has been so urgent-

ly and earnestly argued before us. It is quite natural that the gentleman who was the object of the testamentary prohibition in this case should feel sensitive at the slight put upon him by the testator; but that fact does not justify him in distorting the provisions of the will into an invitation to murder.

The order appealed from should be affirmed, with costs.

Hiscock, Collin, Cuddeback, Hogan, and Pound, JJ., concur. Seabury, J., not voting.

Annotation—Validity and construction of conditions against marriage with a certain person, or a particular class of persons.

Validity.

Where a restraint on marriage is not against marriage generally, but is of a partial character, the courts will uphold it where it is both reasonable in itself¹

¹ Even in those cases in which restraints of a partial character may be imposed on marriage as in respect of time, place, or person, they must be such only as are just, fair, and reasonable. *Maddox v. Maddox* (1854) 11 Gratt. (Va.) 804.

Where conditions in restraint of marriage are only partial, and confined within reasonable limits, the law does not pronounce them void if they do not unduly interfere with the beneficiary's right of choosing whom and when he will marry. *Watts v. Griffin* (1905) 137 N. C. 572, 50 S. E. 218.

In *Scott v. Tyler* (1788) 2 Dick. 712, 21 Eng. Reprint, 448, Lord Thurlow said: "The ancient rule of the civil law has suffered much limitation in descending to us. The case of widowhood is altogether excepted by the novels; and injunctions to keep that state are made lawful conditions. So is every condition which does not directly, or indirectly, import an absolute injunction to celibacy. Therefore, an injunction to ask the consent, as I have said before, is a lawful condition, as not restraining marriage generally. A condition not to marry a widow is no unlawful injunction, for the reason given before. So of the annuity to a widow during her widowhood. A condition to marry or not to marry Titius or Mævia is good, for this reason, that it implies no general restraint; besides, in the first case, it seems to have a bounty to Titius or Mævia in view. In like manner, the injunction which prescribes the due ceremonies and the place of marriage is a lawful condition, and is not understood as operating the general prohibition of marriage. Still more is a condition good which only limits the time to twenty-one, or any other reasonable age, provided this be not evasively used as a covered purpose to restrain marriage generally. And this must obtain still more forcibly where the *lex loci* implies

and does not operate merely in terrorem.² And where the restraint imposed is otherwise valid, it is immaterial that it may have been prompted by spite or malevolence.³ But the want of special

the same restraint. Nay, according to Godolphin, the use of a thing may be given during celibacy; for the purpose of intermediate maintenance will not be interpreted maliciously to a charge of restraining marriage. It seems also agreed on all hands that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectionable purpose of restraining marriage. As we receive the canon law, a bequest over to any purpose or person shall be interpreted in the same manner, and make a conditional limitation."

² For a discussion of the relation of the in terrorem doctrine to the general subject of restraints on marriage, see note in 4 B. R. C. at p. 113, where it is said: "A condition in restraint of marriage otherwise valid (such as a condition against marrying without consent, or against a second marriage) is, where the subject of the gift is personal property, and there is no gift over, held inoperative as being in terrorem. Conversely, such a condition is not void as being in terrorem where there is a gift over. This, it will be perceived, is quite another thing from the rule against restraints on marriage, although the two have sometimes been confused by the courts to the extent of holding conditions which were void as coming within the operation of the rule against restraints on marriage void as being in terrorem, and of mistaking the exceptions to the in terrorem rule for exceptions to the rule against restraints. . . . Being a doctrine of equity, it does not apply to devises of lands, conditions attached to which are operative notwithstanding the absence of a limitation over."

³ In *Jenner v. Turner* (1880) L. R. 16 Ch. Div. (Eng.) 188, it is said: "There is no reason nor any authority, for saying that a

motive for imposing a restraint may render it unreasonable.⁴

Among the restrictions which have been held reasonable are:

Conditions to marry or not to marry a particular individual, or into a certain family;⁵ or to marry or not to marry a person of a particular nationality;⁶ or religion;⁷ unless the circumstances are

such as unduly to restrict a freedom of choice.⁸

A condition not to marry a widow,⁹ or a person of an inferior social position,¹⁰ is a lawful one; but a condition against marrying a person of a certain profession or calling has been held unreasonable;¹¹ and so has the condition that the

testator may not make it a condition that the person the object of his bounty shall not marry any particular person by name, or any person of a particular nation, or belonging to any specified class. It is not competent to the court to seek to inquire into the motives which may have induced the restriction. If it could be properly said they had been prompted by spite or malevolence, the condition would nevertheless be valid; for the law does not prohibit testators from indulging such bad feelings, provided that no principle of public policy is thereby contravened."

⁴The statement of the text cannot be supported by any cases falling within the scope of this note; but in *Carrodus v. Carrodus* [1913] Viet. L. R. (Eng.) 1, 4 B. R. C. 1, it was held that the condition of a devise in trust to allow testator's housekeeper to receive the rents and profits "for the term of her natural life, she, nevertheless, remaining single, conducting herself with propriety and respectability," was void as being in general restraint of marriage, the court basing its decision not on the wording of the condition or the status of the devisee, but on the absence of special motive for imposing the restraint.

⁵The restraint imposed by a condition against marrying into a certain family is partial and reasonable. *Phillips v. Ferguson* (1888) 85 Va. 509, 1 L.R.A. 837, 17 Am. St. Rep. 78, 8 S. E. 241. It seems that a condition against marrying a particular person is valid where accompanied by a gift over. *Jarvis v. Duke* (1681) 1 Vern. 20, 23 Eng. Reprint, 274.

A condition annexed to a bequest to a son, that it shall be void if he shall marry a daughter of a person named, prior to a stated time, is not illegal as a restraint on marriage. *Graydon v. Graydon* (1872) 23 N. J. Eq. 229. In this case it is said that a father, to whom the law gives positive control over the marriage of his children while minors, and who is at all times their proper and natural adviser and counselor in marriage connections, may annex to a gift a condition that it shall be void if his child shall marry a particular person, or one of a specified class, as a Scotchman, a Papist, or a Baptist.

The statement of the text is also supported by dicta in *Scott v. Tyler* (Eng.) ubi supra, and *White v. Equitable Nuptial Ben. Union* (1894) 76 Ala. 251, 52 Am. Rep. 325.

⁶A condition against marrying a Scotchman is legal. *Perrin v. Lyon* (1807) 9 East, 170, 103 Eng. Reprint, 538. See also *Hodgson v. Halford*, in footnote 7, infra. L.R.A.1917A.

⁷*Duggan v. Kelly* (1847) 10 Ir. Eq. Rep. 295.

A condition that if the devisee shall marry or form any connection resembling or in imitation of marriage, contrary to the order and established rules of the people called Quakers, that the devise shall cease and be void, is not contrary to public policy, though it in effect forbids marriage with a member of any sect other than Quakers. *Haughton v. Haughton* (1824) 1 Molloy (Eng.) 611.

A condition that if testator's son should marry, he should "marry a Protestant wife, the daughter of Protestant parents, and who have always been Protestants," the property being given over in the event of failure to comply with the condition, is valid. *Re Knox* (1889) Ir. L. R. 23 Eq. 542.

A condition against marrying a person not professing the Jewish religion, or not born a Jew, is valid. *Hodgson v. Halford* (1870) L. R. 11 Ch. Div. (Eng.) 959, 48 L. J. Ch. N. S. 548, 27 Week. Rep. 545.

⁸In *Maddox v. Maddox* (1854) 11 Gratt. (Va.) 804, where testator gave an interest in personalty to a niece "during her single life and forever if her conduct should be orderly and she remain a member of the Society of Friends," it was held, it appearing that there were not within the circle of her association more than five or six marriageable male members of the society, and that by marrying one not a member she would cease to be a member of the society, that the condition imposed was an undue and unreasonable restraint upon the choice of marriage.

⁹See *Scott v. Tyler*, in footnote 1, supra.

¹⁰A gift over of real estate in the event of the devisee marrying a man "beneath her in social position" is valid. *Greene v. Kirkwood* (1896) 1 I. R. (Ir.) 130.

A condition that the devisee shall not marry a domestic servant, or any person who has been a domestic servant, is valid. *Jenner v. Turner* (1880) L. R. 16 Ch. Div. (Eng.) 188, 50 L. J. Ch. N. S. 161, 43 L. T. N. S. 468, 29 Week. Rep. 99.

¹¹In a marginal note to a placitum in 1 Eq. Cas. Abr. 110, pl. 2, it is said that a devise upon condition not to marry at all, or not to marry a person of such a profession or calling, is void, whether there be a limitation over or not; but if it be upon condition not to marry a Papist, or a certain person by name, it may be good. And see also dictum in *White v. Equitable Nuptial Ben. Union*, in footnote 12, infra. But compare *Jenner v. Turner* (Eng.) supra.

legatee shall not marry any man who does not have a certain fortune.¹²

A condition otherwise valid, as imposing a restraint which is partial and not unreasonable, may be void for uncertainty,—such as a condition in a will forfeiting the devise to testatrix' sons should they, or either of them, marry "a common woman;"¹³ but a defeasance conditioned on the legatee's marrying a person of ample fortune to maintain her in comfort and affluence has been held not too vague to be enforced.¹⁴

It has been held that a condition attached to a legacy that the legatee shall be born of a marriage contracted according to the rites of a certain religion, and be brought up and instructed in that religion, cannot be attacked by legatees born before the decease of the testator, as imposing a restraint on marriage.¹⁵

¹² A condition that the legatee shall not marry any man who shall not be seised, at the time of his marriage, of an estate in fee simple, or of freehold property of the clear yearly value of £500, over and above all encumbrances, is invalid, as amounting practically to a prohibition of marriage. *Keily v. Monck* (1795) 3 Ridgeway (Eng.) 205.

Conditions not to marry a man who follows a particular profession, or who lives in a named town or country, or who is not seised of an estate in fee, are in general restraint of marriage, and are void. *White v. Equitable Nuptial Ben. Union* (1884) 76 Ala. 251, 52 Am. Rep. 325.

¹³ *Watts v. Griffin* (1905) 137 N. C. 572, 50 S. E. 218.

¹⁴ In *Re Moore* (1906) 96 L. T. N. S. (Eng.) 44, where a testator, after giving his wife an equitable life estate in all his property, with remainder to their children, went on to provide that in case his wife should marry again a person of ample fortune to maintain her in comfort and affluence, then that such bequest should stand revoked, it was held, construing the words "comfort and affluence" with reference to the widow's position in life with the fortune left to her by her husband, and the fortune of any husband whom she might marry, his position in life, his sources of income, and whether he is in a position to maintain her in the condition to which she has been accustomed, that the defeasance of her life estate was not too vague to be enforced.

¹⁵ *Lamothe v. Renaud* (1901) Rap. Jud. Quebec 15 B. R. 400, where, however, it was intimated that the condition would not be valid as to children of a marriage contracted after the death of the testator. This decision was sustained on appeal in (1902) 32 Can. S. C. 357, in which, however, the question discussed was whether the condition was invalid as in restraint of liberty of conscience.

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Construction.

It is a settled principle that conditions in restraint of marriage are always to be strictly construed. Accordingly the operation of such conditions has been restricted to the period preceding the time when the gift took effect or became payable;¹⁶ though of course it cannot be so restricted where the testator has expressly given it a wider operation.¹⁷

A condition in a will by which testator declared that if his daughter should at any time marry a certain person without his consent in writing for that purpose being first had and obtained, a legacy of an income for life, given to her, should be absolutely void and of no effect, and should go to other persons, is operative only during testator's lifetime; and having become impossible of fulfilment after testator's death, the gift over does not

¹⁶ In *Osborn v. Brown* (1800) 5 Ves. Jr. 527, 31 Eng. Reprint. 717, where a testator bequeathed a legacy to his daughter, to be paid within twelve months after decease, but if she should marry a certain person, then he revoked the legacy, it was held that the legatee became entitled to the legacy at the end of the twelve months, though she afterward married the prohibited person.

¹⁷ In *Duggan v. Kelly* (1847) 10 Ir. Eq. Rep. 295, where a testator, after giving a legacy to a daughter, to be paid on her attaining the age of twenty-one years, or being married, if she should marry with the consent of his executors, further provided: "In case any or either of my son or sons, daughter or daughters, shall at any time hereafter intermarry with a Papist or person professing the Roman Catholic or Popish religion, or a reputed Papist, I hereby in all and every such case revoke, annul and make void to all intents and purposes all and every the devises and bequests so aforesaid made to such child or children," the share of anyone so marrying being given to the survivors, it was held that the clause of forfeiture was not confined to a marriage with a Roman Catholic before the time at which the legacy was payable, but that the right thereto could be divested by such a marriage at any time.

In *Chapman v. Perkins* [1905] A. C. (Eng.) 106, 74 L. J. Ch. N. S. 331, 53 Week. Rep. 485, 92 L. T. N. S. 372, it was held that a clause in a will by which testator declared that if any son or daughter should contract, in the case of a son or daughter, marriage with a person with any degree of kindred, unless more remote than third cousin, and also, in the case of a daughter, without the previous written consent of a trustee, his or her interest should thenceforth cease, was intended by the testator to apply only to marriages after his death.

take effect upon the daughter's marrying the person referred to.¹⁸

A devisee has his or her lifetime to comply with a condition of contracting a certain marriage,¹⁹ unless it appears that the testator meant the gift over to take effect upon the devisee's marrying elsewhere.²⁰

A condition of a legacy to a kinswoman that she shall marry someone of the same surname as that borne by testator is not complied with by her marrying one who assumed such surname for the purpose.²¹

A condition that the devisee shall marry a woman having a competent marriage portion, or with the approbation of the trustees, is performed by marrying a

woman with a portion, though without consent.²²

Performance of a condition to marry a particular person is, where the subject of the gift is personal property, even though the condition is precedent, dispensed with by the death of such person, or by his or her refusal to marry the legatee,²³ except where the performance of such a condition precedent appears to be the motive of the gift.²⁴ In the latter case a *cy pres* performance of the condition by making an equally good match will not avail the legatee.²⁵

A condition against marrying is not violated by continuing a cohabitation known to the testator.²⁶

A condition against marrying "into

¹⁸ *Booth v. Meyer* (1877) 38 L. T. N. S. (Eng.) 125.

¹⁹ A devisee has his lifetime in which to perform a condition precedent that he marry a certain woman. *Kiersey v. Flavan* [1905] 1 I. R. (Ir.) 45.

A devisee has her whole life in which to perform a condition of marrying into certain families. *Randal v. Payne* (1779) 1 Bro. Ch. 55, 28 Eng. Reprint, 980.

In *Page v. Hayward* (1704) 2 Salk. 570, 91 Eng. Reprint, 481, it was held that the devisee had her whole lifetime in which to perform a condition that she intermarry with a person bearing testator's surname, where the remainder over was in default both of such marriage and of male issue thereof.

²⁰ In *Lowe v. Manners* (1822) 5 Barn. & Ald. 917, 106 Eng. Reprint, 1426, where a testator devised all his landed estates to trustees, and bequeathed £10,000 as a portion to his daughter C., and in case she should marry any one of his three kinsmen named in the will, he gave to whichever of them she married certain estates, and in case that circumstances did not take place with his daughter C., then directed that it might be offered to another daughter, and in case neither daughter should marry one of the persons named, then that each should have only £10,000, and gave all his estates to another, it was held that, each of the daughters having married persons not named in the will, the limitation over took effect.

²¹ *Barlow v. Bateman* (1735) 3 Bro. P. C. 272, 1 Eng. Reprint, 939, reversing (1730) 3 P. Wms. 65, 24 Eng. Reprint, 971.

²² *Long v. Dennis* (1767) 4 Burr. 2052, 98 Eng. Reprint, 69, 1 W. Bl. 630.

²³ In *Robinson v. Comyns* (1736) Cas. t. Talb. 164, 25 Eng. Reprint, 718, it was held that the performance of a condition subsequent that a devisee should marry a certain woman was dispensed with partly by her death, and partly by her refusal to marry him.

Under a devise to a daughter upon condition that she, on or before becoming twenty-

one, consent to marry testator's nephew, but in case she shall refuse to marry the nephew at or before the age of twenty-one, or in the meantime shall marry any other person, the devise shall be void, the daughter is entitled to the estate upon the nephew's dying without requiring her in marriage, although she afterward married before attaining twenty-one. *Thomas v. Howell* (1691) 1 Salk. 170, 4 Mod. 67, 87 Eng. Reprint, 266, 25 Eng. Rul. Cas. 626.

²⁴ In *Falkland v. Bertie* (1696) 2 Vern. 333, 23 Eng. Reprint, 814, 2 Freem. Ch. 220, 3 Ch. Cas. 129, where a testator devised lands in trust for his niece for her life in case she, within three years after his death, should be married to the Lord Guildford, remainder to her first, etc., son by the Lord Guildford in tail male, and in default of such issue, or in case the said marriage should not take effect within the three years, then to another, it was held that the condition being precedent, equity could not relieve against nonperformance, even though the niece may have been willing to marry Lord Guildford, and although she had married equally well.

²⁵ (Eng.) *Ibid*.

²⁶ A provision for a son in a will by which testator directed that his son should have a home on the farm "during his natural life, if he shall so elect, and shall remain unmarried, but he shall have no right to bring a wife on said farm to live in case of his marriage," is not forfeited by his continued cohabitation with a woman with whom he had maintained relations during the last ten years of his father's life. *Soper v. Halsey* (1895) 85 Hun. 465, 33 N. Y. Supp. 105.

As to whether a condition against associating with or having any knowledge of a certain woman with whom the legatee had previously cohabited, but whom he had been compelled by the testator to renounce, comprehends marrying her, query. *Dillon v. Harris* (1830) 4 Bligh, N. R. 321, 5 Eng. Reprint, 114.

the family of²⁷ a certain person is violated by marrying a son of such person, though he is over twenty-one, and independent of his father.²⁷

The same principles as to forfeiture

apply in the case of a legatee who marries in the lifetime of testator, but after the date of the will, as in the case of one who is unmarried at the death, but afterwards marries.²⁸

²⁷ Phillips v. Ferguson (1888) 85 Va. 509, 1 L.R.A. 837, 17 Am. St. Rep. 78, 8 S. E. 241.

²⁸ A condition that if, at any time, testator's daughter should marry a man below her in social position, her share should go to others, applies to a clandestine marriage in testator's lifetime. Greene v. Kirkwood [1895] 1 I. R. (Ir.) 130.

A condition in a will to the effect that

none of testator's children shall receive anything under the will except the sum of \$3, in case of marrying into a certain family, will prevent any estate in his land from vesting at all, under the will, in a child who contracts such marriage during his lifetime. Phillips v. Ferguson (1888) 85 Va. 509, 1 L.R.A. 837, 17 Am. St. Rep. 78, 8 S. E. 241. E. S. O.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK
EX REL. EMPIRE STATE DAIRY COMPANY, App't.,

v.

WILLIAM SOHMER, Comptroller of the
State of New York, Resp't.

(218 N. Y. 199, 112 N. E. 755.)

Tax — exemption — pasteurizing milk.

1. Collecting, pasteurizing, and selling milk is not within a tax exemption as a manufacturing process.

For other cases, see *Taxes*, I. f, 2, in *Dig.* 1-52 N. S.

Same — franchise — dividends and stock.

2. Under a statute imposing upon corporations a franchise tax of one fourth of a mill for each 1 per cent of dividends declared, where the dividend rate was more than 6 per cent, and where it was less, three fourths of a mill on the par value of the capital stock, the tax in case of a stock dividend of 100 per cent, upon which no dividend is declared for the balance of the year, is one fourth of a mill upon each 1 per cent of the dividends, and three fourths of a mill for the balance of the year upon the stock so issued as a dividend.

For other cases, see *Taxes*, III. in *Dig.* 1-52 N. S.

(May 9, 1916.)

APPPEAL by relator from an order of the Appellate Division of the Supreme Court, Third Department, confirming the determination of the comptroller, settling a corporation franchise assessment and tax against relator. Affirmed.

The facts are stated in the opinion.

Messrs. Seybolt & Seybolt, for appellant:

So far as the relator is engaged in the

Note. — For modification of food products as manufacturing within tax exemption provisions, see annotation following this case, post, 53. L.R.A.1917A.

manufacture of butter, cheese, condensed milk, pasteurized milk, etc., it is a manufacturing corporation.

People ex rel. Western Electric Co. v. Campbell, 145 N. Y. 587, 40 N. E. 239; People ex rel. Tiffany & Co. v. Campbell, 144 N. Y. 166, 38 N. E. 990; People ex rel. William J. Matheson & Co. v. Roberts, 158 N. Y. 162, 52 N. E. 1102; People ex rel. American Soda Fountain Co. v. Roberts, 158 N. Y. 168, 52 N. E. 1104; People ex rel. New England Dressed Meat & Wool Co. v. Roberts, 155 N. Y. 411, 41 L.R.A. 228, 50 N. E. 53; People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808.

The pasteurization of milk is a manufacturing process, and pasteurized milk is a manufactured product.

New Orleans v. Le Blanc, 34 La. Ann. 597; Carlin v. Western Assur. Co. 57 Md. 526, 40 Am. Rep. 440; People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808; 26 Cyc. 519; 14 Am. & Eng. Enc. Law, 269; Schrieffer v. Wood, 5 Blatchf. 215, Fed. Cas. No. 12,481; Hawes v. Anglo-Saxon Petroleum Co. 101 Mass. 385; Com. v. National Oil Co. 157 Pa. 516, 27 Atl. 374; New Orleans v. Ernst, 35 La. Ann. 746; State v. American Sugar Ref. Co. 108 La. 603, 32 So. 965; Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62; State ex rel. Browne v. A. W. Wilbert's Sons Lumber & Shingle Co. 51 La. Ann. 1223, 26 So. 106; Johnson v. Somerville Dyeing & Bleaching Co. 15 Gray, 216; East Saginaw Salt Mfg. Co. v. East Saginaw, 13 Wall. 376, 20 L. ed. 611; Salt Co. v. Wilkinson, 8 Blatchf. 30, Fed. Cas. No. 12,269; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; People v. Knickerbocker Ice Co. 99 N. Y. 181, 1 N. E. 669; People ex rel. Standard Wood Co. v. Roberts, 20 App. Div. 514, 47 N. Y. Supp. 122; Re Gardner, 72 Fed. 494; Re I. Rheinstrom & Sons Co. 207 Fed. 119.

The item of \$163.33, being a tax of three

fourths mills on the new capital stock issued as a 100 per cent dividend, is unlawful.

Messrs. Masten & Nichols, for intervenor:

Pasteurization is manufacturing within the spirit and meaning of § 183 of the Tax Law, and in the light of the decided cases.

People ex rel. Blackinton Co. v. Roberts, 4 App. Div. 388, 38 N. Y. Supp. 872, affirmed in 151 N. Y. 652, 46 N. E. 1150; People ex rel. Western Electric Co. v. Campbell, 145 N. Y. 587, 40 N. E. 230; People v. Horn Silver Min. Co. 105 N. Y. 76, 11 N. E. 155; Nassau Gaslight Co. v. Brooklyn, 89 N. Y. 409; People ex rel. Brush Electric Mfg. Co. v. Wemple, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808; State v. American Sugar Ref. Co. 108 La. 603, 32 So. 965; Hawes v. Anglo-Saxon Petroleum Co. 101 Mass. 385; Re I. Rheinstrom & Sons Co. 207 Fed. 119, affirmed in 187 C. C. A. 387, 221 Fed. 829; People v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; Re Alaska American Fish Co. 162 Fed. 498; State ex rel. Browne v. A. W. Wilbert's Sons Lumber & Shingle Co. 51 La. Ann. 1223, 26 So. 106; People ex rel. Standard Wood Co. v. Roberts, 20 App. Div. 514, 47 N. Y. Supp. 122; United States v. Hathaway, 4 Wall. 404, 18 L. ed. 395; Re Tecopa Min. & Smelting Co. 110 Fed. 120; Salt Co. v. Wilkinson, 8 Blatchf. 30, Fed. Cas. No. 12,269; Schrieffer v. Wood, 5 Blatchf. 215, Fed. Cas. No. 12,461.

Mr. Franklin Kennedy, with Mr. Egburt E. Woodbury, Attorney General, for respondent:

Pasteurization of milk is not manufacturing within the purview of the provisions of § 183 of the Tax Law.

People v. Horn Silver Min. Co. 105 N. Y. 76, 11 N. E. 155; People v. Knickerbocker Ice Co. 99 N. Y. 181, 1 N. E. 669; People ex rel. New England Dressed Meat & Wool Co. v. Roberts, 155 N. Y. 408, 41 L.R.A. 228, 50 N. E. 53; People ex rel. Union Pacific Tea Co. v. Roberts, 145 N. Y. 375, 40 N. E. 7; Hartranft v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; Com. v. John T. Dyer Quarry Co. 250 Pa. 589, 95 Atl. 797.

The comptroller was correct in assessing a tax of \$166.33 on the new capital stock, amounting to \$215,900, which was issued on July 1, 1910.

People ex rel. Pullman Co. v. Glynn, 130 App. Div. 332, 114 N. Y. Supp. 460, affirmed in 198 N. Y. 605, 92 N. E. 1097; People v. Home Ins. Co. 92 N. Y. 328, affirmed in 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

L.R.A.1917A.

Hiscock, J., delivered the opinion of the court:

Under the statute governing that subject a tax was assessed against the relator, a domestic corporation, for the exercise of its corporate franchise during the year expiring October 31, 1911, of which it complains. Subject to a minor objection which will be considered later, the question whether said assessment was correct or not will be determined by the answer to be given to the further question whether the pasteurization of milk, in which relator employed a large part of its capital, is a manufacturing process. If such business was one of manufacture, the relator was entitled to exemption from taxation of so much of its capital as was employed in pasteurizing milk and selling the same, and the assessment of which it complains should be materially reduced. If in pasteurizing and selling milk it was not engaged in manufacturing, then, subject to the minor complaint above mentioned, the assessment was correct and the relator has no just complaint to make.

There is no dispute about the facts which present the question before us. The relator collects, pasteurizes, and markets a large amount of milk. Raw milk is liable to contain various kinds of impurities, bacteria, and germs coming from unclean conditions surrounding the drawing of the milk or from the unhealthful condition of the cows or of the persons attending or milking them. In order to free the milk from these impurities and to prevent the ill consequences liable to result from their presence relator subjects it to the process of pasteurization. For this purpose, by the use of a somewhat complicated system of machinery, it is passed through several processes. It is warmed and passed through a clarifier, where, by the use of centrifugal force, the heavier impurities are separated from it. It is then placed in tanks, where it is subjected to a mixing process in order to secure a uniform quality and condition of the milk. It is then subjected in a so-called regenerative pasteurizer and in tanks to a given degree of heat, continued for some time, for the purpose of killing germs. It is then consecutively passed through processes of cooling and aëration in order to allow disagreeable gases and odors to escape and to destroy bacteria which had survived the preceding processes, and finally it is placed in bottles, properly cleaned, ready for the market. The purposes and result of pasteurization as thus practised are thus described and claimed by the relator's counsel in his brief. He says: "It must be borne in mind that the object of pasteurization is to remove impurities and destroy all dangerous germs

without injury to the milk as a pleasant and nourishing food."

And again: "By the processes above described not only natural milk, just as it comes from the cow, always containing bacteria, . . . but also milk contaminated after leaving the cow's udder with the filth of the stable, . . . is altered into a safe and clean food without losing any of its palatable and nourishing qualities,—in fact, a new and artificial product."

In the light of these statements and of the description of the processes through which the milk is passed and of the results obtained thereby, it is perfectly apparent that the object and result of pasteurization are to free milk from germs and foreign substances of various kinds without destroying or changing the inherent and essential qualities of the milk itself. There is no purpose by the application of any foreign substance to change its superficial appearance, or by any method to alter its substantial form and character, as would be the case if it were made into butter or cheese. It is entered upon the process as milk, and it is taken therefrom as milk. The only change accomplished has been to relieve it from objectionable matter which is not properly an inherent part thereof, and thereby to make it more fit for those purposes to which milk is naturally devoted.

We do not think that such a process can be regarded as manufacturing under the statute within any principle or decision which has been applied to the definition of that term as used in the statute in question or any kindred enactments. In reaching this conclusion we accept the view urged by counsel for the appellant and the intervener that the exemption from taxation which we are considering was framed by the legislature for the purpose of encouraging the business of manufacturing within the state, and that in determining whether a given case is within the exemption we ought to consider and give weight to the policy of the legislature in adopting the same. *People ex rel. Blackinton Co. v. Roberts*, 4 App. Div. 388, 38 N. Y. Supp. 872, affirmed on opinion below in 151 N. Y. 652, 46 N. E. 1150; *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 14 L.R.A. 708, 29 N. E. 808.

But, doing this, we are still unable to discover as the result of pasteurization any such degree of change in the form, nature, or intended use of milk, when compared with its original condition, as has been made the basis for holding in other cases that the process producing such change could be regarded as one of manufacture. The cases cited by the relator for the purpose of establishing the contrary proposition deal L.R.A.1917A.

with processes of alteration in the character and proposed use of the article being operated on which, for the most part, are clearly, if not radically, different than the one here being considered.

In *People ex rel. Brush Electric Mfg. Co. v. Wemple*, 129 N. Y. 543, 552, 555, it was being determined whether the business of generating electricity and supplying the same to customers for lighting purposes was a manufacturing business. It seems difficult to understand how it could be seriously urged that it was not, and the court so held. In the course of so holding, some things were said which seem to define a test with which the present relator cannot comply. Referring to the argument there being made that the corporation did not produce anything which, in a certain sense or in some form, did not exist before, it was written: "That, however, is true of most, if not all, manufacturing operations. The application of labor and skill to materials that exist in a natural state gives to them a new quality or characteristic and adapts them to new uses, and the process by which this result is brought about is called manufacturing, whether the change is accomplished by manual labor or by means of machinery."

And again: "The materials from which all manufactured things originate exist in a natural state; but the manufacturer, by the application to these materials of labor and skill, gives to them a new and useful property. The electricity which is generated and transmitted by the operations of the relator, and which under its manipulations, illuminates houses and streets, is a very different thing from that mysterious element that is said to pervade nature."

The same course of reasoning necessarily led to the decision in *Nassau Gaslight Co. v. Brooklyn*, 89 N. Y. 409, that the company engaged in producing and distributing gas was a manufacturing corporation.

Nearer in some of their features to relator's case, as it seems to me, are the cases *Re Alaska American Fish Co.* (D. C.) 162 Fed. 498; *State v. American Sugar Ref. Co.* 108 La. 603, 32 So. 965; *Re I. Rheinstrom & Sons Co.* (D. C.) 207 Fed. 119; *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 514, 47 N. Y. Supp. 122. But these cases, even if accepted by us as authorities of weight, may be distinguished from the present one.

Re Alaska American Fish Co. (D. C. Wash.) 162 Fed. 498, it was held that "catching, preserving by salt, and marketing fish" was manufacturing. It is simply stated in support of this holding without argument or authorities: "Fish, as a commodity of merchandise, requires the application of process for its preservation."

It is a matter of common knowledge, however, that the process referred to in the opinion is a very extensive one, and that the preserved fish finally placed on the market is widely different than such fish in their natural state. *Re I. Rheinstrom & Sons Co.* (D. C.) 207 Fed. 119, 156.

In *State v. American Sugar Ref. Co.* 108 La. 603, 32 So. 965, it was held that one engaged in refining sugar was a manufacturer within the terms of a statute exempting manufacturers from the payment of certain taxes. It would occupy too much space to state even in a summary manner for the purpose of distinguishing that case the various processes through which raw sugar is passed for the purpose of converting it into the refined commercial article with which we are familiar. It seems to me that a consideration of those processes, as described in the opinion, makes it perfectly evident that they create a finished article which differs in condition, character, and form and use from the original raw product in a manner and degree which find no analogy in the relation between raw and pasteurized milk. When one contemplates the difference between the raw, impure sugar, unfit for any ordinary use, and the final, cleansed, whitened, and grained product described in the opinion, it is difficult to see how there could be real doubt that the processes producing such change amounted to manufacturing as it has been quite universally defined.

In the same manner the case of *Re Tecopa Min. Co.* (D. C.) 110 Fed. 120, wherein it is held that the process of smelting and refining ores constitutes a manufacturing process, is to be distinguished from the present case.

In *Re I. Rheinstrom & Sons Co.* 207 Fed. 119, it was held by the district court of Kentucky that the production of "Maraschino Cherries" as therein described was a manufacturing process under the Kentucky statute giving priority to certain classes of creditors of a manufacturing establishment. It appeared that cherries grown abroad, and already subjected to two processes for the purpose of bleaching and preserving them, were by the bankrupt subjected to ten more processes, amongst which were those of coloring, sweetening, cooking, and flavoring them. The district judge, in a very elaborate opinion reviewing, distinguishing, and criticizing many opinions, took as the basis of his decision the principle that, in order to be a manufacturer, one must be a "maker" who is the "efficient cause of the coming into existence of something that did not exist before;" and within that principle he reached the conclusion that the processes of coloring, sweetening, cooking,

and flavoring to which the natural cherries were subjected, aside from other treatment, "rendered the article produced . . . a new and different thing" than the original cherry.

I am inclined to think that this determination of fact that a new article had been produced was justified by the circumstances showing the creation in the natural article of much different and more far-reaching changes than those created in the case of appellant's commodity. But whether this determination on the facts was correct or not, the decision fully realizes the existence of the principle that, in order to manufacture, it becomes necessary to make "a new and different thing,—a thing distinctive in character from the original and natural product."

In *People ex rel. Standard Wood Co. v. Roberts*, 20 App. Div. 514, 47 N. Y. Supp. 122, it was held that a corporation engaged in making and selling kindling wood, which was produced by sawing slabs of wood into strips, which were then kiln dried and compressed by machinery into bundles of a specific size and shape for a particular purpose, was engaged in manufacturing. That case perhaps approaches more closely than any other the character of an authority for appellant's contention. It undoubtedly is very near the border line. But, even so, a distinction can be drawn between the process essentially of purification which appellant employed and the one involved in the case cited, whereby the form of an article was changed and it was prepared for an entirely new use.

In opposition to appellant's claim, reference may be made to a few authorities of controlling character or great weight, which, under varying conditions, define the changes and results which must be produced in an article by any process which is to be regarded as one of manufacturing.

In *People v. Knickerbocker Ice Co.* 99 N. Y. 181, 183, 1 N. E. 669, it was held that the collection, storage, and preservation of natural ice did not constitute manufacturing. It may be conceded that these operations were more simple than those performed by the relator, but what was said in making the decision is pertinent in this case. It was written: "Its [relator's] dealings is with 'ice,' as an existing article, not the manufacture or production of ice by combination of materials, or the application of forces, or otherwise. It collects, stores, and preserves that which natural causes created and which other natural causes would destroy and waste. . . . Many cases are cited by the learned counsel for the appellant; but we find none so comprehensive as to include this case. They

all, so far as they have any application, require the production of some article, thing, or object by skill or labor out of raw material, or from matter which has already been subjected to artificial forces, or to which something has been added to change its natural condition."

In *Tide Water Oil Co. v. United States*, 171 U. S. 210, 43 L. ed. 139, 140, 18 Sup. Ct. Rep. 837, 839, where the question was being considered whether certain articles could be considered under the tariff laws as having been wholly manufactured in the United States, it was written (p. 216): "The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose from the original materials; and usually it is given a different name."

In *Frazee v. Moffit* (C. G.) 20 Blatchf. 267, 18 Fed. 584, it was held that hay was not a manufactured article under the tariff laws.

In *Hartranft v. Wiegmann*, 121 U. S. 609, 615, 30 L. ed. 1012, 1014, 7 Sup. Ct. Rep. 1240, 1243, it was held that shells cleaned by acid and then ground and polished on an emery wheel, some of them, farther, being etched with acid, and all intended to be sold for ornaments, were not manufactured, but were exempt from duty on import as shells "not manufactured." In reaching this conclusion it was written: "We are of opinion that the shells in question here were not manufactured. . . . They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws."

In *Anheuser-Busch Brewing Asso. v. United States*, 207 U. S. 556, 562, 52 L. ed. 336, 338, 28 Sup. Ct. Rep. 204, 206, the court dealt with a claim for a drawback on account of duties which had been paid on imported corks which it was claimed were so imported for manufacturing purposes within the United States. The object of the statute, as of the one before us, was evidently to encourage manufacturing within the United States. In support of the claim it appeared that the corks in question were imported from Spain; that, after

being brought into this country, they were assorted and branded and then put into an air fan for the purpose of removing foreign substances; that they were then thoroughly cleansed by washing and steaming for the purpose of removing tannin and germs and making the cork soft and elastic; they were exposed in a machine to blasts of air for drying purposes and afterwards put in a bath of glycerin and alcohol for the purpose of closing up all seams, holes, and crevices, and for preventing them from giving a cork taste to beer inclosed in bottles in which they were used; subsequently they were subjected to another steam bath for the purpose of making them fit properly in the bottles in which they were used. The steaming of the corks, or pasteurizing them, as it was termed, destroyed all the germs in them that would damage or spoil the beer. It was held that this process did not constitute manufacturing, it being said: "Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary. . . . There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.' This cannot be said of the corks in question. A cork put through the claimant's process is still a cork. The process is the preparation of the encasement of the beer."

We think the effect of these authorities and many more which might be cited is to establish that the pasteurization of milk by relator was not the business of manufacturing within the statute.

Reference was made at the commencement of this opinion to another and minor objection to the tax which has been assessed against the relator. This objection is embraced in the assertion that, to a limited extent, it has been subjected to double taxation.

Prior to July 1, 1910, the relator had issued stock of the par value of only \$215,900 out of an authorized issue of \$750,000. On said date it declared a stock dividend of 100 per cent, which increased its issued capital stock to \$431,800 par value. This capital stock was the basis on which was to be assessed in advance the tax against relator now before us for the year ending October 31, 1911. As applicable to this case, § 182 of the Tax Law provided in substance that where a dividend in excess of 6 per cent had been declared upon capital stock, the rate of taxation should be one fourth of a mill for each 7 per cent of dividends "made or declared upon the par value of the capital stock employed during such year." Said section further provided

that if dividends amounting to less than 6 per cent were declared on the par value of the capital stock, or if no dividend were declared, the tax should be at the rate of three quarters of a mill upon the amount of capital employed in the state.

The comptroller, in making the assessment of relator, was therefore confronted with the facts that upon the capital stock employed by the relator up to July 1, 1910, a dividend of 100 per cent had been declared, for it is conceded that a stock dividend stands upon the same basis as a dividend in cash, and upon \$215,900 par value of stock issued as such dividend no dividend had been declared during the remainder of

the year. From these facts we think it followed that the relator was assessable upon \$215,900 par value of stock at the rate of one-quarter of a mill for each 1 per cent of dividends, and upon \$215,900 of stock issued as such dividend it was taxable at the rate of three quarters of one mill upon the amount of said stock. This was the assessment which was in fact made by the comptroller, and we see no legal objection to it.

The order appealed from should be affirmed, with costs.

Willard' Bartlett, Ch. J., and Collins, Cuddeback, Hogan, Seabury, and Pound, JJ., concur.

Annotation—Modification of food products as manufacturing, within tax exemption provisions.

On the general question of what constitutes manufacturing, see note to Com. v. Northern Electric Light & P. Co. 14 L.R.A. 107.

There are but few cases in which the question of exempting food products from taxation on the ground that the food is "manufactured," within the meaning of provisions exempting manufacturers, is passed upon. The court in *PEOPLE EX REL. EMPIRE STATE DAIRY CO. v. SOHMER*, ante, 48, cites several analogous cases that serve the purpose of defining the terms, and the few cases within the scope of the note will serve to illustrate the application of the rule to the production of foods.

Rice-milling, i. e., cleaning and polishing the grains to fit them for the market in which they are usually sold, is not manufacturing, within the meaning of a constitutional provision that exempts the property used for manufacturing purposes from taxation, and the fact that there is a by-product as an inevitable result of the process, which might be called a manufactured product, does not change the plant into a manufacturing establishment within the meaning of the provision. *State ex rel. Ernst v. State & City Assessors* (1884) 36 La. Ann. 347. The court said: "The formation of this so-called flour is a mere accident of plaintiff's business, and the article itself is refuse, which, under the nice economies of modern manufacturers, is utilized." It would seem, however, that the provision specified certain articles of manufacture, and the court did not discuss to any extent the general question involved. The case is cited with approval and followed on the same point in *Martin v. Thibaut* (1885) 37 La. Ann. L.R.A.1917A.

21, and *Johnson v. Thibaut* (1885) 37 La. Ann. 918. The decision in *New Orleans v. Ernst* (1883) 35 La. Ann. 746, is directly opposed to these holdings and may be regarded as having been overruled by them.

In *Crescent City Seltz & Mineral Water Co. v. New Orleans* (1896) 48 La. Ann. 768, 19 So. 943, it was held that the making of soda, seltz, and similar drinks by causing water to absorb gases produced by chemical action is not the manufacture of chemicals within the meaning of a constitutional provision that exempts from taxation all property used in the manufacture of chemicals. This holding is not clearly in point, since the product would hardly be classed as a food, and the decision turned upon the question whether or not it was a chemical, and not whether it was manufactured.

In *People ex rel. Union Pacific Tea Co. v. Roberts* (1895) 145 N. Y. 375, 40 N. E. 7, the court said: "The business of the relator is alleged to be the manufacture of coffee and tea, and the sale of coffee, tea, spices, and baking powder, in this and several other states. It appears by the uncontradicted evidence that the relator purchases its spices and baking powder in bulk, merely putting up the same in packages for sale, and the question of whether the relator is a manufacturing corporation must be determined by the manner in which it deals with its coffee and tea. The evidence discloses that tea is taken in the original state, and various kinds are mixed together, producing a compound which is called 'combination tea.' Coffee is purchased in the raw bean, roasted, ground, and in some instances different kinds of

coffee are mixed together, forming, as in the case of the tea, a combination article. We think it very clear that the handling of tea and coffee in the manner indicated is not 'manufactured,' in any legal sense, and the relator cannot be regarded as a manufacturing corporation. Mr. Webster defines 'manufacture' to be 'anything made from raw materials by the hand, by machinery, or by art, as clothes, iron utensils, shoes, machinery, saddlery, etc.' The process of manufacture is supposed to produce some new article by the application of skill and labor to the raw material. It is quite apparent that the processes of the relator, when subjected to this test, cannot be deemed manufacture, either in the ordinary or legal definition of that term."

The syllabus in the report of *New Orleans v. New Orleans Coffee Co.* (1894) 46 La. Ann. 86, 14 So. 502, fairly stating the substance of the holding, is as follows: "Exemptions from taxation are strictly construed. A corporation claiming to own a secret nonpatented process by which, without the use of any chemical, it is enabled to make selections of green coffees which, through careful and cleanly roasting and a secret process of cooling, produce 'brands' of unground roasted coffees, each one of which is claimed to have a recognizable taste, is not a 'manufacturer' within the meaning of art. 206 of the Constitution, and is not exempt under that article from the payment of a license."

In *New Orleans v. Mannessier* (1880) 32 La. Ann. 1075, it was held that an ice cream confectioner, who made his ice cream, is not a manufacturer within the meaning of an exemption clause. The court said: "We cannot assent to the proposition that a person making and selling ice cream is a manufacturer

in the sense of the law, or in any other sense of the word. The attempt to magnify a confectionery, which is defendant's business, into a manufacture, must fail. We are told that anyone seeing the steam engine, complicated apparatus, and large force needed to produce defendant's goods, would at once conclude that he is a manufacturer. With as much force it might be said that any one visiting the mammoth kitchen of the Grand Union Hotel at Saratoga, together with their myriads of employees, and their colossal apparatus, would at once magnify the cooks and pastrymen into manufacturers."

But in *State v. American Sugar Ref. Co.* (1902) 108 La. 603, 32 So. 965, the court, in expressly overruling *State v. American Sugar Ref. Co.* (1899) 51 La. Ann. 562, 25 So. 447, affirmed on another point in (1900) in 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, held that a statute imposing a license upon "refiners of sugar" is repugnant to a constitutional provision which exempts "manufacturers" from that particular form of taxes, since a sugar refiner is a manufacturer. The court in this case delivered a very elaborate opinion, quoting many definitions of the term "manufacturer," and gave a very specific description of the process of refining sugar.

In *Engle v. Sohn* (1885) 41 Ohio St. 691, 52 Am. Rep. 103, it was held that a pork packer should make return of his property according to the law governing manufacturers, and not according to that governing merchants. There are, no doubt, other cases in which producers of food have been classified on the question of whether or not they were manufacturers, but they are not within the scope of this note, which is limited to tax-exemption cases. J. W. M.

OKLAHOMA SUPREME COURT.

R. S. LITCHFIELD, Plff. in Err.,
v.

HENSON OIL COMPANY.

(— Okla. —, 157 Pac. 137.)

Corporation—right to transfer stock.

1. Section 1284, Snyder's Comp. Laws

Headnotes by KANE, Ch. J.

Note.—As held in *LITCHFIELD v. HENSON OIL Co.*, and as pointed out in the note appended to *Citizens' Nat. Bank v. State*, L.R.A.1917A.

1909, provides that ". . . Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate, but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to

45 L.R.A.(N.S.) 1076, it is the general rule that statutes or charter provisions requiring the surrender of certificates of stock,

whom transferred, the number or designation of the shares, and the date of the transfer."

For other cases, see Corporations, V. c, in Dig. 1-52 N. S.

Same — method of transfer.

2. Shares of stock in a domestic corporation are personal property, and may be transferred by indorsement and delivery of the certificate; and, where such shares of stock, when issued, provide that they are transferable on the books of the corporation only on surrender of the certificate, such provision is binding upon the corporation, and it cannot reissue such stock without the surrender of the original certificate to a person in whose name they stand on the books of the company, and thereby escape liability to a person who holds such stock by assignment and delivery of the same. Such reissued stock is fraudulent and void as against the rights of the bona fide holder of the original.

For other cases, see Corporations, V. c, in Dig. 1-52 N. S.

Same — suit to compel transfer.

3. Having reached the conclusion that there was no evidence adduced at the trial tending to cast suspicion upon the bona fides of the transfer of the certificate herein involved from N., to whom it was issued, to the Exchange Land & Oil Company, or from the Exchange Land & Oil Company to the plaintiff herein, it follows the latter may prosecute a suit in equity to compel the corporation issuing said stock to transfer the same to him upon its books.

For other cases, see Corporations, V. c, in Dig. 1-52 N. S.

(December 21, 1915.)

ERROR to the District Court for Washington County to review a judgment in defendant's favor in a suit to compel defendant to recognize plaintiff as the owner of certain shares of its capital stock, and to account to him as such stockholder. Reversed.

The facts are stated in the opinion.

Mr. J. B. Tomlinson, for plaintiff in error:

When certificates of bank stock are transferable on the books of the bank on their

together with a proper assignment thereof or power of attorney attached thereto, before reissuing the stock to another, while primarily for the benefit of the corporation, nevertheless impose upon it the duty to enforce the requirement, and if it fails in this regard and transfers upon its books shares of stock to another without a surrender thereof, and without the consent of the true owner, it is liable to the latter, and he may maintain a suit in equity against it to have the transfer set aside and be restored to his rights as a stockholder. In the note referred to, other remedies are also pointed out which may be pursued by L.R.A.1917A.

surrender, a bank which refuses to make such transfer to a purchaser on request is liable to an action for damages.

First Nat. Bank v. Lanier, 11 Wall. 369, 20 L. ed. 172; First Nat. Bank v. Stribling, 16 Okla. 41, 86 Pac. 512; Haynes v. Brown, 18 Okla. 389, 89 Pac. 1124.

Plaintiff may prosecute a suit in equity to compel the corporation to transfer the stock to him upon its books.

Messrs. James Veasy, L. A. Rowland, and Ledbetter, Stuart, & Bell, for defendant in error:

The transfer of the stock by Norton to the Exchange Land & Oil Company, being prohibited by the Constitution, created no rights in favor of the Exchange Land & Oil Company, and that company, having no right to the stock, could convey none to Litchfield.

4 Thomp. Corp. § 3519; Martin v. Ohio Stove Co. 78 Ill. App. 105; Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047; Buckeye Marble & F. Co. v. Harvey, 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427; Nassau Bank v. Jones, 95 N. Y. 116, 47 Am. Rep. 14; De la Vergne Refrigerating Mach. Co. v. Featherstone, 147 U. S. 209, 37 L. ed. 138, 13 Sup. Ct. Rep. 283; Chemical Nat. Bank v. Havermale, 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071; California Nat. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; Clarke v. Lincoln Lumber Co. 59 Wis. 655, 18 N. W. 492; Park Heights & S. P. Bridge Co. v. Brooks & B. Corp. — N. J. L. —, 94 Atl. 83.

Kane, Ch. J., delivered the opinion of the court:

This was a suit in equity, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, for the purpose of securing a decree compelling the defendant in error to recognize the plaintiff in error as the owner of 200 shares of its capital stock, and to account to him as such stockholder. Upon trial to the court the relief prayed for was denied; whereupon this proceeding in error was commenced for

the true owner whose stock has been transferred on the books of the corporation without his consent or surrender by him of his stock. The question of laches of the assignee of the stock in having the stock transferred to him on the books of the company, as affecting his rights against the corporation, is treated in a note appended to Shaw v. Goebel Brewing Co. 45 L.R.A. (N.S.) 1090. As to the validity of a pledge or other transfer of stock when not made on the books of the corporation, as against attachments, executions, or such transfers, see note appended to Everitt v. Farmers' & M. Bank, 20 L.R.A. (N.S.) 996.

the purpose of reviewing the action of the trial court.

There was considerable evidence adduced at the trial, but after it is all analyzed the following material facts stand forth practically undisputed: That Henson Oil Company, the defendant herein, was organized as a corporation in 1907, with a capital stock of \$25,000. Immediately upon its organization, a call was made upon the stockholders to pay to the treasurer of the company at once the par value of their stock subscriptions. At the annual meeting of the board of directors on December 2, 1907, two of the stockholders failed to respond to the call for the payment of their stock; whereupon a stock certificate for 375 shares, being stock certificate No. 1, was issued to W. L. Norton. On January 15, 1908, Norton surrendered stock certificate No. 1, and received in lieu thereof certificate No. 6, for 200 shares. It is this certificate that is in controversy. Of the legal effect of this part of the transaction counsel for defendant say: "Unquestionably the stock belonged to Norton, and not to the corporation." It further appears that Norton not only owned a substantial amount of stock in the defendant company, but he was also president, general manager, and owner of 75 or 80 per cent of the stock of another corporation, the Exchange Land & Oil Company, organized under the laws of New York, and president of the American National Bank of Bartlesville.

In January, 1908, the Exchange Land & Oil Company passed a resolution authorizing the purchase of 200 shares of the capital stock of the defendant company at an agreed price of \$6,500, and provided means to pay therefor. Shortly thereafter the stock of the defendant company theretofore issued to Norton was transferred by him by assignment in due form to the Exchange Land & Oil Company. Shortly after the transfer of Norton's certificate of stock, as above set out, it was forwarded to the secretary of the defendant company to be transferred upon the books of the company to the Exchange Land & Oil Company. The secretary of the defendant company refused to transfer the certificate, and returned the same to the Exchange Land & Oil Company with a statement to the effect that a transfer thereof would be contrary to the laws of the state of Oklahoma. Thereafter, on October 10, 1910, at a meeting of the board of directors of the defendant company, Norton caused the following entry to be made upon the transfer book of the defendant company in relation to the certificate of

stock in controversy, to wit: "This certificate No. 6 has never been pledged by me, but is out of my possession, and I hereby apply for its reissuance and direct that it be reissued to L. A. Rowland."

Thereupon certificate No. 6 was reissued to L. A. Rowland, as directed by Norton. The purpose of this reissuance was to secure a debt owing by Norton to the defendant company.

R. S. Litchfield, the plaintiff herein, a banker of Independence, Kansas, held as collateral security certain stock of the Exchange Land & Oil Company. The debt not being paid, he foreclosed his lien on this stock and had it transferred to himself and his associates. About this time, to wit, on the 10th day of January, 1911, the Exchange Land & Oil Company, by its board of directors, passed a resolution selling the stock transferred to it by Norton, as above stated, to Litchfield for the consideration of \$500. These, in our judgment, are all the facts material to a decision in this cause.

The defendant company claims the stock by virtue of its reissuance to Rowland, who is holding it as collateral security for the company, and the plaintiff claims it by purchase and transfer from the Exchange Land & Oil Company. We think the evidence adduced was sufficient to entitle the plaintiff to the relief prayed for. Section 1284, Snyder's Comp. Laws, 1909, provides that ". . . Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer."

The certificate in controversy provided that it is "transferable only on the books of the corporation by the holder hereof in person, or by attorney, upon surrender of this certificate, properly indorsed."

In *First Nat. Bank v. Stribling*, 16 Okla. 41, 86 Pac. 512, it was held: "Shares of stock in a corporation organized under the laws of the territory of Oklahoma are personal property, and may be transferred by indorsement and delivery of the certificate; and, where such shares of stock when issued provide that they are transferable on the books of the corporation only on surrender

of the certificate, such provision is binding upon the corporation, and it cannot reissue such stock without the surrender of the original certificate to a person in whose name they stand on the books of the company, and thereby escape liability to a person who holds such stock by assignment and delivery of the same. Such reissued stock is fraudulent and void as against the rights of the bona fide holder of the original."

Applying the rule laid down in this case to the case at bar, it would seem that the transfer of the stock "by indorsement by the signature of the proprietor" (Norton) to the Exchange Land & Oil Company vested the title in the stock assigned in that company; and, of course, the subsequent assignment thereof to the plaintiff had the effect of vesting title thereto in him, as in the case of ordinary personal property. It is well known that stock certificates of all kinds have been construed in such a way that they have become the basis of commercial transactions in all the large cities in the country, and are sold in open market the same as other securities; and, whilst they are neither in the form or character of commercial paper, they approximate it as nearly as practicable. The reissuance of the stock to Mr. Rowland, to be held as collateral security for the defendant company, was not an ordinary business transaction, nor can we find any authorization therefor in the law. On the contrary, the Oklahoma case above cited holds that "such reissuance of the stock is fraudulent and void, as against the right of the bona fide holder of the original."

There is absolutely no evidence in the record which reflects unfavorably upon the bona fides of the sale from Norton to the Exchange Land & Oil Company, nor from it to the plaintiff. There are two circumstances disclosed by the evidence which perhaps ought to be noticed on account of the importance which counsel for the respective parties seem to attach to them. It is shown that shortly after the assignment of the certificate to the Exchange Land & Oil Company, Norton drew upon it three drafts, aggregating \$4,500, in favor of the defendant, which were paid, and that the Exchange Land & Oil Company also paid the further sum of \$2,000, or a total of \$6,500. On March 28, 1908, the defendant company remitted to the Exchange Land & Oil Company \$3,000, on June 16, 1908, an additional sum of \$2,000, and on December 3, 1908, an additional sum of \$2,789.26.

It is contended on the part of the plaintiff that the former transaction furnishes evidence of the consideration paid by the L.R.A.1917A.

Exchange Land & Oil Company for the certificate of stock assigned to it by Norton, whilst, on the part of the defendant, it is contended that a fair inference to be drawn from both transactions is that the \$6,500 transaction constituted a loan from the Exchange Land & Oil Company to the defendant company which was subsequently paid by the latter items. In our judgment, we may assume that the contention of counsel for defendant is right, and that the trial court so found, and yet the defendant will be in no better situation. Even if we disposed of these transactions in accordance with its theory, we are unable to see how the conclusion heretofore reached, based on the former statement of facts, would be affected. It is conceded that originally the stock was issued to Norton, and that he thereby became the owner thereof; that in due form he assigned and transferred the same to the Exchange Land & Oil Company. If we concede that the \$6,500 transaction above mentioned was a loan to the defendant company, and did not constitute the consideration for the assignment, still it does not follow that the Exchange Land & Oil Company did not pay Norton for the stock. Indeed, finding the stock duly and regularly assigned to the Exchange Land & Oil Company, and in its possession, without any attendant suspicious circumstances, the presumption would be the other way.

Having reached the conclusion that there was no evidence adduced at the trial—at least, none which has been called to the attention of the court by counsel in their briefs—tending to cast suspicion upon the bona fides of the transfer of the certificate herein involved from Norton, to whom it was issued, to the Exchange Land & Oil Company, or from the Exchange Land & Oil Company to the plaintiff herein, it follows that the latter may prosecute a suit in equity to compel the corporation issuing said stock to transfer the same to him upon its books. *Clark & M. Priv. Corp. p. 1820; Western U. Teleg. Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047; Barstow v. Savage Min. Co. 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.*

For the reason stated, the judgment of the court below is reversed, and the cause remanded, with directions to render judgment in accordance with the views herein expressed.

All the Justices concur.

Petition for rehearing denied May 2, 1916.

OKLAHOMA SUPREME COURT.

O. K. TRANSFER & STORAGE COMPANY,
Plff. in Err.,
v.

MRS. H. A. NEILL et al.

(— Okla. —, 159 Pac. 272.)

Evidence — parol — supplementing written contract.

1. Where an oral contract is partially reduced to writing, and the writing evidencing it is not a complete and final statement of the entire transaction, parol evidence not inconsistent with such written contract is admissible to show the full agreement.

For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.

Carrier — transfer company — breach of contract as to routing.

2. Where a transfer company agreed to ship the goods of plaintiff over a certain route, and took from plaintiff a shipping order limiting the liability of the transfer company, and thereafter the transfer company shipped the goods over a different route to that specified by the shipper, in consequence of which they were burned: held, that the transfer company was liable for the value of the goods less the amount recovered from the railroad company, without regard to the limitation of liability in the shipping order.

For other cases, see Carriers, III. g, in Dig. 1-52 N. S.

Witness — opinion — market value.

3. A witness is not required to be an expert to prove the reasonable or market value of goods, such as ordinary wearing apparel and household furniture, where it is apparent from the facts proved that the value of the articles is within the knowledge of persons of ordinary intelligence and experience.

For other cases, see Evidence, VII. f, in Dig. 1-52 N. S.

Damages — loss of household goods.

4. In an action for loss of household goods and wearing apparel, which have no fixed market value, the measure of damages is the value of the goods to the owner; not a fanciful value which such owner might place upon them, but such reasonable value as they had to him, considering the nature and condition of the goods and the purposes for which they were adapted.

For other cases, see Damages, III. j, in Dig. 1-52 N. S.

(July 11, 1916.)

Headnotes by BURFORD, C.

Note. — For deviation as affecting carrier's right to avail itself of provisions of special contract of affreightment, see annotation following this case, post, 62 L.R.A.1917A.

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover the value of household goods destroyed by fire. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Warren K. Snyder for plaintiff in error.

Messrs. John H. Wright and Clarence J. Blinn, for defendant in error Neill:

A sufficient foundation was laid for the admission of secondary evidence of the contents of the letter written by plaintiff to Mrs. Hughes.

Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946; Checotah v. Chapman Valve Co. — Okla. —, 153 Pac. 133; Central Branch Union P. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163; Redus v. Mattison, 30 Okla. 720, 121 Pac. 253; Cochran v. Bank of Tuttle, 31 Okla. 171, 120 Pac. 652; Olds v. Conger, 1 Okla. 232, 32 Pac. 337.

Having deviated from the instructed and agreed route, the transfer company was guilty of a conversion preventing it from invoking the provisions of the purported release, limiting liability to \$10 per hundred-weight in case of loss.

Hand v. Baynes, 4 Whart. 204, 33 Am. Dec. 54; Merrick v. Webster, 3 Mich. 268; Philadelphia & R. R. Co. v. Beck, 125 Pa. 620, 11 Am. St. Rep. 924, 17 Atl. 505; Saxon Mills v. New York, N. H. & H. R. Co. 214 Mass. 383, 101 N. E. 1075; Lynch v. New York C. & H. R. R. Co. 89 Misc. 472, 153 N. Y. Supp. 633; Brown & H. Co. v. Pennsylvania Co. 63 Minn. 546, 65 N. W. 961; McKahan v. American Exp. Co. 209 Mass. 270, 35 L.R.A.(N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612; Coyne v. Grand Rapids & I. R. Co. 185 Ill. App. 431; Graves v. Smith, 14 Wis. 5, 80 Am. Dec. 762; Howell v. Morlan, 78 Ill. 162; S. D. Seavey Co. v. Union Transit Co. 106 Wis. 394, 82 N. W. 285; Coykendall v. Eaton, 55 Barb. 188; Muller v. Ryan, 19 N. Y. S. R. 109, 2 N. Y. Supp. 736; Cerkel v. Waterman, 63 Cal. 34; Jeffersonville R. Co. v. White, 6 Bush, 251; Grennall v. Hersum, 220 Mass. 278, 107 N. E. 941; Lucas v. Trumbull, 15 Gray, 306; Fish v. Ferria, 5 Duer, 49.

Where a written instrument does not express the entire agreement, the parol-evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matters not provided for in the writing.

Lynch v. New York C. & H. R. R. Co. 89 Misc. 472, 153 N. Y. Supp. 633; McKahan v. American Exp. Co. 209 Mass. 270, 35 L.R.A.(N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612; Saxon Mills v. New York, N.

H. & H. R. Co. 214 Mass. 383, 101 N. E. 1075; Smith v. Bond, — Okla. —, 155 Pac. 1116; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 28 L. ed. 527, 4 Sup. Ct. Rep. 566; Gulf, C. & S. F. R. Co. v. Jackson, — Tex. Civ. App. —, 86 S. W. 47; Missouri P. R. Co. v. Beeson, 30 Kan. 298, 2 Pac. 496.

Testimony of Mrs. Neill as to the value of the goods was competent.

Barker v. Lewis Storage & Transfer Co. 78 Conn. 198, 61 Atl. 363, 3 Ann. Cas. 889; Head v. Becklenberg, 116 Ill. App. 576; Mathews v. Livingston, 86 Conn. 263, 85 Atl. 529, Ann. Cas. 1914A, 195; Bateman v. Ryder, 106 Tenn. 712, 82 Am. St. Rep. 910, 64 S. W. 48; Green v. Boston & L. R. Co. 128 Mass. 221, 35 Am. Rep. 370.

If, under cross-examination, witnesses testified as to the cost of any of the articles, that was a proper element of damage, especially where the jury is informed as to the extent of the use of the property.

McMahon v. Dubuque, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517, 5 Am. Neg. Rep. 147; Luse v. Jones, 39 N. J. L. 707; Printz v. People, 42 Mich. 144, 36 Am. Rep. 437, 3 N. W. 306; Burgess v. Felix, 42 Okla. 193, 140 Pac. 1180; Filson v. Territory, 11 Okla. 351, 67 Pac. 473, 14 Am. Crim. Rep. 524.

The court correctly instructed the jury as to the measure of damages.

St. Louis & S. F. R. Co. v. Dunham, 36 Okla. 724, 129 Pac. 862; Rogers v. O. K. Bus & Baggage Co. — Okla. —, 148 Pac. 837; St. Louis & S. F. R. Co. v. Young, 30 Okla. 588, 120 Pac. 999; Reamer v. Morrison Exp. Co. 93 Mo. App. 501, 67 S. W. 718; Muller v. Ryan, 19 N. Y. S. R. 109, 2 N. Y. Supp. 736.

Mr. R. A. Kleinschmidt for defendant in error railway company.

Burford, C., filed the following opinion:

The record in this case discloses that Mrs. Neill, who had formerly lived in Oklahoma City, but who was at the time living in Des Moines, Iowa, directed her friend, Mrs. Hughes, then residing in Oklahoma City, to have Mrs. Neill's household goods crated, shipped, and forwarded to her at Des Moines, over the line of the Rock Island Railroad. Pursuant to such instructions Mrs. Hughes called upon the O. K. Transfer & Storage Company and asked them to ship the goods. There is conflict in the evidence as to whether or not she directed them to ship the goods over the Rock Island Road, but that question was submitted to the jury, and there being ample evidence to sustain their finding, we, for the purposes of the case, assume that she did give such specific shipping directions. The transfer

company packed and shipped the goods over the line of defendant, St. L. & S. F. R. Co. at Miami, Oklahoma, and while on the line of road of that company, they were destroyed by fire. Prior to the shipment, the transfer company had obtained from Mrs. Hughes what was denominated a "shipping order and release," the material parts of which are as follows:

Shipping Order and Release.

11-6-1913.

O. K. Transfer & Storage Co., City:

Please forward lot of household goods from Oklahoma City to Des Moines, Iowa. In consideration of the reduced rate made for the shipment of my household goods, it is understood and agreed that O. K. Transfer & Storage Company acts only as agent for the shipper and is not responsible for damage or loss beyond the amount which may be collected from the railroad companies over whose lines said goods are forwarded. Desiring to receive the benefit of the reduced rate, I release goods to the value of ten (\$10) per cwt., in case of loss or damage and subject to other printed conditions of the regular bill of lading issued by the railroad company via whose lines goods are forwarded. It is expressly agreed that O. K. Transfer & Storage Company will not be held responsible for loss or damages of goods by fire or otherwise in excess of ten dollars (\$10) per cwt. valuation while in its care, or in cars being loaded or unloaded, or in warehouses awaiting shipment or delivery. It is further expressly agreed that O. K. Transfer & Storage Company is hereby authorized to forward the household goods referred to in this shipping order at released valuation of ten (\$10) per cwt.

The goods were forwarded over the line of the Frisco in a car with other household goods going to Des Moines. The transfer company signed a bill of lading which fixed the value of the goods, and took the reduced rate offered by the carrier, in consideration of which its liability was limited to \$10 per hundredweight. After the destruction of the goods, the plaintiff brought suit against the transfer company and the railroad company, alleging the loss of goods and seeking to recover their value, alleged to be \$2,314.55. The transfer company denied the specific direction and set up its shipping order heretofore set out. The railroad company pleaded its bill of lading, and at the trial in effect offered to confess judgment for \$10 per hundredweight for the goods, amounting to something over \$300. The court instructed the jury to return a verdict against the railroad company for this amount and no other, and submitted

the cause to the jury as between the plaintiff and the transfer company, upon the theory, as set out in the instruction, that if the plaintiff's agent had given specific directions as to the route to be used, and the transfer company had forwarded the goods over some other road, the transfer company would be liable for the difference between their value and the amount recovered from the railroad company, but that if the agent did not give special directions, the shipping order executed by Mrs. Hughes was a complete defense on behalf of the transfer company.

Upon these issues the jury returned a verdict in favor of the plaintiff and against the transfer company in the sum of \$1,026.57, with interest and costs. Numerous errors are alleged, but we think they may be properly determined upon the various questions of law hereinafter considered.

First. Was evidence admissible to establish the direction given by Mrs. Hughes as to the shipment of the goods? An examination of the shipping order and release convinces that it was not intended to cover the entire contract. Such being the case, parol evidence was admissible, not to vary the terms of the contract already made, but to prove what the contract actually was.

In the recent case of *Smith v. Bond*, — Okla. —, 155 Pac. 1116, not yet officially reported, this court said: "Where an oral contract is partially reduced to writing, and the writing evidencing it is not a complete and final statement of the entire transaction, parol evidence not inconsistent with such written contract is admissible to show the full agreement."

In the case at bar we think, as in *Smith v. Bond*, supra, that the shipping order and release was only an incident to the entire contract, and did not attempt to define the whole contract, and that therefore parol evidence was admissible to prove the remaining terms of the contract.

The question then arises as to the effect of the shipping order and release given to the transfer company. It is exceedingly doubtful to our minds whether or not this release was ever intended to cover a case of this nature. However that may be, it is clear that it cannot operate to limit the liability of the transfer company in this case, for the reason that it was based upon the stipulation and condition of the contract, which, it is true, was oral, that the goods should be shipped over the Rock Island Railroad. When the transfer company violated its duty as agent, and sent the goods over the Frisco, its contract became entirely inapplicable, and the stipulations thereof could not limit its liability for its wrongful act as agent.
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The principles supporting this doctrine have been many times enunciated in the English and American courts. The liability is placed upon various grounds. The most widely adopted and perhaps the soundest is that laid down in *McKahan v. American Exp. Co.* 209 Mass. 270, 35 L.R.A. (N.S.) 1046, 95 N. E. 785, Ann. Cas. 1912B, 612, where, speaking of the effect of a deviation by a carrier from the route specified by the shipper, the court said: "The effect of a deviation is to do away with the express contract altogether; at least, at the election of the shipper. In other words, the breach of the express contract of shipment (which takes place when there is a deviation from route, or departure from mode, method, or manner of transportation) is such a breach on the part of the carrier that the shipper can rescind the express contract of shipment."

This case was one in which the carrier had taken a bill of lading, based upon a reduced rate, and which limited its liability to a certain value; and the court held that when the carrier deviated from the route prescribed therein, it lost the benefit of the stipulations of the bill of lading. In the notes to the case as reported in L.R.A. and Ann. Cas. many authorities upon the subject are collected.

In *Lynch v. New York C. & H. R. R. Co.* 89 Misc. 472, 153 N. Y. Supp. 633, the court said: "This contract, however, is not in force because of a deviation from the agreed route. . . . The deviation here destroyed the entire contract. . . . The carrier, having broken in a material part one of the covenants in an express contract to be performed on its part, cannot in reason or justice call upon a shipper to perform his covenants contained in the same contract. It is elementary that a party to a contract cannot repudiate burdensome covenants therein and at the same time enforce beneficial ones."

In *Merrick v. Webster*, 3 Mich. 268, a transportation company contracted to forward goods "by sail on the lake," all the dangers of the sea being assumed by the shipper. Instead, the transportation company forwarded the goods by steam. The court said: "The plaintiffs below, by the terms of the contract, took upon themselves the dangers of the sea, upon the condition that they were transported 'by sail on the lake,' and upon no other condition did they assume the risk."

It was there held that, the carrier having sent the goods by steam, as a result of which they were lost, it was liable. See also *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54; *Philadelphia & R. R. Co. v. Beck*, 125 Pa. 620, 11 Am. St. Rep. 924, 17 Atl.

505; *Saxon Mills v. New York*, N. H. & H. R. Co. 214 Mass. 383, 101 N. E. 1075; *Brown & H. Co. v. Pennsylvania* Co. 63 Minn. 546, 65 N. W. 961; *Balian v. Joly, V. & Co.* 6 Times L. R. 345; *Thorley & Sons v. Orchiss S. S. Co.* [1907] 1 K. B. 660, 2 B. R. C. 565, 76 L. J. K. B. N. S. 595, 90 L. T. N. S. 488, 23 Times L. R. 338, 12 Com. Cas. 251, 7 Ann. Cas. 281; *Kish v. Taylor* [1911] 1 K. B. 625, 2 B. R. C. 575, 80 L. J. K. B. N. S. 601, 103 L. T. N. S. 785, 27 Times L. R. 174, 16 Com. Cas. 59, 11 Asp. Mar. L. Cas. 544; *Internationale Guano en Superphosphaatwerken v. Macandrew* [1909] 2 K. B. 360, 78 L. J. K. B. N. S. 691, 100 L. T. N. S. 850, 25 Times L. R. 529, 53 Sol. Jo. 504, 14 Com. Cas. 194.

Some of the American cases have gone upon the ground that the contract is not done away with altogether by deviation from route, but that it must be shown that the loss was a result of the deviation. These cases, in our judgment, are not in accord with the weight or reason of authority, but whether they may be sound or unsound is, for the purposes of this case, immaterial, since it is apparent that the loss occurred upon the line of the Frisco, and was the direct result of the deviation from route.

So far we have considered cases applicable to carriers. The principles therein enunciated, however, are clearly applicable to the case at bar. Furthermore, the courts of this country have frequently held that where a warehouseman or bailee deviates from the conditions of his contract, whereby the goods or their value is lost, he is liable. *Graves v. Smith*, 14 Wis. 5, 80 Am. Dec. 762; *Howell v. Martin*, 78 Ill. 162; *Coykendall v. Eaton*, 55 Barb. 188; *Jeffersonville R. Co. v. White*, 6 Bush, 251; *Greenall v. Hersum*, 220 Mass. 278, 107 N. E. 941; *Cerkel v. Waterman*, 63 Cal. 34. We are of the opinion, therefore, that the plaintiff's release could not affect its liability for failing to ship the goods by the route directed.

Error is also assigned upon the admission of certain testimony. The plaintiff, in giving her deposition, testified from a list of the lost goods attached to the petition. It was afterwards established at the trial that this list had been made by Mrs. Hughes at about the time the goods were shipped, and she testified positively that every article, except one, and it was waived by the plaintiff, was actually delivered to the transfer company. Under these circumstances, we think it was not error to allow the witness to refer to the list in giving her testimony. *Elwell v. Purcell*, 42 Okla. 1, 140 Pac. 412. This list was a part of the petition, and we think its use by the witness was proper. *Frair v. Caswell*, 79 Wash. L.R.A. 1917A.

470, 140 Pac. 564. At the trial the list was offered. The court excluded the one article which Mrs. Hughes could not identify, and the value of the articles printed on the list, which it appeared had been put there by Mrs. Neill. Under the circumstances we think the introduction of the list could not have harmed the plaintiff, as Mrs. Hughes had already testified, item by item, that the goods contained in it, with the exception of the one waived, had been by her actually delivered to the transfer company, and there was no contradiction of her testimony. The amounts written on the list were excluded, and, so far as the list of articles was concerned, its admission could not prejudice the plaintiff in error.

Complaint is also made as to the competency of the witnesses who testified. It is not necessary to have experts to testify to the value of household goods and wearing apparel, if the witnesses are reasonably familiar with the goods concerning which they are testifying. The testimony is not essentially different from that in *Rogers v. O. K. Bus. & Baggage Co.* — Okla. —, 148 Pac. 837, not yet officially reported, and for the rejection of which that case was reversed. The testimony complained of in relation to the cost of the articles was elicited by the plaintiff on cross-examination. In any event it has been held that cost might be an item in determining the value of articles, depreciation being also considered. *Filson v. Territory*, 11 Okla. 351, 67 Pac. 473, 14 Am. Crim. Rep. 524; *Burgess v. Felix*, 42 Okla. 193, 140 Pac. 1180.

Error is also alleged upon the court's instruction upon the measure of damages, and upon certain questions allowed to be asked the witnesses in relation to the value of the goods. Both the instructions and the questions are very close to the language in *St. Louis & S. F. R. Co. v. Dunham*, 36 Okla. 724, 129 Pac. 862, and were apparently based upon that case. It was there said: "In an action against a carrier for loss of household goods and wearing apparel, which have no fixed market value, the measure of damage is the value of the goods to the owner; not any fanciful value which he might place upon them, but such reasonable value as, from the nature and condition of the goods and the purpose to which they were adapted and used, they had to him."

We see no reason to repudiate the doctrine of this case, and upon its authority the instructions are approved.

Finally it is claimed that the judgment against the railway company was a bar to a judgment against this plaintiff. We think not. In *Great Northern R. Co. v. O'Connor*, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53, the Supreme

Court considered a case in which a forwarder, such as the plaintiff in error, had shipped goods at reduced rates in carload lots. The suit was against the carrier, and the Supreme Court of the United States held that the plaintiff was limited in her recovery to the declared value, saying: "Plaintiff contended, however, that she had expected her goods to be transported as a separate consignment. But the transfer company had been intrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her private

instructions or limitations on the authority of the transfer company, whether it be treated as agent or forwarder. If there was any undervaluation, wrongful classification, or violation of her instructions, resulting in damage, the plaintiff has her remedy against that company."

This decision is sufficient authority both for the limitation of recovery against the railway company, and for the recovery of the value of the goods above that amount from the plaintiff in error.

Finding no error in the record, the judgment is affirmed.

Per Curiam:

Adopted in whole.

Annotation—Deviation as affecting carrier's right to avail itself of provisions of special contract of affreightment.

This note is supplementary to the note to McKahan v. American Exp. Co. 35 L.R.A.(N.S.) 1046, to which reference should be had for a statement of the difference of opinion as to the effect of a deviation to displace a special contract of affreightment, and for the earlier decisions upon the question.

The case of Kish v. Taylor [1911] 1 K. B. (Eng.) 625, 2 B. R. C. 575, 80 L. J. K. B. N. S. 601, 103 L. T. N. S. 785, 27 Times L. R. 174, 16 Com. Cas. 59, 11 Asp. Mar. L. Cas. 544, referred to in the earlier note as holding that an unjustifiable deviation does away with the special contract of affreightment altogether, including stipulations unconnected with the performance of the contract of carriage, has since been reversed by the House of Lords in [1912] A. C. 604, 3 B. R. C. 266, 81 L. J. K. B. N. S. 1027, 17 Com. Cas. 355, 106 L. T. N. S. 900, [1912] W. N. 144, 28 Times L. R. 425, 56 Sol. Jo. 518, 49 Scot. L. R. 1046, but on the ground that the deviation there in question was justifiable; and so, while agreeing with the court of appeal that an unjustifiable deviation displaces the special contract of affreightment, arriving at the conclusion that such a consequence did not follow in the case under consideration, so as to deprive the owner of the vessel of the benefit of the special stipulation therein.

In Morrison & Co. v. Shaw S. & A. Co. [1916] 1 K. B. (Eng.) 747, 84 L. J. K. B. N. S. 724, 114 L. T. N. S. 746 [1916] W. N. 77, 32 Times L. R. 307, it was held that the effect of deviation is to displace the contract of carriage during and af-

ter deviation, and possibly ab initio; and that when a ship deviates and loss or damage to cargo carried by her occurs by act of the public enemy, it is not open to her owners to set up the exception, whether it is contractual or implied by law, such exception applying only to a carrier who is performing his contract, and not to one who is breaking it, unless he can show that the loss or damage must have occurred in any event.

In Lynch v. New York C. & H. R. R. Co. (1915) 89 Misc. 472, 153 N. Y. Supp. 633 (affirmed without opinion in (1916) — App. Div. —, 156 N. Y. Supp. 1131), it was held that the effect of a deviation from the agreed route was to destroy the entire contract of shipment, and therefore to deprive the carrier of the benefit of a stipulation in the bill of lading relative to the time and place of making claims for loss, damage, or delay.

In Coyne v. Grand Rapids & I. R. Co. (1914) 185 Ill. App. 431, it was held that where a carrier unjustifiably deviates from the agreed route or mode or manner of transportation, it becomes liable as an insurer for any loss or injury to the shipment, and cannot avail itself of an exception made in its behalf in the contract of shipment.

In The Renée Hyafil (1915) 32 Times L. R. (Eng.) 83, it was held that a deviation precluded the carrier from availing itself of the protection of an exception in the bill of lading of liability for damage arising from the master's neglect, default, or error in judgment in the navigation or management of the vessel.

E. S. O.

RHODE ISLAND SUPREME COURT.

JOHN R. FREEMAN, Appt.,

v.

CHARLES P. POOLE et al., Respts.

(37 R. I. 489, 93 Atl. 786.)

Auction — completion of contract by bid.

1. An offer, without any notice of reservation, to sell real estate at auction, does not enable the highest bidder to complete a contract which he can specifically enforce by the mere announcement of his bid, but the owner may reject the offer, or raise the bid through his own agent.

For other cases, see *Auction*, in *Dig. 1-52 N. S.*

On Petition for Rehearing.**Same — fall of hammer — effect.**

2. The fall of the auctioneer's hammer in response to a fictitious bid by an agent of the property owner does not conclude a contract with the one who made the highest bona fide bid.

For other cases, see *Auction*, in *Dig. 1-52 N. S.*

(April 14, 1915.)

A PPEAL by plaintiff from a decree of the Superior Court for Providence and Bristol Counties sustaining a demurrer to a bill filed to compel specific performance of a contract to convey certain land. Affirmed.

The facts are stated in the opinion.

Messrs. George Hurley and Tillinghast & Collins, for appellant:

It is of the very nature of an auction sale, on the one hand, that the fact of being the highest bidder is the means by which the purchaser makes his offer; and, on the other hand, that the auctioneer's conduct in knocking down the property is the means by which the vendor signifies his acceptance of the offer.

Bateman, *Auctions*, Am. ed. 131, note a; 2 Langdell, *Summary*, Contr. p. 997, § 19; Hartwell v. Gurney, 16 R. I. 78, 13 Atl. 113.

The fall of the hammer constitutes an acceptance of the highest bid.

3 Am. & Eng. Enc. Law, 501; Bateman, *Auctions*, Am. ed. p. 1; 1 Warvelle, *Vend. & P.* p. 296, ¶ 240; Tillman v. Dunman, 114 Ga. 406, 57 L.R.A. 784, 88 Am. St. Rep. 28, 40 S. E. 244; Jackson v. Warren, 32 Ill. 331; Veazie v. Williams, 8 How. 134, 12 L. ed. 1018; Hinde v. Pendleton, Wythe, 354; Kerr v. Philadelphia, 3 Legal Gaz. 292; Johnston v. Boyes [1899] 2 Ch. 73,

Note. — As to right to withdraw property from auction sale after it has been offered, see annotation following this case, post, 74 L.R.A.1917A.

68 L. J. Ch. N. S. 425, 47 Week. Rep. 517, 80 L. T. N. S. 488; Payne v. Cave, 3 T. R. 148, 100 Eng. Reprint, 502, 1 Revised Rep. 679; Robinson v. Wall, 2 Phill. Ch. 372, 41 Eng. Reprint, 986, 16 L. J. Ch. N. S. 401, 11 Jur. 577; Towle v. Leavitt, 23 N. H. 367, 55 Am. Dec. 195; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332; Staines v. Shore, 16 Pa. 200, 55 Am. Dec. 492; Grotenkemper v. Achtermeyer, 11 Bush, 222.

The fall of the hammer completes the contract, although the owner has a secret desire that his conduct shall not have this effect.

Tillman v. Dunman, 114 Ga. 406, 57 L.R.A. 784, 88 Am. St. Rep. 28, 40 S. E. 244; Stoddard v. Ham, 129 Mass. 383, 37 Am. Rep. 369; Foster v. Ropes, 111 Mass. 10; Daley v. Carney, 117 Mass. 288; Wright v. Willis, 2 Allen, 191; Hull v. Johnson, 22 R. I. 66, 46 Atl. 182; Fitch v. Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Williams v. Carwardine, 4 Barn. & Ad. 621, 110 Eng. Reprint, 590, 1 Nev. & M. 418, 5 Car. & P. 566, 2 L. J. K. B. N. S. 101, 6 Eng. Rul. Cas. 133; Carlill v. Carbolic Smoke Ball Co. [1893] 1 Q. B. 256, 62 L. J. Q. B. N. S. 257, 4 Reports, 176, 67 L. T. N. S. 837, 41 Week. Rep. 210, 57 J. P. 325; Warlow v. Harrison, 1 El. & El. 309, 120 Eng. Reprint, 925.

There can be no doubt that this complainant was the highest real bidder.

Bexwell v. Christie, Cowp. pt. 1, p. 395, 98 Eng. Reprint, 1150; Howard v. Castle, 6 T. R. 643, 101 Eng. Reprint, 748, 3 Revised Rep. 296; Thornett v. Haines, 15 Mees. & W. 367, 153 Eng. Reprint, 892, 15 L. J. Exch. N. S. 230; Dealey v. East San Mateo Land Co. 21 Cal. App. 39, 130 Pac. 1066; Walker v. Nightingale, 4 Bro. P. C. 193, 2 Eng. Reprint, 132; Hinde v. Pendleton, Wythe, 354; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561; McAlpine v. Young, 2 Ch. Chamb. Rep. (U. C.) 85.

The sale in this case must be treated as "without reserve."

Warvelle, *Vend. & P.* § 242, p. 298; Bateman, *Auctions*, p. 90; Wheeler v. Collier, Moody & M. 123; Green v. Baverstock, 14 C. B. N. S. 204, 143 Eng. Reprint, 424, 32 L. J. C. P. N. S. 181, 10 Jur. N. S. 47, 8 L. T. N. S. 360, 11 Week. Rep. 128; McMillan v. Harris, 110 Ga. 72, 48 L.R.A. 345, 78 Am. St. Rep. 93, 35 S. E. 334; Anderson v. Wisconsin, 107 Minn. 296, 20 L.R.A. (N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379; Veazie v. Williams, 8 How. 134, 12 L. ed. 1018; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561; Rainbow v. Howkins [1904] 2 K. B. 322, 73 L. J. K. B. N. S. 641, 53 Week. Rep. 46, 91 L. T. N. S. 149, 20 Times L. R. 508.

Messrs. Edward C. Stiness and Aylsworth Brown, for respondents:

Complainant's bill does not state facts sufficient to establish puffing at said auction sale as a matter of law.

Peck v. List, 23 W. Va. 338, 48 Am. Rep. 398.

In order for complainant to obtain specific performance, he must establish the existence of a contract between respondent and himself.

2 Williams, Vend. & P. 2d Eng. ed. 1911, p. 1094.

The announcement of an auction sale is a mere declaration of an intention to hold an auction at which bids will be received; and is not an offer which may be accepted by bidding.

Payne v. Cave, 3 T. R. 148, 100 Eng. Rep. 502, 1 Revised Rep. 679; Anderson v. Wisconsin C. R. Co. 107 Minn. 296, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379.

Baker, J., delivered the opinion of the court:

This is a bill in equity for specific performance, brought by John R. Freeman, of Providence, in this state, against Charles P. Poole, of Philadelphia, in the state of Pennsylvania, and John O. Brigham, of said Providence. The bill alleges that said Poole, on the 27th day of September, 1913, was the owner of a certain tract of land in said Providence, described in the bill; that he, by his agent, said Brigham, offered said tract of land for sale at public auction without notice of any reserve; that through his agent, Brigham, he employed Frank J. Kinney, a public auctioneer, to conduct said auction sale; that the sale was advertised to take place on the premises on said 27th day of September, at 12 o'clock noon; that, in accordance with said advertisement, the auctioneer, with the consent and under the direction of the defendant Poole, offered said property for sale at public auction on the premises on said date to the highest bidder, without reservation, and called for bids for the same; that James H. Hurley, agent of the complainant, and others, were bidders at said sale; that said Hurley made a bid in behalf of the complainant of 16 cents per square foot on said tract of land, represented by the auctioneer to contain 59,180 square feet; that the bid was recognized by the auctioneer, and, at the request of said Hurley, was registered and written down by the auctioneer in his book; that another bid or other bids were made at said sale after said bid of 16 cents; that the defendant John O. Brigham was present and acted as the agent of the owner, the defendant Poole, at said sale, and as such L.R.A.1917A.

agent made a bid of 19 cents a foot; that said tract of land was knocked down and declared sold by the auctioneer; that he entered in his book the name of John O. Brigham as purchaser, but that in fact the bid of John O. Brigham and all other bids made after the bid of 16 cents per square foot were fictitious bids, made by the agents of the owner of said property; that complainant's bid of 16 cents per square foot was the highest bona fide bid made at said auction sale, and that a contract was thereby made and entered into by and between the complainant, as the highest bona fide bidder, and the defendant Poole, by the terms of which the complainant agreed to buy of the defendant Poole, and said Poole, in consideration thereof, agreed to sell, said tract of land to the complainant for the sum of \$8,028.80; that the complainant, on the declaration of sale by the auctioneer, then and there tendered him 5 per cent of the purchase price, as required by the terms of sale, which tender the auctioneer then and there refused to accept; that the terms of sale provided that a deed conveying said tract of land would be delivered to the purchaser at the office of the auctioneer on the 7th day of October, 1913, on the payment of the purchase price in cash on or before that day; that on said 7th day of October the complainant, at the auctioneer's office, tendered to the auctioneer, as agent of the defendant Poole, \$8,028.80 in good legal tender, which moneys the auctioneer, in behalf of said Poole, refused to accept; that the complainant at the same time demanded a deed conveying said tract of land, and that the auctioneer, in behalf of said Poole, refused to give a deed to the complainant. The bill contains various other allegations unnecessary to be recited at the present time. The death of John O. Brigham on November 7, 1913, is suggested on the record. The defendant Poole demurred to the bill, and also filed a plea that the alleged contract was never reduced to writing or signed by him, or by any person lawfully authorized by him so to do, within the meaning of § 6 of chapter 283 of the General Laws of 1909. The grounds of demurrer are: First, that it appears by the bill that no contract was ever made between the complainant and the respondent entitling the complainant to the relief prayed for; second, that the employing of puffing or by-bids did not operate to consummate the contract between the complainant and the respondent, where the former's bid was never accepted, so as to entitle the complainant to specific performance by the respondent; and, third, that the employing of puffing or by-bids at an auction sale does not in itself entitle the complainant to

specific performance by the respondent. The case was heard in the superior court on the demurrer, which was sustained. The case is here on complainant's appeal from the decision on the demurrer.

As this is a bill for the specific performance of a contract by the respondent Poole to sell the real estate in question to the complainant, the precise question presented for consideration is whether or not the facts, as stated in the bill, show the existence of such a contract. This involves an inquiry into the nature of a sale at auction, both when and how at such sale the owner and the bidder effect and complete the contractual relation of vendor and vendee. The counsel for the complainant have, with great thoroughness, investigated and shown by English and American decisions the significance of by-bidding or puffing bids at auction sales as affecting the rights and liabilities of a purchaser at such sales, showing in the early decisions some difference in the effect as considered in law or equity, with the final general acceptance of the strict rule of the law courts that such bidding is illegal. It would serve no useful purpose to discuss this matter at length in the present case, as the law in relation thereto is generally well settled.

The question was considered in *Hartwell v. Gurney*, 16 R. I. 78, where, on page 79; 13 Atl. 113, the court says: "But, in our opinion, the rule which is the more authoritatively established is that by-bidding is illegal, and that the vendor cannot hold the purchaser where the price has been run up by means thereof."

That is the law in this state applicable to all cases where the owner has not, at the sale, announced his intention to bid. In so far as this rule relates to the "sale of goods" by auction, it is now embodied in § 5 of chapter 262 of the General Laws of Rhode Island of 1909, as follows: "Section 5. In the case of a sale by auction

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself, or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller, or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer."

The claim of the complainant that a contractual relation between him and the respondent Poole, briefly stated, seems to be that the offer to sell said land at auction, without notice of any reserve, was an offer to sell to the highest bidder; that his bid

was the highest bona fide bid, and, as such, an acceptance of the offer to sell, making the contract complete; that the receiving of the higher puffing bids by the auctioneer, and his knocking down the premises to one of these puffing bidders as purchaser, did not affect the complainant's rights because of the fraudulent character of such bids, and that the fall of the hammer was only significant of the fact that the auctioneer would wait for no further bids. In its lowest terms the question is this: Is a bid at an auction sale an offer or the acceptance of an offer? The complainant's claim is that his bid was the acceptance of an offer. The respondent's claim is that the bid was an offer not accepted by him. There is some ground for complainant's claim, although he admits his inability to cite any case squarely upholding it. The case is apparently an unusual one. It is at least novel in the courts of this state. The claim seems to rest chiefly on dicta found in some cases, suggesting and perhaps recognizing a theory never as yet directly applied in any case. *Langdell* seems to be the only one among text-writers holding this theory, and his statement shows that it is what (in his opinion) the law should be rather than what it is; for, after referring to the decision in *Payne v. Cave*, 3 T. R. 148, 100 Eng. Reprint, 502, 1 Revised Rep. 679 (to be considered herein later), that a bid at an auction is an offer accepted by knocking down the hammer, and suggesting that "perhaps it is too late to question the correctness of this decision," he goes on to say in his summary at the end of volume 2 of his *Cases on Contracts*, on page 997: "On principle, however, it is open to much doubt. The true view seems rather to be that the seller makes the offer when the article is put up, namely, to sell it to the highest bidder; and that, when a bid is made, there is an actual sale, subject to the condition that no one else shall bid higher."

In *Bexwell v. Christie*, Cowp. pt. 1, p. 395, 98 Eng. Reprint, 1150 (1776), the plaintiff brought an action on the case against an auctioneer to recover damages for selling a horse at auction for less than £7, contrary to plaintiff's directions "not to let it go under £15." The conditions of the sale were "that the goods should be sold to the best bidder." Held, that plaintiff could not recover. Lord Mansfield said in the course of the opinion: "What is the nature of a sale by auction? It is that the goods shall go to the highest real bidder. But there would be an end of that if the owner might privately bid upon his own goods."

This is the first case to clearly announce the doctrine that by-bidding is a fraud on the public and will vitiate a sale.

But the complainant seems to rely largely upon *Warlow v. Harrison* (1859) 1 El. & El. 295, 309, 120 Eng. Reprint, 920, 925, as, in his brief, he says that in that case "the fundamental question was, Did the plaintiff have any standing since the property was knocked down to another, that other being a fraudulent bidder?"

As so much importance is given this case, it will be considered at length. The facts in that case quite closely resemble those in this. The *Warlow Case* was an action to recover damages for breach of contract. The facts differ in that in the *Warlow Case* the sale was advertised to be "without reserve," while in the present case no announcement whatever as to reservation was made. The expressions in the bill "without notice of any reserve" and "offered . . . to the highest bidder without reservation" are construed by us to mean that the owner gave no notice of the reservation of a right to bid, and not as meaning that he announced that the sale would be "without reserve" or "to the highest bidder." This is the construction given by the parties in their argument. In the English case the plaintiff bid 60 guineas and the owner, a Mr. Henderson, bid 61 guineas. *Warlow*, being informed that the owner was the last bidder, refused to bid again, and the horse was knocked down to the owner. *Warlow*, claiming to be the highest bona fide bidder, tendered the amount of his bid to the auctioneer and demanded the horse. The auctioneer refused to receive the money or to deliver the horse, saying that he had knocked the horse down to the highest bidder. The plaintiff alleged that he was the highest bidder, and that the defendant became and was his agent to complete the contract; that he had refused to do so, and that in consequence the plaintiff had been deprived of the benefit of his contract and had incurred divers expenses. The defendant pleaded: (1) Not guilty; (2) that the plaintiff was not the highest bidder; (3) that defendant did not become plaintiff's agent. The plaintiff obtained a verdict, but the court of Queen's bench ordered a nonsuit, on the ground that the issue as to the third plea had not been sustained by the plaintiff. Lord Campbell, Ch. J., in delivering the judgment of the court, said: "The plaintiff's counsel argued that, as soon as the plaintiff had bid for the mare, the defendant, as auctioneer, became his agent to complete the contract for the purchase, and that the defendant was guilty of a breach of duty in failing to do so. This ingenious reasoning rests entirely upon the decision that, if, after an article put up to be sold by auction is knocked down to the highest bidder, the auctioneer at his request signs a

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memorandum of the agreement to purchase, this is a sufficient memorandum of the agreement to bind the purchaser. But the auctioneer is the agent of the purchaser for this purpose only; and he becomes so only when there is a contract of sale by the acceptance of the bidding, which is usually declared when the hammer is knocked down. Then the purchaser, or his representative, being present, authorizes the auctioneer to sign the memorandum. But, till the hammer goes down, the auctioneer is exclusively the agent of the vendor. Mr. Spooner contended that from the commencement of a sale by auction the auctioneer is in the situation of a broker or middleman between the vendor and the purchasers, as the common agent of both; that he is the agent of the bidder to receive the bidding; that the bidder is a conditional purchaser; that, where the sale by the conditions is without reserve, the bidder is absolutely the purchaser, unless there be a bona fide higher bidding; and that the auctioneer, in consideration of the bidding by which commission will come to him, promises the highest bidder to knock down the article to him, and to do all that is necessary to complete the sale. But this reasoning is wholly at variance with the case of *Payne v. Cave*, supra, which has been considered good law for nearly seventy years. That case decided that a bidding at an auction, instead of being a conditional purchase, is a mere offer; that the auctioneer is the agent of the vendor; that the assent of both parties is necessary to the contract; that this assent is signified by knocking down the hammer; and that, till then, either party may retract. This is quite inconsistent with the notion of a conditional purchase by a bidding, and with the notion of there being any personal promise by the auctioneer to the bidder that the bidding of an intending purchaser shall absolutely be accepted by the vendor. The vendor himself and the bidder being respectively free till the hammer is knocked down, the auctioneer cannot possibly be previously bound. At this auction, the mare never was knocked down to the plaintiff; and the relation of principal and agent between him and the defendant never had commenced."

The court stated that it was not called upon to say whether there was any "remedy on the conditions of the sale against the vendor who violates the condition that the article shall be bona fide sold without reserve; but we are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the vendor before the hammer has been knocked down."

In the court of exchequer chambers upon

appeal it was held that, upon the pleading, the judgment of the court of Queen's bench was right, and that the defendant was entitled to the verdict upon the issue on the third plea, viz., that he had never become the plaintiff's agent. The judgment of the court, delivered by Martin, B., speaking for himself and Byles, J., and Watson, B., after suggesting that the court of appeal could allow amendment in order "to determine the real question in controversy between the parties in the existing suit," was, in part, as follows: "Upon the facts of the case, it seems to us that the plaintiff is entitled to recover. In a sale by auction there are three parties, viz., the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which, of course, includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed; he was a concealed principal. The name of the auctioneers, of whom the defendant was one, alone was published; and the sale was announced by them to be 'without reserve.' This, according to all the cases, both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. *Thornett v. Haines*, 15 Mees. & W. 367, 153 Eng. Reprint, 892, 15 L. J. Exch. N. S. 230. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. *Denton v. Great Northern R. Co.* 5 El. & Bl. 860, 119 Eng. Reprint, 701, 25 L. J. Q. B. N. S. 129, 2 Jur. N. S. 185, 4 Week. Rep. 240. Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so, and that this contract is made with the highest bona fide bidder, and, in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the seventeenth section of the Statute of Frauds, which relates only to direct sales, and not to contracts relating to or connected with them. Neither does it seem to us material whether the

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owner, or person on his behalf, bid with the knowledge or privity of the auctioneer. We think the auctioneer has contracted that the sale shall be without reserve, and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or it be the last bid upon which the article is knocked down; in either case the sale is not 'without reserve,' and the contract of the auctioneer is broken. We entertain no doubt that the owner may, at any time before the contract is legally complete, interfere and revoke the auctioneer's authority. . . . Mr. Henderson could not be the buyer; he was the owner; and, if it were material, there is ample evidence that the defendant knew him to be so. Indeed, we think he ought not to have taken his bid, but to have refused it, stating, as his reason, that the sale was 'without reserve.' We feel inclined to differ with the view of the court of Queen's bench in this: That we rather think the bid of Mr. Henderson was not a revocation of the defendant's authority as auctioneer."

Willes, J., and Bramwell, B., did not dissent from the judgment, but rested their decision "as to the amendment upon the ground that the defendant undertook to have, and yet there was evidence that he had not, authority to sell without reserve."

Section 17 of the Statute of Frauds, referred to, is as follows: "Section 17. No contract for the sale of any goods, wares or merchandise for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

As already stated, the *Warlow Case* is in many respects quite similar to the present one. In both there is a highest bona fide bidder. In each case the owner made a higher bid and the property was knocked down to him. In each the bona fide bidder made tender of the amount of his bid in accordance with the announced terms of sale and demanded a completion of the sale, and in each case there was a refusal so to do. In the English case the bidder sued the auctioneer because, as his agent, he had not completed the contract of sale, thereby causing him damage. Had the auctioneer in that case knocked down the horse to the bidder, in addition to being the agent of the vendor, he would then also have become the agent of the purchaser for the purpose of signing the memorandum required to bind

the purchaser. The Queen's bench, as already appears, holding that the assent of both vendor and purchaser is necessary to the contract, and that assent at an auction sale is signified by knocking down the hammer, decided that, as the horse was not knocked down to the plaintiff, the relation of principal and agent between him and the auctioneer never commenced. This must mean that the plaintiff never became a purchaser and that there was no sale of the horse to him. The court of exchequer chamber affirmed the judgment that the auctioneer did not become the plaintiff's agent, and in no respect dissented from the view expressed by the Queen's bench in following the case of *Payne v. Cave* as to the relation of vendor, auctioneer, and bidder at an auction sale. It did dissent from the judgment of Queen's bench in two particulars: The latter court had signified that the final bid of the vendor had determined the authority of the auctioneer to accept the offer of the bidder, as to which the court of exchequer said: "We rather think the bid of Mr. Henderson was not a revocation of the defendant's authority as auctioneer." The second point of dissent is this: The Queen's bench indicated that there was no foundation for the "notion of there being any personal promise by the auctioneer to the bidder that the bidding of an intending purchaser shall absolutely be accepted by the vendor," as to which the court of appeal held that "the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so and that this contract is made with the highest bona fide bidder, and in case of a breach of it, that he has a right of action against the auctioneer," at the same time pointing out that such a contract is one relating to or connected with sales contracts, and accordingly not affected by the 17th section of the Statute of Frauds, "which relates only to direct sales." In the *Warlow* Case it was held that upon amendment, the action to recover damages would lie because there had been no sale, though it had been promised "without reserve," the right of action for breach of contract arising out of the last two words. In other words, the action is not based on the theory that there was a sale, but that there was no sale, in consequence whereof there was a breach of a contract made by the auctioneer at the start of the auction sale, announced to be "without reserve," with the person who should prove to be the highest bona fide bidder at such sale. The support afforded the complainant by what was decided in the case of *Warlow v. Harrison* is not readily apparent.

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The other English cases cited by complainant seem to lend no substantial aid to his claim.

In *Harris v. Nickerson*, L. R. 8 Q. B. 286, 42 L. J. Q. B. N. S. 171, 28 L. T. N. S. 410, 21 Week. Rep. 635 (1873), the plaintiff brought an action against an auctioneer to recover damages, consisting of expenses and loss of time in attending an auction to purchase goods advertised to be sold, but not actually put up, which case was apparently an attempt to extend the application of *Warlow v. Harrison* so far as to hold that an auctioneer, in advertising an intention to hold an auction sale, created a binding contract between those who acted upon such notice and attended the sale for the purpose of buying. It was held that such an action was not maintainable.

In *Johnston v. Boyes* [1899] 2 Ch. 73, 68 L. J. Ch. N. S. 425, 47 Week. Rep. 517, 80 L. T. N. S. 488, the defendant advertised real estate at auction under the condition that the highest bidder should be the purchaser, and that the deposit to be paid at the sale should be cash. The plaintiff sent her husband to bid for her. The property was knocked down to him. He offered a check which the auctioneer refused. The property was sold to someone else. She sued for breach of contract; that the highest bidder should be the purchaser. There was judgment for the defendant on the ground that the conditions of sale had not been complied with by the purchaser. This was accompanied by a statement of one of the judges that, had the bidder tendered the deposit in cash and then been refused the property, he would have had a right of action, citing *Warlow v. Harrison*.

In *McManus v. Fortesque* [1907] 2 K. B. 1, 76 L. J. K. B. N. S. 393, 96 L. T. N. S. 444, 23 Times L. R. 292, it was held at a sale by auction, subject to reserve price on the article sold, where the fact that there was a reserve was known, that the offer of the auctioneer to sell, the bidding, and the knocking down of the article to the highest bidder, are all subject to the condition that the reserve price should be reached. The lot was actually knocked down to plaintiff, but the auctioneer refused to sign a memorandum of sale or to receive a deposit. The action was brought against him for breach of contract. It was held that there could be no recovery, because the lots were offered for sale subject to a reserve price, and if the bid at which the lot was knocked down was less than the reserve price, there was no authority on the part of the auctioneer to complete the sale, the case being distinguished from *Warlow v. Harrison* in that in the latter

the offer to sell was "without reserve" and in the former with a reserve.

The complainant also cited three American decisions as tending to support his claim. The first is *Hinde v. Pendleton*, Wythe, 354 (1791). Plaintiff had bought five slaves at auction, to be paid for in tobacco. There was by-bidding, and the final bid of the plaintiff was very large, to secure the payment of which he gave bond with surety. The defendants recovered a judgment against the plaintiff for the tobacco shown to be due by the bond. The plaintiff filed a bill to enjoin the defendants from collecting their judgment on the ground that, on account of by-bidding, he ought not to be charged by the bond with more than the true value of the slaves. Apparently one of the defendants suggested that the sale be set aside, as the court says: "The sale ought not to be set aside entirely, as the active defendant proposed, although the last price bidden by the plaintiff above a true bidder cannot be now discovered because this uncertainty was occasioned by the defendant's agent and by-bidder; but the sale ought to be effectual upon payment of so much tobacco as is equal to the value of the slaves at the time of the sale."

The cause was referred to commissioners to ascertain the value of the slaves at the time of the sale, and the injunction was made perpetual as to so much of the judgment as should be in excess of the finding of the commissioners as to the value of the slaves. The point decided in *Payne v. Cave*, 3 T. R. 148, 100 Eng. Reprint, 502, 1 Revised Rep. 679, *supra*, was not involved or suggested in this case. The slaves had been knocked down to plaintiff. He did not seek to rescind the sale, but asked relief from the fraud resulting from the by-bidding.

Veazie v. Williams, 3 Story, 611, Fed. Cas. No. 16,907 (1845), and *Id.*, 8 How. 134, 12 L. ed. 1018 (1850), was a bill in equity to rescind the purchase of real estate with mill privileges on account of puffing bids. The purchase was made at an auction sale in 1836, and the price was run up to \$40,000 by puffing bids. The purchaser did not learn of the by-bidding until 1840. In 1841 he filed his bill. In the circuit court, Story, J., held the plaintiff not entitled to relief. Ware, District Judge, held otherwise. In the course of his opinion he said: "When goods are offered for sale by auction, the plain and only meaning of the offer is that they shall go to the highest bidder. There is an implied guaranty to every man who bids that he shall have the property if no one bids more."

He then suggests that an owner may protect himself by putting up his property at a minimum price, or by giving notice of

his intention to bid at the sale, and adds: "But if nothing of this kind is done, the only intelligible interpretation that can be given to the act, and it is language held out to all the world, is that he who will give most shall have the property."

It was in evidence that, since the sale, property of the kind in question in the locality had greatly depreciated in value, and that the highest bona fide bid unaffected by puffing bids was about \$20,000. The conclusion at which Judge Ware arrived was expressed as follows: "The conclusion to which I have come, on the whole, is that a decree allowing the sale to stand, and cutting down the price to about and perhaps a little over \$20,000, will do substantial justice between the parties. It leaves to the defendants all the advantages of a sale, under the most favorable circumstances which they can justly claim, and takes from the plaintiff only what others were willing to give."

Upon appeal, the Supreme Court, in 8 How. 134, 159, 12 L. ed. 1018, 1029, by a divided court, reached the conclusion that the most equitable course would be "to treat as unjust only so much of the proceedings as was fraudulent; that is, the excess of price over \$20,000 obtained by by-bidding, and to cause that excess only to be refunded," and it decreed accordingly, giving relief similar to that afforded in the preceding case, although that case was not cited. In considering the effect of by-bidding, the court, on page 154 of 8 How. says: "The by-bidding deceives, and involves a falsehood, and is therefore bad. It violates, too, a leading condition of the contract of sales at auction, which is that the article shall be knocked off to the highest real bidder, without puffing."

This is suggestive of the view expressed in *Warlow v. Harrison*, 1 El. & El. 295, 309, 120 Eng. Reprint, 920, 925, *supra*. It is to be borne in mind, also, that in the *Veazie Case* the property was actually knocked off to the plaintiff, which was not done in the present case.

Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195 (1851), was an action of replevin for the recovery of a carriage. Plaintiff owned the carriage, which he sent to a carriage maker for repair, at the same time authorizing the latter to sell it at a minimum price of \$40. Carriages of the carriage maker were advertised at auction, and at the auction sale, without the knowledge of the owner, the carriage maker put up the carriage in question. It was knocked down by the auctioneer to the defendant for \$17, and the sale was duly entered by the clerk of the sale. The defendant paid the clerk, receiving a receipted bill, and also

took possession of the carriage. It was in evidence that the carriage maker had employed a person named Ricker to bid on the carriage, with instructions not to let it be sold under \$40. Ricker testified that he bid \$17 and heard no other person bid that sum; that when he heard the carriage struck off at his bid, he left the place of sale without noticing to whom the sale was declared by the auctioneer to be made, and that he supposed the sale to be made to himself. The principal dispute was whether the defendant or Ricker was the highest bidder at the sale. The only part of the charge of the court below, applicable to the facts above stated, is as follows: "That though the defendant and Ricker both bid the same sum upon the property, and the auctioneer did not notice Ricker's bid, and declared the property sold to the defendant, and the same was entered to the defendant in the record of the sale, and no objection was made thereto because Ricker supposed it struck off to himself, and the defendant paid for the property, yet he acquired no title to it by such bid unless he was in fact the highest bidder."

The court also charged that, if Ricker, acting for the owner, made a higher bid than the defendant at the auction, the defendant would acquire no title, even if the property was struck off to him by the auctioneer; and "that the highest bidder alone could be the purchaser, and although he were a by-bidder, an actual bona fide bidder of a lower sum could take no title." As the case is stated there is no evidence that Ricker made a higher bid than the defendant, and therefore this portion of the charge seems irrelevant to any issue. To be relevant it would at least have to appear that there was a question as to defendant's having bid \$17. The upper court construed the effect of by-bidding, discussing the cases in considerable detail, and also the distinction made in the law and equity courts, concluding as to this point as follows: "The line of distinction which is attempted to be drawn in equity between a fair and fraudulent sale, where secret puffing or by-bidding is resorted to, appears to us to be difficult to trace. We think it will be far better to discard the distinction entirely, and thereby close the door to all temptation to fraud in auction sales and the perjury that would be very likely to follow. The whole and real truth should be stated when the property is offered for sale. Upon this point of the case the instructions of the court must be held to be erroneous."

It is difficult to determine what portion or portions of the charge are held to be erroneous, and consequently also the value of L.R.A.1917A.

that case as an authority in the present one. The case was actually decided in favor of the plaintiff, on the ground that the carriage maker was without authority to sell at auction.

In *McAlpine v. Young*, 2 Ch. Chamb. Rep. (U. C.) 171 Ontario, there was a judicial sale. On page 173, the chancellor says: "When the bidding ceases, the person who had made the highest bid is, under the general orders of the court, the purchaser; and that neither the vendor nor the auctioneer, nor anyone else, can interfere and deprive him of his position."

The complainant, in his brief, says: "In this country to-day auction sales under judicial authority appear to be considered as more or less in a class by themselves;" and he lays no stress on the last case as an authority, although it is the only case cited which in terms upholds his claim. There are two lines of cases on this point as to judicial sales, which are brought together in *Anderson v. Wisconsin C. R. Co.* 107 Minn. 296, 20 L.R.A.(N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379, in which it is stated that "the decided weight of authority is" against the doctrine announced in *McAlpine v. Young*, supra. Leaving this last case out of the account, it is difficult to see how the other cases cited afford any material support for the complainant's claim in the present case, that a contract for the sale of land was complete between the respondent and himself. The most that can be said is that some of these cited cases contain dicta which, given the broadest interpretation of which the language is susceptible, can be held to imply that the highest bona fide bidder at an auction sale ought to be held to be the purchaser, irrespective of anything else. As already pointed out, aside from some decisions as to judicial sales, the view is without authoritative support. The law has so long been definitely settled otherwise that, to use Professor Langdell's language (with the omission of the qualifying word "perhaps"), "it is too late to question its correctness." Williston (who drew the Uniform Sales Act, hereinafter referred to), in his work on Sales, in considering the Formation of Contract at Auctions, says in § 296: "As an original question, it is fairly open to argument whether the auctioneer, by offering goods for sale, makes an offer which ripens into a contract or sale when the highest bidder accepts the offer, or whether putting up the goods for sale is merely an invitation to those present to make offers, which they do by making bids, one of which is ultimately accepted by the fall of the hammer. Under the first view each bid would amount to an acceptance of

the offer and a completion of the contract, subject to the condition subsequent that no higher bid should be made. On the second view each bid is an offer, and the contract becomes complete only when the hammer falls. The latter view seems more in accordance with the facts, as the auctioneer may more accurately be said to invite offers than himself to be the offerer, and the law has adopted this doctrine. It follows that the bidder may retract the bid at any time before the hammer falls, for until then the contract is incomplete. If the contract is incomplete so far as the bidder is concerned, it must also be incomplete so far as the auctioneer is concerned. Consequently the auctioneer, unless he has announced that the sale shall be without reserve . . . may withdraw the goods from sale at any time before the hammer falls."

The leading case as to the relation in an auction sale of the seller and the bidder is *Payne v. Cave*, 3 T. R. 148, 100 Eng. Reprint, 502, 1 Revised Rep. 679, *supra* (1789). That was an action to recover damages for breach of contract. The plaintiff had offered for sale at an auction a worm tub and a pewter worm in the same. The defendant bid £40. The auctioneer dwelt on the bidding, on which the defendant said: "Why do you dwell? You will not get more." The auctioneer said he was informed the worm weighed at least 1,300 hundredweight, and was worth more than £40. The defendant then asked if he would warrant its weight, and, receiving a negative answer, then declared that he would not take it and refused to pay for it. It was resold on a later day for £30. The action was to recover the difference of £10. The plaintiff was nonsuited. The court affirmed the nonsuit, saying: "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not inaptly called *locus penitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer and the other not, which can never be allowed."

This case is cited with approval in *Jones v. Nanney*, 13 Price, 76, 96, 147 Eng. Reprint, 925, in *Routledge v. Grant*, 4 Bing. 655, 660, 130 Eng. Reprint, 920, 1 Moore & P. 717, 3 Car. & P. 267, 6 L. J. C. P. 166, 29 Revised Rep. 672, and in other English cases. Campbell. Ch. J., in *Warlow v. Harrison*, 1 El. & El. 295, 309, 120 Eng. Reprint, 920, 925, *supra*, in 1858, said that L.R.A.1917A.

this case "has been considered good law for nearly seventy years." And see *Fenwick v. Macdonald, F. & Co.* 6 Sc. Sess. Cas. 5th series, 850, 41 Scot. L. R. 688, 12 Scot. L. T. 227 (1904). No English case is cited as overruling *Payne v. Cave*. In fact, the English Sale of Goods Act, 1893, accepts the rule and embodies it in § 58 (2) where it states: "A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made, any bidder may retract his bid."

This act applies, of course, only to the sale of personal property; but the nature and effect of bidding at public auction has never been held to be affected by the character of the property sold, whether real estate or personal property.

In *Blossom v. Milwaukee & C. R. Co.* 3 Wall. 196, 18 L. ed. 43, the Supreme Court says this as to the effect of bidding at auction: "4. Biddings at an auction, says Mr. Addison, are mere offers, which may be retracted at any time before the hammer is down and the offer has been accepted. Leading case upon that subject is that of *Payne v. Cave*, where it was expressly held that every bidding at an auction is nothing more than an offer on one side until it has received the assent of the auctioneer as the agent of the owner. Supreme court of Pennsylvania held, in the case of *Fisher v. Seltzer*, 23 Pa. 308, 62 Am. Dec. 335, that a bidder at a sheriff's sale has a right to retract his bid before the property is struck down to him, and that the sheriff has no right to prescribe conditions which will deprive him of such a right. Express ruling was that a bid at an auction before the hammer falls is like an offer before acceptance, and that when the bid is withdrawn before it is accepted there is no contract, and that such a bidder cannot be regarded in any sense as a purchaser. Rule, as laid down in the last edition of *Story on Sales*, is substantially the same as that adopted in the preceding case. Speaking of ordinary sales at an auction, the author says that the seller may withdraw the goods or the bidder may retract his bid at any time before they are struck off, and the reason assigned for the rule is that so long as the final consent of both parties is not signified by the blow of the hammer, there is no mutual agreement to a definite proposition. But as soon as the hammer is struck down, says the same author, the bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid nor the buyer to withdraw from the contract. Same rules prevail upon a sale under common-law process as in other cases of sales at public auction, so far as respects the question now

before the court. Until the property is actually struck off to the bidder, he may withdraw his bid as a mere offer or proposition."

See also *Corryolles v. Mossy*, 2 La. 504; *Newman v. Vonderheide*, 9 Ohio Dec. Reprint, 164; *Grottenkemper v. Achtermeyer*, 11 Bush, 222; *Hibernia Sav. & L. Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812; *Fisher v. Seltzer*, supra; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741, 55 S. W. 233; *Thomas v. Kerr*, 96 Am. Dec. note, page 265; *Bateman, Auctions*, **30, 126; 2 Kent, Com. 424; *Tillman v. Dunman*, 114 Ga. 406, 57 L.R.A. 784, 88 Am. St. Rep. 28, 40 S. E. 244; *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 9 L.R.A. (N.S.) 748, 88 Pac. 199 (1907); 4 Cyc. 1044; *Benjamin, Sales*, 6th Am. ed. pp. 422, 423; 3 Am. & Eng. Enc. Law, 501; *Page, Contr.* § 33; 2 R. C. L. 1126; *Anderson v. Wisconsin C. R. Co.* 107 Minn. 296, 20 L.R.A. (N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379.

In *Newman v. Vonderheide*, 9 Ohio Dec. Reprint, 164, it is said that "where property offered at public auction for sale is withdrawn before the acceptance of a bid, there is no contract of sale, and the highest bidder cannot compel a conveyance by an action for specific performance."

In *McPherson Bros. Co. v. Okanogan County*, 45 Wash. 285, 9 L.R.A. (N.S.) 748, 88 Pac. 199, the defendant advertised real estate for sale at public auction to the highest bidder for cash. When the property was offered for sale as advertised, the plaintiff made a bid which was the only and highest bid. The county treasurer refused to accept it and to knock down the property to the plaintiff, and, on subsequent tender of the sum bid, refused to accept it and to convey the property. In a proceeding for specific performance the court held that there was "no contract of sale between the parties," and "no contract capable of being specifically performed." In *Anderson v. Wisconsin C. R. Co.* 107 Minn. 296, 20 L.R.A. (N.S.) 1133, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379 (1909), which was an action for damages for not selling to the plaintiff as the alleged highest bidder at an auction sale certain real estate, the question considered in this case was very carefully examined and thoroughly discussed. Referring to the view herein pressed by the complainant, the court, on page 313 of 107 Minn., states the case thus: "It is, in fact, utterly irreconcilable with principles which are universally recognized. Mutuality is an essential element of a contract. One party thereto cannot be bound and the other remain free. If the announcement of an auction is an offer to sell to the highest

good-faith bidder, and the contract is closed when the bid is made, both the vendor and the vendee must be bound thereby. But it is conceded by all the authorities that the bidder may withdraw his bid at any time before the hammer falls, and this means necessarily that the bid is a mere offer which is not binding until accepted."

And on page 314 of 107 Minn.: "A bid is an offer which is accepted when the hammer falls, and until the acceptance of the bid is signified in some manner, neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase, or the auctioneer his offer to sell."

Hartwell v. Gurney, 16 R. I. 78, 13 Atl. 113, is suggested as giving support to the complainant's view, where the court, on page 80 of 16 R. I. said: "An offer to sell at auction is an offer to sell to the highest bidder, and every bid is an inchoate acceptance, entitling the bidder to the property offered, if it turns out to be the highest, and there is no retraction on either side before the hammer falls."

Leaving out the last clause, the quotation may be taken to lend support to complainant's claim, but the last clause destroys that support, for that clause clearly indicates that both owner and bidder may retract before the hammer falls, and that neither one of them is contractually bound until it does fall. The passage is dictum, and apparently is not stated with the clearness and precision ordinarily so characteristic of the learned justice who wrote the opinion. The seeming contradiction in the language would disappear by substituting the words "a possible purchase" for "an inchoate acceptance," and, thus read, the passage would be in accord with the prevailing authorities.

But the whole matter of whether a bid at an auction is an offer capable of being withdrawn before the fall of the hammer, or is the acceptance of an offer binding owner and bidder to a contract, is definitely settled, so far as personal property is concerned, by section 5, chap. 262, Gen. Laws 1909. This is a portion of the Uniform Sales Law enacted in this and many other states which is similar in its provisions to the Sale of Goods Act of England. Said § 5 provides, among other things, as follows: "(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve."

As already pointed out there is no inherent or necessary difference in the manner of conducting auction sales as affected by the character of the property sold, whether it be real or personal. Of course an act governing only the sale of goods would not, in its terms, refer to the sale of real estate, but as these uniform acts are attempts to embody in legislation what has already been generally declared to be the law by the courts, no good reason is apparent for refusing to follow in all auction sales a rule thus sanctioned. Applying the rule (2) above quoted, it is plain that the complainant in this case was at liberty at any time before the hammer fell to withdraw his bid; that the auctioneer, as agent of the respondent, was likewise at liberty to withdraw the land from sale, inasmuch as the auction had not been announced to be without reserve. In other words, the statute recognizes a bid as an offer, and not as the acceptance of an offer, and clearly implies that no contract exists until the hammer falls. Undoubtedly this rule, in the absence of an express announcement that the sale is to be without reserve, does permit an owner to "put up property merely 'to feel the public pulse' and see if he can get a better price than he can at private sale," as complainant states and criticizes in his brief. The knocking down of property on the highest bid made by Brigham as the agent of the owner must at least be given the effect of a withdrawal of the property from sale. It certainly negatives any intention to accept complainant's bid. The honorable and straightforward course would have been to make an open withdrawal if the highest bona fide bid were not satisfactory to the owner; but, inasmuch as it appears that the owner was not bound contractually to the bidder up to the fall of the hammer, we are unable to understand how that event, coupled with the auctioneer's announcement of the sale of the property to another person for a higher price, can possibly be construed to be an acceptance of a lower bona fide bid and the completion of a sale to the lower bidder. We do not think it was such an acceptance. It is our judgment that the bill fails to show the existence of a contract of sale by the respondents to the complainant, and that the decision of the presiding justice of the superior court in sustaining the demurrer was correct.

The appeal of the complainant is dismissed, the decree of the Superior Court appealed from is affirmed, and the cause is remanded to the Superior Court for further proceedings.
L.R.A.1917A.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on June 2, 1915 (— R. I. —, 94 Atl. 152):

The opinion in this case dismissing complainant's appeal was handed down April 14, 1915, and the following May 7th complainant, by permission of the court, filed a motion for leave to reargue his appeal, and has stated his reasons therefor at length. No reason is now offered which had not already been considered by this court in its opinion, but greater stress is laid upon certain points than was placed in complainant's original argument as presented orally and by brief, and the attempt is made to show that certain cases already cited and considered should be interpreted as more favorable to the complainant than they have been by this court. It is recognized that the fundamental question is: Was a contract of purchase and sale entered into by complainant and respondent?

1. The complainant now strongly urges that in this case, because courts and text-writers have either expressly or in effect said: "A valid and binding contract of sale is made when the hammer falls,"—when the auctioneer knocked down the property and declared it sold to John O. Brigham for 10 cents a square foot, and so entered it in his auctioneer's book, he nevertheless had by the fall of his hammer contracted to sell the property to the complainant for 16 cents a square foot, because Brigham was the respondent's agent, and because complainant's was the highest bona fide bid. Having already in the opinion considered the point, it is sufficient now to say that we regard the complainant's argument as unsound, if not sophistical.

2. The complainant has twice stated in his motion that the question raised in this case is an entirely novel one, and yet he also twice says that in *Veazie v. Williams*, 8 How. 134, 12 L. ed. 1018, the Supreme Court of the United States declared that the respondent vendors had contracted with the highest bidder at the highest bona fide bid. If the statement be true, then, of course, the element of novelty is eliminated from the case, although that is not a very important matter. We do not think, however, that the statement is true. In the *Veazie* Case the auction sale took place January 1, 1836; the suit to rescind was filed in 1841; decision therein was rendered in 1845 in the circuit court, and in the Supreme Court in 1850. The latter court found that the sale sought to be rescinded was fraudulent on account of the auctioneer's puffing bids, "though no evidence is seen of fraud practised by the respondents in person, nor by their express direction."

The answer set up that since the auction sale "there has been a great depreciation in such property, owing to an increase in the number of mills, the scarcity of timber, and financial difficulties in that region, by which mill sites have much depreciated in value." In the statement of the case it is said: "The witnesses all concurred that there had been a great depreciation in the market value of mills and mill privileges since January 1, 1836."

The court goes on to say in 8 How. on page 159: "All that remains is to decide upon the most equitable course to carry these views into effect, consistent with sound principles. One mode is to set aside unconditionally the whole sale, for the fraud practised in it, and have the mills reconveyed by Veazie, and the money, notes, and mortgage returned by the respondents. Another mode is to treat as unjust only so much of the proceedings as was fraudulent; that is, the excess of price over \$20,000 obtained by by-bidding, and to cause that excess only to be refunded. To attain this last result in some way is preferable, considering the length of time which has elapsed here, and the probable deterioration in value of the mills by use and the fall of prices in the market since the inflation of 1836."

And in 8 How. on page 161, it says: "We can set aside the whole sale and contract; but, instead of doing it unconditionally, the plaintiff should be required first to do

equity, and to allow any countervailing equities on the part of the respondents."

And the court accordingly granted the complainant relief, but upon equitable terms. The court, of course, did not make a new contract for the parties, but it did, in its equitable settlement of the controversy, impose terms which neither party asked or desired. The decree required to be entered shows this. It runs: "And this court, . . . doth now here order, adjudge, and decree that the aforesaid sale, as above set forth, be and the same is hereby rescinded and set aside, that the said complainant shall, as equitable terms, retain the said property at and for the said sum of \$20,000, part of the moneys paid by him to the said defendants."

These citations clearly show that the statement that in that case the Supreme Court "declared that he [the owner] had contracted with the highest bidder at the highest bona fide bid" is without warrant. Had the court found such a contract to exist, it is obvious that it would have said so plainly, and not have based its decision upon the exercise of its power in imposing equitable terms. The fact that the results may be the same is not material.

The other matters referred to in the motion were sufficiently considered in the opinion already handed down, and do not need discussion.

The motion for reargument is denied.

Annotation—Right to withdraw property from auction sale after it has been offered.

Earlier cases on this question will be found in notes to *Tillman v. Dunman*, 57 L.R.A. 784, and *Anderson v. Wisconsin C. R. Co.* 20 L.R.A. (N.S.) 1133.

The decision in *FREEMAN v. POOLE*, ante, 63, that an offer without any notice of reservation to sell real estate at auction does not enable the highest bidder to complete a contract which he can specifically enforce by the mere announcement of his bid, but the owner may reject the offer or raise the bid through his own agent,—in other words, that in such a case a bid is merely an offer, and not an acceptance of an offer to sell, and that the owner may withdraw the property from sale after the bid, so long as there has been no acceptance thereof,—appears sound and in accord with the trend of judicial opinion as disclosed in the cases cited in this and the earlier notes on the question. It appears, however, from the cases cited in the earlier notes, that heretofore the rule in this re-

gard has not been clearly defined either in England or the United States. It is said in the note in 57 L.R.A. 784, that, upon the whole, it seems that the right to withdraw property from an auction sale after it has been put up depends upon the nonexistence of a binding obligation on the part of the auctioneer to sell after a bid has been made, and that the existence of such an obligation is still an open question, although the doctrine that the bidder may retract at any time before the hammer falls is considered as settled by many writers and decisions. The cases cited in the note in 20 L.R.A. (N.S.) 1133, on this subject, appear, in general, together with the case of *Anderson v. Wisconsin C. R. Co.* (1909) 107 Minn. 296, 131 Am. St. Rep. 462, 120 N. W. 39, 16 Ann. Cas. 379, to which the note is appended, to support the propositions that an announcement or advertisement that certain property will be sold at auction to the highest bidder is a mere

declaration of intention to hold an auction at which bids will be received; that it is not an offer to sell which becomes binding, even conditionally, on the owner when a bid is made; that a bid at such a sale is an offer to purchase, and that, until accepted, no contract relation exists; and that at any time before the bid is accepted the bidder may withdraw his offer to purchase, or the owner his offer to sell. These decisions, with that in *FREEMAN v. POOLE*, tend to clarify the law on a question on which the earlier decisions were in conflict and confusion.

In *New York v. Union News Co.* (1915) 169 App. Div. 278, 154 N. Y. Supp. 638, the rule, which the court stated was particularly applicable to an auction sale, was said to be that a right reserved to reject any or all bids is to be exercised before the acceptance of any bid, that the auctioneer is the agent of the vendor, and that his act in accepting a bid is the act of the vendor. And it was held that the right reserved by the dock commissioner, in a proposal for bids for certain privileges on a municipal ferry terminal in New York city, to reject any or all bids, could not be exercised two days after the sale, where the auctioneer had unconditionally accepted the highest bid, and the bidder had paid the auctioneer's fees, and had deposited the first quarter's rent with the cashier of the department of docks.

In *United States ex rel. Goldberg v. Meyer* (1911) 37 App. D. C. 282, it was held that the Secretary of the Navy, until acceptance of a bid, might withdraw from sale a vessel belonging to the United States, condemned and advertised for sale under the Act of Congress of 1883, after the opening of the bids, notwithstanding the highest bidder had complied with all the terms and conditions of the sale, and the statute and the advertisement of the sale did not expressly reserve the right to reject bids, but stated that the vessel would be sold to the bidder offering the highest price above the appraised value. It was said: "The statute under consideration does not, in terms, declare that a vessel, when offered for sale, shall not be withdrawn, but shall be declared sold to the highest bidder, regardless of conditions that may arise after the advertisement, rendering it important to reconsider the decision to sell, and to retain the vessel for the uses of the government; nor can we interpret it so to mean. All that it commands is that the vessel shall be offered for sale in a particular manner, L.R.A.1917A.

and that 'any vessel sold' shall be delivered to the purchaser. Congress might have directed the sale to be made at public auction to the highest bidder, instead of through written bids to be opened upon the advertised date. Had this been done, it could not be successfully contended that the sale at such auction would be complete until the acceptance of the highest bid. It is settled law that an auction sale, whether made by a private owner or by an officer under execution of a decree, is not complete until the bid shall have been accepted, and the property struck off and declared sold to the bidder. The seller may decline to accept the bid, and may withdraw the property from sale. Until acceptance of his bid, the bidder acquires no title to the property. . . . We perceive no difference between a sale made at public outcry, and one made in the manner prescribed by statute. In each case it is an offer for sale to the highest bidder, and no sale is made until the bid is accepted. Here, notwithstanding the relator's bid was the highest, and its acceptance might have been advisable, the representative of the government charged with the conduct of the sale decided not to accept it, and therefore no sale was actually made."

Cases of auction sales, it was said in *McDonald v. Green* (1885) 5 Haw. 325, are to the effect that the contract with the purchaser is closed when, by the fall of the hammer, the bid is accepted, and that the bid may be withdrawn before such acceptance. And it was held that assignees of a bankrupt store, who had advertised merely that they were prepared to receive bids for the bankrupt stock, and that bids would be closed on a certain date, could not be compelled in equity to accept the highest bid.

It is said in the earlier note on this question, in 57 L.R.A. 784, that the doctrine is firmly established that a bidder may retract his bid at any time before the hammer falls, and attention is there called to the fact that it is difficult to reconcile this doctrine with that accepted by some of the decisions, that the property cannot be withdrawn after a bid has been made. Apparently, if the bidder may retract his bid before acceptance, there has been no contract, even conditionally, consummated between him and the owner by the making of the bid, and this doctrine would appear consistent only with the theory that the right of withdrawal of the property from sale may be exercised by the owner before acceptance, even after a bid has been

made. Accordingly, cases which uphold the right of the bidder to withdraw his bid before acceptance appear also, by implication, to sustain the latter theory.

The proposition that a bid at a judicial sale amounts only to a proposal to buy, and that until the crier at the sale, by the fall of the hammer or other recognized act of acceptance, signifies assent to the proposal, there is no contract, and the proposal may be withdrawn, is expressly approved in *George v. Pracheil* (1912) 92 Neb. 81, 137 N. W. 880, although it was there found that the bid had been accepted without any intimation of withdrawal. As sustaining the proposition, the court cited *Payne v. Cave* (1789) 3 T. R. 149, 100 Eng. Reprint, 502 1 Revised Rep. 679, and *Blossom v. Milwaukee & C. R. Co.* (1866) 3 Wall. (U. S.) 196, 18 L. ed. 43 (set out in the note in 57 L.R.A. on pages 786 and 789, respectively); also *Nebraska Loan & T. Co. v. Hamer* (1894) 40 Neb. 281, 58 N. W. 695, and *Fisher v. Seltzer* (1854) 23 Pa. 308, 62 Am. Dec. 335.

The necessity of an acceptance of a bid at a judicial sale before a binding contract is consummated is implied in such statements as that in *Continental Ins. Co. v. Reeve* (1909) 135 App. Div. 737, 119 N. Y. Supp. 901, that a bid at a foreclosure sale may be deemed an offer to purchase title, and such bid, when accepted, so far constitutes a contract that a bidder may not withdraw his bid except under circumstances that will justify the rescission or reformation of an ordinary contract for the sale of land. An appeal was dismissed in (1910) 198 N. Y. 595, 92 N. E. 1081. The above was quoted with approval in *Hayward v. Wemple* (1912) 152 App. Div. 195, 136 N. Y. Supp. 625, which is affirmed without opinion in (1912) 206 N. Y. 692, 99 N. E. 1108.

Of course, if the sale is announced to be without reserve, a liability may, as indicated in *FREEMAN v. POOLE*, arise from a withdrawal of the property from the sale after a bid. R. E. H.

RHODE ISLAND SUPREME COURT.

THOMAS L. DONAHUE

v.

R. A. SHERMAN'S SONS COMPANY,
Appt.

(— R. I. —, 98 Atl. 109.)

Master and servant — failure to give notice of injury — excuse.

1. An injured workman is within the provision of the statute excusing notice to be given the employer within thirty days in case of accident, mistake, or unforeseen cause, where, a week after the accident, he was taken to a distant city for an operation, after which for a time he was in extremis, not allowed to talk, and had a very stormy convalescence which covered the balance of the thirty-day period, during which he could not personally have prepared the required notice, although he might during the last two weeks have sent word to the employer had it occurred to him to do so. *For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

Appeal — question of fact — sickness as accident.

2. A finding by the trial judge that illness of an injured employee after the acci-

dent was an accident, mistake, or unforeseen cause which, under the Workmen's Compensation Act, excused notice to the employer of the accident within thirty days, is one of fact within the rule that questions of fact cannot be reviewed by the appellate court.

For other cases, see Appeal and Error, VII. l. 3, in Dig. 1-52 N. S.

(Vincent, J., dissents.)

(July 5, 1916.)

A PPEAL by respondent from a decree of the Superior Court for Washington County in favor of petitioner in a proceeding under the Workmen's Compensation Act, to recover compensation for an injury sustained by him while in respondent's employ. Affirmed.

The facts are stated in the opinion.

Mr. Harry B. Agard, for appellant:

Petitioner is not entitled to compensation for an indefinite period when the injury and the effects of the injury have ceased to be an element of his present condition.

1 Bradbury, Workmen's Compensation. pp. 391, 392, § 23, p. 392; Mack v. Pacific Teleph. & Teleg. Co. Cal. Indus. Acci. Board.

There was no evidence upon which to base the finding of the court that the petitioner did not know the fact of his injury.

Atlantic F. & M. Ins. Co. v. Wilson, G. & Co. 5 R. I. 479.

Note.—The American cases on the provision as to notice of injury in the workmen's compensation acts are treated at page 244, and the English cases at page 83, of the note in L.R.A.1916A, covering the entire subject of workmen's compensation acts.

L.R.A.1917A.

What constitutes accident, mistake, or unforeseen cause is a question of law.

Bolster v. Bolster, 35 R. I. 368, 87 Atl. 23.

Petitioner is not entitled to have his failure to give the notice excused by reason of accident, mistake, or unforeseen cause.

Haggelund v. Oakdale Mfg. Co. 26 R. I. 521, 60 Atl. 106; *Seward v. Johnson*, 27 R. I. 396, 62 Atl. 569; *Howard v. Capron*, 3 R. I. 182; *Hartley v. Rhode Island Co.* 28 R. I. 244, 66 Atl. 576; *McKeough v. Gifford*, 30 R. I. 192, 73 Atl. 1085; *Jackvony v. Colaluca*, 20 R. I. 441, 72 Atl. 289; *Allen v. Russell*, 33 R. I. 422, 82 Atl. 129; *Healey v. George K. Blake Mfg. Co.* 180 Mass. 270, 62 N. E. 270; *Grebenstein v. Stone & W. Engineering Corp.* 209 Mass. 196, 95 N. E. 503; *Batchelder v. White*, 28 R. I. 465, 68 Atl. 320; *Maloney v. Cook*, 21 R. I. 472, 44 Atl. 692; *Taylor v. Peck*, 20 R. I. 481, 72 Atl. 645.

The notice required by the statute is required for the protection of the employer; and where there has been no notice, damage is presumed to have resulted to him and prejudice to his rights.

McNamara v. Boston & M. R. Co. 216 Mass. 506, 104 N. E. 285; 1 *Bradbury, Workmen's Compensation*, 2d ed. 766; *Eger-ton v. Moore* [1912] 2 K. B. 308, 106 L. T. N. S. 663, 81 L. J. K. B. N. S. 696, 5 B. W. C. C. 284.

The fact that it did not occur to the petitioner to give the notice when he had the capacity to do so is no excuse for him.

1 *Bradbury, Workmen's Compensation*, p. 767; *Judd v. Metropolitan Asylums Board*, 5 B. W. C. C. 420.

Whether or not a particular state of facts constitutes reasonable cause for failure to give notice is a question of law.

1 *Bradbury, Workman's Compensation*, p. 767; *Moore v. Naval Colliery Co.* [1912] 1 K. B. 28, 81 L. J. K. B. N. S. 149, 105 L. T. N. S. 838, 5 B. W. C. C. 87.

Mes-rs. A. B. Crafts and George R. McKenna, for appellee:

Petitioner was excused by accident, mistake, or unforeseen cause, from giving notice within thirty days after the injury.

Haggelund v. Oakdale Mfg. Co. 26 R. I. 520, 60 Atl. 106; *Marshall v. McCormick*, 27 R. I. 357, 62 Atl. 212; *Marshall v. Gray*, 26 R. I. 517, 59 Atl. 744; *McCotter v. New Shoreham*, 23 R. I. 100, 49 Atl. 695; *Baker v. Tyler*, 28 R. I. 152, 66 Atl. 65.

Petitioner's injury was a personal injury by accident, arising out of or in the course of his employment.

Carroll v. What Cheer Stables Co. — R. I. —, L.R.A.1916D, 154, 96 Atl. 210. L.R.A.1917A.

Sweetland, J., delivered the opinion of the court:

This matter is before us upon the respondent's appeal from a final decree of the superior court, entered upon a petition filed under the Workmen's Compensation Act (Pub. Laws 1911-12, chap. 831). The petitioner seeks to recover compensation from the respondent for injuries alleged in the petition to have been sustained by the petitioner by reason of accident arising out of and in the course of his employment by the respondent. Mr. Justice Barrows, of the superior court, who heard said petition, ordered the entry of final decree in favor of the petitioner. From an examination of the transcript of evidence we are of the opinion that all the findings of fact made by said justice and contained in said decree are supported by legal evidence. The respondent's reasons of appeal set forth no question of law or equity, decided adversely to the respondent, which entitles it to have the decree of the superior court reversed or modified.

There is but one contention of the petitioner which seems to us to require particular consideration in this opinion. The question involved therein is likely to frequently arise in proceedings under said act and we have treated the same at length. It appeared that the petitioner did not give notice of said injury to the respondent within thirty days after the happening thereof. Said justice held that, in all the circumstances of the case, such "notice within thirty days, as required by the act, was excused by reason of accident, mistake, or unforeseen cause."

Although we are of the opinion that, upon a strict construction of the statute, the respondent's appeal should be denied, it should not be overlooked that the act, and like acts in the different states, are universally considered as of a remedial character, the provisions of which should be construed broadly and liberally in order to effectuate their purpose. *Powers v. Hotel Bond Co.* 89 Conn. 142, 93 Atl. 245; *Kennerson v. Thames Towboat Co.* 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372. In *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1, the court, in its consideration of the Massachusetts Workmen's Compensation Act, said: "The act is to be interpreted in the light of its purpose, and, so far as reasonably may be, to promote the accomplishment of its beneficent design."

This court in its former opinions has recognized the liberal spirit of this legislation, and has been guided by that liberality in the construction of the provisions of the Rhode Island act, and in the application of those provisions to particular cases.

The justice presiding in the superior court found that the petitioner, while engaged in the employ of the respondent, received a severe personal injury by accident arising out of and in the course of said employment, which resulted in the permanent total incapacity of the petitioner. He is clearly a workman entitled to the benefits of this remedial statute. The act provides that no proceedings for compensation under it shall be maintained unless written notice of the injury shall be given to the employer within thirty days after the happening thereof, but excuses the failure to give such notice, among other things, if such failure is due to "accident, mistake, or unforeseen cause." The petitioner failed to give notice of his injury to the respondent within thirty days after the accident. During the thirty days in question the petitioner was very ill; he underwent a serious surgical operation; a part of the time he was in extremis and was not allowed to talk; he had what the surgeon termed a "very stormy convalescence;" during the last twenty-three of these thirty days he was in a hospital, among strangers, in a city at considerable distance from his home and from the place of business of the respondent. When, after the expiration of said thirty days, he was removed to his home, his condition was still so weak that he was unable to walk or attend to any business, and was partly confined to his bed for a considerable period. If these circumstances do not bring the petitioner within the exception, and do not warrant the finding that his failure to give the required notice was due to accident or unforeseen cause, then the act is defective in that regard, and in this case fails of its beneficent purpose. That should very clearly appear before this court can properly reach such an unfortunate conclusion.

The respondent refers to the giving of notice of his injury by the workman to his employer within thirty days as a condition precedent to the maintenance of proceedings for compensation; urges that such provision must be strictly construed; and cites a number of Massachusetts cases in support of that position. There can be no question of the soundness of that doctrine in the ordinary case. But that doctrine is not involved in the question before us. We are called upon to determine whether we will disturb the finding of the justice of the superior court that, because of the exception in the statute, in the circumstances of this case, the giving of the statutory notice was not such a condition precedent, and the petitioner was excused from giving such notice "by reason of accident, mistake, or unforeseen cause." At the time the decisions in the Massachusetts cases, cited by L.R.A.1917A.

the respondent, were rendered, the Massachusetts act provided no relief and no exception from the requirement of notice within thirty days after the accident causing the injury, and the court was forced to hold, in all cases, that the giving of such notice constituted a condition precedent to the right to recover. Since those decisions, the Massachusetts legislature has removed the harshness of their statute; and the provision of the Massachusetts law in that regard now is that notice shall be given as soon as practicable after the accident.

Our act, as originally passed and still in force, shows a liberality in the matter of notice, and the intent to prevent as far as possible the defeat of a meritorious claim through technicality. After providing that the written notice to the employer shall be given within thirty days after the happening of the injury, and shall state the nature, time, place, and cause of the injury, and the name and address of the person injured, the act further provides that such notice shall not be held invalid by reason of any inaccuracy in stating these particulars, unless it is shown that there was an intention to mislead the employer and that he was in fact misled thereby. There is a further provision that failure to give such notice shall not bar the proceedings, if it is shown that the employer or his agent had knowledge of the injury, or if the failure be due to accident, mistake, or unforeseen cause. The principle may fairly be deduced from the cases that if, in statutes of this character, there is a provision requiring a notice of the injury to the employer within a certain fixed period, and nothing more, the courts, of necessity, are bound to hold that notice within the prescribed time is imperative and amounts to a condition precedent to the maintenance of proceedings; but, if the statute itself provides relief for failure to give such notice, for reasons which seem equitable to the legislature, then such remedial provisions shall be broadly and liberally construed by the courts to effectuate the main purpose of all such legislation.

The respondent contends that the liberality shown by the courts of other jurisdictions in the construction and application of similar remedial provisions should have no persuasive force with us, because of the peculiar and strict language employed in our act. This is claimed to be particularly true in regard to the decisions under the British act, because, while, with us, failure to give notice is excused if caused by accident, mistake, or unforeseen cause, in the British act the failure is excused if it arose from "mistake, or other reasonable cause." Mistake relieves under either statute. Is

there any essential legal difference between the expressions "accident or unforeseen cause" and "reasonable cause?" In no proper construction of our statute should it be held that every accident or every unforeseen cause, however slight, would amount to an excuse. It must be such an accident or such a cause, unforeseen, as would amount to a reasonable cause for the failure to give notice. Both expressions come to the same thing; and the two provisions in their legal effect are identical. The great liberality shown by the British courts in their interpretation of the statutory provisions referred to are precedents worthy of our consideration in determining the question before us.

Since the British act went into operation, numerous cases in the reports illustrate that liberal tendency. The following citations, taken from one volume of Butterworth's Workmen's Compensation Cases, show the broad application which the judges have given to the provision which for "reasonable cause" excuses the giving of notice. In each of these cases, it was held that the circumstances furnished reasonable cause for the failure to give the statutory notice. In *Hoare v. Arding*, 5 B. W. C. C. 36, the saleswoman thought that she was suffering only from a temporary nervous derangement, when in fact her disease was serious. In *Moore v. Naval Colliery Co.* [1912] 1 K. B. 28, 81 L. J. K. B. N. S. 149, 105 L. T. N. S. 838, 5 B. W. C. C. 87, the workman, a collier, as a result of his employment became affected with a disease known as "hystagmus;" a strike came on, and, thinking that relief from his employment in the mine would cure his disease, he neglected to give notice until after the time prescribed by statute. In *Breakwell v. Clee Hill Granite Co.* 5 B. W. C. C. 133, a workman who was ignorant of the fact that he was permanently incapacitated, and fearing if he obtained compensation the indemnity insurance company would prevent his being taken back to work on recovery, gave no notice to his employer till after the statutory period. In *Fry v. Cheltenham Corp.* [1911] W. N. 199, 81 L. J. K. B. N. S. 41, 105 L. T. N. S. 495, 28 Times L. R. 16, 56 Sol. Jo. 33, 5 B. W. C. C. 162, a workman fell and hurt his knee, but did not know that he was seriously injured till after the time for giving notice under the statutes had passed. In *Refuge Assur. Co. v. Millar* [1912] S. C. 37, 49 Scot. L. R. 67, 5 B. W. C. C. 522, the workman, thinking his injury slight, gave no notice to his employer within the period fixed in the act and not until after he left his employer's service, when he found that he had been seriously injured.

It is, however, urged by the respondent L.R.A.1917A.

that we are in some way restrained by the very narrow, strict, and closely defined interpretation which has been placed by this court upon the words "accident, mistake, or unforeseen cause" as they appear in other Rhode Island statutes; and that the legislature, in employing that language in the Workmen's Compensation Act, must be held to have had in mind such strict and narrow interpretation. This court has most often been called upon to consider that expression as it occurs in the statute empowering us to grant new trials or permit appellate proceedings, when it appears that there has been a failure to comply with certain statutory requirements by reason of "accident, mistake, or unforeseen cause." An examination of the cases fails to show that, in granting relief under said statute, this court has generally adopted a narrow or strict interpretation of those words, or that those words have been given a close and well-defined interpretation. It might even be said, critically, that on this subject the court has not been consistent and its decisions have not been uniform and harmonious. It is not surprising that that should appear in the examination of a line of decisions extending over a number of years, given by different judges, upon a matter which, from its nature, is largely discretionary. In some cases, this court has held that the mistake or neglect of an attorney did not warrant relief under the language of the statute. It was so held in *Haggelund v. Oakdale Mfg. Co.* 26 R. I. 521, 60 Atl. 106. The decision in that case has been pressed upon our attention by the respondent. Whenever counsel appear before us in opposition to the granting of relief under the statute, and ask the court to take a very harsh and illiberal position in such matters, they always urge upon our consideration the authority of *Haggelund v. Oakdale Mfg. Co.* In that case, the court held that the neglect of an attorney, arising from forgetfulness and his reliance upon an erroneous memorandum, did not furnish a ground for relief. It should not be overlooked, however, that in the *Haggelund* Case, which, in some of its aspects, shows the least liberal application that this court has ever given to that provision for relief, there had already been a full trial of the case upon its merits. The court distinguished that case from cases in which no trial has been had, and said that in the latter "the court has exercised a very broad discretion in granting trials, even where the mistake has not been entirely excusable; but after one full trial of a cause, with all the formalities prescribed by law, we do not feel warranted in granting a review unless the petitioner has lost his opportunity to

apply for it by some substantial misfortune."

All that can fairly be said in support of that case as an authority here is that it decides that, after one full trial, mere neglect, unaccompanied by other circumstances moving the discretion of the court, does not warrant the granting of relief. The doctrine of that case should not be extended or misapplied; and it can be readily distinguished from the matter now before us. In opposition to the Haggelund Case may be cited the following decisions of this court in which relief has been granted: In *Sayres v. Ormsbee*, 11 R. I. 504, the petitioner for relief was granted a new trial ten months after the time for appeal from the final decree of a probate court had expired, because the petitioner had testified in the probate court under a misapprehension as to the effect of his testimony, and because he was ignorant of the terms of the final decree. These facts appear to state a case of neglect simply; for it was the duty of the petitioner, being a party to the proceedings in the probate court, to follow the matter in that court and inform himself as to the nature of the decree which was entered. This court must have been moved to its decision by a consideration of the substantial hardship of the petitioner's situation. In *Donnelly v. McAdams*, — R. I. —, 13 Atl. 108, it appeared that an attorney had taken a retainer from the defendant, but, by the oversight of his assistant, who attended to his business in the district court, the case was defaulted in that court and the time for an appeal had gone by. There were no other circumstances on which the prayer for relief was based; yet this court granted the defendant a new trial. In *Burrough v. Hill*, 15 R. I. 190, 2 Atl. 382, it appeared that the attorney for the plaintiff neglected to re-enter the case in court at the time required by law, because in examining the court docket, he found a case entitled *Bennett v. Hill*, and, misled by the similarity of names, he supposed that *Burrough v. Hill* had been re-entered, and failed to do so. The court said: "We think there was, to say the least, a considerable admixture of negligence or inattention on the part of the counsel. We have, however, come to the conclusion, though not without a good deal of hesitation, that there was enough of accident or mistake to entitle the plaintiff to a new trial on terms."

In *Densereau v. Saillant*, 22 R. I. 500, 48 Atl. 668, the case was defaulted through the neglect of defendant's attorney, and this court granted a new trial on the ground of accident and mistake. In the unreported case of *Miller v. McCormick*, — R. I. —, 60 Atl. 48, decided November 25, 1904, it L.R.A.1917A.

appeared that the action was one of trespass on the case for personal injuries; that the attorney for an indemnity insurance company, in which the defendant held a policy, answered the case in the first instance, but later said insurance company declined to further defend the case on the ground that the defendant had failed to comply with the terms of said policy. Said attorney withdrew his appearance, and on May 26, 1904, notified the defendant that he had done so, advised the defendant to employ other counsel at once to look out for his interests, and on the following day returned to the defendant a copy of the writ and declaration in the case. The defendant neglected to employ other counsel and did nothing to protect his interests. On October 5, 1904, judgment was entered against the defendant by default. The court held that the defendant had been negligent; but, in view of the fact that the defendant was unaware that the case had been assigned for trial, and also in view of the fact that there had been no trial of the case upon its merits, the court granted the defendant a trial. In *Baker v. Tyler*, 28 R. I. 152, 66 Atl. 65, it appeared that the defendant desired to prosecute in this court a bill of exceptions to the decision of a justice of the superior court. The defendant's attorney duly filed notice of an intention to prosecute such a bill, and presented to said justice an application that said justice fix the time for filing a transcript of evidence and a bill of exceptions. Under the statute, the time fixed by said justice should have been within fifty days after filing the notice to prosecute. Probably through inadvertence, said justice failed to fix the time for filing. Without again requesting said justice to fix the time, and apparently without giving further attention to the matter, the defendant's attorney waited until after the entry of judgment, and then, more than one hundred days after filing the notice to prosecute a bill of exceptions, the defendant's attorney filed a bill of exceptions in the superior court. Although said justice failed to act when requested, the facts present a condition of neglect and marked inattention on the part of the attorney; yet this court granted a new trial because the attorney's carelessness was coupled with the mistake of the court. In *McCotter v. New Shoreham*, 23 R. I. 100, 49 Atl. 695, it appeared that the petitioner desired to appeal from the action of the town council of New Shoreham in laying out a highway; that the time within which an appeal could be taken expired on February 11, 1899; that on February 7, 1899, the attorney for the petitioner mailed from Providence to the town clerk of New Shore-

ham by registered mail the papers necessary for the commencement of appellate proceedings, in ignorance of the course of the mail between Providence and Block island in winter, and apparently without making any effort to learn. Said papers in the regular course of mail were not sent from Providence until February 11, 1899; the boat was delayed by stormy weather; said papers did not reach the postoffice at Block island until shortly before midnight on February 11, 1899, and were not delivered to the town clerk until February 16, 1899. If the statute in question was to be narrowly applied, it might well have been said that it was negligence on the part of said attorney, if he wished to make the United States mail his agent in filing said papers, not to have learned that mail deposited in the postoffice in Providence on February 7, 1899, would not be forwarded to Block island until February 11, 1899, and further, that it was negligence to disregard the fact that mail intended for delivery at Block island, before the close of office hours on February 11, 1899, could not prudently be mailed in Providence on February 11, 1899, in view of the great probability of delay by winter storms. Further, it does not appear that there was at that time a delivery of mail by carrier on Block island. And it appears quite likely that there was not, for said papers, though reaching the postoffice at Block island on February 11, were not received by the town clerk until five days later. Yet, in the face of all the facts, upon which neglect might have been predicated, this court held that, in the circumstances, the failure of the papers to reach the town clerk in time is within the meaning of the words "accident, mistake, or unforeseen cause," as used in the statute.

That this court does not appear to have given at all times a strict and uniform interpretation to the language under discussion is further shown by an examination of the cases dealing with mistakes which are of law. In some cases this court has held that the statute does not relieve against mistakes of law, but in others it has somewhat modified that construction. In *Ball v. Ball*, 21 R. I. 90, 41 Atl. 894, it appeared that the petitioners claimed an appeal from the decree of the probate court of New Shoreham, admitting to probate an instrument purporting to be a last will and testament, and took the necessary steps to perfect their appeal, except that by mistake the obligee named in the appeal bond filed by them was the town of New Shoreham instead of the court of probate of New Shoreham, as by statute required. The appeal was dismissed by the common pleas L.R.A.1917A.

division because of such imperfect appeal bond. It was contended, against the petition, that this was a mistake of law, and the relief afforded by the statute did not extend to cases of such mistake. This court held that, however it may be as to other mistakes of law, this was the case of a party who, by mistake, had neglected to prosecute his appeal according to law, and that was a mistake in procedure; that such mistakes in law were clearly within the provision of the statute. The court also said that it had so held in the unreported case of *Harris v. Earle*, — R. I. —, 30 Atl. 192, decided at the April term, July 27, 1899. In *Marshall v. McCormick*, 27 R. I. 357, 62 Atl. 212, a garnishee who had failed to file an affidavit, as by law required, sought to relieve himself from the consequences of his neglect by filing in court an affidavit of no funds and an affidavit "that through accident and mistake he had previously neglected to file his personal affidavit thereof." The court said: "The plaintiff argues further that the affidavit of the garnishee does not disclose a case of mistake within the intent of the statute, his error being one of law, and not of fact. We feel constrained, however, to give to the word 'mistake,' as here used, a broad construction. The process of garnishment by which a person is held to pay his debt to the judgment creditor of his creditor imposes upon him an inconvenience for the benefit of other parties with whom he has no privity, and should be limited so as not to do him actual injustice. The proviso in question is for the protection of the garnishee, and ought to be liberally interpreted."

We have entered into this somewhat lengthy consideration of the cases on this subject for the purpose of showing the liberal manner in which this provision for relief has generally been applied by this court, and also to demonstrate that the words "accident, mistake, or unforeseen cause," as used in our statutes, have not been given a strict and uniform interpretation in our decisions, but have been regarded by this court as broad and general words used in a remedial statute, which enable this court, within reasonable limits, to grant relief from hardship and substantial misfortune whenever, in the discretion of this court, the circumstances of the particular case warrant such action. The contention that the language in question should receive a narrow interpretation has little support in the respondent's suggestion that the words "accident, mistake, or unforeseen cause" are used in the Workmen's Compensation Act with the precise meaning with which they have been used in other

statutes, and as they have been "defined and settled by the repeated decisions of this court."

It is said that what constitutes "accident, mistake, or unforeseen cause" is a question of law. That statement is true in this sense, that certain circumstances in law present a case of accident, mistake, or unforeseen cause; but whether such circumstances exist in a particular case is a question of fact. Mental or physical disability which prevents a man from protecting his rights, or severe illness, the ordinary tendency of which is to seriously impair the natural alertness of a man in guarding his interests and attending to his business, are generally held to amount in law to accident or unforeseen cause. This, we think, is clearly recognized in the cases to which we shall later refer. Whether in a certain case, when illness is urged as a ground of relief, the circumstances show such a condition, is a question addressed to the judgment of the court considering the case, to be determined by it upon the facts in evidence, viewed in the light of the court's experience and knowledge of human nature and human affairs. This was the question which was presented to the justice of the superior court in the case at bar, and his conclusion thereon is a finding of fact, which, under the provisions of the Workmen's Compensation Act, in the absence of fraud, is conclusive, and not reviewable by this court.

In *Dillon v. O'Neal*, 26 R. I. 87, on page 88, 58 Atl. 455, this court has used the expression "mistake, or accident, or sickness, or other unforeseen cause," in speaking of the grounds of relief. In *Kenyon v. Hayhurst*, — R. I. —, 89 Atl. 15, we said: "Upon a hearing in the above-entitled matter, it appears that, at the time of the entry of the decree of the municipal court in question, and for forty days thereafter, the petitioner was in such physical and mental condition that he was unable to transact business of any importance, to protect his own interests, or to have a knowledge and understanding of the proceedings before said municipal court. These circumstances present a situation of accident, mistake, and unforeseen cause."

In *Eddy v. Angell*, — R. I. —, 85 Atl. 936, relief was granted upon a petition alleging a failure to take an appeal from the probate of a will because of accident, mistake, or unforeseen cause; although it appears that other circumstances were given weight by the court, the sickness of the petitioner was named as one of the facts upon which the decision was based. It appeared by the affidavits of the petitioner on file that, during the time within which she should have

taken said appeal, she was sick and in a nervous condition, although she admits that during that time she did leave her home and go to the probate court and talk with the judge thereof in relation to filing a claim against the estate of the testator of said will. In granting relief, this court said: "We have carefully examined these affidavits, and we think it sufficiently appears therefrom that the condition of health of the petitioner, upon and after the death of her mother, was such, and continued to be such, for a period of more than forty days after the entry of the decree admitting the will to probate, as to unfit her for the transaction of business, and that during such period she received assurances from her uncle that he would look out for and protect her interests under her mother's will."

The petition of *Francis J. Bartley (State v. Bartley)*, — R. I. —, 95 Atl. 668, for leave to prosecute a bill of exceptions, was decided November 17, 1915, and is unreported. In that case it appeared that the time for filing said bill expired June 15, 1915; that said bill had been prepared by the attorney for the petitioner before June 12, 1915; that from said June 12, 1915, until after June 15, 1915, said attorney was confined to his home by an attack of tonsillitis; and said bill was not filed in court, as by law required. Upon a claim of accident and unforeseen cause based on these facts, this court granted relief. In *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57, it appeared that, by sickness of the petitioner and the death of his father, he was prevented and delayed from making the journey from Italy to the United States, and did not appear at trial to defend the suit against him. The court said: "We think that the petitioner's sickness and the death of his father may properly be considered accidental causes of his failure to appear in court upon the trial of his case, and that he is entitled to a new trial."

In *Sluman v. Dolan*, 24 S. D. 32, 123 N. W. 72, it appeared that, by reason of his own illness and that of his son, the defendant was prevented from appearing in court until the witnesses for the plaintiff had been examined. He was prevented from obtaining the attendance of witnesses, and was not himself in condition to properly attend to his defense. The supreme court of South Dakota, in granting the petition, said: "The object of courts is to secure parties a fair and impartial trial of the matter in litigation, and that when, by reason of accidents, such a trial has not been had, a court should liberally exercise its discretion, in the interests of justice."

In *White v. Martin*, 63 Ga. 659, the court

held that the defendant, who had a violent attack of asthma on the day on which a suit against him was called for trial, was for that reason "providentially prevented" from attending court on that day. In *Dinwiddie v. Tims*, 52 Tex. Civ. App. 72, 114 S. W. 400, the court of appeals of Texas held that a defendant who was seriously ill on the day of trial was "unavoidably absent." In *Jackson v. Shapard*, 24 Ky. L. Rep. 713, 69 S. W. 954, the court of appeals held that the lower court had not been "guilty of an abuse of discretion in granting a new trial, on the ground of casualty or misfortune, to a defendant who had been prevented from preparing his case for trial by illness of his daughter. In *Peebles v. Ralls*, 1 Litt. (Ky.) 25, the court said, in granting a new trial to a party who had failed to attend court by reason of the illness of his daughter: "And it would be strange if, after suit brought, all the social and relative duties should yield and give way to the necessity of attending the trial. Such, we do not, however, suppose, is required by the rules of law; and, as *Peebles* appears to have been prevented from attending the trial by the indisposition of his daughter, his failure to attend and apply for a continuance ought rather to be ascribed to an unavoidable necessity, than any lack of diligence in the management of his cause."

In *Carroll v. What Cheer Stables Co.* 38 R. I. 421, at page 426, L.R.A.1916D, 154, 96 Atl. 208, we have held that, in a workman's compensation case, it is to be presumed by us that the justice of the superior court has made his finding upon all the testimony before him. In addition to the circumstance which we have named above, with reference to the physical condition of the petitioner during the thirty days following his injury, it was in evidence that during the last twenty-three days of that time he was unable to do any writing or attend to any business. Although he was in the possession of his mental faculties, and was able to talk with those about him, he was in a condition of great physical weakness. During the twenty-three days in question, he was clearly unable to give the prescribed written notice himself. If given at all, such notice would have to be given by someone else at his request and in his behalf. If it was a matter which we could review, would we not be forced to say that the justice of the superior court was warranted in finding that the illness and weakness of the petitioner presented such circumstances of accident and unforeseen cause as would excuse him from taking steps to procure some other person, among the strangers about him, to give the written

notice containing the particulars required by the statute? But counsel for the respondent has seized upon a remark made by said justice in his decision, and incorporated in the decree, which the counsel claims negatives the finding of said justice. The justice said: "It is doubtless true that the petitioner could, if it had occurred to him, have sent word from the hospital to the respondent company during the last two weeks or ten days of his stay at the hospital, but, considering all the circumstances of the case, the court does not believe itself justified in charging him with neglect by reason of his failure so to do. The court therefore holds that the giving of notice within thirty days, as required by the act, was excused by reason of accident, mistake, and unforeseen cause."

Because the petitioner, who still continued during said two weeks or ten days in the sick and weak condition which I have named, could have sent word to the respondent, if it had occurred to him, it is held that the failure to give written notice is due entirely to neglect, and is not occasioned by accident or unforeseen cause. It is not clear that the justice in using the expression "sent word" meant "gave notice in writing as prescribed by statute;" but we will give to his language all the purport which the respondent claims for it, and, so interpreting the finding of the justice, in the circumstances of the case, does the conduct of the petitioner show neglect? Negligence, in law, is a relative term. It is the failure to observe that degree of care which would be required of the ordinary, prudent, man in like circumstances. This man had been desperately ill as the result of a major abdominal surgical operation; after said operation and until the end of said thirty days, he was weak and sick. It is within the common experience of mankind that his physical condition must have been one which tends to depress the mind, weaken the will, and incapacitate the patient for the ordinary business of life. To say that such a man is negligent, because it fails to occur to him to take some action for the protection of his legal rights, is to make no allowance for human physical weakness, and to fix the same standard of conduct and vigilance for a man in his normal condition and for one who is just emerging from a condition of physical collapse and extremity. But if we do find that the petitioner should be charged with some measure of neglect, in view of the decisions of this court, is that fact inconsistent with the finding of said justice, that, in all the circumstances of the case, the failure to give statutory notice was excused by reason of accident or unforeseen cause?

We have seen that in a number of cases, which presented solely a condition of negligence, this court has granted relief, when, in its discretion, it appears to have considered the hardship too severe a penalty to impose for the lack of care. And this court has only refused relief when the neglect was unaccompanied by other circumstances upon which could be predicated some measure of accident, or mistake, or unforeseen cause. The result of the respondent's claim is that, in workmen's compensation cases, whatever may be the accident or the reasonableness of the cause, if there also appears any degree of inattention, relief will be denied. In all the Rhode Island cases which we have cited above, there had been neglect,—there had been a failure on the part of the petitioner to vigilantly attend to safeguarding his legal rights; but the court has found other circumstances which excused that neglect. In no case has the excuse been more potent than that presented here. In every case, with one possible exception, the petitioner had been in the possession of his full mental faculties. If it had been the policy of this court to apply the grounds of relief, named in the statute, closely and narrowly, rather than broadly and liberally, the court might well have said in every case: "The petitioner cannot have relief, for, if it had occurred to him to take the steps which he has omitted, he could have done so; and, notwithstanding the accident or mistake or unforeseen cause which we find, we shall hold that it is his negligence which is the cause of his misfortune." That this has not been the test applied is shown by an examination of the cases. Without multiplying instances, we will take but one as an example, the petition of Bartley, the last Rhode Island case, which has been cited above. It appears from the affidavits, on which the petition was granted, that the attorney had prepared the bill of exceptions more than three days before the time for filing the same; that there was another attorney at law occupying the same office with him; although the attorney for the petitioner was detained at home with tonsillitis, he was not mentally incapacitated; if it had occurred to him on either the 12th, 13th, 14th, or 15th day of June, 1915, to send word to his office associate to file in court the prepared bill of exceptions, he could have done so and had the bill filed in accordance with the requirement of law. Because of those circumstances, however, we did not hold that the petitioner was not entitled to relief.

The appeal of the respondent is denied. The final decree of the Superior Court is L.R.A.1917A.

affirmed, and the cause is remanded to the Superior Court for further proceedings.

Vincent, J., dissenting:

This is a petition under the Workmen's Compensation Act, brought by Thomas L. Donahue of Stonington, in the state of Connecticut, asking for compensation for alleged injuries received by him while in the employ of the respondent, the R. A. Sherman's Sons Company, a corporation organized under the laws of Rhode Island and located and doing business in Westerly, in said state of Rhode Island. The respondent corporation is a contractor and builder, and the petitioner, at the time of the alleged injury, was in the employ of the said respondent as a carpenter.

The petitioner claims that, on the 23d of October, 1914, while he was engaged with others in attempting to place one of the corner posts of a large dwelling house, in process of erection by the respondent, said post, after it had been brought to a perpendicular position, started to fall, and that, in his endeavor to arrest it, he sustained a strain. There is some conflict of testimony as to the date when the accident happened, the petitioner claiming that it was on Friday, October 23, 1914, while other witnesses give the date as Friday, October 16, 1914. The superior court seems to have adopted October 23 as the more probable date of the accident, and I do not think it necessary to discuss the conclusion of the trial court in that regard.

The accident, the petitioner says, occurred shortly after the noon hour, and that upon its occurrence he ejaculated, in the presence of the respondent's foreman, "I think I got something that time." He continued, however, to work the remainder of the day, apparently without making any complaint, although he says he did not feel well. He consulted a doctor in the evening of the same day, October 23, and he received further medical advice and treatment at different times, covering a period of a week, after which, on the 31st of October, he went to a hospital at Norwich, Connecticut, where he was operated upon for a fecal fistula located in the vicinity of the navel. He remained in the hospital until November 23. The trial court did not find that the fistula resulted from the accident, but that the accident accelerated conditions already existing and brought about an earlier operation than otherwise would have been necessary.

It appears from the testimony that, during the week prior to his entering the hospital, the petitioner visited the office of his doctor on two occasions; that he complained at his home that he had received

an injury; and that at least a week before he left the hospital, November 23, 1914, he discussed the subject of his injuries with the doctor there.

The petitioner gave no notice of his injury to his employers until the 20th of December, 1914, when he claims to have given them notice verbally, which was followed by a notice in writing about a month later: There is no satisfactory evidence that the respondent was in any way made aware that the petitioner had suffered or claimed to have suffered any injury, while in its employ, prior to the verbal notice.

The Workmen's Compensation Act, under which this petition is brought, provides that "no proceedings for compensation for an injury under this act shall be maintained unless a notice of the injury shall have been given to the employer within thirty days after the happening thereof."

This provision is designed to afford some protection to the employer; to seasonably apprise him of the accident, and enable him to make such investigation thereof as he may desire, while the surrounding circumstances are fresh in the minds of witnesses. The giving of this notice within thirty days is a condition precedent to the maintenance of any proceedings looking to the recovery of compensation, and the petitioner does not claim that any such notice was given within the period of thirty days following the accident. The petitioner contends, however, that, during the thirty days following the injury, he was incapacitated by reason of his illness from giving such notice, and that he was consequently excused from so doing under another provision of the act which says that "want of notice shall not be a bar to proceedings under this act, if it be shown . . . that failure to give such notice was due to accident, mistake, or unforeseen cause."

Upon this point, the trial court found that it was "doubtless true that the petitioner could, if it had occurred to him, have sent word from the hospital to the respondent company during the last week or ten days of his stay there," and I think that such finding was justified by the evidence. The trial court, however, proceeded further, saying: "But, considering all the circumstances of the case, the court does not believe itself justified in charging him with neglect by reason of failure so to do." I think that this last finding or conclusion of the trial court was erroneous. If the petitioner failed to give the required notice because he did not think of it, or, having thought of it, neglected to do it, I cannot conceive of any circumstances which would

justify the trial court in waiving or disregarding the provision of the act regarding notice, which, as before stated, is a condition precedent to the maintenance of any proceeding for compensation. A statute of this character must be strictly construed. In Massachusetts, where the employers' liability act contained, before its amendment, a provision regarding notice to the employer of the same tenor, and in substantially the same language, as that of our own act, the courts have given it a strict construction.

In *Healey v. George Blake Mfg. Co.* 180 Mass. 270, 62 N. E. 270, where the employer was a foreign corporation and the employee served a notice upon the commissioner of corporations, who, within thirty days, sent a copy to the corporation, such commissioner being the attorney of the corporation upon whom legal process might be made, the court held that it was not a notice to the corporation, under the act requiring a notice to be given to the employer within thirty days. In its opinion, the court said: "This notice is similar to that required in the case of injuries received by reason of defects in highways, and is a condition precedent to the right of action. It is not simply one of the steps in enforcing a right of action already existing, but is the last circumstance necessary to the creation of such right. The liability is not complete until the notice is given."

In *Grebenstein v. Stone & W. Engineering Corp.* 209 Mass. 196, 95 N. E. 503, it was held that a letter from an attorney of the plaintiff to the defendant, advising the latter of the injury, and suggesting a conference looking to an adjustment of the claim, was not sufficient as a notice under the statute. The court said: "The notice required by the statute is a condition precedent to a right of action. Any right of action which the plaintiff otherwise would have had is lost if he fails to give a sufficient notice."

Forgetfulness or neglect is not accident, mistake, or unforeseen cause, within the meaning of those terms as they have been construed by this court. *Haggelund v. Oakdale Mfg. Co.* 26 R. I. 521, 60 Atl. 106; *Seward v. Johnson*, 27 R. I. 396, 62 Atl. 569; *Allen v. Russell*, 33 R. I. 422, 82 Atl. 129.

Having found, upon the evidence presented, that the petitioner might have given the notice had it occurred to him to do so, the trial court should have denied and dismissed the petition.

The trial court has referred to some of the English cases in support of its finding that the petitioner was excused from giving

notice of his injury, to wit, *Hoare v. Ard- ing*, 5 B. W. C. C. 36; *Eaton v. Evans*, 5 B. W. C. C. 82; *Fry v. Cheltenham Corp.* [1911] W. N. 199, 81 L. J. K. B. N. S. 41, 105 L. T. N. S. 495, 28 Times L. R. 16, 56 Sol. Jo. 33, 5 B. W. C. C. 162. In examining these cases, it will be found that the act under which they were brought confers upon the court a much more liberal exercise of discretion than is conferred upon our courts under our Compensation Act. The English courts are specifically authorized by the act to consider (1) whether the respondent has been prejudiced by the delay, and (2) whether there was reasonable cause for the delay.

Under our Compensation Act, the only ground upon which the failure to give notice may be excused is that of accident, mistake, or unforeseen cause. These words must be presumed to have been used, in the Compensation Act, with the same meaning with which they have heretofore been used in other statutes, and as they have been heretofore construed and interpreted by this court.

Under our Compensation Act, the giving of notice being a condition precedent to the maintaining of proceedings, the reasonableness of the delay and the prejudice of the employer cannot enter into the consideration of the court. The only question is, has the petitioner given the required notice, or has he failed to do so by accident, mistake, or unforeseen cause, giving to those words the meaning which has heretofore been conceded to them.

In considering the question of notice, the English courts have held that ignorance of the act or its provisions, on the part of the petitioner, cannot be considered as a reasonable cause for delaying the notice beyond the period fixed by statute. *Judd v. Metropolitan Asylums Board*, 5 B. W. C. C. 420.

The trial court has found that the petitioner could have given the notice if it had occurred to him to do so, which is equivalent to saying that he could have done so had he thought of it, or if he had not neglected it.

I think that the respondent's appeal should be sustained.

UNITED STATES SUPREME COURT.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, Plff. in Err.,

v.

GEORGE BOMBOLIS, Admr., etc., of Constantine Nanos, alias Gust Nanos, Deceased.

(241 U. S. 211, 60 L. ed. 961, 36 Sup. Ct. Rep. 595.)

Jury — Infringement of right — non-unanimous verdict — action under Federal statute.

The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, i. e., by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the Employers' Liability Act of April 22, 1908, and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict.

For other cases, see Jury, I. d., I, in Dig. 1-52 N. S.

(May 22, 1916.)

ERROR to the Supreme Court of the State of Minnesota to review a judgment which, on a second appeal, affirmed a judgment of the District Court for Hennepin County, in favor of plaintiff, in an action brought under the Federal Employers' Lia-

bility Act, to recover damages for the death of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Messrs. Frederick M. Miner and William H. Bremner, for plaintiff in error:

The right of trial by jury which is secured to all persons subject to the jurisdiction of the United States, by the provisions of the 7th Amendment, means a jury of twelve men, who must, in finding facts, act unanimously.

American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 10 Sup. Ct. Rep. 580.

The right which is secured by the 7th Amendment is not a matter of procedure, but of substance, and one possessing such right cannot be deprived of the same by any means short of an amendment to the Constitution of the United States.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, supra; *Slocum v. New York L. Ins. Co.* 228 U. S. 364, 57 L. ed. 879, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

Not only the courts, but the legislature of the United States, is limited by the 7th Amendment, and the right secured thereby enters into and controls all suits founded upon legislation enacted by Congress in

Note. — As to constitutionality of verdict by less than all the jurors, see annotation following this case, post, 91. L.R.A.1917A.

whatever court the same may be brought, where such court sits and exercises power within the domain of the United States.

Walker v. New Mexico & S. P. R. Co. 165 U. S. 595, 41 L. ed. 840, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Bauman v. Ross*, 167 U. S. 592, 42 L. ed. 289, 17 Sup. Ct. Rep. 966; *Thompson v. Utah*, 170 U. S. 343-350, 42 L. ed. 1061-1066, 18 Sup. Ct. Rep. 620; *Guthrie Nat. Bank v. Guthrie*, 173 U. S. 528-537, 43 L. ed. 796-800, 19 Sup. Ct. Rep. 513; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Maxwell v. Dow*, 176 U. S. 581, 596, 44 L. ed. 597, 603, 20 Sup. Ct. Rep. 448, 494; *Black v. Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; *Downes v. Bidwell*, 182 U. S. 244, 270, 45 L. ed. 1088, 1100, 21 Sup. Ct. Rep. 770; *Rasmussen v. United States*, 197 U. S. 516-526, 49 L. ed. 862-865, 25 Sup. Ct. Rep. 514; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 55, 57, 56 L. ed. 327, 348, 349, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Slocum v. New York L. Ins. Co.* 228 U. S. 364, 377, 57 L. ed. 879, 885, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029; *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265, Ann. Cas. 1916B, 252; *Atlantic Coast Line R. Co. v. Burnette*, 239 U. S. 189, 60 L. ed. 226, 36 Sup. Ct. Rep. 75.

A state court can derive no authority from the power which creates it to adjudicate controversies based upon the Federal act.

Ableman v. Booth, 21 How. 506, 16 L. ed. 169; *Levin v. United States*, 63 C. C. A. 476, 128 Fed. 826.

The principles of law comprised within the term "comity," by which courts entertain controversies involving rights created by sovereign power, other than that which created such courts, do not afford the basis or ground upon which state courts may exercise their powers in controversies founded upon the Federal act.

Claffin v. Houseman, 93 U. S. 130, 23 L. ed. 833; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

When it, "comity," is the basis of judicial determination, the court extending the comity out of favor and good will extends to foreign laws an effect they would not otherwise have.

Stowe v. Belfast Sav. Bank, 92 Fed. 90. L.R.A.1917A.

But its obligation is not imperative.

Mast, F. & Co. v. Stover Mfg. Co. 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708.

Comity in the legal sense is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens, who are under the protection of its laws.

Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139.

It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests.

People v. Martin, 175 N. Y. 315, 96 Am. St. Rep. 628, 67 N. E. 589, 15 Am. Crim. Rep. 591.

Congress, in the legitimate exercise of the power conferred upon it, may withhold jurisdiction to try causes founded upon laws passed by it, or can confer exclusive jurisdiction with respect to such matters upon the Federal courts.

Claffin v. Houseman, supra; *The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397.

State courts, in deciding controversies founded upon this act, are applying the judicial power of the United States; and if it be held that the 7th Amendment is a limitation only upon that power, state courts could not enforce such power apart from the limitation of the said Amendment.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Cohen v. Virginia*, 6 Wheat. 414, 5 L. ed. 293.

Mr. George B. Leonard for the defendant in error.

Mr. Chief Justice White delivered the opinion of the court:

Counting upon the *Employers' Liability Act of 1908* (chap. 149, 35 Stat. at L. 65), as amended by the *Act of 1910* (chap. 143, 36 Stat. at L. 291, Comp. Stat. 1913, § 8662), the defendant in error sued in a state court to recover for the loss resulting from the death of Nanos, his intestate, alleged to have been occasioned by the negligence of the plaintiff in error while he, Nanos, was in its employ and engaged in interstate commerce.

Whatever may have been the controversies in the trial court prior to the verdict of the jury in favor of the plaintiff, and the contentions which were unsuccessfully urged in the court below to secure a reversal of the judgment entered thereon, on this writ of error they have all but one been

abandoned, and hence have all but one become negligible. As the one question here remaining was also involved in five other cases pending under the Employers' Liability Act on writs of error to the courts of last resort of Virginia, Kentucky, and Oklahoma, those cases and this were argued together. As the other cases, however, involve additional questions, we dispose separately of this case in order to decide in this the one question which is common to them all, and thus enable the other cases, if we deem it is necessary to do so, to be treated in separate opinions.

By the Constitution and laws of Minnesota in civil causes, after a case has been under submission to a jury for a period of twelve hours without a unanimous verdict, five sixths of the jury are authorized to reach a verdict, which is entitled to the legal effect of a unanimous verdict at common law. When in the trial of this case the court instructed the jury as to their right to render a verdict under such circumstances, the defendant company objected on the ground that, as the cause of action against it arose under the Federal Employers' Liability Act,—in other words, was Federal in character,—the defendant was by the 7th Amendment to the Constitution of the United States entitled to have its liability determined by a jury constituted and reaching its conclusion according to the course of the common law, and hence to apply the state statute would be repugnant to the 7th Amendment. This objection, which was overruled and excepted to, was assigned as error in the court below, was there adversely disposed of (128 Minn. 112, 150 N. W. 385), and the alleged resulting error concerning such action is the one question which, we have said, is now urged for reversal.

It has been so long and so conclusively settled that the 7th Amendment exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict (*American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580), that it is not now open in the slightest to question that if the requirements of that Amendment applied to the action of the state of Minnesota in adopting the statute concerning a less than unanimous verdict, or controlled the state court in enforcing that statute in the trial which is under review, both the statute and the action of the court were void because of repugnancy to the Constitution of the United States. The one L.R.A.1917A.

question to be decided is therefore reduced to this: Did the 7th Amendment apply to the action of the state legislature and to the conduct of the state court in enforcing at the trial the law of the state as to what was necessary to constitute a verdict?

Two propositions as to the operation and effect of the 7th Amendment are as conclusively determined as is that concerning the nature and character of the jury required by that Amendment where applicable. (a) That the first ten Amendments, including, of course, the 7th, are not concerned with state action, and deal only with Federal action. We select from a multitude of cases those which we deem to be leading: *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox v. Ohio*, 5 How. 410, 434, 12 L. ed. 213, 223; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *Twining v. New Jersey*, 211 U. S. 78, 93, 53 L. ed. 97, 103. And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same. *Livingston v. Moore*, 7 Pet. 460, 552, 8 L. ed. 751, 781; *Supreme Justice v. Murray* (*Supreme Justice v. United States*) 9 Wall. 274, 19 L. ed. 658; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Walker v. Savinnet*, 92 U. S. 90, 23 L. ed. 678; *Pearson v. Yewdall*, 95 U. S. 204, 24 L. ed. 436. So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning. Doubtless it was this view of the contention which led the supreme court of Minnesota in this case and the courts of last resort of the other states in the cases which were argued with this to coincide in opinion as to the entire want of foundation for the proposition relied upon, and in the conclusion that to advance it was virtually to attempt to question the entire course of judicial ruling and legislative

practice, both state and national, which had prevailed from the commencement. And it was, of course, presumably an appreciation of the principles so thoroughly settled which caused Congress, in the enactment of the Employers' Liability Act, to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts. Indeed, it may not be doubted that it must have been the same point of view which has caused it to come to pass that during the number of years which have elapsed since the enactment of the Employers' Liability Act and the Safety Appliance Act, and in the large number of cases which have been tried in state courts, growing out of the rights conferred by those acts, the judgments in many of such cases having been here reviewed, it never entered the mind of anyone to suggest the new and strange view concerning the significance and operation of the 7th Amendment which was urged in this case and the cases which were argued with it.

Under these circumstances it would be sufficient to leave the unsoundness of the proposition to the demonstration to result from the application of the previous authoritative rulings on the subject, and the force of the reasoning inherently considered upon which they were based, as also upon its convincing power so aptly portrayed by the opinions of the courts below in this and the other cases which we have said were argued along with this. *Chesapeake & O. R. Co. v. Carnahan*, 118 Va. 46, 86 S. E. 863; *Chesapeake & O. R. Co. v. Kelly*, 160 Ky. 298, 169 S. W. 736, 161 Ky. 655, 171 S. W. 185; *Louisville & N. R. Co. v. Stewart*, 163 Ky. 823, 174 S. W. 744; *St. Louis & S. F. R. Co. v. Brown*, 45 Okla. 143, 144 Pac. 1075. In view, however, of the grave misconception of the very fundamentals of our constitutional system of government which is involved in the proposition relied upon and the arguments seeking to maintain it, and the misapplication of the adjudged cases upon which the arguments rest, while not implying that the question is an open one, we nevertheless notice a few of the principal propositions relied upon.

1. It is true, as pointed out in *Walker v. New Mexico & S. P. R. Co.* 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768, and in *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618, that the right to jury trial which the 7th Amendment secures is a substantial one in that it exacts a substantial compliance with the common-law

standard as to what constitutes a jury. But this truth has not the slightest tendency to support the contention that the substantial right secured extends to, and is operative in, a field to which it is not applicable and with which it is not concerned. It is also true, as pointed out in the cases just cited, that although territorial courts of the United States are not constitutional courts, nevertheless, as they are courts created by Congress, and exercise jurisdiction alone by virtue of power conferred by the law of the United States, the provisions of the 7th Amendment are applicable in such courts. But this affords no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law, in the teeth of the express and settled doctrine that the Amendment does not relate to proceedings in such courts.

2. The proposition that, as the 7th Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress, and regulate the enforcement of such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. And of course it is apparent that to apply the constitutional provision to a condition to which it is not applicable would be not to interpret and enforce the Constitution, but to distort and destroy it.

Indeed, the truth of this view and the profound error involved in the contention relied upon is aptly shown by the further propositions advanced in argument and based upon the premise insisted upon. Thus it is urged that if the limitation of the Amendment applies to Congress so as to prevent that body from creating a court and giving it power to act free from the restraints of the Amendment, it must also apply, unless the substance is to be disregarded and the shadow be made controlling, to the power of Congress to create a right and leave the power to enforce it in a forum to which the constitutional limitation is not applicable. But this again enlarges the Amendment by causing it not merely to put a limitation upon the power of Congress as to the courts, constitutional or otherwise, which it deems fit to create, but to engraft

upon the power of Congress a limitation as to every right of every character and nature which it may create, or, what is equivalent thereto, to cast upon Congress the duty of subjecting every right created by it to a limitation that such right shall not be susceptible of being enforced in any court whatever, whether created by Congress or not, unless the court enforcing the right becomes bound by the restriction which the Amendment establishes. It is true that the argument does not squarely face the contention to which it reduces itself, since it is conceded that rights conferred by Congress, as in this case, may be enforced in state courts; but it is said this can only be provided such courts, in enforcing the Federal right, are to be treated as Federal courts, and be subjected *pro hac vice* to the limitations of the 7th Amendment. And, of course, if this principle were well founded, the converse would also be the case, and both Federal and state courts would, by fluctuating hybridization, be bereft of all real, independent existence. That is to say, whether they should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject-matter of the controversy which they were considering.

But here again the error of the proposition is completely demonstrated by previous adjudications. *Martin v. Hunter*, 1 Wheat. 304, 330, 4 L. ed. 97, 103; *Houston v. Moore*, 5 Wheat. 1, 27, 28, 5 L. ed. 19, 25; *Ex parte McNeil*, 13 Wall. 236, 243, 20 L. ed. 624, 626; *Claffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 55-59, 56 L. ed. 327, 348-350, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. Moreover, the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them. This principle was made the basis of the first Federal judiciary act, and has prevailed in theory and practice ever since as to rights of every character, whether derived from constitu-

tional grant or legislative enactment, state or national. In fact, this theory and practice is but an expression of the principles underlying the Constitution, and which cause the governments and courts of both the nation and the several states not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them. And it is a forgetfulness of this truth which doubtless led to the suggestion made in the argument that the ruling in *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, had overthrown the ancient and settled landmarks and had caused state courts to become courts of the United States, exercising a jurisdiction conferred by Congress, whenever the duty was cast upon them to enforce a Federal right. It is true in the *Mondou Case* it was held that where the general jurisdiction conferred by the state law upon a state court embraced otherwise causes of action created by an act of Congress, it would be a violation of duty under the Constitution for the court to refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers. But that ruling in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that, for the purpose of enforcing the right, the state court was to be treated as a Federal court, deriving its authority not from the state creating it, but from the United States. On the contrary, the principle upon which the *Mondou Case* rested, while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose.

Affirmed.

Annotation—Constitutionality of verdict by less than all the jurors.

The earlier cases on this question are discussed in the note to *Jacksonville, T. & K. W. R. Co. v. Adams*, 24 L.R.A. 272.

The general question of the number and agreement of jurors necessary to constitute a valid verdict is discussed in the note to *State v. Bates*, 43 L.R.A. 33.

As to the number of grand jurors necessary or proper to act, see note to *State v. Belvel*, 27 L.R.A. 846.

The right to waive absence of a jurymen in a criminal case is discussed in the note to *Jennings v. State*, 14 L.R.A. (N.S.) 862.

As pointed out in the earlier note, it was settled at common law that a valid verdict required an agreement of the entire panel of twelve jurors. Consequently a constitution which guarantees a trial by jury requires the unanimous verdict of twelve men. *Girdner v. Bryan* (1902) 94 Mo. App. 27, 67 S. W. 699, holding a finding by the jury in a civil action before a justice of the peace, for the plaintiff, by a vote 10 to 2, and an assessment of the damages for which a verdict was returned by a vote of 9 to 3, invalid under a constitutional provision that "the right of trial by jury as heretofore enjoyed shall remain inviolate."

In *Kansas City, C. & S. R. Co. v. Story* (1888) 96 Mo. 611, 10 S. W. 203, it is stated that the jury meant in a constitutional guaranty that the right of trial by jury shall be held inviolate is the historical jury of 12 men with all of its incidents; and in *State ex rel. St. Louis, K. & N. W. R. Co. v. Withrow* (1895) 133 Mo. 500, 34 S. W. 245, 36 S. W. 43, it is stated that the right of trial by jury, guaranteed by a constitution, means that all the substantial incidents and consequences which pertain to the right of trial by jury are preserved in their ancient substantial incidents as existing at common law. There is obiter to the same effect in *Bank of Missouri v. Anderson* (1822) 1 Mo. 244; *Vaughan v. Seade* (1860) 30 Mo. 600 and *Copp v. Henniker* (1875) 55 N. H. 193, 20 Am. Rep. 194.

An implied limitation upon the power of the legislature to provide for less than a unanimous verdict arises from a constitutional provision that "a jury in civil cases in all courts . . . may consist of less than twelve men as may be prescribed by law." The court, referring to the familiar maxim that the mention of one thing is the exclusion of the other, states that "the authority to re-

duce the number of jurors from twelve, is thereby created, and in the absence of any express declaration of the further intention regarding trial by juries in civil actions it follows that the legislature was granted no other authority than this, and impliedly that all other rights of trial by jury in civil actions were reserved." *Denver v. Hyatt* (1900) 28 Colo. 129, 63 Pac. 403, holding unconstitutional a statute providing that in all civil cases in courts of record which shall be tried by a jury, not less than three fourths of the number of jurors sitting may concur in and return a verdict therein, and such verdict shall have the same force and effect as though found and returned by all the jurors sitting in the case. This case was followed in *Clough v. McKay* (1903) 31 Colo. 300, 73 Pac. 30.

In *First Nat. Bank v. Foster* (1900) 9 Wyo. 157, 54 L.R.A. 549, 61 Pac. 466, the court, construing a similar provision, states that the whole section must be construed together; that the subject of it is the right of trial by jury; and "we think the intention of the framers reasonably appears to have been to preserve the right inviolate in criminal cases, and to point out by way of permission to the legislature wherein the common law might be invaded by statute in civil cases. It is as if the Constitution had said: 'With reference to the right of trial by jury it is provided that in criminal cases it shall remain in all respects as heretofore. In civil cases it shall remain as heretofore except that the legislature may provide for a number less than twelve to constitute a jury.'" The provision in the Wyoming Constitution is to the effect that "the right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, not of record, may consist of less than twelve men, as may be prescribed by law." Declaration of Rights, art. 1, § 9.

The 7th Amendment to the Federal Constitution provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," etc. Any case that is cognizable at common law, under this provision, requires the unanimous verdict of twelve men. *Carroll v. Byers* (1894) 4 Ariz. 158, 36 Pac. 499, holding the statutory action of claim and delivery in all essential attributes the same as the ancient common-

law remedy of replevin, and therefore to require the unanimous verdict of twelve jurors. The act of the Arizona territorial legislature involved in this case, provided that "in all trials of civil cases and in all trials of misdemeanors in the courts of the territory where a jury of twelve persons shall be impaneled . . . the concurrence of three fourths of such jury shall be sufficient to render a verdict therein."

It will be seen by a reference to the case of *Hess v. White*, reported in connection with the earlier note in 24 L.R.A. 277, that a territorial statute providing for a verdict by three fourths of the jury in a civil case was held not to violate the 7th Amendment. This case was followed in a number of cases in this jurisdiction. *American Pub. Co. v. Fisher* (1894) 10 *Utah*, 147, 37 Pac. 259; *Tucker v. Salt Lake City* (1894) 10 *Utah*, 173, 37 Pac. 261; *Fred W. Wolf Co. v. Salt Lake City Brewing Co.* (1894) 10 *Utah*, 179, 37 Pac. 262; *Riley v. Salt Lake Rapid Transit Co.* (1894) 10 *Utah*, 428, 37 Pac. 681; *Mackey v. Enzensperger* (1895) 11 *Utah*, 154, 39 Pac. 541; *Pratt v. Parsons* (1896) 13 *Utah*, 31, 43 Pac. 620; *Smith v. Salt Lake City R. Co.* (1896) 13 *Utah*, 33, 43 Pac. 919. But upon appeal to the United States Supreme Court in *American Pub. Co. v. Fisher* (*Utah*) *supra*, that court held the territorial statute unconstitutional. (1897) 166 *U. S.* 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618. The court states that if the 7th Amendment did not operate in and of itself to invalidate the territorial statute, Congress, which has full control over the territories, expressly extended the Constitution and laws of the United States to the territory of Utah, and provided in the Act of April 7, 1874, chap. 80, 18 Stat. at L. 27, Comp. Stat. 1913, § 3458, "that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." Other Utah cases, *Fred W. Wolf Co. v. Salt Lake City Brewing Co.* (1894) 10 *Utah*, 179, 37 Pac. 262; *Tucker v. Salt Lake City* (1894) 10 *Utah*, 173, 37 Pac. 261; and *Springville v. Thomas*, were expressly reversed by the United States Supreme Court in (1897) 166 *U. S.* 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717, on the authority of *American Pub. Co. v. Fisher*.

But in actions other than common-law actions it has been held that a verdict by less than twelve jurors is not in conflict with this constitutional provision. *Providence Gold Min. Co. v. Burke* L.R.A.1017A.

(1899) 6 *Ariz.* 323, 57 Pac. 641, 19 *Mor. Min. Rep.* 625, holding a contest filed in the United States land office, under a statute, to contest the right of an applicant for United States patent, a purely statutory, and not a common-law action, in which the parties were not entitled as a matter of constitutional right to a verdict by a common-law jury. Accordingly, a verdict by three fourths of the jury under a territorial statute was held valid. The court states that the jury at best "was an advisory agent of the court to enlighten its conscience and not to control its judgment."

And it has been held under a state Constitution as to a matter which is not one that is required by the Constitution to be submitted to a jury, that the legislature may provide for less than a unanimous verdict. Thus, the legislature may authorize a finding of eight of the jurors upon the question of whether a ditch will be conducive to the public health, convenience, or welfare, and whether the route thereof is practicable, where the only question required by the Constitution to be submitted to a jury is as to the amount of compensation to which the owner is entitled. *Emig v. Clark County* (1887) 5 *Ohio S. & C. P. Dec.* 459; *Thomas v. Clark County* (1887) 5 *Ohio S. & C. P. Dec.* 510.

It was well settled even before the decision in *MINNEAPOLIS & ST. L. R. Co. v. BOMBOLIS*, ante, 86, that the 7th Amendment to the Federal Constitution does not control procedure in the state courts. See cases cited in opinion in support of this general proposition.

That it does not control procedure in state courts is true even in taking jurisdiction of Federal legislation. *Chesapeake & O. R. Co. v. Gainey* (1916) 241 *U. S.* 494, 60 L. ed. 1124, 36 Sup. Ct. Rep. 633; *Louisville & N. R. Co. v. Stewart* (1916) 241 *U. S.* 261, 60 L. ed. 989, 36 Sup. Ct. Rep. 586; *MINNEAPOLIS & ST. L. R. Co. v. BOMBOLIS*, ante, 86, *St. Louis & S. F. R. Co. v. Brown* (1916) 241 *U. S.* 223, 60 L. ed. 966, 36 Sup. Ct. Rep. 602; *Chesapeake & O. R. Co. v. Kelly* (1916) 241 *U. S.* 485, 60 L. ed. 1117, 36 Sup. Ct. Rep. 630. This proposition also, which must now be regarded as settled by the decision in *MINNEAPOLIS & ST. L. R. Co. v. BOMBOLIS*, ante, 86, is supported by a number of state decisions. *Chesapeake & O. R. Co. v. Kelly* (1914) 161 *Ky.* 655, 171 *S. W.* 185 (Federal Employers' Liability Law); *Louisville & N. R. Co. v. Stewart* (1915) 163 *Ky.* 823, 174 *S. W.* 744 (Fed-

eral Employers' Liability Act); Louisville & N. R. Co. v. Holloway (1916) 168 Ky. 262, 181 S. W. 1126 (Federal Employers' Liability Act); Cincinnati, N. O. & T. P. R. Co. v. Claybourne (1916) 169 Ky. 315, 183 S. W. 903 (Federal Employers' Liability Law); Louisville & N. R. Co. v. Thomas (1916) — Ky. —, 185 S. W. 840 (Federal Employers' Liability Law); Donaldson v. Great Northern R. Co. (1916) 89 Wash. 161, 154 Pac. 133.

As appears from the foregoing, the unmodified constitutional guaranty of a jury trial requires the unanimous verdict of the jury; but some state constitutions expressly provide for less than a unanimous verdict, or expressly authorize provision by law for less than a unanimous verdict in civil cases in any court of record. Under a provision to the effect that, in the trial by jury of all civil cases in courts of record, three fourths of the members of the jury concurring may render a verdict, an insanity inquiry was held to be a civil case within the meaning of this provision, and a verdict concurred in by ten of the twelve jurors was upheld in *State ex rel. Peper v. Holtecamp* (1911) 235 Mo. 232, 138 S. W. 521.

Some constitutional provisions authorize less than a unanimous verdict in criminal cases not capital. Such constitutional provision was held applicable in *State v. Wooten* (1915) 136 La. 560, 67 So. 366, upon the second trial for manslaughter of one who had originally been accused of murder, but who, upon the first trial, had been found guilty of manslaughter,—a verdict which had the effect of acquitting the accused of murder and reducing the charge against him to manslaughter.

Upon the objection in a civil action that the defendant's right to trial by jury, as guaranteed by the Constitution of the state and of the United States, was violated by a constitutional amendment authorizing nine of the jurors to return a verdict, the court, in *Franklin v. St. Louis & M. River R. Co.* (1905) 188 Mo. 533, 87 S. W. 930, states that "no constitutional right of defendant was violated in the action of the court in giving the instruction above referred to (authorizing a verdict by nine of the jurors in accord with the constitutional provision), or in receiving the verdict, in which only nine of the jury concurred."

The case of *Gabbert v. Chicago, R. I. & P. R. Co.* (1902) 171 Mo. 84, 70 S. W. 891, has been treated in subsequent cases in this jurisdiction as passing upon L.R.A.1917A.

the validity of a constitutional amendment authorizing a verdict by nine of the twelve jurors. It does not appear, however, from the opinion in that case, that any other question was considered there than the due submission and adoption of the constitutional amendment. One of the grounds relating to this subject in the motion for a new trial was that the court erred in holding that the constitutional amendment "had been lawfully submitted and adopted by the people of this state, whereby three fourths of a jury in a civil action may render a verdict," and the supreme court, in stating the question for decision, says that the record presents the question "whether the amendments . . . were duly submitted and adopted." In *Roefeldt v. St. Louis & Suburban R. Co.* (1903) 180 Mo. 554, 79 S. W. 706, the court states that the defendant, in its motion for a new trial, raised the question of the constitutionality of the law "authorizing nine of a jury in a civil case to render a verdict . . . since the decision in *Gabbert v. Chicago, R. I. & P. R. Co.* (Mo.) supra, that is no longer a question in this state." In *Taussig v. St. Louis & K. R. Co.* (1905) 186 Mo. 269, 85 S. W. 378, the court states: "The validity of the law authorizing a verdict by a jury, nine or more of their number concurring therein, has been established by the decision of this court in *Gabbert v. Chicago, R. I. & P. R. Co.* (Mo.) supra, and numerous decisions since." In *Logan v. Field* (1905) 192 Mo. 54, 90 S. W. 127, it is stated that "it was held in *Gabbert v. Chicago, R. I. & P. R. Co.* (Mo.) supra, that common-law right of trial by jury, by which is meant a trial by twelve jurors, who must render a unanimous verdict, might be so amended that nine jurors concurring could render a verdict."

The legality of the adoption of such a constitutional amendment is not discussed herein, nor does the note consider whether such a constitutional provision or statute enacted in pursuance thereof can be constitutionally applied to cases which were begun before the provision went into effect, or to causes of action which were in existence before. In other words, any question as to whether there is a vested right in having the unanimous verdict of a jury, or whether the application of a law authorizing less than a unanimous verdict is *ex post facto* as applied to existing actions or causes of action, is excluded.

W. A. E.

VIRGINIA SUPREME COURT OF APPEALS.

MARVIN BOYD, Plff. in Err.,
v.

C. L. RITTER LUMBER COMPANY.

(— Va. —, 89 S. E. 273.)

Eminent domain — right of way for private railway.

1. The development by a private corporation of a tract of timber land is not a public purpose so as to justify the exercise of the right of eminent domain to secure a right of way between the tract and the sawmill of the owner, although provision is made in the statute for the use of the way by anyone having access to it.

For other cases, see Eminent Domain, I. d, 1, in Dig. 1-52 N. S.

Statutes — adoption — effect of prior construction.

2. The rule that a statute adopted from another state carries the construction given by the courts of that state does not include a decision as to its constitutionality.

For other cases, see Statutes, II. c, in Dig. 1-52 N. S.

(June 22, 1916.)

ERROR to the Circuit Court for Buchanan County to review a judgment in plaintiff's favor in a proceeding to condemn a portion of defendant's land for the purpose of constructing a tramroad over which to haul logs and lumber owned by plaintiff. Reversed.

The facts are stated in the opinion.

Mr. T. C. Bowen for plaintiff in error.

Messrs. Flannagan & Boyd and George W. St. Clair, for defendant in error:

Chapter 75, Acts 1912, is not in violation of the Constitution of this state or the Federal Constitution.

Com. v. Moore, 25 Gratt. 951; *Com. v. Brown*, 91 Va. 781, 28 L.R.A. 110, 21 S. E. 357; *Cooley*, Const. Lim. 7th ed. pp. 252-254.

The statute upon which this proceeding is based was taken from the Kentucky statute which, prior to its adoption by the Virginia legislature, had been construed by the Kentucky court of appeals, and declared constitutional.

Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 16 L.R.A.(N.S.) 479, 104 S. W. 762; *Kirk-Christy Co. v. American Asso.* 128 Ky. 668, 108 S. W. 232.

If a statute is construed and followed by a series of decisions, and our legislature enacts the statute (even if it is only substan-

Note. — As to eminent domain for purposes of logging road or logging railroad, see annotation following this case, post, 102. L.R.A.1917A.

tially adopted), the construction must be considered adopted along with the statute.

Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280; *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Norfolk & W. R. Co. v. Old Dominion Baggage Transfer Co.* 99 Va. 111, 50 L.R.A. 722, 37 S. E. 784; 36 Cyc. 1154.

The public has the right to use both the land taken and the tramroad, or either.

Lewis v. Washington, 5 Gratt. 265; *Heninger v. Peery*, 102 Va. 899, 47 S. E. 1013.

Cardwell, P., delivered the opinion of the court:

This is a proceeding under chapter 75 of Acts 1912, instituted by the C. L. Ritter Lumber Company, Incorporated, against Marvin Boyd, seeking to condemn a portion of defendant's land located on Dismal creek, in Buchanan county, for the purpose of constructing a tramroad to haul logs and lumber owned by the petitioner over the land sought to be condemned. The purposes for which the land is sought to be condemned, as stated in the petition to the circuit court of Buchanan county, are to transport logs, timber, and supplies over a tramroad to be constructed on the same, to be used for the benefit of the petitioner and the public generally.

It is shown by the record that the defendant and the petitioner could not agree as to the location of, or the amount of damages to be paid for, the land proposed to be condemned, and, according to the provisions of the statute, commissioners were appointed by the circuit court to view the land proposed to be taken, and to lay off and set apart a sufficient portion thereof for the purposes mentioned in the petition, etc. The commissioners so appointed filed their report, as provided in the statute, which the court, by its final order entered on the 5th day of May, 1916, confirmed, and the right of way and tramroad over the defendant's land was established in accordance with the prayer of the petition of the lumber company, to which final order this writ of error was awarded.

The sole question requiring our consideration is whether or not the act under which this proceeding is had violates either the Constitution of the state of Virginia or the Constitution of the United States.

The act is entitled: "An Act to Facilitate the Development of the Resources of the State by Providing Ways of Ingress and Egress for Mining, Manufacturing, and Timber Cutting, and to Authorize Proper Pass Ways, Tramroads, Haul Roads, and Other Means of Transportation over the Lands of Another or Others."

The 1st and 2d sections of the act provide

for the procedure to be had before the land sought to be taken is condemned, and the 3d section of the act provides as follows:

"But nothing in this act shall operate to give any person, firm, or corporation a right to the exclusive use of such lands, pass ways, tramroads, haul roads, or other means of transportation; and the public shall have the right to use the said land for travel as other public roads are used, and any other person, firm, or corporation shall have an equal right to use the said pass ways, tramroads, haul roads, or other means of transportation upon paying proper compensation therefor. If no agreement can be made for such compensation, then the amount thereof shall be fixed by the circuit court of said county upon the petition of the person, firm, or corporation desiring to use the same, and upon the payment of the amount so fixed by said court, he shall have the right to the use thereof as herein provided.

"Provided, further, that if said land shall cease to be used for the period of five years for the purposes of hauling or delivering minerals, oils, timber, lumber, wood, bark, or other forest product in the manner hereinbefore provided, the same shall be deemed to have been abandoned, and the right and title thereto shall revert to the owner of the residue of the tract."

The Constitution of Virginia, § 58 (Code 1904, p. cccxii.), provides: "It [the general assembly] shall not enact any law whereby private property shall be taken . . . for public uses, without just compensation."

And the Federal Constitution, art. 5, provides: "Nor shall private property be taken for public use without just compensation."

While, under both of these constitutional provisions, private property may be taken for public uses upon the payment of just compensation, it has been universally held that the spirit of both Constitutions is in conflict with the view that private property can be taken for private uses under any conditions or stipulations.

It plainly appears in this case that the object of the defendant in error is to condemn the land of the plaintiff in error for the purpose of enabling it to build a tramroad over the lands of plaintiff in error on which to transport about 40,000,000 feet of timber owned by it on the waters of Dismal creek, to its mill at Whitewood, in Buchanan county, a distance of about 7 miles. The defendant in error is engaged in the lumber business; that is, the purchasing of trees in Buchanan county, the sawing and manufacturing of those trees into lumber at its mill at Whitewood, and shipping the L.R.A.1917A.

finished products from Whitewood to Doran, a point on the Clinch Valley division of the Norfolk & Western Railway, a distance of 14 miles from Whitewood. The lumber and its finished products are taken over a tramroad with steel rails, and the right of way, track, and rolling stock thus used is the private property of the defendant in error. It is also operating a tramroad with steel rails, extending from its mill at Whitewood in a westerly direction down Dismal creek, in Buchanan county, a distance of approximately 7 miles, which tramroad, tracks, steel rails, and rolling stock are the private property of the company. Several miles farther down the creek, defendant in error owns a large boundary of valuable timber, approximately 40,000,000 feet, and desires to extend its tramroad over the lands of plaintiff in error to the said boundary of timber, for the purpose of cutting and hauling it over the tramroad to its mill at Whitewood, and there sawing and manufacturing it into lumber and then transporting the finished products of the lumber to Doran; and, in order to reach this large and valuable boundary of timber, it is necessary to extend its tramroad through and over the lands of the plaintiff in error. It therefore appears that this proposed tramroad or right of way over the lands of plaintiff in error will be surrounded and hemmed in by the private property of the plaintiff in error and the private property of the defendant in error; so that, if the right of way be established as prayed by the defendant in error, the public generally, as it would seem, could only use the right of way over the lands of plaintiff in error, and would be restricted to the use of the right of way on his land,—that is, the public generally would have no right to use the private road of the defendant in error from the plaintiff in error's land up Dismal creek, a distance of 7 miles, to Whitewood, and would have no right to use the tramroad of the defendant in error from Whitewood to Doran on the Norfolk & Western Railway.

This court, in *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 81 L.R.A. 129, 99 Am. St. Rep. 855, 43 S. E. 194, said: "Although not forbidden by the Constitution of this state, the legislature cannot authorize the taking of private property for private use, as it is contrary to the fundamental principles of a republican government."

What is and what is not a public use has been decided in various ways by the states of the Union, but the great weight of authority, both of the decisions and the text writers, is against any loose construction of the term such as has been given to it in a few of the decided cases.

The statute under which this proceeding is had was taken, it seems, from a statute of the state of Kentucky, which was held constitutional and valid by the court of appeals of that state prior to the passage of the act under consideration, namely, *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 16 L.R.A. (N.S.) 479, 104 S. W. 762; and it is insisted here for the defendant in error that when a constitutional provision is ordained or a statute enacted by another state, and it is ingrafted into the Constitution or statutes of this state, and prior thereto such constitutional provision or statute had received judicial construction by the courts of such other state, then it is to be presumed that the law-making power of this state intended that the constitutional provision or statute should be given the same construction in this state that it was given in the state from which it was taken. This principle of construction, however, applies only to the construction of constitutional provisions and statutes, and has no relation, as the authorities hold, to the question of whether or not a statute is constitutional and valid. In other words, the legislature, by enacting a statute which has been held constitutional and valid by the courts of another state, cannot deprive the courts of this state of the right to determine for themselves the question of the constitutionality of such statute.

In *Fallsburg Power & Mfg. Co. v. Alexander*, supra, a quotation is made from the opinion by Judge Green in the case of *Varner v. Martin*, 21 W. Va. 548: "Referring to that class of cases, other than those in which the general public have the immediate use of the property condemned without charge, as in cases of public highways, where the property condemned is under the control of public officers, though the gratuitous use of it is enjoyed by the public at large, etc., the opinion demonstrates that where the property condemned is in the direct use and occupation of a private person or of a private corporation, and the general public have only an indirect and qualified use of it, or perhaps no use of it of any kind, or simply derive from its use some indirect advantage, as by the promotion of the general prosperity of the community, to which belong railroads, ferries, gristmills, etc., in order that a person or corporation may be included in this class and have legislative authority to condemn lands, it must be shown that he or they are possessed of each and all of three qualifications: First, The general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation

in whom the title of property when condemned will be vested, a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the legislature; second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes otherwise than by authorizing the condemnation of private property."

In determining whether the land is sought to be condemned in this proceeding for a public or a private use, it is to be borne in mind that the party asking the condemnation is a lumber company engaged in cutting trees, manufacturing them into lumber, and transporting it to market; that it owns timber on various tracts of land on the waters of Dismal creek, a portion of which is below the tract owned by plaintiff in error and its mill; and that it is necessary for the defendant in error to have means of transportation over plaintiff in error's tract of land in order to cut its timber into logs to be carried to its mill for manufacture into lumber, etc., and it is a mere assertion on the part of defendant in error in its petition to the circuit court, that the tramroad it proposes to construct over the land of plaintiff in error would benefit the public generally; the evidence adduced in the proceeding being very vague and indefinite as to what use such tramroad would be to the public generally, and in fact it refutes the idea that it would be of benefit to the general public. The act of the general assembly, supra, does not pretend to make the defendant in error a common carrier. It is not compelled to carry for the public goods over its tramway, or any part thereof, but the act merely allows the public to use the tramway, provided the public furnishes its own rolling stock and power, whether that power be steam, electricity, mules, or gravitation. Defendant in error may use, as it would seem, one kind, some of the public another kind, and the residue of the public still another kind. The public, by the terms of the act, could use the tramway as a public road is used; but there is no general management to prescribe rules and regulations for such use, or to provide sidings, passing points, switches, etc. Manifestly the tramroad cannot be operated on the same principles as a public road. As to public roads, the legislature can and does prescribe "the law of the road" as to meeting and passing, and passing going in the same direction. So that it is apparent from

the whole scope of the act that it contemplates or makes possible the condemnation of private property for private purposes, in that it does not provide for a definite and fixed use by the public of the contemplated tramroad, etc., over the land authorized by the act to be condemned, whereby the private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking private property for a private use, against the will of the owner, which cannot be done in any case. The constitutionality of the act is to be determined not only by what may be attempted to be done in a particular case, but what may be done pursuant to the terms of the act.

Judge Cooley, in his work on Constitutional Limitations (page 654), says: "The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

As was said in *Brown v. Gerald*, 100 Me. 351, 70 L.R.A. 472, 109 Am. St. Rep. 526, 61 Atl. 785, the legislature cannot make a private use public by calling it so, so as to justify an exercise of the power of eminent domain in its behalf; the question of its public character must be determined by the court. "Neither mere public convenience nor mere public welfare will justify the exercise of the right of eminent domain. The mere creation and distribution of power for manufacturing enterprises are not a public use which will justify an exercise of the power of eminent domain. The furnishing of electric power for manufacturing purposes does not become a public use, so as to justify the exercise of the power of eminent domain in its behalf, on the theory that the one generating it may, because of his franchises, be regarded as a public servant; especially since the capacity for service is, of necessity, limited, and cannot extend to the general public, and therefore the service is a matter of grace, and not of right."

See also *Re Barre Water Co.* 62 Vt. 27, 9 L.R.A. 195, 20 Atl. 109.

In *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398, it was held that the legislature did not have the right to declare what was a public use, and that the act under consideration was unconstitutional. That was a case of a gristmill; but an examination of it will show that the Vermont statute was L.R.A.1917A.

different from the Virginia statute, in that, while the owner of the gristmill was required to grind well and sufficiently all grain received, at certain fixed rates of toll, such owner was not compelled to receive grain for grinding against his will. It was held that the public had no right whatever in them, or any other use, and that therefore the act allowing condemnation was unconstitutional.

In the case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 63 L.R.A. 820, 99 Am. St. Rep. 964, 74 Pac. 681, it is held:

"(1) The acquisition of an easement over land for the transportation to market of logs of a private owner is within a constitutional provision that private property shall not be taken for private use, and making the question whether or not a contemplated use is private one for the determination of the courts.

"(2) That a particular use will be of benefit to the public does not alone make it a public use, within the meaning of a constitutional provision that private property shall be taken only for public use.

"(3) Constitutional authority to acquire an easement over land for a private way of necessity does not empower one landowner to condemn a right of way over his neighbor's property for the purpose of getting his logs and timber to market."

In discussing and disapproving the case of *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394, 5 Mor. Min. Rep. 424, the supreme court of Washington, in the case above cited, says:

"There the broad doctrine was announced that any appropriation of private property under the right of eminent domain, for any purpose of great public benefit, interest, or advantage to the community, is a taking for public use; the application in that case being to condemn a strip of land in order to transport the wood, lumber, timbers, and other materials to enable it to conduct and carry on its business of mining. The law granting the privilege was sustained on the ground that mining was one of the leading industries of the state, and the principles above announced were applied. This is, in substance, the contention of the appellant in this case. It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights, which the Constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. Under such a rule, an act might be construed to be legal one year, because a certain business was found to be

profitable to the community at large, and the next year held void, because it appeared that the business was not a paying one.

"The Constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform, and to constitute a check on the more mutable sentiment and actions of members of different legislatures. And it seems to us that the result of such a construction would be a virtual removal of any constitutional inhibition on legislative power in this respect, leaving the legislative will as free and untrammelled as in those states where the legislatures are permitted to act in consonance with the inherent power of sovereignty, and no constitutional enactments have intervened. It was, no doubt, for the purpose of preventing enthusiastic legislation, practically destroying this limitation, that the question of public use was especially submitted to the courts, who are and should be ever watchful in maintaining inviolate the constitutional rights of the citizen."

The same court cites with approval the case of *Bloodgood v. Mohawk & H. River R. Co.* 18 Wend. 9, 31 Am. Dec. 313, and quotes from it as follows: "When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation that of public utility, public interest, common benefit, general advantage or convenience, of that still more indefinite term 'public improvement,' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat, without any certain principle to guide us."

And further in its opinion the court says: "Mr. Cooley, in his *Constitutional Limitations*, and Mr. Elliott, in his work on *Eminent Domain*, have given this subject special attention and reviewed all the authorities bearing thereon; and, while detached expressions from these authorities frequently made with reference to cases cited seem to sustain both contentions, yet the general deduction made is opposed to the idea that public use and public benefit are synonymous terms.

"Mr. Lewis, in discussing this identical proposition in § 165, after giving a history of the earlier decisions, concludes as follows: 'Public use means the same as use by the public, and this, it seems to us, is the L.R.A.1917A.

construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier Constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite and practical application. If the Constitution means that private property can be taken only for use by the public, it affords a definite guide to both the legislature and the courts.'"

See also *State ex rel. Tacoma Industrial Co. v. White River Power Co.* 39 Wash. 648, 2 L.R.A.(N.S.) 842, 82 Pac. 150, 4 Ann. Cas. 987.

In the case of *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790, the court held that the findings of fact clearly show that the plaintiff is a corporation organized for the construction of a railroad for the transportation of freight and passengers, and is therefore a public service corporation; and the court says that, the findings being as stated, it has no alternative but to affirm the judgment, but adds: "In doing so, however, we do not desire to be understood as holding that a railroad constructed by a mill company for the evident purpose of transporting logs to its mill can become a public highway, so as to justify the exercise of the power of eminent domain in its behalf, because of any declaration in its articles of incorporation to that effect, or on account of any right of the public to use it for the transportation of freight and passengers."

Adverting again to the case of *Varner v. Martin*, 21 W. Va. 548, quoted from and approved by this court in the case of *Fallsburg, Power & Mfg. Co. v. Alexander*, in which there is a learned discussion of the mill acts of Virginia, tracing them back prior to the year 1700, it is shown conclusively that the right of condemnation existed in mill cases only for gristmills, and because gristmills were so regulated by statute that the public had a direct interest therein. Grain was not only to be ground for a toll fixed by law, but all grain presented to the miller was to be ground in its turn, and the mill, if destroyed by fire or otherwise, must be reconstructed within a specified time or the land condemned reverted to the original owner. It is shown in the opinion that the rights of the public in all such cases were safeguarded

by strict laws imposing penalties and forfeitures for their nonobservance, but this was not true of sawmills or other manufacturing plants, and Green, J., in his opinion says: "No effort was ever made, so far as the reported cases show, to condemn lands for mills other than gristmills."

In *Cozard v. Kanawha Hardware Co.* 139 N. C. 283, 1 L.R.A.(N.S.) 909, 111 Am. St. Rep. 779, 51 S. E. 932, Judge Connor, in delivering the opinion of the court, quoted extensively from the argument of counsel, which was strikingly like the argument advanced in *Healy Lumber Co. v. Morris*, supra, and is very similar to the petition filed in the case we have under consideration; and held the act invoked to be unconstitutional. The opinion concludes as follows: "While, as found by his Honor, it is reasonable, and even necessary to the successful operation of defendant's enterprise, that they carry their timber and timber products over plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken a fundamental principle, upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guaranties upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the others is weakened."

Prior to the adoption of our present Constitution, the legislature of Virginia had the power to incorporate public service and public utility corporations, and to grant to them in a proper case the right of eminent domain. Every power could then be conferred upon a corporation at the time of its incorporation that can now be conferred, either by its incorporation by the State Corporation Commission, under the laws now existing, or by laws that may be subsequently enacted by the general assembly. But, as the learned counsel in this case contend, if the power was not vested in the legislature to declare what is and what is not a public use, before the adoption of the new Constitution, it has certainly not acquired that power since that time, and it cannot do, by means of a general statute, at this time, what it could not do before. The same constitutional limitations that hedged it about then control it now, and it can no more confer upon private corporations and individuals the right of eminent domain at this time, under the guise of a public act, than it could grant such right directly to

them by private act before the creation of the State Corporation Commission, and the transfer to it of powers that formerly were held by the legislature.

Section 153 of our present Constitution, in defining terms used in article 12, says: "The term 'corporation' or 'company' shall include all trusts, associations, and joint stock companies having any powers or privileges not possessed by individuals or unlimited partnerships, and exclude all municipal corporations and public institutions owned or controlled by the state; . . . the term 'transportation company' shall include . . . any freight car company, car association, or car trust, express company, or company, trustee, or person in any way engaged in business as a common carrier over a route acquired in whole or in part under the right of eminent domain. . . ."

And in subdivision b of § 156, the State Corporation Commission is vested with the power and charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; "and to that end the Commission shall, from time to time, prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations," etc.

The act here under consideration undertakes to confer upon the circuit courts of this state the control and regulation of tramroads, haul roads, and other means of transportation over the lands of another which are authorized to be established by the act in the exercise of the power of eminent domain.

In *Miller v. Pulaski*, 109 Va. 137, 22 L.R.A.(N.S.) 552, 63 S. E. 880, an amendment to the charter of an incorporated town, giving to it the right to condemn property, was held to be unconstitutional; the opinion saying: "An Act which authorizes a town to condemn land for the purpose of supplying the inhabitants of said town 'or other persons, companies, or corporations,' with electric lights or power, embraces an object which is constitutional with one which is unconstitutional, and they are so united as to be inseparable, and hence the whole grant of power is unconstitutional. The right to furnish lights or power to 'other persons, companies, or corporations' is a private use, and, where a private use is so combined with a public use that the two cannot be separated, the whole act is void."

This case also held that whether a particular use is public or not is a question for the judiciary, and not for the legislature.

In the still later case of *Norfolk County Water Co. v. Wood*, 116 Va. 142, 81 S. E. 19, it appeared that the Norfolk County Water Company was first incorporated by the circuit court of Norfolk county in June, 1899, but in January, 1900, an act was passed by the general assembly ratifying and confirming this charter, and adding thereto the right to condemn such lands as might be necessary for the building of its works, etc.; and it was argued that the water company had never done anything but a public service, had never used its water supply for its own or any other private purposes, but devoted the whole to the use of the public generally; but this court held that this did not constitute that company a public service corporation, and that "the status of a company as a public service corporation with the power of eminent domain must be determined, not by what it actually does or intends to do, but what its charter prescribes it must do by way of public duty."

It was also held that "because the legislature has assumed to grant the right of eminent domain, and the grant has been accepted, it does not follow that the . . . [grantee] is a public service corporation. The legislature cannot make a use public by declaring it to be such. The question at last is whether the declared uses are in law public uses, and that is a question which the courts must determine."

It was further held in that case that "before a company can exercise the power of eminent domain, the general public must have a definite and fixed use of the property to be condemned, a use independent of the private person or private corporation in whom the title of the property, when condemned, will be vested,—a public use which cannot be defeated by such private owner, by which public use continues to be guarded and controlled by the general public through laws passed by the legislature. The general public must have the right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled to permit the general public to enjoy it. The public must have a legal right to the use of the property which cannot be gained, denied, or withdrawn by the owner."

We could not in an opinion within reasonable limits undertake to review the numerous cases that have been cited on behalf of the contentions of the defendant in error. Suffice it to say that our examination of them leads to the conclusion that they are easily to be differentiated or dis-

tinguished from the case at bar, or, in fact, of no application to it. Certainly there is not enough in these cases to warrant us in departing from or qualifying in the least degree the principles of law laid down in our own decisions to which we have referred. As we have seen, our own decisions are to the effect that before a private corporation operating its own saw-mill and tramroad can be given the right to exercise the power of eminent domain, it must appear to the court clothed with authority to confer the power, that the use by the general public of the property to be condemned is definitely fixed, and its use cannot be defeated by such private owner, nor the right of the public to the use of the property be withdrawn, denied, or gained.

In the case in judgment the public has no fixed right which will attach to the property if it is condemned, and we see nothing in the act to prevent such right as they have, if any, from being withdrawn at any time the defendant in error wishes to tear up its track and remove the same from the tramroad it proposes to construct over plaintiff in error's land. Upon the very face of the petition to the circuit court for power and authority to condemn the land needed by the petitioner for its proposed tramroad, nothing more than a temporary easement is sought. When the timber in the neighborhood is cut and removed, the tramroad may be abandoned, and the public will have no redress. The statute does not pretend to give any relief to the public in any of these matters. There is no way under the statute by which defendant in error can be compelled to file a schedule of passenger and freight rates, nor by which it can be made to operate a tramroad one day after it sees fit to abandon it, nor can its operation be regulated and controlled even while the road is in operation. It cannot be compelled to run any certain number of trains, either passenger or freight; it cannot be compelled to operate the road every day or every week, nor can it be compelled to operate a train of any sort for any particular distance. The public is only given the right of travel over the particular land condemned; it can use only such portions of the road as are condemned, and can use them only as other public roads are used. The right of travel is by § 3 expressly limited as above stated, and, being so limited, it is absolutely valueless, and it would therefore be absurd to say that any right of travel is conferred upon the public. That section then provides "that any other person, firm, or corporation shall have an equal right to use the said pass ways, tramroads, haul roads, or other means of transportation upon paying com-

pensation therefor;" but it contemplates that a bargain or agreement must be made for each lot of freight that such other person, firm, or corporation desires to move over said roads. If no agreement can be made, then the amount of charge for carrying the freight shall be fixed by the circuit court upon the petition of the person, firm, or corporation desiring to use the same, and that upon prepayment of the amount so fixed by the court, such person, etc., shall have the right to the use of the said roads as therein provided. No penalties are provided by the act for the failure to perform any duty to the public that would devolve upon the defendant in error. It does not even direct the fixing of a rate by the circuit court, except in each particular instance, and then only after a suit has been duly matured and tried. It is hard to conceive of a more absolutely unworkable and useless right in the public than is contemplated by the act. No provision whatever is made for perishable freight, unless the shipper is willing to pay any charge that may be demanded by the owner of the road. The management of the road by the owner may be such as to retard all others than the owner in the use of the road by putting them to great expense, inconvenience, and delay. Not only is the carrier not controlled in any way by the act, but the circuit court, which the act seeks to invest with some sort of jurisdiction, can have no jurisdiction of this matter.

As it seems to us, the whole scheme for providing a private use in the owner of the tramway, together with a public use in the general public, is wholly impracticable, and in any event would be of no value whatever to the general public, so that after all the sole purpose for which the property of the plaintiff in error would be taken is the exclusive use and benefit of the defendant in error.

Our own decisions which have been cited above are in accord with the great weight of authority. Both the decided cases in other jurisdictions and the text writers hold that, where the property to be condemned is to come under the control of private persons or corporations, three qualifications are necessary to impose upon it such a public use as would justify its being taken, viz,

1. The use which the public is to have of the property must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it.

2. The use of the property by the public

must be a substantially beneficial one, which is obviously needed for the public, and which it could not do without, except by suffering great loss or inconvenience.

3. The necessity for condemnation must be obvious. It must obviously appear from the location of the property, or from the character of the use to which it is to be put, that the public could not, without great difficulty, obtain the use of this or other land which would answer the same general purpose, unless it be condemned; and in such case the court will judge of the necessity for condemnation. Thus the public use is all important. There must be an imperious public need. There must be a plain public use in view. The application presented to the court for condemnation is the basis of the proceeding, and it must plainly and affirmatively show the existence of this public need and public use. Because the legislature has assumed to grant the right of eminent domain, and the grant has been accepted, it does not follow that the grantee is a public service corporation. The legislature cannot make a use public by declaring it to be such. The question is whether the declared uses are in law public uses, and that is a question which the courts must determine. Although not forbidden by the Constitution of this state, the legislature cannot authorize the taking of private property for private use, as it is contrary to the fundamental principles of a republican government. A use to the public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of the property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public use must dominate the private gain.

In addition to the authorities above cited, see also an elaborate and able note as to the effect of combination of public and private purposes on the right to exercise the power of eminent domain, to a report of the case of Wisconsin River Improv. Co. v. Pier, 21 L.R.A. (N.S.) p. 538.

For the foregoing reasons, we are of opinion that the act (chapter 75 of Acts 1912) supra is unconstitutional and void, and therefore the judgment of the Circuit Court complained of here will be reversed, and this court will enter the order which the Circuit Court should have entered, dismissing the petition of defendant in error, with costs to plaintiff in error.

Sims, J., absent; case submitted before his term began.

Annotation—Eminent domain: for purposes of logging road or logging railroad.

Scope.

Other specific aspects of the principles applied by the cases cited in this note, to the question as to the exercise of the power of eminent domain for purposes of logging roads and logging railroads, are treated in notes referred to in the Index to L.R.A. Notes under the title, "Eminent Domain," subtitle, "For what purpose."

There are two possible grounds for holding that a logging road or railroad is for the benefit of the public. In the first place, the question may be looked at from the point of view of the service rendered the public by the getting out of the logs and the furnishing of them for use. In addition to this, there is the point of view of the use which the public itself will have in the road or railroad constructed. In this note all cases involving the use of eminent domain for the purpose of establishing logging roads or railroads are considered, ~~whether the point of view the court takes in deciding them.~~

The earlier cases on the question of eminent domain for the purposes of logging railroads are considered in a note to *Cozad v. Kanawha Hardwood Co.* 1 L.R.A.(N.S.) 969, to which reference is made therefor.

General statement.

"The constitutional inhibition against taking private property for public use without compensation by necessary implication prohibits taking private property for private uses." 15 Cyc. 579. It must follow, therefore, that, in absence of constitutional provision to the contrary, the power of eminent domain may be exercised only where the property is taken for public uses. Hence, the question as to what constitutes public uses. That question, as applied to logging roads and railroads, is the one here under discussion.

Constitutional provision authorizing taking for private uses.

As stated above, where the Constitution specifically gives the right to take private property for private purposes, there can, of course, be no objection to the granting of the right of eminent domain for private purposes, and the question as to what are public and what are private uses does not arise.

Thus, it is held in *State ex rel. Mountain Timber Co. v. Superior Ct.* (1914) 77 Wash. 585, 137 Pac. 994, that a stat-

ute giving the right of eminent domain to secure a private way of necessity, and defining the term, "private way of necessity," as including a right of way for the construction and maintenance of logging roads, is not unconstitutional, where the Constitution provides for the condemnation of land for private ways of necessity.

Furnishing of lumber to public as constituting public use.

The question whether public benefit and utility from the development of the natural resources or the industries of a state are a justification for the exercise of the power of eminent domain, independently of the direct use by the public of the facilities afforded, far transcends the scope of this annotation. It is possible to note here only that the broad conception of the public purpose or use essential to the exercise of the power of eminent domain does not seem to have been given effect so far as logging roads or logging railroads are concerned, although it would seem that the development of timber lands might come within this broader view of the question, if it can be justified at all.

In *Anderson v. Smith-Powers Logging Co.* (1914) 71 Or. 276, L.R.A. 1916B, 1089, 139 Pac. 736, an action involving the condemnation of lands for a road from a steamboat landing to some timber land, it is held that so much of a statute "as relates to the establishment of a county road from the timber land or timber of a person owning the same to some public road, steamboat landing, or railway station is unconstitutional, because it in effect attempts to authorize the taking of private property for a private use." This was on the ground that the public had no interest in the road; "the fact that it would facilitate the transportation of said lumber" being held not to make its use public. "Every legitimate business, to a greater or less extent," says the court, "indirectly benefits the public by benefiting the people who constitute the state, but the fact does not make such enterprises public business."

And see *Kirk-Christy Co. v. American Asso.* (1908) 128 Ky. 668, 108 S. W. 232, *infra*, under the heading, "Statute providing that road shall be public."

See also *BOYD v. C. L. RITTER LUM-*

BER Co. ante, 94, and *Cozad v. Kanawha Hardwood Co.* 1 L.R.A.(N.S.) 969.

In *State ex rel. Clear Lake Logging R. Co. v. Superior Ct.* (1915) 83 Wash. 445, 145 Pac. 421, 148 Pac. 7, however, a case involving the right of a toll logging railroad to extend its right of way, the court said that the bringing to mill or market of the timber to be reached by the extension "is certainly a public use."

But apparently the court did not mean that the exercise of the power of eminent domain for that purpose could be sustained apart from the direct service rendered to other members of the public, as it declared that it is the nature, and not the extent, of the use by the public that determines its public character.

Use of highway by public as constituting public use—in general.

Where a highway is built exclusively for the purpose of transporting lumber, and the public is to have no use of it, it cannot, of course, be said to be devoted to a public use.

Thus, it is held in *Hench v. Pritt* (1907) 62 W. Va. 270, 125 Am. St. Rep. 966, 57 S. E. 808, that a railroad built for the exclusive purpose of transporting lumber to a railroad is a private, and not a public, highway, and that a statute authorizing the condemnation of lands for such purposes is unconstitutional.

This case is cited and followed in the similar case of *Scott Lumber Co. v. Wolford* (1907) 62 W. Va. 555, 59 S. E. 516.

And see *Weidenfeld v. Sugar Run R. Co.* (1892) 48 Fed. 615, as set out in the note in 1 L.R.A.(N.S.) 969.

But where the highway is open to use by the public, it seems to be immaterial to what extent the public has availed itself of the privilege of such use.

Thus, in *State ex rel. Clear Lake Logging R. Co. v. Superior Ct.* (1915) 83 Wash. 445, 145 Pac. 421, a case involving the right of a toll logging road to extend its right of way, the court says: "It is also shown that, since the relator began operating the road as at present constructed, it has been used to some extent for the shipment of timber products. The amount of service that has been rendered other parties is not so material in determining the question of the public use, so long as the relator receives without discrimination all that is offered, and has in no respect failed to discharge its duty in this regard." And L.R.A.1917A.

it is added that "the fact that a large part of relator's business would be the transportation of timber for the Perry Lumber Company, and that the timber company would exercise a controlling interest in the logging railroad, does not destroy the character of the relator as a public service corporation, nor change its contemplated use from a public to a private use."

And see, in this connection, *Sultan R. & Timber Co. v. Great Northern R. Co.* (1910) 58 Wash. 604, 109 Pac. 320, 1020.

—accessibility of, to public.

It has been held that a logging railroad built on a strip of land entirely inaccessible to the public is not authorized by a statute providing for the use of eminent domain in acquiring land for temporary highways from timbered lands to streams or railroads, and specifying that such highways shall be public. "To be public," says the court, "it must not only be nominally open to use by the public, but it must be so located that the public can get onto it at some point. A strip of land lying entirely within the lines of private ownership, upon which the public cannot possibly enter without committing trespass on private property, cannot be held to be a public way." It is added further that "the fact that the respondents have carried some passengers over the railroad, and also some freight for others, cuts no figure. The respondents are not common carriers. They could not be compelled to carry a pound of freight or a single passenger." *Wallman v. R. Connor Co.* (1902) 115 Wis. 617, 92 N. W. 374.

And see *Bridal Veil Lumbering Co. v. Johnson* (1896) 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790, and *Apex Transp. Co. v. Garbade* (1898) 32 Or. 582, 62 L.R.A. 513, 52 Pac. 573, 54 Pac. 367, 882, as set out in the note in 1 L.R.A.(N.S.) 969.

—statute providing that road shall be public.

Some statutes conferring the right of eminent domain for the purpose of logging roads and railroads attempt to get around the rule that the purpose of such roads must be public, by prescribing that all roads established under their provisions shall be public. But even under such statutes it is still a question in each instance whether the road is subject to such use as will make it public.

In *Chapman v. Trinity Valley & N. R.*

Co. (1911) — **Tex. Civ. App.** —, 138 S. W. 440, where it was objected that the proposed railroad was organized primarily to subserve the interest of a certain lumber company by which it was owned, in transporting its lumber to market, it was held that, in view of the duties to the public imposed by statute upon it as a railroad, it must be deemed to be for the use of the public. "It may not have been called upon to serve the general public, either in the carriage of freight or passengers," says the court, "but it must carry every passenger who presents himself for carriage, and every pound of freight offered for transportation. . . . The character of a way, whether public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised."

Under a clause in a statute giving the power of eminent domain to companies organized to construct logging railroads, which requires such railroad to "transport all timber products offered to it for carriage," the public service required is held, in *State ex rel. Clark v. Superior Ct.* (1911) 62 Wash. 612, 114 Pac. 444, to be sufficient to support the grant of the right of eminent domain. With respect to the contention that only timber products are required to be carried, the court says: "Every person desiring to ship timber products over such road may require the corporation to carry such timber products under exactly the same conditions. This is certainly a public service; and we are not able to see that it is any less a public service because the corporation is a common carrier of a particular class of property. Every public service corporation is engaged in a business which is more or less limited in character. The fact that such business is so limited does not change its character so far as the right of the public to command the service of the corporation in its particular business is concerned. An express company is generally a common carrier of a particular class of property. A street or interurban railway company may be a common carrier of passengers only. No one would contend that such companies are not public service corporations because of the limited character of their business."

In *Kirk-Christy Co. v. American Asso.* (1908) 128 Ky. 668, 108 S. W. 232, an action involving the right of the owner of timber to condemn a right of way over the lands of others for the

purpose of getting out its timber, an act is held constitutional which provides for condemnation by a private individual so as to allow the establishment of "a private tramroad or haul road over the land of one or more persons to enable him to reach a warehouse, steamboat landing, ferry, railroad switch, or navigable stream, for the purpose of marketing the products of a lead mine, ironworks, salt works, coal mine, fire clay, and other minerals, oil wells, stone quarry, sand bank, or merchantable forest timber," and which provides further that "nothing in this act shall operate to give any person . . . exclusive use of such passage; but any other person . . . shall have the right to use the same upon paying proper compensation therefor." The court does not discuss the point involved here, but refers to *Chesapeake Stone Co. v. Moreland* (1907) 126 Ky. 656, 16 L.R.A.(N.S.) 479, 104 S. W. 762, in which the question of the constitutionality of the statute was settled. In that case, which involved the right to condemn land for a tramway from petitioner's stone quarry to a railroad, the court, after holding that eminent domain can be grounded only upon public benefit, says: "The controlling and decisive question is: Have the public the right to its use upon the same terms as the person at whose instance the way was established? If they have, it is a public use; if they have not, it is a private one. If the owner can exercise the same kind of dominion over it as he does over other property owned by him, if he can close it up, if he can prohibit all or any part of the public from its use,—then it is clear that its establishment would be private, and not public; and the right of eminent domain could not be invoked in its creation. Nor is the fact that the public interest will be promoted by the contemplated improvement sufficient to authorize the taking in the absence of the right on the part of the public to participate in the enjoyment of the property taken. If public use was construed to mean that the public would be benefited in the sense that the enterprise or improvement for the use of which the property was taken might contribute to the comfort or convenience of the public, or a portion thereof, or be esteemed necessary for their enjoyment, there would be absolutely no limit on the right to take private property. It would not be difficult for any person to show that a factory or hotel or other

like improvement he contemplated erecting or establishing would result in benefit to the public. . . . The only limitation upon the right of the individual . . . is found in the provision that any other person . . . shall have the right to its use upon paying reasonable compensation. . . . Giving to this provision the most liberal construction, it may be deemed to allow a use by the public of the way, although the person at whose instance it was taken opposes it; and hence it will be considered to have been taken for a public use, not upon the ground that the public will be benefited by the product gathered from the mine, well, or forest, but upon the ground that the public, or any number so desiring, may use the way."

But see *BOYD v. C. L. RITTER LUMBER Co.* ante, 94, involving a statute similar to that set out in the preceding case, where, in view of the fact that a

tramway constructed under its provisions could not be compelled to operate trains, or to continue the operation of the tramway, it was held that the public's use was such that it could be defeated by the private owner, and the statute was held unconstitutional. These cases may be reconciled on the ground that the one involved a wagon road while the other involved a railroad. In the former the owner of the road had done all that was necessary to the use of the road by the public when he had constructed it. In the latter he was required either to run trains of his own or to establish regulations for the running of them by others, before the public could make any use of it.

And see *Wallman v. R. Connor Co.* (1902) 115 Wis. 617, 92 N. W. 374, supra, under the heading, "Accessibility of highway to public." E. L. D.

CONNECTICUT SUPREME COURT
OF ERRORS.

DAVID PITCHER, Exr., etc., of Mary
Dutton, Deceased,

v.

CLARK H. STANDISH.

(— Conn. —, 98 Atl. 93.)

**Bankruptcy — superseding state law —
involuntary proceedings against
farmers.**

The provisions of the Federal Bankruptcy Act allowing voluntary proceedings in case of the indebtedness of farmers, and denying the right to institute involuntary proceedings against such persons, do not annul state statutes providing for such involuntary proceedings.

For other cases, see *Bankruptcy, I. in Dig.* 1-52 N. S.

(June 27, 1916.)

RESERVATION by the Superior Court for New London County for the opinion of the Supreme Court of Errors, of a demurrer to defendant's reason of appeal from an order of the Probate Court, adjudging him to be an insolvent debtor, and appointing a trustee over his property, in invol-

untary insolvency proceedings. Demurrer sustained.

The facts are stated in the opinion.

Mr. William A. King for plaintiff.

Messrs. Thomas M. Shields and William H. Shields, Jr., for defendant:

Congress, when the acts of 1898 relating to bankruptcy were passed, had the power to establish uniform laws on the subject of bankruptcies throughout the United States; and the acts of 1898 are an exercise of that power, and, as such, superseded and put in abeyance the insolvent laws of this state.

Ketcham v. McNamara, 72 Conn. 709, 50 L.R.A. 641, 46 Atl. 146; *Rockville Nat. Bank v. Latham*, 88 Conn. 71, 89 Atl. 1117; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 70 Am. St. Rep. 258, 51 N. E. 529; *Slosser v. Strawn*, 227 Fed. 146.

The Federal Bankruptcy Act applies to farmers. Should the probate court take jurisdiction a voluntary petition in bankruptcy by Standish would terminate it,—all to no purpose but that of useless litigation and unnecessary expense.

Re *F. A. Hall Co.* 121 Fed. 993, contains a true exposition of the law.

Ketcham v. McNamara, 72 Conn. 709, 50 L.R.A. 641, 46 Atl. 146; *Norcross v. Nathan*, 90 Fed. 414; *Littlefield v. Gay*, 96 Me. 422, 52 Atl. 925; *Re J. W. Zeigler Co.* 189 Fed. 259; *Leidigh Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 638.

Prentice, Ch. J., delivered the opinion of the court:

This is an appeal from an order and decree of a court of probate, passed upon the petition of creditors, adjudging the defend-

Note.—As to effect upon state insolvency laws of provisions of Federal Bankruptcy Act excepting farmers, wage earners, and small debtors from involuntary bankruptcy, see annotation following this case, post, 109.
L.R.A.1917A.

ant, a person engaged chiefly in farming and the tillage of the soil, to be an insolvent debtor, and appointing a trustee in insolvency to take possession of, manage, and dispose of his estate, as provided by the insolvency laws of this state. The person so declared an insolvent debtor appeals for the sole reason that the probate court was without jurisdiction or authority to make the order and decree, since the statutes of the state, purporting to confer such jurisdiction and authority, were rendered inoperative by reason of the existence of the Federal Bankruptcy Act then in force. This reason of appeal is demurred to, and the question thus presented reserved for our advice.

It is undoubted law that the enactment by Congress of the Bankruptcy Act of 1898 suspended and held in abeyance during its existence all insolvency laws of the several states then in existence or subsequently passed, conflicting therewith. *Sturges v. Crowninshield*, 4 Wheat. 122, 208, 4 L. ed. 529, 551; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 229, 17 L. ed. 531, 532; *Tua v. Carriere*, 117 U. S. 201, 210, 29 L. ed. 855, 858, 6 Sup. Ct. Rep. 565. State laws are in conflict with Federal, within the meaning of this statement of principle, when the two cover the same field, or the subject-matter of the state law is within the purview of the Federal legislation. *Re Eames*, 2 Story, 322, 326, Fed. Cas. No. 4,237; *Harbaugh v. Costello*, 184 Ill. 110, 113, 75 Am. St. Rep. 147, 56 N. E. 363; *Ketcham v. McNamara*, 72 Conn. 709, 711, 50 L.R.A. 641, 46 Atl. 146.

In consonance with this principle, we have held that our state courts were without jurisdiction in voluntary insolvency of a farmer, since the Federal Bankruptcy Act provides for the distribution of his estate among his creditors by proceedings in voluntary bankruptcy. *Rockville Nat. Bank v. Latham*, 88 Conn. 70, 89 Atl. 1117.

The case now before us presents a different situation and a more difficult question. The proceedings, in the course of which the order and decree appealed from were made, were in involuntary insolvency, while the Bankruptcy Act expressly excepts farmers, as well as wage earners and debtors owing less than \$1,000, from the category of those who may be adjudged involuntary bankrupts. Bankruptcy Act, § 4, 30 Stat. at L. 547, chap. 541, Comp. Stat. 1913, § 9588. The question we have to determine thus becomes narrowed to one whether or not the provisions of our state law providing for involuntary insolvency are suspended and rendered inoperative as to farmers by the existence of the Federal law which pro-

vides for the voluntary but not involuntary bankruptcy of that class of persons.

The question thus presented has not, as far as we are aware, been before the Supreme Court of the United States for authoritative determination, and we are left to answer it with only such help as may come from the few decisions of the state and inferior United States courts which have had occasion to give utterance to their views upon the subject. These decisions are not in full accord.

In *Littlefield v. Gay*, 96 Me. 422, 52 Atl. 925, the court squarely decided that the existence of the Bankruptcy Act deprived the state courts of all jurisdiction, in either voluntary or involuntary insolvency, in the case of an insolvent debtor owing less than \$1,000, who, in the act, is classed with the farmer. The reason given was, in substance, that as the act provided that such person might voluntarily invoke the aid of the Federal courts, and thereby put an end to the jurisdiction of the state court, assumed in involuntary proceedings, it followed that he and his property were subjected to the bankruptcy act and brought within its purview.

The defendant cites *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 70 Am. St. Rep. 258, 51 N. E. 529, in support of his contention that state jurisdiction in cases like his has been suspended. Despite the broad language used in the closing sentence of the opinion, we fail to find justification for this citation. The question involved in the case was one as to the date when the Bankruptcy Act took effect, and the state courts, as a consequence, lost their jurisdiction. In the course of its brief opinion, the court refers to the act as superseding, from the time it took effect, all conflicting state provisions, and in another place says that the rights of all persons "in the particulars to which the act refers" are to be determined by the act. Nowhere is it said or intimated that the act supersedes other than conflicting provisions, until, in its concluding sentence, the court says that it is of the opinion that the new system of bankruptcy superseded "all state laws in regard to solvency from the date of the passage of the statute." Evidently the court had here in mind the date of the suspension created by the statute, and not the scope of that suspension, and the court did not mean to assert the untenable doctrine that all insolvency legislation, whether conflicting or not, was rendered inoperative by the passage of the act.

Closser v. Strawn, 227 Fed. 139, 146, is another case referred to by the defendant. It was a case in the district court of the western district of Pennsylvania, involving

a question arising out of the voluntary assignment by a farmer under the Pennsylvania laws. In the course of his opinion the district judge made a correct statement of the pertinent principle that, the Bankruptcy Act being in force, no farmer who declined to avail himself of its provisions could avail himself of the insolvency act of Pennsylvania, and then added, "or be subjected to the requirements of that act." For this last obiter dictum assertion he assigns no reason beyond that contained in the general proposition that, where Congress has exercised its power over a subject, the control of the states over that subject is prohibited. He seems to have assumed that what Congress has done as respects the insolvent condition of farmers, wage earners, and small debtors, amounts to an exercise of control over that whole subject.

Cases either expressly or by plain implication holding a contrary doctrine include: *Old Town Bank v. McCormick*, 96 Md. 341, 351, 60 L.R.A. 577, 94 Am. St. Rep. 577, 53 Atl. 934; *Lace v. Smith*, 34 R. I. 1, 12, 82 Atl. 268, Ann. Cas. 1913E, 945; *Keystone Driller Co. v. Superior Ct.* 138 Cal. 738, 742, 72 Pac. 398; *Singer v. National Bedstead Mfg. Co.* 65 N. J. Eq. 290, 55 Atl. 868; *Citizens' Nat. Bank v. Gass*, 29 Pa. Super. Ct. 125; *Rittenhouse's Insolvent Estate*, 30 Pa. Super. Ct. 468. The Maryland case above cited contains the most satisfactory and convincing discussion of the subject which has come under our notice, and with most of its reasoning we heartily concur.

It is undoubted law that the Federal act does not suspend the operation of state laws in so far as the latter affect classes of persons who are expressly excepted from the operation of its provisions, or which those provisions do not reach. Such classes include municipal, railroad, insurance, and banking corporations, which the act expressly excepts. *Sturges v. Crowninshield*, 4 Wheat. 122, 195, 4 L. ed. 529, 548; *R. H. Herron Co. v. Superior Ct.* 136 Cal. 279, 89 Am. St. Rep. 124, 282, 68 Pac. 814; *Old Town Bank v. McCormick*, 96 Md. 341, 352, 60 L.R.A. 577, 94 Am. St. Rep. 577, 53 Atl. 934; *Simpson v. City Sav. Bank*, 56 N. H. 466, 22 Am. Rep. 491.

Equally, and for the same reasons, it must be true that whatever classes of cases are either expressly excepted from the operation of the Bankruptcy Act, or lie outside of the reach of its provisions, are left subject to state regulation. Such classes of cases and the conditions and situations which produce them are not within the field covered by the Federal act, and legislative provisions concerning them by the states cannot be said to be in conflict in any way L.R.A.1917A.

with the Federal legislation. The power and jurisdiction of the states in the field of insolvency regulation is full and complete, except as Federal legislation may invade and thereby limit it; and it is limited by such legislation only to the extent of that invasion. Wherever the field is not thus restricted, it must follow as a logical consequence that the power of the states remains. The field of restriction certainly cannot be broader than that of the operation of the Federal statute. In other words, the test to be applied in determining whether or not the Federal act suspends state laws is not one based upon a classification of persons, but upon a less arbitrary and more logical and just classification of cases, situations, and conditions in so far, at least, as they fall into clearly defined groups. Otherwise some portion of the proper field of bankruptcy and insolvency legislation is quite likely to remain unoccupied. *Sturges v. Crowninshield*, 4 Wheat. 122, 195, 4 L. ed. 529, 548; *Ex parte Eames*, 2 Story, 322, 326, Fed. Cas. No. 4,237; *Singer v. National Bedstead Mfg. Co.* 65 N. J. Eq. 290, 294, 55 Atl. 868; *R. H. Herron Co. v. Superior Ct.* 136 Cal. 279, 282, 89 Am. St. Rep. 124, 68 Pac. 814; *Lace v. Smith*, 34 R. I. 1, 12, 82 Atl. 268, Ann. Cas. 1913E, 945; *Re Macon Sash, Door & Lumber Co.* (D. C.) 112 Fed. 323, 331.

The pertinent questions thus are: "Does the Federal act, in the purpose and intent of its framers, cover the field which these cases, situations, and conditions occupy? Did Congress intend to bring them within its purview and make its provisions in view of them and to govern them?" If so, the Federal act is paramount and exclusive; if not, it does not invade the province of state legislation, and leaves such legislation free to provide for them. As Chief Justice Marshall, referring to insolvency matters, said in *Sturges v. Crowninshield*, 4 Wheat. 122, 195, 4 L. ed. 529, 548: "It may be thought more convenient that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach."

It would thus appear that the crucial inquiry in this case is as to the intent of Congress in framing the provisions of the Bankruptcy Act, and that intent must be gathered from the language of the act, examined in the light of the subject with which it deals and the remedial purposes of legislation upon that subject. Its remedial provisions are extended to the farmer, in

that the door of voluntary bankruptcy is open to him. On the other hand, it is expressly provided that he may not be adjudged an involuntary bankrupt. Did Congress in so legislating intend to cover the whole field of his insolvent condition, and intend to provide in his case and in that of the wage earner and the small debtor, who were classed with him, that the only means of securing the equal distribution of his assets among his creditors should be through the medium of voluntary bankruptcy, or was its intent and purpose to leave the matter of securing such distribution upon the initiative of creditors untouched, and therefore subject to the regulation of the states? By the exception of municipal, railroad, insurance, and banking corporations from the operation of both voluntary and involuntary bankruptcy provisions, as made in § 4, it clearly was not intended that there should be no state regulation as to those corporations when insolvent, and therefore none at all. Shall a different intent be drawn when the farmer, wage earner, and small debtor are excepted from the operation of its involuntary operations only? Shall we say that the one exception implies no intent to legislate for persons within the classes named, while the other exception does? If so, it must be for the sole reason that some provision was made for the latter class; that is, one permitting them to become voluntary bankrupts.

We take it to be well settled that the intent to supersede the execution of state powers in respect to matters not covered by direct Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. *Savage v. Jones*, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715. The controlling question here is whether or not Congress has chosen to occupy a limited field.

Judge Taft, in *Leidigh Carriage Co. v. Stengel*, 37 C. C. A. 210, 220, 95 Fed. 637, 647, has stated the proper purposes of a bankruptcy act to be: "First, . . . to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden of debts which, through business misfortunes and otherwise, they have incurred, and which they are unable to pay."

And again he pertinently says that the involuntary nature of insolvency and bankruptcy laws is chiefly directed against frauds upon creditors. 37 C. C. A. 210, 95 Fed. 648. With no provision for involuntary proceedings in the case of an insolvent

person in either the Federal or state courts, the first two of the three purposes above enumerated are only meagerly satisfied, and the chief object aimed at by involuntary proceedings entirely missed. Creditors are left to the ordinary, and frequently inadequate, machinery of the law or the debtor's volition for their protection. They are powerless to compel an equal distribution of his assets among them. He may confer the favor of such a distribution upon them. They cannot secure it against his will. We can hardly assume that Congress intended to deprive creditors of that right, generally if not universally, accorded to them by the states. If the existence of the Bankruptcy Act forbids all state legislation dealing summarily with the insolvent condition of farmers, wage earners, and small debtors, its effect is to deprive their creditors of rights they have long enjoyed and which the creditors of other persons are permitted to enjoy. We can more readily believe that Congress deemed it wiser that Federal jurisdiction be not assumed in the matter of proceedings *ad invitum*, and that such action be left for state regulation as local conditions might seem to require. True, the debtor might, if he preferred, avail himself of the voluntary provision of the Federal law, and oust the state courts of jurisdiction, once assumed; but he need not do so, and, whether he did so or not, he could not defeat the desire of his creditors for an equal distribution of his assets among them.

Upon this aspect of the case the following observations in *Geery's Appeal*, 43 Conn. 280, 302, 21 Am. Rep. 653, are peculiarly pertinent: "The equal distribution of a bankrupt's property among his creditors is a leading and prominent feature of both national and state laws. It has now become a controlling principle in the laws relating to debtor and creditor. Upon the belief that it will be strictly applied and faithfully administered, in case of bankruptcy, the business of the country is carried on and credit given. The benefit of this principle cannot be denied to a creditor who is in no fault without doing him injustice. It is a remedy upon which he relied in giving credit and to which he is fairly entitled. If that remedy is not to be found in the Bankrupt Act, it will not be presumed that Congress intended to take away the remedy provided by the state."

We are of the opinion that Congress did not intend to bring the situation, created by the unwillingness of insolvent farmers, wage earners, and small debtors to submit themselves of their own volition to the jurisdiction of the Federal bankruptcy courts for the equal distribution of their estates among their creditors, within the purview

of the Bankruptcy Act, or to cover the field created by that condition, not unlikely to arise, and that the provisions of our state legislation regulating such situations and conditions are therefore not suspended and rendered inoperative by reason of the existence of the Bankruptcy Act.

The Superior Court is advised to enter

up judgment sustaining the demurrer to the defendant's reasons of appeal, dismissing the appeal, and affirming the order and decree appealed from. Costs in this court will be taxed in favor of the plaintiff.

In this opinion the other Judges concur.

Annotation—Effect upon state insolvency laws of provisions of Federal Bankruptcy Act excepting farmers, wage earners, and small debtors from involuntary bankruptcy.

Generally as to relation of bankruptcy laws to assignments and insolvent proceedings under state law, see note to State ex rel. Strohl v. Superior Ct. 45 L.R.A. 177.

Applying the broad general rule long since established by the Supreme Court of the United States that the enactment by Congress of a uniform bankruptcy law suspends or supersedes existing state insolvency laws only in so far as the latter conflict with a paramount Federal statute, it would seem to follow that state insolvency laws would not be affected, with respect to provisions relating to involuntary proceedings against persons not reached by the Federal act, such as farmers, wage earners, and small debtors, who are, by § 4 of the act of 1898, expressly excepted from among those who may be declared involuntary bankrupts thereunder, since in such a case there would be no conflict between the state and Federal laws.

And this conclusion is supported by the weight of authority, which is to the effect that the provisions of the Federal Bankruptcy Act allowing voluntary proceedings in case of the indebtedness of a farmer, wage earner, or person owing less than \$1,000, and denying the right to institute involuntary proceedings against such persons, do not annul state statutes providing for involuntary proceedings against such classes of persons. The following cases so hold: *PITCHER v. STANDISH*, ante, 105 (farmer); *Old Town Bank v. McCormick* (1903) 96 Md. 341, 60 L.R.A. 577, 94 Am. St. Rep. 577, 53 Atl. 934, 10 Am. Bankr. Rep. 767 (farmer); *Citizens' Nat. Bank v. Gass* (1905) 20 Pa. Super. Ct. 125, quoted with approval in *Charles v. Smith* (1905) 29 Pa. Super. Ct. 594 (holding that wage earners and farmers are subject to the Pennsylvania insolvency act, as such statute is only suspended by the Federal Bankruptcy Act as to persons who can be made subject to that act, to which farmers and wage earners cannot

be, because expressly excepted therefrom); *Rittenhouse's Insolvent Estate* (1906) 30 Pa. Super. Ct. 468 (farmer); *Miller v. Jackson* (1907) 34 Pa. Super. Ct. 31 (farmer); *Hoover v. Ober* (1910) 42 Pa. Super. Ct. 308 (farmer); *Landis Mach. Co. v. Cooper* (1913) 53 Pa. Super. Ct. 416 (insolvent owing less than \$1,000); *Lace v. Smith* (1912) 34 B. L. 1, 82 Atl. 268, Ann. Cas. 1913E, 945 (farmer). In *Old Town Bank v. McCormick* (Md.) supra, the court discussed this question and stated the reasoning upon which its conclusion was based, as follows: "It appears that the defendant is expressly excepted from the provision of the act relating to involuntary bankruptcy, and, therefore, as to this class to which the defendant belongs, i. e., farmers or tillers of the soil, the Federal power has not been exercised. And it therefore follows that if this class is not within the state law, there is no existing provision under which those embraced within it can be compelled to distribute their assets fairly and equally among their creditors . . . can it be properly or correctly said that any conflict can exist between the state and the Federal law so long as the latter, by express terms, excludes from its operation the subject or class of persons expressly provided for by the state law? The power to enact insolvent or bankrupt laws is vested in the states, and it cannot be extinguished except by the establishment of a Federal system in conflict with the state law. And this Federal system of bankruptcy must be a genuine bankrupt law . . . the power to pass a uniform system of bankruptcy must be actually exercised, and the state law must be in conflict with it in order to render the latter inoperative. The question, therefore, logically arises, does the present Federal Bankrupt Law actually provide for involuntary proceedings against farmers? And the answer must be that it does not; but the answer of the defendant

goes further and necessarily must do so in order to save his case. He says it is true that while this class is not included, and is expressly excepted, from the involuntary feature of the system, yet it is included in the voluntary feature, and therefore it is within the scope of the national system. We cannot approve of this method of reasoning, not only because it would seem to be a 'contradiction in terms to say that cases excepted from the operation of the most important part of the act are included in its scope,' but because it would seem to involve the proposition that the Federal power can render inoperative the state insolvent laws applicable to involuntary insolvency without establishing a genuine bankrupt law to take the place of the state law. As we have already seen, it has been held from an early day that it is only to the extent that Congress has actually legislated upon the subject that the statutes of the several states are suspended by its legislation. How, then, can it be said that a failure to legislate—in other words, that an express exclusion—raises a conflict? But without pursuing this question further it seems to us that the position taken by the defendant must necessarily lead to the conclusion that if the Congress of the United States can, by including this class in the voluntary part of the system and excepting it from the involuntary part, withdraw it from the operation of our state insolvent law, it can do the same in regard to any two or more classes; as, for instance, merchants, traders, and corporations; and the result would be that, in spite of the failure on the part of Congress to establish a bankrupt law,—that is, to actually exercise the power conferred by the Constitution to pass a genuine bankrupt law,—state legislation would become inoperative, and creditors would be deprived of a remedy to which . . . they are fairly entitled. . . . It is not within the power of Congress to render inoperative the involuntary feature of state insolvent laws as to any particular class by excepting that class from the involuntary part of the national law. Otherwise the result would be that the state laws as to involuntary insolvency would become inoperative by the mere existence of the power of the United States to establish a system of involuntary bankruptcy. We have seen, however, that it is not the mere existence, but the exercise of the power to establish a genuine bankrupt law in conflict with the state laws, which renders the L.R.A.1917A.

latter inoperative." And in *Lace v. Smith* (R. I.) supra, the court said: "Under the provisions of the Federal law, § 4a: 'Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt,' and under said § 4b, with certain exceptions, any natural person, and certain corporations, owing debts to the amount of \$1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of the act. The exceptions alluded to comprise wage earners and persons engaged chiefly in farming, or the tillage of the soil. It is manifest therefrom that the respondent Clarence A. Smith, being a person engaged chiefly in farming or the tillage of the soil, is expressly excepted and exempted from the involuntary provisions of the bankruptcy act. As a person, said respondent is entitled to the benefits of the act if he seeks them as a voluntary bankrupt, but he cannot be forced into involuntary bankruptcy, because he is a farmer. If the state and Federal statutes conflict, it must be because the former may be applied to a person included within the terms of the latter. However, no such conflict has arisen in this case. Clarence A. Smith, who is entitled to apply for the benefit of the bankruptcy act, did not make application for relief as an insolvent under the state statute. Neither is there in this case any conflict of jurisdiction between the state and the United States courts. Up to the present time the state courts have taken jurisdiction of the parties and subject-matter of the litigation, and, for aught that appears, nothing has been done in the way of invoking the jurisdiction of the courts of the United States in the premises. But the argument that state statutes must not be applied to persons who may be entitled to relief under the Federal law takes too narrow a view of the subject. To repeat the language of Chief Justice Marshall: 'It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach.' Cases and not persons alone should be the test. Tried by this test, does the Bankruptcy Act provide for the involuntary bankruptcy of wage earners or farmers? It not only does not, but specially exempts them from its provisions. Therefore the

power of the state may be considered as existing over such cases."

And it has been held that the Federal Bankruptcy Act of 1867, which applied in all cases where the indebtedness exceeded \$300, did not suspend a state insolvency law so as to prevent involuntary proceedings thereunder where it did not appear that the debtor owed over \$300. *Shepardson's Appeal* (1869) 36 Conn. 23. In this case the court said that unless it appeared affirmatively that the debts were over \$300, there was no conflict between the state and the Federal laws, and that the state law was clearly operative in all cases which were not within the provisions of the United States law. And see *Simpson v. City Sav. Bank* (1876) 56 N. H. 466, 22 Am. Rep. 491, wherein the court quoted with approval from *Bump on Bankruptcy*, 243, as follows: "Where the Bankrupt Act expressly excepts a class of cases, it must have been the intention of Congress not to interfere in such specified class with the laws of the several states."

But the rule that the Federal Bankruptcy Act does not suspend state insolvent laws as to the class of persons under consideration has not been uniformly adhered to. Thus, in the Maine case of *Littlefield v. Gay* (1902) 96 Me. 422, 52 Atl. 925, 8 Am. Bankr. Rep. 409, it was expressly held that the state insolvency law allowing involuntary proceedings against persons owing over \$300 and less than \$1,000 could not be invoked, and in fact was superseded by the Federal Bankruptcy Act, the court saying: "Under the bankruptcy law

Blackington could have gone into bankruptcy voluntarily, but could not be forced in by his creditors, under involuntary proceedings. He was asked to go in and refused. It is argued with great ability that in that condition, the state insolvency law may be invoked. Plausible as the argument is, we do not regard it as sound. At any time after proceedings under the state law, Blackington could have voluntarily invoked the bankrupt law, and thereupon all proceedings under the state law would necessarily cease. The test of jurisdiction under the state law does not rest upon the volition of the debtor. If his person and property are or may be subject to the bankrupt law, then as to him and his possessions the state insolvency law is in abeyance and powerless. Upon any other view, it would be in the power of the debtor at any time to oust the jurisdiction of the state court, after it had been assumed. This would result in great confusion. It may be avoided by holding, as we do, that where the person falls within the purview of the Bankrupt Act, whether by voluntary or involuntary proceedings, the state insolvent law must be silent." And see the dictum in *Closser v. Strawn* (1915) 227 Fed. 139 (quoted and discussed in *PITCHER v. STANDISH*, ante, 105), to the effect that a farmer who declines to avail himself of the provisions of the Bankruptcy Act can neither avail himself of the provisions of a state insolvency act nor "be subjected to the requirements of that act." G. J. C.

ARKANSAS SUPREME COURT.

B. F. BUSH, Receiver for the St. Louis, Iron Mountain, & Southern Railway Company, Appt.,

v.

R. P. BARKSDALE.

(122 Ark. 262, 183 S. W. 171.)

Appeal — from order granting new trial — effect of stipulation for judgment absolute.

One who has appealed from an order granting a motion for new trial, with a statutory stipulation for judgment absolute in case of affirmance, cannot elect to dismiss his appeal and proceed with the new trial. *For other cases, see Appeal and Error, VI. a, in Dig. 1-52 N. S.*

(February 7, 1916.)

Note.—As to right of appellant to dismiss appeal or writ of error, see annotation following this case, post, 113.
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APPEAL by defendant from an order of the Circuit Court for Lonoke County, granting plaintiff's motion for new trial of an action brought to recover damages for personal injuries sustained by him while in defendant's employ. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. Troy Pace for appellant.

Messrs. Frank W. Rawles, Sam M. Wassell, Trimble & Williams, and Harry M. Woods for appellee.

Per Curiam:

This is an appeal from an order of the circuit court granting appellee's motion for a new trial. Appellant filed a stipulation, in accordance with the terms of the statute, containing "an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant." Kirby's Dig. § 1188.

The transcript was not lodged in this

court within ninety days, as required by statute, and appellee filed a motion to affirm the judgment in accordance with the rules of the court. The rules provide that an appellant may, at any time before such a motion is submitted to the court, prevent a judgment of affirmance by offering to prosecute the appeal or to dismiss the appeal, in which case the motion to affirm shall be overruled as a matter of course. In this case the appellant responded to the motion by a motion to dismiss the appeal. That motion is contested by appellee on the ground that appellant cannot dismiss an appeal from an order granting a new trial. The contention of appellee is not sound, strictly speaking, for an appeal in any case may be dismissed by the appellant as a matter of right, for the purpose of praying another appeal, or, in any case other than an order granting a new trial, for the purpose of submitting to the judgment appealed from. But appellant does not seek to dismiss the appeal for the purpose of prosecuting another appeal. It is candidly conceded that another appeal would be unavailing for the reason that there is no bill of exceptions in the case, and that the judgment would be affirmed on that account. The purpose is to dismiss the appeal in order to submit to the order granting a new trial. The real question presented to us for decision is whether or not such an appeal can be abandoned so as to proceed with a new trial.

The decision of that question calls for a construction of the statute on the subject. It provides, as before indicated, that no appeal from an order granting a new trial "shall be effectual for any purpose, unless the notice of appeal contains an assent on the part of the appellant that, if the order be affirmed, judgment absolute shall be rendered against the appellant." It is further provided by statute that, on appeal from an order granting a new trial, "if the supreme court shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages or other proceedings to render judgment effectual, may be then and there had in cases where such subsequent proceedings are requisite." Kirby's Dig. § 1238. The effect of the statute is to make the order granting a new trial a final and appealable judgment, if the appellant stipulates as above indicated; otherwise, the

order is not appealable. We have so treated such orders in many cases. *Osborn v. Le Mafre*, 82 Ark. 490, 102 S. W. 372; *Huddleston v. St. Louis, I. M. & S. R. Co.* 88 Ark. 454, 115 S. W. 381; *Taylor v. Grant Lumber Co.* 94 Ark. 566, 127 S. W. 962; *Blackwood v. Eads*, 98 Ark. 304, 135 S. W. 922; *McDonnell v. St. Louis Southwestern R. Co.* 98 Ark. 334, 135 S. W. 925; *McIlroy v. Arkansas Valley Trust Co.* 100 Ark. 596, 141 S. W. 196. There is a discussion of other subdivisions of the same section of the statute in the case of *Davie v. Davie*, 52 Ark. 224, 20 Am. St. Rep. 170, 12 S. W. 558, and in the recent case of *State v. Greenville Sand & Gravel Co.* 122 Ark. 151, 182 S. W. 553, where it was held that interlocutory orders cannot be appealed from.

But, as before stated, an order granting a new trial is by the statute made final upon the filing of a stipulation that it may be so treated, as a decision either way as to the correctness of the order settles the rights of the parties. The stipulation constitutes an election not to submit to a new trial, and it is irrevocable. It deprives the trial court of jurisdiction to proceed with another trial except "for an assessment of damages or other proceedings to render the judgment effectual" in case this court "shall determine that no error was committed in granting the new trial." The order granting a new trial is necessarily self-executing and cannot be superseded except by an appeal taken in the manner prescribed by the statute; and, when the appeal is taken, the force of the order cannot be reinstated by an abandonment of the appeal. If the appeal be not prosecuted, the appellee has the right under the statute (Kirby's Dig. § 1195) to file a transcript of the record and ask for an affirmance, which operates as a final adjudication of the rights of the parties in the subject-matter of the litigation. The principle that an election of remedies is irrevocable seems too plain for argument to the contrary, and its application to the proceeding now under discussion is obviously proper. 15 Cyc. 262.

The motion of appellant to dismiss the appeal is therefore overruled, and judgment absolute will be entered to the effect that appellee is entitled to recover in accordance with the prayer of his complaint, and the cause will be remanded for an assessment of damages and for other proceedings not inconsistent with this opinion.

It is so ordered.

Annotation—Right of appellant to dismiss appeal or writ of error.

I. General rules, 113.

II. Where appellee would be prejudiced, 115.

III. Where third persons would be prejudiced, 116.

IV. Where appellant has entered into stipulation, 117.

V. When dismissal may be made, 117.

VI. Withdrawal of part of several appellants, 118.

VII. Dismissal of one of several appellees, 119.

VIII. Effect of cross errors, 119.

IX. Effect of dismissal on judgment, 120.

X. Costs on dismissal, 120.

XI. Appeal bond on dismissal, 120.

XII. Right of dismissal as affected by statute, 120.

I. General rules.

In the absence of statute,¹ it has been generally held that an appellant or plaintiff in error may dismiss his appeal or writ of error.² In view of the general practice of granting both parties to a judgment or order the right of appealing therefrom, this rule seems entirely equitable and fair.³ Where the appellee has had the opportunity of appealing on his own behalf, and has not taken ad-

¹ See *infra*, subd. XII.

² *Yell v. Outlaw* (1858) 14 Ark. 164; *Re Degnan* (1901) 132 Cal. 260, 64 Pac. 485; *Re Breisen* (1898) — Conn. —, 41 Atl. 774; *Evans v. Humphreys* (1896) 9 App. D. C. 392; *Kenneker v. McMichael* (1861) 33 Ga. 94; *Ransom v. Coleman* (1872) 45 Ga. 316; *Dozier v. Williams* (1876) 57 Ga. 600; *Brantley v. Buck* (1878) 62 Ga. 172; *Collins Park & B. R. Co. v. Short Electric R. Co.* (1894) 95 Ga. 570, 20 S. E. 495; *Delta v. Walker* (1860) 24 Ill. 233; *Bacon v. Lawrence* (1861) 26 Ill. 53; *Thorp v. Thorp* (1866) 40 Ill. 113; *Field v. Kenneweg* (1905) 218 Ill. 366, 75 N. E. 986; *Granat v. Kruse* (1904) 213 Ill. 328, 72 N. E. 744; *Ring v. Graves* (1900) 90 Ill. App. 269; *Feder v. Field* (1889) 117 Ind. 386, 20 N. E. 129; *Harper v. Albee* (1859) 10 Iowa, 389; *Goodenow v. Perry* (1861) 12 Iowa, 350; *State v. Moriarty* (1866) 20 Iowa, 595; *Simonson v. Chicago, R. I. & P. R. Co.* (1878) 48 Iowa, 19; *Re Clark* (1911) 151 Iowa, 511, 131 N. W. 700; *Kansas City, Ft. S. & G. R. Co. v. Hammond* (1881) 25 Kan. 208; *Diffenderffer v. Hughes* (1825) 7 Harr. & J. (Md.) 3; *Newton v. Douglass* (1826) 7 Harr. & J. (Md.) 417, 16 Am. Dec. 317; *Derick v. Taylor* (1898) 171 Mass. 444, 50 N. E. 1038; *Birch v. Brown* (1858) 5 Mich. 31; *Ullman v. Sandell* (1909) 158 Mich. 396, 122 N. W. 617; *State v. Reed* (1907) 206 Mo. 719, 105 S. W. 601; *Lindell Glass Co. v. Hanneman* (1891) 46 Mo. App. 614; *Berggren v. Soule* (1911) 44 Mont. 587, 124 Pac. 1129; *Eden Musee Co. v. Yohe* (1893) 37 Neb. 452, 55 N. W. 866; *Tuttle v. Omaha* (1898) 55 Neb. 55, 75 N. W. 50; *Doughty v. Little* (1881) 61 N. H. 365; *Hood v. Marshall* (1899) 69 N. H. 605, 45 Atl. 574; *Simpson v. Gafney* (1891) 66 N. H. 477, 30 Atl. 1120; *Brown v. Simmons* (1888) 14 Daly. 456, 15 N. Y. S. R. 370; *Holy Trinity Church v. Church of St. Stephen* (1891) 128 N. Y. 604, 27 N. E. 1017; *Warren v. Eddy* (1861) 13 Abb. Pr. (N. Y.) 28; *Donaghy v. McCorkle* (1906) 118 Tenn. 73, 98 S. W. 1050; *Fort v. Fort* (1906) 118 Tenn. 103, 101 S. W. 433, 11 Ann. Caa. 964; *International Bldg. & L. Asso. v. Snodgrass* (1894) — Tex. L.R.A.1917A.

Civ. App. —, 26 S. W. 309; *Foley v. Houston Belt & T. R. Co.* (1908) 50 Tex. Civ. App. 218, 108 S. W. 169; *Ft. Worth & R. G. R. Co. v. Kinder* (1907) 46 Tex. Civ. App. 522, 121 S. W. 569; *James v. State* (1910) — Tex. Civ. App. —, 128 S. W. 613; *Rivera v. State* (1907) — Tex. Crim. Rep. —, 105 S. W. 103; *San Pedro, L. A. & S. L. R. Co. v. Board of Education* (1909) 35 Utah, 13, 99 Pac. 263; *Tacoma Lumber & Mfg. Co. v. Wolff* (1892) 4 Wash. 260, 29 Pac. 936; *Allen v. Catlin* (1894) 9 Wash. 603, 38 Pac. 79; *Agassiz v. Kelleher* (1894) 9 Wash. 656, 38 Pac. 221; *Post v. Spokane* (1902) 28 Wash. 701, 69 Pac. 371, 1104; *Re Seattle* (1905) 40 Wash. 450, 82 Pac. 740; *Colman v. West Virginia Oil & Oil Land Co.* (1884) 25 W. Va. 148; *Helden v. Helden* (1859) 9 Wis. 557; *Oelberman v. Newman* (1892) 83 Wis. 212, 53 N. W. 451; *Hart v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1904) 122 Wis. 308, 99 N. W. 1019, 2 Ann. Cas. 793; *Donallan v. Tannage Patent Co.* (1897) 24 C. C. A. 647, 50 U. S. App. 1, 79 Fed. 385; *Greene v. United Shoe Machinery Co.* (1903) 60 C. C. A. 93, 124 Fed. 961; *United States v. Minnesota & N. W. R. Co.* (1855) 18 How. (U. S.) 241, 15 L. ed. 347; *Latham's Appeal* (1869) 9 Wall. (U. S.) 145, 10 L. ed. 654; *United States v. Griffith* (1890) 141 U. S. 212, 35 L. ed. 719, 11 Sup. Ct. Rep. 1005.

"The appellant in appeal, and the plaintiff in a writ of error, may always dismiss their suit before a decision on the merits, and the effect of such dismission is to leave the parties where they were before the appeal was taken or the writ of error brought." *Hancock County v. Marsh* (1840) 3 Ill. 491.

And see *Thomas County v. Hopkins* (1903) 118 Ga. 643, 45 S. E. 433; *Berry v. Parker* (1908) 130 Ga. 741, 61 S. E. 541.

³ "Whether a party may dismiss his own appeal, in the absence of any other guide than statutory authority, should be resolved, it would seem, in favor of the right, since the statute plainly gives the privilege of appealing to the party in whose favor, as well as the party against whom, the

vantage of it, he must be deemed to be satisfied with the judgment of the court below, and ought not to be heard to complain because the appellant has chosen to withdraw his appeal and to join him in acquiescing in the decision appealed from.

Whether or not the appellant will be permitted to dismiss his appeal is a matter within the discretion of the court,⁴ and not a matter of right on the part of

the appellant.⁵ He must accordingly make application for leave to dismiss,⁶ and show, if called upon to do so, that the desired dismissal will not prejudice the appellee,⁷ or, in some instances, third persons.⁸ And for that reason the mere service of notice that the appeal has been withdrawn,⁹ or the filing of such notice in the court from which the appeal has been taken,¹⁰ has been held not to amount to a dismissal of the ap-

judgment was rendered. That indicates that each party who deems himself aggrieved by a justice's judgment, in order to control the same for the purpose of securing a redress of such grievance upon appeal, must act by resorting to the appeal remedy; that if one appeals and retains the cause in the appellate court till a trial occurs, his supposed grievance, and that of his adversary as well, if any, are to be redressed if found real; but the latter, not having appealed, upon the former's application to dismiss his appeal, is deemed to be satisfied with the judgment which the dismissal would reinstate." *Hart v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1904) 122 Wis. 308, 99 N. W. 1019, 2 Ann. Cas. 793.

⁴In *Cleveland Gas Light & Coke Co. v. Duffy* (1871) 22 Ohio St. 208, where the refusal of the court to permit the plaintiff in error to dismiss its petition is assigned as error, it is held that "it is in the discretion of the court whether it will dismiss a petition in error without the consent of both parties."

In *Walker v. Jenney* (1908) 30 Ohio C. C. 521, it is said: "We know of no provision of our statute which authorizes an appellant to dismiss an appeal when perfected, and we think that there is no such power. Such power rests solely in the court."

⁵*Sweeney v. Coulter* (1900) 109 Ky. 295, 58 S. W. 784; *Thornhill v. Olson* (1913) 26 N. D. 27, 142 N. W. 913; *Donallan v. Tannage Patent Co.* (1897) 24 C. C. A. 647, 50 U. S. App. 1, 79 Fed. 385; *United States v. Griffith* (1890) 141 U. S. 212, 35 L. ed. 719, 11 Sup. Ct. Rep. 1005.

Where, in *Re Seattle* (1905) 40 Wash. 450, 82 Pac. 740, appellants had filed in court below and served on respondent a notice that they abandoned their appeal, the court said: "This court acquires jurisdiction of an appeal by the giving of notice and the filing of a proper bond, and that jurisdiction cannot be defeated by any act of the parties. An appellant cannot dismiss an appeal as a matter of right."

In *Cartlidge v. Sloan* (1899) 124 Ala. 596, 26 So. 918, in holding that the appellant might withdraw his offer to dismiss his appeal at any time before it had been acted upon by the appellate court, it is said: "A dismissal could not have been effectuated except by an order made here. True, he [appellant] had the right to direct the clerk not to make a transcript of the proceedings, and had he not withdrawn this instruction to this effect, the appellee could L.R.A.1917A.

have had a judgment of affirmance not only against the appellant, but his sureties also, upon production by him of the proper certificate of the clerk that an appeal had been taken."

See, however, *Fahey v. Fahey* (1903) 32 Colo. 25, 74 Pac. 884, in which the language of the court seems to indicate an opposite view.

⁶The court, in *Merrill v. Dearing* (1877) 24 Minn. 179, says: "If an appellate court has once got jurisdiction of a cause, it cannot be deprived of that jurisdiction, and the respondent of a decision, at the mere will of the appellant. He should make application to the court for leave to dismiss. A mere notice that he dismisses is a nullity."

In *United States v. Minnesota & N. W. R. Co.* (1855) 18 How. (U. S.) 241, 15 L. ed. 347, the court says: "After an appeal brought to the appellate court, the withdrawal or discontinuance of the same is not a matter of course, but, if the plaintiff finds it expedient to discontinue, he must first obtain leave of the court."

⁷See *infra*, subd. II.

⁸See *infra*, subd. III.

⁹It is held in *Weinman v. Dilger* (1880) 14 Jones & S. (N. Y.) 101, that the service of a notice that "the notice of appeal heretofore served in this action is hereby withdrawn" will not discontinue the appeal. The court assigns as its reason that "an order was necessary to accomplish that, and the appellant had such rights that the court, if applied to for an order of discontinuance, might have absolutely denied it or granted it in a modified form."

And see *Merrill v. Dearing*, *supra*, footnote 6.

¹⁰The filing with the clerk of the court from which an appeal is taken of a notice that the appellant has abandoned his appeal does not operate to restore the jurisdiction of such court. An order from the appellate court is necessary before the appeal is dismissed. *Getchell v. Great Northern R. Co.* (1911) 22 N. D. 325, 133 N. W. 912.

And see *Re Seattle* (1905) 40 Wash. 450, 82 Pac. 740, *supra*, footnote 5.

On the other hand, in *Hale v. Morgan* (1900) — Tenn. —, 63 S. W. 506, where, after perfecting their appeal, a part of the appellants notified the clerk and master of the trial court not to make out a transcript, as they did not want an appeal, it was held that application for dismissal should have been made to the appellate court; but, in-

peal. In the latter case the court has the additional ground that the notice was filed in the wrong court upon which to base its decision. In one case where the notice was filed in the appellate court, it was held that the appeal had thereby been withdrawn,¹¹ no notice being taken of the fact that the appellant had assumed to act as if the dismissal were a matter of right.

II. Where appellee would be prejudiced.

It seems to be the universally accepted rule that before a court will permit an appellant to withdraw his appeal, it must be satisfied that no prejudice will thereby result to the appellee.¹²

As pointed out above,¹³ the mere loss of the appeal by an appellee who has

as much as assignments of error were not filed by counsel, and no statement was made by counsel in the appellate court that conflicted with the certificate of the clerk and master, the court assumed such certificate to be correct and to be authority for dismissing the appeal.

¹¹ A written notification that the appellant "has concluded not to carry forward the appeal," which was furnished the appellee and the clerk of court before the record had been printed, is held in *Re Breisen* (1898) — Conn. —, 41 Atl. 774, to constitute a withdrawal of the appeal.

¹² *Fahey v. Fahey* (1903) 32 Colo. 25, 74 Pac. 884; *State v. Moriarty* (1866) 20 Iowa, 595; *Acequia Madre v. Meyer* (1912) 17 N. M. 371, 128 Pac. 68; *Saint v. Cornwall* (1903) 207 Pa. 270, 56 Atl. 440.

"The court ought not, in any case, to permit the appellant to dismiss his appeal, where it appears evident that such an act on his part will do an injury to the appellee by depriving him of a right which can only be maintained and enforced by the appellate court." *Shannon v. Barnwell* (1815) 4 Mart. (La.) 35. In this case the dismissal was refused and damages for delay allowed.

In *Acequia Madre v. Meyer* (1912) 17 N. M. 371, 128 Pac. 68, the court says: "An appellant may dismiss his appeal, unquestionably as a matter of course, if such dismissal will not prejudice the rights of the appellee, 'but broad as is the right of the appellant to dismiss, he will not be permitted to exercise it to the manifest injury of the appellee.' . . . To permit a dismissal under the present circumstances would, we think, be to the manifest injury of the appellees." In this and several other cases (see *infra*, footnote 40) it is held that after appellee has moved to affirm on the ground of appellant's failure to comply with the statute and rules of court in the prosecution of his appeal, appellant cannot have his appeal dismissed.

¹³ See the first paragraph of the text in *subd. I*, *supra*.

¹⁴ Where the transcript has been filed in L.R.A.1917A.

failed to avail himself of his right to bring an appeal of his own does not amount to prejudice. The prejudice which is meant is the loss of some right to which the appellee has become entitled by reason of the bringing of the appeal. Thus, where the appellee has suffered damage by reason of the delay attendant upon the appeal, he is entitled to money damages therefor, and the appellant will not be permitted to dismiss the appeal and thus prevent the recovery thereof.¹⁴ But where the right to damages for delay is limited by statute to cases where there has been a judgment for a sum certain, there can, of course, be no prejudice to the appellee in permitting an appellant to withdraw his appeal in a case where there has been no such judgment.¹⁵ The statute, and

the appellate court, and everything has been done to bring the errors complained of before that court for review, and the appellee has been damaged by the supersedeas, the appellant may no longer dismiss the appeal. *Sweeney v. Coulter* (1900) 109 Ky. 295, 58 S. W. 784.

It is said in *Yell v. Outlaw* (1853) 14 Ark. 164, that "where there has been a recognizance, this court, after it has obtained control of the cause, might well refuse to allow a dismissal of it in all cases where, in its discretion, damages ought to be imposed upon affirmance, because if the appeal taken in the court below appears to have been for delay, the appellant will not be allowed to escape the consequences, after having received the benefit of the delay." In this case, however, no recognizance had issued, and the court adds: "Where the execution of the judgment has not been suspended or superseded, no reason short of a manifest design to vex and harass the opposite party ought to deprive the appellant . . . of what we conceive to be his right to dismiss, at his own costs, his appeal."

¹⁵ Under a statute allowing damages to defendant in error only where there has been a judgment for a sum certain, where there has been no such judgment there can be no damages for delay, and the plaintiff in error will be allowed to withdraw the writ of error over the objection of opposing counsel. *Collins Park & B. R. Co. v. Short Electric R. Co.* (1894) 95 Ga. 570, 20 S. E. 495.

It is said in the abstract of *Brantley v. Buck* (1878) 62 Ga. 172, that "a judgment in a claim case, declaring the property subject, and directing that the *fieri facias* proceed, is not a judgment for any sum certain," within the meaning of the statute, "so as to enable the supreme court to award damages against the claimant . . . for bringing up the case for delay;" and "the claimant, desiring to withdraw his writ of error, may have leave to do so."

And in *Dozier v. Williams* (1876) 57 Ga. 600, where there was no judgment below

not the withdrawal of the appeal, is accountable for the appellee's failure to receive damages for the delay.

Dismissal of an appeal by appellant has been held prejudicial to an appellee who has filed the transcript in the appellate court in pursuance of a statute giving him that right, and providing that his action shall have the same effect as if the filing had been by appellant.¹⁶ This seems to be on the ground that the filing of the transcript gives the appellee a right to have the judgment reviewed. To permit the appellant to dismiss the appeal would deprive him of that right.

Where, of course, appellee has no rights which will be prejudiced by the dismissal, he cannot object thereto; and it has been held in one instance that where he has not appeared in the case by brief, cross assignment of error, or suggestion of delay before the dismissal, he cannot be prejudiced thereby.¹⁷

III. Where third persons would be prejudiced.

Where third persons would be prejudiced thereby, the courts have in some instances granted and in some instances denied appellant's motion to dismiss his appeal. As a general rule, third per-

sons have no such interest in an action that the prejudice resulting to them will be taken into consideration. Where, for instance, a third person agrees with the appellee, against whom he is prosecuting an action similar to the one in which the appeal is taken, that the appeal in that case shall operate as an appeal in his case, the prejudice resulting to him will have no effect on appellant's right to dismiss his appeal.¹⁸ And where other persons equally interested in prosecuting an appeal have entered into an arrangement with the appellant by which the appeal is to be taken in his name and the expense shared by all, the withdrawal of the appeal must be allowed by the court upon settlement between the parties, if the appellee entered therein in ignorance of the arrangement.¹⁹ Likewise it has been held that where a corporation, agreeing, as a portion of the settlement of an action for personal injury, to indemnify the injured person against the claims of his attorneys for their fees, defends an action brought against the injured person for the recovery of such fees, the injured man may dismiss a writ of error sued out in his name by the corporation after judgment in the lower court.²⁰ In one case, however, it has been held that a writ of error prosecuted on behalf of a person not

which would authorize the court to award damages for delay, the plaintiffs in error were permitted to withdraw their writ of error.

In holding, in *Ransom v. Coleman* (1872) 45 Ga. 316, that plaintiff in error could withdraw the record from the court of review, it is said: "As it was not to reverse a judgment for money, the court held that it could be withdrawn, and that if it were a money judgment, plaintiff could not withdraw without defendant's consent, as she would then have a right to have the cause heard and ask for damages for delay."

¹⁶ *Sweeney v. Coulter* (Ky.) *supra*; *Doherty v. First Nat. Bank* (1914) 160 Ky. 64, 169 S. W. 493.

In the former of these cases it is said: "When the legislature gave an appellee the right to file an authenticated copy of the record in the clerk's office of the court of appeals with the same effect as if filed by the appellant, it did not intend to do an idle thing. It was the intention to confer upon him the right to have the court review the judgment from which the appeal was granted. If he did not secure that right by filing the transcript, he certainly would be authorized by law to do a meaningless thing. We are of the opinion that, in a case where the transcript is thus filed by the appellee, it was the intention of the legislature that he should have the right to have the judgment reviewed."

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¹⁷ While subscribing to the rule against allowing appellant to dismiss the appeal to appellee's prejudice, it is held, in *Ft. Worth & R. G. R. Co. v. Kinder* (1907) 46 Tex. Civ. App. 522, 121 S. W. 569, that where the appellee has not appeared in the case by brief, cross assignment of error, or suggestion of delay before the dismissal, he is not prejudiced thereby.

¹⁸ In *Tuttle v. Omaha* (1898) 55 Neb. 55, 75 N. W. 50, where two suits against the city were tried together in the trial court, and one plaintiff agreed with the city that the appeal in the other case should operate as an appeal in his case, it was held that appellant, not being a party to such stipulation, was not bound thereby, and had the right to dismiss her appeal.

¹⁹ Where an appeal is taken from a decree of distribution of the estate of a decedent by one of several heirs, equally interested therein, under an arrangement by which the appeal is to be taken in the name of the one, and all are to share the expense thereof, a withdrawal of such appeal must be allowed by the court on the request of all parties thereto, in spite of the objections of the remaining heirs, where the appellees have entered into a settlement in ignorance of the agreement existing between the appellant and his fellow heirs. *Lake's Appeal* (1865) 32 Conn. 331.

²⁰ *Granat v. Kruse* (1904) 213 Ill. 328, 72 N. E. 744.

a party to the suit may not be dismissed by the party prosecuting it.²¹

In view of the reluctance of the courts to hold the prejudice of third persons unconnected with a case to be sufficient grounds for denying appellant's application to dismiss his appeal, it would hardly seem probable that the prejudice done to a creditor of an appellant who resists the dismissal on the grounds of his interest in having the judgment reversed, would be such as to cause the court to oppose the dismissal. And such was the view of one court to which application had been made by such a creditor to enjoin the dismissal of an appeal.²²

Where the attorney of the plaintiff in error has a contract for a contingent fee,²³ or where the litigation is such that it will, if the plaintiff in error is successful, result in a recovery of property on which his counsel will have a lien for his fees,²⁴ it has been held that the attorney would be so prejudiced by the withdrawal of the writ that it ought to be denied.

As a general rule, an appellant will not be denied permission to withdraw his appeal because of the objections of an attorney who no longer represents him in the case.²⁵ And this is especially true where the appeal has been taken by the attorney after his discharge, and con-

trary to appellant's wishes.²⁶ But where the original attorneys have not been regularly substituted by the attorneys seeking the dismissal, it has been held that the appeal must stand.²⁷ Appellant, however, is not deprived of his right of dismissal because the motion, instead of being made by his own attorney, is made by the attorneys of the respondent.²⁸

IV. Where appellant has entered into stipulation.

Another exception to the right of an appellant to dismiss his appeal arises where such dismissal would have the effect of violating a stipulation made between appellant and appellee. This has been held to be the case both where the stipulation is the result of voluntary agreement²⁹ and where it is demanded by statute.³⁰ Where, however, the appellant is not a party to a stipulation made between the appellee and third persons, he is not, of course, bound thereby.³¹

V. When dismissal may be made.

Where the allowance of the appeal is by the court appealed from, that court retains jurisdiction of the cause until the transcript is filed in the appellate court, and it may grant permission to the appellant to withdraw his appeal.³²

²¹ In *Ragland v. Wickware* (1830) 4 J. Marsh. (Ky.) 530, an action by the alleged owner of a slave against a sheriff who had sold the slave on a *fiat facias* against a third person, the court being satisfied that the writ of error was prosecuted on behalf of the surety of the judgment creditor, the sheriff was not permitted to dismiss it.

²² A plaintiff in error cannot be enjoined from dismissing his writ of error by a creditor, not connected with the case, on the ground that the reversal of the judgment would be beneficial to him in his capacity as creditor. *Colman v. West Virginia Oil & Oil Land Co.* (1884) 25 W. Va. 148.

²³ A writ of error cannot be withdrawn by the plaintiff in error, over the objection of its counsel, where it appears that such counsel has a contract for a fee contingent upon the successful outcome of the case. *Richmond County v. Richmond County Reformatory Institute* (1914) 141 Ga. 457, 81 S. E. 232.

²⁴ *Walker v. Equitable Mortg. Co.* (1902) 114 Ga. 882, 40 S. E. 1010.

And see *Re Degnan* (1901) 132 Cal. 200, 64 Pac. 485.

²⁵ *Holy Trinity Church v. Church of St. Stephen* (1891) 128 N. Y. 604, 27 N. E. 1017.

²⁶ *Riney v. Hemenway Furniture Co.* (1907) 119 La. 329, 44 So. 116. L.R.A.1917A.

²⁷ *Russell v. Crook County Ct.* (1915) 75 Or. 168, 145 Pac. 653, 146 Pac. 806.

²⁸ *Re Degnan* (Cal.) supra.

²⁹ When a suit is selected from among a number of similar suits against the same defendant as a representative case, and a stipulation is made by all the parties to such suits that all of such causes, then pending on appeal, shall abide by the final determination of this case, the stipulation divests the defendant, who is the appellant, of his right to dismiss the appeal over the objection of appellee in the case selected. *McKinley v. Wilmington Star Min. Co.* (1880) 7 Ill. App. 386.

³⁰ See *BUSH v. BARKSDALE*, ante, 111.

³¹ *Tuttle v. Omaha* (1898) 55 Neb. 55, 75 N. W. 50, supra, footnote 18.

³² Where the allowance of the appeal is by the court appealed from, the jurisdiction of the appellate court "is only partial and incomplete until the transcript of record is filed" in that court; and "until that time it is within the discretion of the appellant to determine whether he will prosecute the appeal." *Evans v. Humphreys* (1896) 9 App. D. C. 392. In this case it was held that until the transcript was filed in the appellate court, the lower court retained jurisdiction, and the appellant might withdraw his appeal.

Conversely, until such transcript or a certified copy of the judgment and order of appeal have been filed in the appellate court, that court cannot grant appellant permission to dismiss.³³

After the appellate court has gotten jurisdiction of the appeal, the question next arises as to how long the appellant may wait before applying for a dismissal. This question has received varying answers from the different courts. It has been held that a withdrawal is not too late where made before the printing of the record and several weeks before the next term of court;³⁴ where made before the commencement of the trial;³⁵ where made after the introduction of the evidence on the appeal, and while the judge is charging the jury;³⁶ where made before the decision of the appeal on its merits;³⁷ and where made after the delivery of the opinion, but before entry of the judgment.³⁸ However, one court is of the opinion that an application made after the finding of the verdict may be refused on the ground that it comes too late.³⁹

Where, by appellant's failure to com-

ply with statutes or rules of court with respect to carrying forward his appeal, the appellee becomes possessed of a statutory right to affirmance, after a motion for affirmance has been made, appellant may no longer dismiss his appeal.⁴⁰ In cases of this kind there is, in addition to the element of time, an element of prejudice to the rights of the appellee involved.⁴¹ However, it has been held that a motion to dismiss the appeal, made by appellee in his brief, in accordance with a rule of court, will not take away from appellant his privilege of having his appeal dismissed.⁴²

In the case of coappellants, it has been held that after all have appealed, and they have all assigned joint errors, and filed a joint brief, it is too late for a part of them to decline to join in the appeal.⁴³

VI. *Withdrawal of part of several appellants.*

In the case of a joint appeal it seems to be the rule that a portion of the appellants may withdraw without the consent of their coappellants.⁴⁴ And such

³³ Where a party has been allowed and has taken an appeal, either a transcript or a certified copy of the judgment and order of appeal must be filed in the appellate court before the appellant can dismiss the appeal. *Mahopaulos v. Chicago, R. I. & P. R. Co.* (1914) 256 Mo. 249, 165 S. W. 310.

³⁴ It is held, in *Re Breison* (1898) — Conn. —, 41 Atl. 774, that where appellant, before the printing of the record, and several weeks before the next term of court, notified the clerk of court in writing of his intention not to carry forward the appeal, the notification constituted a withdrawal of the appeal.

³⁵ "A party who takes an appeal can withdraw it at any time before the commencement of the trial, and probably at any time before the final submission of the case." *Kansas City, Ft. S. & G. R. Co. v. Hammond* (1881) 25 Kan. 208.

"It is the right of an appellant from the decree of the probate court to have his appeal dismissed at any time before trial." *Hood v. Marshall* (1899) 69 N. H. 605, 45 Atl. 574.

Doughty v. Little (1881) 61 N. H. 365; *Simpson v. Gafney* (1891) 66 N. H. 477, 30 Atl. 1120.

³⁶ It is held in *Donaghy v. McCorkle* (1906) 118 Tenn. 73, 98 S. W. 1050, that an appellant is entitled to dismiss his appeal after the introduction of the evidence on the trial in the appellate court, and while the judge is charging the jury.

³⁷ *Hancock County v. Marsh* (1840) 3 Ill. 491, *supra*, footnote 2.

³⁸ In *Newson v. Douglass* (1826) 7 Harr. & J. (Md.) 417, 16 Am. Dec. 317, after the opinion of the court was delivered, and L.R.A.1917A.

before judgment was entered, the appellant was permitted to dismiss his appeal.

³⁹ After the parties have proceeded to trial before the court, a full investigation has been had, and the court has found its verdict, the court may, in its discretionary power, refuse to dismiss an appeal upon the request of the appellant. *The Delta v. Walker* (1860) 24 Ill. 233.

⁴⁰ *Dunlap v. Weber Gas & Gasoline Engine Co.* (1906) — Mo. —, 94 S. W. 761; *Thoms v. Sullivan* (1899) 79 Mo. App. 384; *Erwin v. Missouri & K. Teleph. Co.* (1913) 173 Mo. App. 508, 158 S. W. 913; *Acequia Madre v. Meyer* (1912) 17 N. M. 371, 128 Pac. 68; *Hubbell v. Armijo* (1913) 18 N. M. 68, 133 Pac. 978.

⁴¹ See *Acequia Madre v. Meyer* (1912) 17 N. M. 371, 128 Pac. 68, *supra*, footnote 12, and the text to which it is appended.

⁴² Where, in *Tacoma Lumber & Mfg. Co. v. Wolff* (1892) 4 Wash. 260, 29 Pac. 936, before appellant had moved to dismiss his appeal, respondent had moved to dismiss it in his brief, in accordance with a rule of court requiring such motions to be stated in the brief, it was held that the rule "should not be interpreted to take from appellants the right to control their case."

⁴³ It is said in *Advance Mfg. Co. v. Auch* (1900) 25 Ind. App. 687, 58 N. E. 1062, that "as to the right of one or more coappellants to dismiss his or their appeal, there is no doubt; but here, after all the appellants have appealed and they have all assigned joint errors and filed a joint brief, it is too late for two of them to say that they decline to join in the appeal of their coappellants."

⁴⁴ It is held in *Thorpe v. Thorpe* (1866) 40

is the rule even where the coappellants have been made such, over their objection, by the service of process.⁴⁵ The withdrawal of a part of the appellants, however, has no effect on the appeal of the remainder,⁴⁶ and they may proceed as before. Although no authority can be cited therefor, it seems doubtful whether, in any case where the withdrawal of a part of the appellants would embarrass the remaining appellants, or cause them the loss of their appeal, such portion of the coappellants would be permitted to withdraw.⁴⁷

VII. Dismissal of one of several appellees.

While no cases have been found on that point, it seems probable that where one of several appellees may be dis-

missed without prejudice to the remaining appellees, the appellant will not be denied the privilege of so dismissing him.⁴⁸ But where the dismissal of one of several joint appellees would prejudice his coappellees, such dismissal is properly refused.⁴⁹

VIII. Effect of cross errors.

The courts have taken the view that the dismissal by appellant of his appeal does not affect the right of appellee, who has assigned cross errors, to be heard thereon.⁵⁰ As the result of this rule, appellee cannot be said to be prejudiced with respect to his cross errors by the dismissal of the appeal, and, accordingly, appellant's privilege of dismissal is in no way affected.⁵¹

Ill. 113, that any of the persons jointly suing out a writ of error may dismiss it as to themselves, and leave the remaining plaintiffs in error to prosecute their suit.

Advance Mfg. Co. v. Auch, supra, footnote 43; Hyde v. Tracy, infra, footnote 46.

And see Hale v. Morgan (1900) — Tenn. —, 63 S. W. 506, supra, footnote 10.

⁴⁵ In Field v. Kenneweg (1905) 218 Ill. 366, 75 N. E. 986, where eighteen of the plaintiffs in error moved to dismiss the writ of error, it is held that their right to such a dismissal is not affected by the existence of a number of persons who have refused to join in the writ, and who have been made plaintiffs in error by the service of process.

⁴⁶ In Hyde v. Tracy (1807) 2 Day (Conn.) 491, where one of several plaintiffs in error, against whom a decree had been made, moved, without the consent of his coplaintiffs in error, to withdraw the writ of error, it was held that he could not withdraw the writ so as to prevent the other plaintiffs in error from proceeding with it, as between them and the opposite party, but that his personal retraxit should be entered on the record.

And see Thorp v. Thorp, supra, footnote 44.

⁴⁷ See Advance Mfg. Co. v. Auch, supra, footnote 43.

⁴⁸ See supra, subd. VI., and what is there said with respect to the withdrawal of one of several appellants.

⁴⁹ Where the mortgagor of land conveys to each of two others respectively an undivided one third therein, and each of the grantees assumes, as part consideration, one third of the mortgage debt, the mortgagee cannot, in an action of foreclosure, dismiss his appeal as against one of the two purchasers of undivided interests, and maintain it against the other defendants, the judgment appealed from being joint and the proportionate liabilities of the remaining defendants necessarily being liable to be affected by the absence of the dismissed defendant. L.R.A.1917A.

fendant. McPherson v. Storch (1892) 49 Kan. 313, 30 Pac. 480.

⁵⁰ "It would seem, therefore, that after an appeal is taken the case is not entirely within the control of either party, except in so far as pertains to the questions presented by the respective parties; that is, the appellant may, as a matter of course, dismiss his appeal, and such dismissal deprives this court of the power to reverse or modify on his assignment of errors, but it does not deprive the respondent of the right to be heard upon his assignment of cross errors." San Pedro, L. A. & S. L. R. Co. v. Board of Education (1909) 35 Utah, 13, 99 Pac. 263.

The dismissal by appellants of their appeal does not carry the case so far as it is affected by an assignment of cross errors by the appellee. Feder v. Field (1889) 117 Ind. 386, 20 N. E. 129; Horne v. Harness (1897) 18 Ind. App. 214, 47 N. E. 688.

The cross errors of appellee were held, in Foley v. Houston Belt & T. R. Co. (1908) 50 Tex. Civ. App. 218, 108 S. W. 169, not to prevent appellant from dismissing his appeal, and appellant's election to dismiss was not viewed as impairing appellee's right to have its cross assignments considered.

⁵¹ In Eden Musee Co. v. Yohe (1893) 37 Neb. 452, 55 N. W. 866, it is said that "had the appeal been dismissed, the rights of the appellee would not have been in the least prejudiced thereby, inasmuch as such a dismissal would have left the case precisely the same as though no appeal had been taken."

And under a statute providing that, if the appeal be dismissed, the cause shall be remanded, to be proceeded in as if no appeal had been taken, "the failure to appeal revives the judgment, and restores the parties to all rights existing at the time of the appeal." Kansas City, Ft. S. & G. R. Co. v. Hammond (1881) 25 Kan. 208.

See Hancock County v. Marsh (1840) 3 Ill. 491, supra, footnote 2.

IX. Effect of dismissal on judgment.

The effect of the dismissal of an appeal at the instance of the appellant has been held in some jurisdictions to put the parties in the same position with respect to the judgment that they held before the appeal.⁵¹ This question of effect, however, depends largely, if not wholly, on statute, and it is not to be expected that the same rule will apply in all jurisdictions. Thus, in Washington it is held that, after the dismissal of the appeal, appellee is entitled to a judgment affirming the judgment below,⁵² and, in addition thereto, a judgment on the appeal bond.⁵³

X. Costs on dismissal.

The appellant being accountable for the bringing of the appeal, it is entirely just that he should be made to bear the costs of it where he has it dismissed, and

such is the unanimous opinion of the courts.⁵⁴ It has even been hinted that an order entered by an appellant, dismissing his appeal, is a nullity unless he pays such costs.⁵⁵ The rule is the same where a portion of several coappellants, jointly suing out a writ of error, dismiss it as to themselves.⁵⁶

XI. Appeal bond on dismissal.

In the only two cases in which the question has arisen, it has been held that, even after the dismissal of the appeal, the appellee is entitled to the security of the appeal bond.⁵⁷ In one of these cases, at least, the opinion is the result of statute.

XII. Right of dismissal as affected by statute.

Where the withdrawal of an appeal is expressly prohibited by statute, the

⁵¹ Where, in *Post v. Spokane* (1902) 28 Wash. 701, 69 Pac. 371, 1104, the time for a second appeal had elapsed when the appeal was dismissed, the respondent was held to be entitled to an affirmance of the judgment of the court below.

⁵² In *Agassiz v. Kelleher* (1894) 9 Wash. 656, 38 Pac. 221, where the appellant moved for dismissal in order that he might bring a second appeal, the court granted what it called a "qualified dismissal," and retained jurisdiction of the cause for the purpose of permitting the respondent, after the time for taking such second appeal should have expired, to move "for an affirmance of the judgment, and for damages, and for judgment against the appellant and his sureties on the appeal bond." This was on the ground that the appellant ought not to be permitted by his dismissal to deprive appellee of the right given him by statute to move, upon affirmance of the judgment below, for a judgment on the bond.

In *Allen v. Catlin* (1894) 9 Wash. 603, 38 Pac. 79, it is held that, after dismissal of the appeal by appellant, judgment should be rendered in favor of respondents against appellant and his sureties for the amount of the judgment in the lower court, with interest and costs. In distinguishing this case, it is said in the later case of *Agassiz v. Kelleher* (Wash.) supra, that in this case there was no desire on appellant's part for a second appeal. It is also said that "subsequently, however, the respondents appeared and moved for judgment against the appellant and his sureties upon the appeal bond, giving due notice thereof, and we held that, notwithstanding the prior dismissal, they were entitled to such judgment."

⁵⁴ *Harper v. Albee* (1860) 10 Iowa, 389; *Birch v. Brown* (1858) 5 Mich. 31; *Ullman v. Sandell* (1909) 153 Mich. 396, 122 N. W. 617; *Brown v. Simmons* (1888) 14 Daly, 456, 15 N. Y. S. R. 370; *Warren v. Eddy* (1861) 13 Abb. Pr. (N. Y.) 28; *Fort v. L.R.A.* 1917A.

Fort (1906) 118 Tenn. 103, 101 S. W. 433, 11 Ann. Cas. 964; *Allen v. Catlin* (1894) 9 Wash. 603, 38 Pac. 79; *Re Seattle* (1905) 40 Wash. 450, 82 Pac. 740; *Helden v. Helden* (1859) 9 Wis. 557; *Oelberman v. Newman* (1892) 83 Wis. 212, 53 N. W. 451.

And see *Yell v. Outlaw* (1853) 14 Ark. 164, supra, footnote 14.

⁵⁵ It is said obiter in *Burnett v. Harkness* (1849) 2 N. Y. Code Rep. 100, 4 How. Pr. 158, that an order entered by an appellant, dismissing his appeal, might be treated by the appellee as a nullity unless the appellant had paid the costs.

⁵⁶ After holding, in *Thorp v. Thorp* (1866) 40 Ill. 113, that any of the persons jointly suing out a writ of error may dismiss it as to themselves, the court adds that the dismissal will be at the cost of those dismissing.

⁵⁷ The court, in *Helden v. Helden* (1859) 9 Wis. 557, says: "The appellant may dismiss his appeal upon the payment of the costs of the appeal. But that part of his motion to withdraw his appeal bond must be denied. The respondent is entitled to the security given in this bond."

It is held, in *Allen v. Catlin* (1894) 9 Wash. 603, 38 Pac. 79, that, after dismissal of the appeal by appellant, judgment should be entered in favor of respondents against appellant and his sureties in the appeal bond, for the amount of the judgment in the lower court, with interest and costs. This is on the ground that appellant ought not to be permitted by his dismissal to deprive appellee of the right given him by statute to move, upon affirmance of the judgment below, for a judgment on the bond.

And see *Agassiz v. Kelleher*, supra, footnote 53.

As to effect of compromise or consent to affirmance upon liability of surety upon the appeal bond, see note to *First Nat. Bank v. Stevens Land Co.* 43 L.R.A. (N.S.) 1040.

appellant cannot, of course, dismiss his appeal.⁵⁸ And it has been held that, under statutes providing that the appellate court shall become possessed of the cause the same as if it had originally commenced there,⁵⁹ or that an appeal shall be a trial de novo,⁶⁰ the appellant may not dismiss his appeal, where he was the defendant in the original action. This is on the ground that the

parties occupy the same relative positions as they did in the court below, where plaintiff alone could dismiss the action.

It has also been held that, under a statute requiring an appellant to stipulate for judgment absolute in case of affirmance, one who makes such a stipulation is barred from dismissing his appeal.⁶¹

⁵⁸ Where the Code expressly prohibits the withdrawal of a perfected appeal, the appellant cannot, of course, withdraw his appeal after it has been perfected. *State ex rel. Simonds v. Judge* (1877-80) *Man. Unrep. Cas. (La.)* 130; *Johnson v. Weinstein* (1877-80) *Man. Unrep. Cas. (La.)* 157; *Smith v. Miller* (1844) 9 *Rob. (La.)* 117; *Traverso v. Row* (1837) 10 *La.* 500; *White v. Maguire* (1861) 16 *La. Ann.* 337; *Wolfe v. Poirier* (1867) 19 *La. Ann.* 103; *Graff v. Graff* (1915) 136 *La.* 749, 67 *So.* 817.

Under a statute prohibiting the withdrawal of an appeal from an award of arbitrators without the written consent of the adverse party, the defendant, in *Monongahela Nav. Co. v. Blair* (1852) 20 *Pa.* 71, is denied the right to withdraw the appeal taken by it from the award of viewers appointed to assess the damage done to plaintiff's land by its improvements.

⁵⁹ Under a statute providing that, "on filing the return of the justice, the circuit court shall become possessed of the cause the same as if it had been originally com-

menced in said appellate court," the court held, in *Peterson v. Frey* (1896) 109 *Mich.* 689, 67 *N. W.* 974, that the defendant below could not dismiss his appeal without the consent of the appellee. This is on the ground that the defendant could not dismiss the original suit.

⁶⁰ It is held, in *Bingham v. Waterhouse* (1870) 32 *Tex.* 468, that, in an appeal from the probate court, the parties occupy the same relative positions of plaintiff and defendant, although the defendant is the appellant, and that such defendant has the same right to dismiss or enter a nolle prosequi in the appellate court as he had in the probate court, and no other. This is on the ground that the appeal is a trial de novo under the statute governing such appeals.

⁶¹ One who has appealed from an order granting a motion for a new trial cannot elect to dismiss the appeal and proceed with the new trial, where, under the statute, he has stipulated for judgment absolute in case of affirmance. *BUSH v. BARKSDALE*, ante, 111. E. L. D.

ILLINOIS SUPREME COURT.

LAWRENCE PURVIS, Appt.,
v.

IRVING SHUMAN.

(273 Ill. 286, 112 N. E. 679.)

Landlord and tenant — assignment of reversion — action on covenant.

The assignee of a lessor of land for an amusement park is, although not named therein, bound by a covenant binding the lessor, his heirs or personal representatives, to pay, at the termination of the lease, for improvements erected on the property, under a statute giving the lessee the same remedies against the assignees of the lessor for breach of any agreement in the lease as he might have had against the lessor.

For other cases, see *Landlord and Tenant*, I. b, in *Dig. 1-52 N. S.*

(April 20, 1916.)

Note. — For necessity of use of word "assigns" to make covenant as to a thing not in esse run with the land, see annotation following this case, post, 127. L.R.A.1917A.

APPEAL by plaintiff from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Moultrie County in favor of defendant, grantee of the lessor, in an action brought to recover a certain per cent of the cost of improvements placed on the leased premises by virtue of a covenant of the lessor, contained in a lease of the premises. Reversed.

The facts are stated in the opinion.

Messrs. Frank M. Harbaugh, Edward C. Craig, Donald B. Craig, and James W. Craig, for appellant:

The covenant contained in the lease relative to the use to which this real estate was to be subjected, and for the payment of the improvements to be erected thereon at the end of the lease, was a covenant which, at common law, ran with the land.

Peters v. Stone, 193 *Mass.* 179, 79 *N. E.* 336; *Wertheimer v. Hosmer*, 83 *Mich.* 50, 47 *N. W.* 48; *Sampson v. Easterby*, 9 *Barn. & C.* 505, 109 *Eng. Reprint*, 188, 4 *Mann. & R.* 422, 5 *L. J. K. B.* 291, 6 *Bing.* 644, 4 *Moore & P.* 601, 1 *Crompt. & J.* 105; *Sims, Covenants*, 94; *Miller v. Prescott*, 163 *Mass.*

12, 47 Am. St. Rep. 434, 39 N. E. 409; *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L.R.A. 604, 21 Am. St. Rep. 189, 24 N. E. 756; *McDonald v. Starkey*, 42 Ill. 442; *Hammond v. Hibbler*, 168 Mich. 66, 133 N. W. 932; *Denecke v. Miller*, 142 Iowa, 486, 119 N. W. 380, 19 Ann. Cas. 949; *Verplanck v. Wright*, 23 Wend. 509; 1 Washb. Real Prop. p. 436; *Brockmeyer v. Sanitary Dist.* 118 Ill. App. 56.

Under the statute of 32 Hen. VIII. the appellee, being the grantee of the lessor, was made liable to pay for these improvements, and to carry out the agreement of the lessor in reference thereto.

Sims, Covenants, 77-79; 2 Washb. Real Prop. 3d ed. chap. 8, § 13, pp. 690, 691; 1 Washb. Real Prop. 3d ed. chap. 10, § 318, p. 417; *Webb v. Russell*, 3 T. R. 393, 1 Revised Rep. 725, 100 Eng. Reprint, 639; 2 *Cooley's Bl. Com.* 3d ed. p. 156; *State, Watson, Prosecutrix, v. Idler*, 54 N. J. L. 467, 24 Atl. 555; 1 *Tiffany, Land. & T.* § 149, p. 884.

Under § 15 of chapter 80, *Hurd's Revised Statutes*, the appellee is liable to pay for the improvements placed on the land just the same as the original lessor would have been liable to pay for the same.

Barnes v. Northern Trust Co. 160 Ill. 116, 48 N. E. 31; *Ecke v. Fetzner*, 65 Wis. 55, 26 N. W. 266; *Barr v. Florentine Alabaster Co.* 174 Ill. App. 256; *Howland v. White*, 48 Ill. App. 236; *Thomasson v. Wilson*, 146 Ill. 384, 34 N. E. 432; 3 *Page, Contr.* 1982.

Messrs. Whitaker, Ward, & Pugh, Thompson & McLaughlin, and Simmons & Irving, for appellee:

At common law the lessees' covenants ran with the land, but the lessor's did not run with the reversion. The statute 32 Hen. VIII., was passed to give the reversioner the same benefit the lessee had.

Rogers v. Hosegood [1900] 2 Ch. 388, 69 L. J. Ch. N. S. 652, 48 Week. Rep. 659, 83 L. T. N. S. 186, 16 Times L. R. 489; *Smith, Land. & T.* 355, 356, 359, 362, 368; *Masury v. Southworth*, 9 Ohio St. 340; *Hotham v. East India Co.* 1 Dougl. K. B. 272, 99 Eng. Reprint, 178; *Wood, Land. & T.* p. 502, § 309.

A covenant which relates to something not in being at the time of the demise, or which is merely personal or collateral to the thing demised, does not run with the land, and therefore assignees are not bound, even though they be expressly named.

Wood, Land. & T. pp. 500, 501; *Spencer's Case*, 5 Coke. 16a, 77 Eng. Reprint, 72, 1 *Smith, Lead. Cas.* 9th ed. 174, 15 Eng. *Rul. Cas.* 233; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; 1 Washb. Real Prop. 6th ed. 1902, § 680; *Tiedeman, Real Prop.* L.R.A.1817A.

§ 190; *Kerr, Real Prop.* § 1218; *Grey v. Cuthbertson*, 2 Chitty, 482, 1 Selw. N. P. 498, 4 Dougl. K. B. 351, 99 Eng. Reprint, 917; *Taylor, Land. & T.* 8th ed. pp. 308, 309, § 260.

The statute of Henry is in force in Illinois, and the English decisions thereon are the rule of construction to be followed by the courts of this state.

Fisher v. Deering, 60 Ill. 114; *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282; *Diederich v. Rose*, 228 Ill. 610, 81 N. E. 1140.

Covenants running with the land are controlled by the law of the state where the land is situated.

Dalton v. Taliaferro, 101 Ill. App. 592; *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237.

A covenant not running with the land may be for the benefit of the property, but that fact does not change it from a personal covenant to an easement.

Berryman v. Hotel Savoy Co. 160 Cal. 569, 37 L.R.A.(N.S.) 5, 117 Pac. 677.

The statute of Henry does not discriminate in favor of one class and against another class. It simply "evens up" the rights of the parties.

Rogers v. Hosegood [1900] 2 Ch. 388, 69 L. J. Ch. N. S. 652, 48 Week. Rep. 659, 83 L. T. N. S. 186, 16 Times L. R. 489; 2 *Sugden, Vend. & P.* 8th Am. ed. 1873, 247, 249, 250; *American note on rule in Spencer's Case*; 1 *Smith, Lead. Cas.* 9th ed. 174, 206.

The rule in *Spencer's Case* has been the law in Illinois since February, 1819.

Penny v. Little, 4 Ill. 301; *Plumleigh v. Cook*, 13 Ill. 669.

Cartwright, J., delivered the opinion of the court:

The appellant, Lawrence Purvis, filed his declaration in this case in the circuit court of Moultrie county against the appellee, Irving Shuman, grantee of the reversion in premises leased to the appellant by Sam T. Miller, to recover from the appellee 75 per cent of the cost of improvements placed on the leased premises by virtue of a covenant of the lessor contained in the lease. The court sustained a demurrer to the declaration and rendered judgment against the appellant for costs. An appeal was taken to the appellate court for the third district, where the judgment was affirmed and a certificate of importance and a further appeal were allowed.

The facts alleged in the declaration and admitted by the demurrer are as follows: On April 9, 1907, Sam T. Miller, owner of the north half of the northwest quarter of the southeast quarter of section 1, town 13, range 5, in Moultrie county, leased the same to the plaintiff from March 1, 1907,

to March 1, 1912, at a rental of \$200 per annum. It was agreed that the plaintiff should not sublet the premises without the consent of the lessor, and the lease contained the following provisions: "It is further mutually agreed between the parties hereto that the party of the second part has leased said premises as an amusement park, and that the party of the second part is entitled to all rents and privileges that he may be able to receive from the parties desiring to use the same for a ball park, race meetings, or other similar forms of amusement. It is further agreed between the parties hereto that any and all improvements that may be put on said premises by the party of the second part for the purpose of carrying out the provisions of this lease will, at the expiration of this lease, be purchased by the party of the first part at 75 per cent of the original cost of said improvements. . . . The covenants herein shall extend to and be binding upon the heirs, executors, and administrators of the parties to this lease."

The lease was recorded, and the plaintiff took possession and constructed the improvements for the purpose of carrying out the provisions of the lease that the premises should be used for an amusement park, and the improvements cost \$8,255.95. During the term, on August 10, 1909, Sam T. Miller, the lessor, having platted the premises into lots, sold and conveyed a portion to the defendant and another portion to the defendant and D. L. Enslow, and on January 3, 1910, Enslow conveyed all his interest to the defendant. On March 1, 1912, the defendant notified the plaintiff that he was the owner of the premises, and requested the plaintiff to remove the improvements. The plaintiff refused to comply with the request, and demanded from the defendant 75 per cent of the original cost of the improvements, which the defendant refused to pay. Afterward the defendant obtained a judgment against Sam T. Miller, the lessor, caused an execution to be issued and levied upon the improvements as the property of Miller, and sold them by virtue of the execution. The appellate court was of the opinion that, the improvements not being in existence at the time the lease was executed, the covenant of Miller to pay at the termination of the lease 75 per cent of their original cost was personal and collateral to the demise, and did not run with the land so as to bind the grantee of the lessor, under the decision in *Spencer's Case*, 5 Coke, 16a, 77 Eng. Reprint, 72, 1 Smith, Lead. Cas. 9th ed. 174, 15 Eng. Rul. Cas. 233, and subsequent cases following that one. The decision of this case will turn

upon the question whether that view of the law was correct.

The statutory provision giving lessees a right of action against grantees of the reversion is § 15 of chapter 80 of the Revised Statutes of 1874, relating to landlord and tenant, and is as follows: "The lessees of any lands, their assigns or personal representatives, shall have the same remedy, by action or otherwise, against the lessor, his grantees, assignees of his or their representatives, for the breach of any agreement in such lease, as such lessee might have had against his immediate lessor: Provided, this section shall have no application to the covenants against encumbrances, or relating to the title or possession of the premises demised."

The previous statute, included among those adopted as the law of this state, was enacted in the thirty-second year of the reign of Henry VIII. (Stat. 32 Hen. VIII. chap. 34). The reason for the enactment of that statute was that the monasteries and other religious and ecclesiastical houses had been dissolved and their lands had come to the possession of the King, who distributed them to the lords. Much of the lands was subject to leases when they fell into the hands of the King, and the monks had inserted in the leases various covenants and provisions for their benefit and advantage. At the common law no person could take the benefit of any covenant or condition except such as were parties or privies thereto, so that the grantees of the King could not enforce the covenants in the leases. These things were recited in the preamble, and the statute was enacted to give to the grantees of the King the same remedies that the original lessors might have had. Section 1 of the act provided that the grantees of the King should have the same advantages, benefits, and remedies as the lessors might have had. Section 2 was added, purporting to create rights in lessees which they already had so far as covenants running with the land were concerned, probably to give the statute the appearance of providing for the rights of tenants as well as of landlords. 2 Sugden, Vend. & P. 247. The benefit of covenants relating to the land, entered into by the lessor, passed to the assignee of the lessee, for though no contract had been made between the lessor and assignee individually, yet, as the latter became the tenant of the former, a privity of estate arose between them, by virtue of which the covenants running with the land entered into when the lease was granted became mutually binding, and might be enforced by the one against the other. *Williams, Real Prop.* 397. At the common law, upon the grant of a reversion an at-

tortment was necessary, by which the tenant agreed to become the tenant of the new lord, since the lord could not grant the services of his tenant by deed without his consent, the relation between landlord and tenant and the services of the tenant being personal. Shep. Touch. 255. That section provided that all lessees should have the same rights and remedies against the grantees of the reversion as they might have had against the lessors, and § 15 of our statute is a substantial re-enactment of § 2 of the former statute.

It is earnestly contended that our statute is broader in its terms than § 2 of the statute of Henry VIII., and in one respect it seems to have been so regarded by this court. *Fisher v. Deering*, 60 Ill. 114. Although the statute of Henry VIII. purported to give to grantees of the reversion a right of entry for nonpayment of rent and the remedies which the lessors might have had or enjoyed, it was still held that the assignee of the reversion could not recover rent until there was an attornment, but afterward could recover in respect to privity of estate and contract. The necessity of an attornment was dispensed with by the Act of 4 and 5 Anne, chap. 16, in England, but that statute was not one of the statutes adopted by this state, and this court held that an attornment was still necessary to enable the grantee of the reversion to recover rent. In *Barnes v. Northern Trust Co.* 169 Ill. 112, 48 N. E. 31, the decision in *Fisher v. Deering*, that, even under the statute of Henry VIII., an attornment was necessary, was stated, and it was held that § 14 of the Landlord and Tenant Act (*Hurd's Rev. Stat.* 1913, chap. 80) had dispensed with the necessity of an attornment on account of the general language of that section. The language of § 15 is equally general, and purports in general terms to give to the lessee every right of action that he would have had against the lessor; but it is no more general in its terms than the 2d section of the statute of Henry VIII., and if that statute was limited in its operation to covenants which run with the land, and did not include such covenants as are personal and collateral, § 15 must receive the same interpretation, and has not enlarged the rights or remedies of lessees.

The construction of the statute of Henry VIII. has generally been considered as determined in *Spencer's Case*, supra, in which *Spencer* and his wife brought an action of covenant against *Clark* on a covenant contained in a lease made by the plaintiffs to *S.*, in which *S.* covenanted to build a brick wall on a part of the land demised. The covenant did not purport to bind the assigns L.R.A.1917A.

of *S.*, who assigned his term to *J.*, and *J.* to the defendant. Sir Edward Coke reported seven resolutions of the judges concerning covenants, which of them would run with the land and which of them are collateral and do not go with the land, where the assignee shall be bound without naming him, and where not, and where he shall be bound, although he be expressly named, and where not. The first resolution was as follows: "When the covenant extends to a thing in esse, parcel of the demise, the thing to be done by force, of the covenant is quodammodo annexed and appurtenant to the thing demised and shall go, with the land and shall bind the assignee altho' he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being, as, if the lessee covenants to repair the houses demised to him during the term that is parcel of the contract and extends to the support of the thing demised, and therefore is quodammodo annexed and appurtenant to houses and shall bind the assignee altho' he be not bound expressly by the covenant. But in the case at bar the covenant concerns a thing which was not in esse at the time of the demise made but to be newly built after, and therefore shall bind the covenantor, his executors or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being."

The second was: "It was resolved that in this case, if the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that for as much as it is to be done upon the land demised, that it should bind the assignee, for, altho' the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words."

It is contended that the statute was not construed in *Spencer's Case*, both because it was not mentioned, but mainly because it was wholly inapplicable to the facts of the case. The case was decided in the twenty-fifth year of Elizabeth,—more than forty years after the passage of the statute,—and the statute was not mentioned. It is also true that the case did not involve the statute because it was a suit by the lessor, and the statute did not purport to enlarge the rights of lessors. As to covenants of a nature to run with the land, the assignee of the lessee was bound by the covenants of the lessee, and the right of the lessor to take advantage of them did not depend

upon the statute, the purpose of which was to give rights to grantees of reversions so that they might take the same advantage of covenants and conditions as their grantors might. While the decision in *Spencer's Case* was not dependent upon the statute and no mention made of it, nevertheless it is a necessary deduction from the decision that if the lessor did not have the right to enforce the covenant against the assignee of his lessee, his grantee could not have done so by virtue of the statute, which only purported to give the same right of action to the grantee of the reversion as the lessor had; so that a rule was actually established for the application of the statute. The decision as reported by Lord Coke was that no covenant would run with the land so as to bind assigns unless it related to something in esse at the time the lease was executed. Perhaps no decision has caused more comment and controversy than that one, and the correctness of the report has been disputed. In *Minshull v. Oakes*, 2 Hurlst. & N. 793, the court of exchequer expressed the opinion that the rule was not founded on any reason, and suggested that *Spencer's Case* was decided the other way. In the other report referred to of the same case by F. Moore, page 159, the decision of the court was given as follows: "Notwithstanding that covenants lack words [assigns], yet each by acceptance of possession has made himself subject to all covenants concerning the land, but not to collateral covenants, and covenants of reparations and building of walls or houses are covenants inherent to the lands, with which the assigns, without special words, shall be charged."

The court of exchequer directed attention to the circumstance that the resolutions were never acted on, and that, according to F. Moore, the decision was to the contrary, as was the decision in *Smith v. Arnold*, 3 Salk. 4, 91 Eng. Reprint, 655, and the declaration of the court in *Bally v. Wells*, 3 Wils. 25, 95 Eng. Reprint, 913, although the word "assigns" appeared in the covenant in that case. In *Minshull v. Oakes*, supra, a covenant to repair the massuage and all other erections and buildings which should or might be erected during the term was held to run with the land, which was at least a modification of the first resolution in *Spencer's Case*. When Lord Coke was dismissed from his office, he was ordered by the council to revise his book of reports, which was said to contain many extravagant opinions, but *Spencer's Case* as reported by him has so often been cited as stating the law—sometimes without any consideration and sometimes because it was an established rule which ought not to be changed L.R.A.1917A.

by the courts—that it must be regarded as law in any case to which it is directly applicable. *Thompson v. Rose*, 8 Cow. 266; *Ovington Bros. Co. v. Henshaw*, 47 Misc. 167, 93 N. Y. Supp. 380; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Willcox v. Kehoe*, 124 Ga. 484, 4 L.R.A. (N.S.) 466, 52 S. E. 896, 4 Ann. Cas. 437; *Cicalla v. Miller*, 105 Tenn. 255, 58 S. W. 210; *Lynn v. Mt. Savage Iron Co.* 34 Md. 603; *Dewar v. Goodman* [1908] 1 K. B. 94, 77 L. J. K. B. N. S. 169, 97 L. T. N. S. 885, 24 Times L. R. 62.

According to the first resolution in *Spencer's Case*, if the covenant relates to a thing in esse, parcel of the demise, and which directly touches or concerns the thing demised, it binds the assignee, although he be not named; and by the second resolution, if the covenant relates to a thing not in esse, but the thing is to be done upon the land demised, the assignee, if named, will be bound by the covenant, but not otherwise. The distinction has not been regarded as founded in reason, but the rule has been considered an artificial and arbitrary one, from which the courts have always endeavored to escape if any distinction could be found for that purpose (*Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 171 Pa. 284, 29 L.R.A. 423, 50 Am. St. Rep. 807, 33 Atl. 239) and it has been said that the use of the word "assigns" as a technical word never was essential to the running of a covenant with the land at the common law, and there never was ground for a rational distinction between the assignee named and not named as to things not in esse. *Sexauer v. Wilson*, 136 Iowa, 357, 14 L.R.A. (N.S.) 185, 113 N. W. 941, 15 Ann. Cas. 54; 7 R. C. L. 1101.

The test whether a covenant runs with the land or is merely personal is whether the covenant concerns the thing granted and the occupation or enjoyment of it, or is a collateral and personal covenant, not immediately concerning the thing granted. If a covenant concerns the land and the enjoyment of it, its benefit or obligation passes with the ownership; but, to have that effect, the covenant must respect the thing granted or demised, and the act to be done or permitted must concern the land or estate conveyed. An illustration of the rule is found in *Wiggins Ferry Co. v. Ohio & M. R. Co.* 84 Ill. 83. In that case the Wiggins Ferry Company conveyed to a railroad company rights and easements in two parcels of ground, and the railroad company covenanted to employ the ferry company to transport across the Mississippi river persons and property brought to the river upon the railroad or to be transported on the railroad. The Ohio & Mississippi Railway

Company purchased the railroad property, and the suit was for a breach of the covenant. The court said that in order that a covenant may run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or must affect the mode of enjoyment. The covenant, having nothing to do with the two parcels of land in which the easement was granted, was held to be personal. It makes no difference whatever, as to the question whether a covenant runs with the land and may be enforced against the grantee, whether the method of enforcement is by an action at law or in equity. Equity may give the thing itself, and therefore furnish a more complete and adequate remedy than an action at law in which damages may be recovered, but the method of enforcement has no relation to the rights of the parties. In *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146, 3 N. E. 282, the court quoted with approval from the notes to *Spencer's Case* in *Smith's Leading Cases* the following: "Whether a covenant will or will not run with the land does not so much depend on whether it is to be performed on the land itself as on whether it tends directly or necessarily to enhance its value or render it more beneficial or convenient to those by whom it is owned or occupied; for if this be the case, every successive assignee of the land will be entitled to enforce the covenant."

In *Spencer's Case* the building of the wall does not appear to have been for the purpose of rendering the premises more beneficial or convenient to the occupant, or to enable him to use and enjoy the land demised, but in *Sampson v. Easterby*, 9 Barn. & C. 505, 109 Eng. Reprint, 188, 4 Mann. & R. 422, 5 L. J. K. B. 291, where an undivided one-third part of certain mines was leased, and the lease contained a covenant by the lessee that he would build a new smelting mill and keep it in repair for working the mines, the covenant was held to bind the assignees, although not expressly named.

In *Fitch v. Johnson*, 104 Ill. 111, a corporation owning a fee in real estate on either side, and extending across Rock river, upon which the construction of a dam had been commenced designed to be used in operating a flourmill, conveyed the mill and land upon which it was situated, together with certain water power, and in the deed covenanted to complete and finish the dam and works in a good and substantial manner according to a certain contract, and to forever keep up and maintain at least a 6-foot dam, to enable the grantees, their heirs and assigns, to use and enjoy the water power.

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The corporation conveyed the dam and other hydraulic works, together with the land upon which they were constructed, and it was held that the covenant was not a mere personal one on the part of the corporation, but its burden devolved upon the grantees. The dam was not completed and in esse when the conveyance containing the covenants was executed, and no importance was attached to any questions whether assigns were named or not. The principal consideration was that the mill without the motive power would be of no value to the owner.

In *Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 65, a railroad company entered into an agreement, in consideration of a conveyance to it, that it would in the future construct and maintain a fence, with proper cattle guards, two crossings and gates, and a depot on the lands, and afterward conveyed its property to the St. Louis, Alton, & Terre Haute Railroad Company. The suit was an action of covenant by the grantor against the assignee of the covenantor. The circuit court sustained a demurrer, and the judgment was reversed by this court. The court referred to the first two resolutions in *Spencer's Case*, and said they would control if the covenant had been executed by an individual, but as the corporation, when the covenant was entered into, was not authorized to convey its property, the law did not require a clause binding assignees to secure the grantor in his covenants; that the covenant related to the land, and, in contemplation of the law, inhered perpetually, and any authority conferred on the grantee to convey did not and could not sever the covenant from the land. The decision, while recognizing the rule in *Spencer's Case* where it could not be avoided, enforced the covenant to effectuate the intention of the parties; but if, as stated, the covenant related to the land, and, in contemplation of the law, inhered perpetually, it came within the definition of one which would run with the land.

In the case of *Hansen v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282, the suit was brought to recover damages for the breach of a covenant of the lessor to buy from the lessee, at a reasonable price, counters and shelving to be put in a storeroom on the first floor of a hotel building by the lessee. The court cited *Spencer's Case*, and held that the grantee of the lessor was not bound because the counters and shelving were not in esse and had not yet become a part of the land when the lease was made. The appellant claimed a right to maintain the action under § 15 of our statute, before referred to, but the court declined to consider that question because the statute was

enacted after the lease was executed. It does not appear, however, that there was any restriction upon the use of the premises which required counters and shelving, or that they were necessary to the enjoyment of the leasehold estate. The court, therefore, did not consider that question, and the case came exactly within the first resolution in *Spencer's Case*.

Neither the *Hansen Case* nor *Spencer's Case* is authority for the doctrine that if the lessee is restricted to a particular use of the lands demised, requiring improvements without which the land could not be used for the special purpose, a covenant relating to such improvements does not run with the land and bind assigns not expressly named. The covenant in this case did directly affect the mode of enjoying the leasehold estate which could not be otherwise enjoyed. Surely such a covenant is annexed to the land itself, and the privity of estate which is the foundation of the running of covenants with the land is present. The improvements, when made, would not only tend to the support of the thing demised, but would be essential to its use. The provisions of the lease amounted to an express covenant not to use the premises for any other purpose than as an amusement park. The naked land without the improvements could not be used for that purpose, and the lessee agreed to create the very thing which would enable him to use the land for the specified purpose. Stalls,

paddocks, seats for the people, stands for the judges, fences with gates, offices for the sale of tickets, and other improvements, were absolutely essential to effect the purpose of the lease and to give the lessee the benefit of it. The grantee of *Miller* unquestionably had a right to enforce the covenant of the lease that the premises should be used for an amusement park, and, having the benefit of the covenant, the burden and benefit ran together with the land. The defendant, as grantee of the reversion, might have enforced against an assignee of the plaintiff the provision of the lease that the demised premises should be used for an amusement park, and such use necessitated the making of the improvements. The mutual covenants related to the manner of use and enjoyment of the premises, and were inherent in the demise, and not personal or collateral. Whether there was ever any rational ground for a distinction between things which are or are not in esse when the covenant is made, where they do not concern the use and enjoyment of the demised premises, there certainly is none where the covenant directly concerns such use and enjoyment.

The judgments of the Appellate Court and Circuit Court are reversed, and the cause is remanded to the Circuit Court.

Petition for rehearing denied June 8, 1916.

Annotation—Necessity of use of word “assigns” in order to make covenant as to a thing not in esse run with the land.

This note is supplementary to note to *Sexauer v. Wilson*, 14 L.R.A.(N.S.) 185, and contains only the cases decided later.

On the question of what particular covenants run with the land, without reference to the use of the word “assigns,” so as to create rights and liabilities between the lessee and the transferee of the reversion, see note to *Glidden v. Second Ave. Invest. Co.* L.R.A. 1915C, 190, subsecs. IV. c, 2, and IV. c, 3; and on the same question, with particular reference to a covenant for repairs or to pay for tenant's improvements, see note to *Willcox v. Kehoe*, 4 L.R.A.(N.S.) 466. See also notes cited in Index to L.R.A. Notes, under the title, “Covenants.”

The court in *PURVIS v. SHUMAN*, ante, 121, says that *Spencer's Case* (1583) 5 Coke, 16a, 77 Eng. Reprint, 72, 1 Smith Lead. Cas. 9th ed. 174, 15 Eng. Ral. Cas. 233, is not “authority for the doc-

trine that if the lessee is restricted to a particular use of the lands demised, requiring improvements without which the land could not be used for the special purpose, a covenant relating to such improvements does not run with the land and bind assigns not expressly named.” This seems to be the better interpretation of that decision, but it does not reconcile the inconsistency between the first resolution in that decision and the second resolution, but rather depends upon the second resolution alone. This inconsistency between the two resolutions is pointed out in the note to *Sexauer v. Wilson*, supra. It is there said: “Of late, the courts, recognizing this inconsistency of the resolutions in *Spencer's Case*, have been trying to break away from the old rule that it was necessary to use the word ‘assigns’ to make a covenant concerning a thing not in esse run with the land, and have been coming to regard the intention of the

parties, as gathered from the whole instrument, the controlling factor, and not the use or omission of mere technical words. And, while the authorities, on the whole, are pretty evenly divided on the question, the conclusion reached in *Sexauer v. Wilson* seems to have the support of a majority of the later decisions." This note is supplementary to the one just referred to.

The same point is raised in reference to a covenant to provide a railroad crossing, and there is some discussion thereof, in note to *Childs v. Boston & M. R. Co.* 48 L.R.A.(N.S.) 378, 382.

But, notwithstanding that the trend of modern decisions is toward a more liberal interpretation, some courts yet hold to the old doctrine as to something not in esse. Thus, in *Maryland & P. R. Co. v. Silver* (1909) 110 Md. 510, 73 Atl. 297, it was held that a covenant in a grant of a railroad right of way, providing that the company should maintain a station on the premises where trains would stop when flagged, was concerning a thing not in esse; hence, it did not run with the land unless assigns were mentioned. The court said: "A covenant in a deed, whether to be performed on or off the land, must, in order to run with the land, touch and concern the land so that the thing required to be done will tend to enhance its value or render it more convenient or beneficial to the owner; and if the covenant extends to something not then in esse, the covenant must be to one, 'his

heirs and assigns,' by express words, else the assignee shall take no benefit of it. *Spencer's Case* (1583) 5 Coke, 16a, 77 Eng. Reprint, 72, 1 Smith, Lead. Cas. 9th ed. 174; *Whalen v. Baltimore & O. R. Co.* (1908) 108 Md. 11, 17 L.R.A.(N.S.) 130, 129 Am. St. Rep. 423, 69 Atl. 390." There was another entirely independent ground for the decision: the court regarded the covenant as having been fulfilled by the maintenance of a station at the designated place until such time as the business of the road no longer required its maintenance there; but the first ground for the decision, as here indicated leaves no room to doubt that the court intended to adhere to the old rule of the *Spencer Case*, as it understands the decision in that case.

And the court, in *Duester v. Alvin* (1915) 74 Or. 544, 145 Pac. 660, said: "Covenants relating to a subject-matter not in esse, as, for the building of a fence or the erection of a structure upon designated real property, are personal, and do not run with the land so as to bind assignees, unless they are expressly named in the deed. *Brown v. Southern P. Co.* (1899) 36 Or. 128, 47 L.R.A. 409, 78 Am. St. Rep. 761, 58 Pac. 1104; *Hisey v. Eastminster Presby. Church* (1908) 130 Mo. App. 566, 109 S. W. 60;" but as "heirs and assigns" were mentioned in the covenant, containing building restrictions, in a deed, the covenant was held to run with the land. J. W. M.

OKLAHOMA SUPREME COURT.

E. M. LISLE et al., Doing Business as E. M. Lisle & Company, Pliffs. in Err.,

v.

E. N. ANDERSON.

(— Okla. —, 159 Pac. 278.)

Negligence — elements.

1. In every case involving actionable negligence, there are of necessity three constituent elements to its existence: First,

Headnotes by BROWN, C.

Note — Violation of Sunday law as defense to an action for personal injuries was treated in the note to *Hughes v. Atlanta Steel Co.* 36 L.R.A.(N.S.) 547. The only case in point since that note is *Gerretson v. Rambler Garage Co.* 40 L.R.A.(N.S.) 457, holding that the owner of an automobile leased for hire cannot escape liability for injury to an occupant of the car through the negligence of the chauffeur because the L.R.A.1917A.

the existence of a duty on the part of the person complained against to protect the complainant from the injury of which he complains; second, the failure of the defendant to perform that duty; third, injury to the plaintiff resulting from such failure of the defendant; and when a petition affirmatively shows these three elements, it is good as against a demurrer.

For other cases, see *Negligence, I.; Pleading, II. j. in Dig. 1-52 N. S.*

Evidence — sufficiency — demurrer.

2. Where the evidence is sufficient to reasonably tend to support the allegations of a petition that states a cause of action, a

leasing was on Sunday. In this connection, see note to *Hinkle v. Pruitt*, L.R.A.1915F, 644, as to liability for damage to or conversion of property leased or hired in violation of Sunday law.

The note first referred to presupposes a violation of the Sunday law by the person injured, so that the cases in notes to *James v. Wellston Twp.* 13 L.R.A.(N.S.) 1271, 1272, and *Lerner v. Philadelphia*, 21 L.R.A.

demurrer to such evidence should be overruled.

For other cases, see Trial, II. d, 4, in Dig. 1-52 N. S.

Negligence — duty as to care.

3. Whenever the circumstances attending a situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises; and, if such care is not exercised by the party on whom the duty rests, and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties.

For other cases, see Negligence, I. a, in Dig. 1-52 N. S.

Same — co-contractors — care in work.

4. Where the defendants had a contract with a school board to erect a school building complete save a heating and ventilating system, and the company for whom the plaintiff was working had a contract with the said school board for installing the said heating and ventilating system, and the defendants and the company for whom the plaintiff was working were each at the same time carrying out their respective contracts with the school board, and the defendants, under and by virtue of the terms of their contract, were to furnish and install joists in the attic of said school building, upon which a tank that was to be a part of the heating and ventilating system was to be placed by the plaintiff, and the defendants knew that this was one of the purposes for which the said joists were to be used, and after the defendants had selected and installed the said joists in said attic, but before said defendants had fully completed their contract with said school board and turned the building over to the school board, the plaintiff, in installing the said tank, went upon said joists, and one of the joists broke, and, as a result thereof, the plaintiff fell and was injured,—held, that if the defendants knew, or, by the exercise of ordinary care, could have known, that the plaintiff might be reasonably expected to go upon the joists in installing the tank, the defendant owed the plaintiff the duty to exercise ordinary care in the selection of said joists, although the relation of master and servant did not exist.

For other cases, see Negligence, I. c, 1, in Dig. 1-52 N. S.

(N.S.) 669, 670, involving the liability of towns and municipalities for injuries to persons while traveling on Sunday, by defects and obstructions in streets and highways, are not within the scope of this note, and are distinguishable in so far as they consider the question whether or not there had been a violation of the Sunday law, L.R.A.1917A.

Sunday — labor — injury — rights.

5. The fact that the plaintiff was injured on Sunday, while at work in violation of the Sunday law of the state of Oklahoma, is not a bar to a recovery.

For other cases, see Sunday, V. in Dig. 1-52 N. S.

Judgment — sustaining demurrer — res judicata.

6. When a demurrer to the plaintiff's petition is sustained and the court, by its order, duly entered upon the record, allows the plaintiff a certain time in which to make his election as to whether or not he will stand upon the sufficiency of his petition, and the plaintiff, before the expiration of the time in which he is required to make such election, files a motion to dismiss the cause without prejudice, and the court sustains the motion and makes an order dismissing the cause without prejudice, the order sustaining the demurrer is not such a final adjudication as will defeat another action between the same parties in another court, on the same facts as set out in the petition to which the demurrer was sustained.

For other cases, see Judgment, II. b, in Dig. 1-52 N. S.

Joint debtors — release — covenant not to sue.

7. An instrument, executed to a joint tort-feasor in the following language: "I do agree and covenant that I shall never institute or prosecute any suit on account of my said injuries against said . . . L . . . and . . . K, or either of them," etc., is merely a covenant not to sue, and not a release,—and will not operate to discharge another joint tort-feasor from liability.

For other cases, see Joint Creditors and Debtors, II. in Dig. 1-52 N. S.

Instructions — correctness.

8. Instruction as to measure of damages upheld on authority of Midland Valley R. Co. v. Hilliard, — Okla. —, 148 Pac. 1001, and authorities therein cited.

For other cases, see Trial, III. e, 2, in Dig. 1-52 N. S.

(January 24, 1916.)

ERROR to the Superior Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the Commissioner's opinion.

without discussing the effect of such a violation upon the right of action for personal injuries.

For other cases treating of the effect of a violation of Sunday law, consult Index to L.R.A. Notes and Digest under the title "Sunday."

Messrs. **Everest & Campbell**, for plaintiffs in error:

Defendants did not owe plaintiff the duty of protecting him, or of furnishing him a place in which to work, or of advising him with regard to the strength or weakness of the joists, there being no privity of contract between him and them.

Bokoshe Smokeless Coal Co. v. Morehead, 34 Okla. 424, 126 Pac. 1033; **Gorham v. Gross**, 125 Mass. 232, 28 Am. Rep. 224; **Burke v. De Castro & D. Sugar Ref. Co.** 11 Hun, 354; **Bright v. Barnett & R. Co.** 88 Wis. 299, 26 L.R.A. 524, 60 N. W. 418; **The Joseph B. Thomas**, 81 Fed. 578; **Chicago, R. I. & P. R. Co. v. Watson**, 36 Okla. 1, 127 Pac. 693; **Giles v. Diamond State Iron Co.** 7 Houst. (Del.) 453, 8 Atl. 368, 13 Am. Neg. Cas. 772; **Miner v. Franklin County Teleph. Co.** 83 Vt. 311, 26 L.R.A. (N.S.) 1195, 75 Atl. 653; **Covington & C. Bridge Co. v. Goodnight**, 22 Ky. L. Rep. 1242, 60 S. W. 415; **McGuire v. Bell Teleph. Co.** 167 N. Y. 208, 52 L.R.A. 437, 60 N. E. 433; **Iabatt, Mast. & S. § 1073**; **Cheatham v. Hogan**, 50 Wash. 465, 22 L.R.A. (N.S.) 951, 97 Pac. 499; **American Mach. Co. v. Ferry**, 141 Ky. 372, 132 S. W. 546; **Clark v. Union Iron & Foundry Co.** 234 Mo. 436, 45 L.R.A. (N.S.) 295, 137 S. W. 577; **Yellow Pine Oil Co. v. Noble**, — Tex. Civ. App. —, 97 S. W. 332; **Frisco Lumber Co. v. Spivey**, 40 Okla. 633, 140 Pac. 157; **Salliotte v. King Bridge Co.** 65 L.R.A. 620, 58 C. C. A. 466, 122 Fed. 378; **Daugherty v. Herzog**, 145 Ind. 255, 32 L.R.A. 837, 57 Am. St. Rep. 204, 44 N. E. 457; **Curtin v. Somerset**, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; **Whart. Neg. § 439**; **Albany v. Cunliff**, 2 N. Y. 165; **First Presby. Congregation v. Smith**, 163 Pa. 561, 26 L.R.A. 504, 43 Am. St. Rep. 808, 30 Atl. 279; **Hagen v. Schleuter**, 236 Ill. 467, 22 L.R.A. (N.S.) 856, 86 N. E. 112.

So far as defendants were concerned, plaintiff was a bare licensee, even if it be assumed that he was there with their permission.

Emerson v. Bergin, 76 Cal. 197, 18 Pac. 204; **Great Falls Waterworks Co. v. Great Northern R. Co.** 21 Mont. 487, 54 Pac. 963; **Means v. Southern California R. Co.** 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206, 17 Am. Neg. Rep. 1; **Connell v. Keokuk Electric R. & Power Co.** 131 Iowa, 622, 109 N. W. 177; **Blackstone v. Chelmsford Foundry Co.** 170 Mass. 321, 49 N. E. 635; **Beehler v. Daniels**, 18 R. I. 563, 27 L.R.A. 512, 49 Am. St. Rep. 790, 29 Atl. 6; **Vanderbeck v. Hendry**, 34 N. J. L. 467; **Gibson v. Leonard**, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182.

Plaintiff having submitted his amended petition setting up all the rights he claimed L.R.A.1917A.

against defendants, the judgment of the court that the amended petition, taking all of it as true, did not entitle him to recover, was a final judgment.

Bissell v. Spring Valley Twp. 124 U. S. 225, 31 L. ed. 411, 8 Sup. Ct. Rep. 495; **Chicago v. Partridge**, 248 Ill. 442, 94 N. E. 115; **McDuffie v. Geiser Mfg. Co.** 41 Okla. 488, 138 Pac. 1029; **Hyatt v. Challiss**, 59 Kan. 422, 53 Pac. 467; **St. Joseph & D. C. R. Co. v. Dryden**, 17 Kan. 278; **Schafer v. Weaver**, 20 Kan. 294.

Any agreement which acknowledges satisfaction for injuries received in cases of this kind is a release.

Rogers v. Cox, 66 N. J. L. 432, 50 Atl. 143; **Abb v. Northern P. R. Co.** 28 Wash. 426, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 964; **Seither v. Philadelphia Traction Co.** 125 Pa. 397, 4 L.R.A. 54, 11 Am. St. Rep. 905, 17 Atl. 338; **Hartigan v. Dickson**, 81 Minn. 284, 83 N. W. 1091; **Ellis v. Esson**, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; **Chicago v. Babcock**, 143 Ill. 358, 32 N. E. 271; **Gilbert v. Finch**, 173 N. Y. 465, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; **Edens v. Fletcher**, 79 Kan. 139, 19 L.R.A. (N.S.) 618, 98 Pac. 784; **Carey v. Bilby**, 63 C. C. A. 361, 129 Fed. 203; **El Paso & S. R. Co. v. Darr**, — Tex. Civ. App. —, 93 S. W. 166.

Where a specific standard for measure of damages is fixed by the statute, all litigants have the right to have that standard fixed whenever an instruction on the measure of damages is given to the jury.

Smith v. Milwaukee Builders' & T. Exch. 91 Wis. 360, 30 L.R.A. 504, 51 Am. St. Rep. 912, 64 N. W. 1041; **Block v. Milwaukee Street R. Co.** 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; **Pennsylvania Co. v. Files**, 65 Ohio St. 403, 62 N. E. 1047.

Messrs. **Ames, Chambers, Lowe, & Richardson** and **Hogsett & Boyle**, for defendant in error:

Defendants owed plaintiff the duty of using ordinary care and skill to avoid injury to him, and particularly the duty of using ordinary care in selecting and installing the joists upon which he would be required to work.

Devlin v. Smith, 80 N. Y. 470, 42 Am. Rep. 311; **Heaven v. Pender**, L. R. 11 Q. B. Div. 503, 52 L. J. Q. B. N. S. 702, 49 L. T. N. S. 357, 47 J. P. 709, 19 Eng. Rul. Cas. 81; **American Engineering & Constr. Co. v. Kostolnisk**, 141 Ky. 8, 131 S. W. 1033; **Donnelly v. Hufschmidt**, 79 Cal. 74, 21 Pac. 546; **Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.** 71 N. H. 522, 60 L.R.A. 116, 53 Atl. 807, 13 Am. Neg. Rep. 363; **Olson v. Phoenix Mfg. Co.** 103 Wis. 337, 79 N. W. 409; **Coughtry v. Globe Woolen Co.**

56 N. Y. 124, 15 Am. Rep. 387; Fish v. Waverley Electric Light & P. Co. 189 N. Y. 336, 13 L.R.A.(N.S.) 226, 82 N. E. 150; Pennsylvania Steel Co. v. Ellmore & H. Contracting Co. 175 Fed. 176; O'Brien v. American Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012; Bill v. New York Expanded Metal Co. 60 App. Div. 470, 69 N. Y. Supp. 989; Cameron v. Vandergriff, 53 Ark. 381, 13 S. W. 1092; Loehring v. Westlake Constr. Co. 118 Mo. App. 163, 94 S. W. 747; Hutchinson v. Richmond Safety Gate Co. 247 Mo. 71, 152 S. W. 60; Clark v. St. Louis & Suburban R. Co. 234 Mo. 396, 137 S. W. 583; Clark v. Union Iron & Foundry Co. 234 Mo. 436, 45 L.R.A.(N.S.) 295, 137 S. W. 577; Trout v. Laclede Gaslight Co. 151 Mo. App. 207, 132 S. W. 58; Appel v. Eaton & P. Co. 97 Mo. App. 428, 71 S. W. 741; Flanagan v. Wells Bros. Co. 237 Ill. 82, 127 Am. St. Rep. 315, 86 N. E. 609; Kitchen v. Riter-Conley Mfg. Co. 207 Pa. 558, 56 Atl. 1083, 16 Am. Neg. Rep. 678; Crane Elevator Co. v. Lippert, 11 C. C. A. 521, 24 U. S. App. 176, 63 Fed. 942; Young v. Waters-Pierce Oil Co. 185 Mo. 634, 84 S. W. 929; Newark Electric Light & P. Co. v. Garden, 37 L.R.A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74; Peters v. Johnson (Peters v. Jackson) 50 W. Va. 644, 57 L.R.A. 428, 88 Am. St. Rep. 909, 41 S. E. 190; 1 Thomp. Neg. § 688; Moll, Independent Contractors & Employers' Liability, § 226, p. 341; O'Brien v. American Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012.

If the defendants owed the duty of exercising ordinary care in the selection of the joists, then plaintiff had a right to assume that they would perform that duty.

Giles v. Diamond State Iron Co. 7 Houst. (Del.) 453, 8 Atl. 368, 13 Am. Neg. Cas. 772.

The fact that the accident occurred on Sunday could not be considered in any way the proximate cause of the accident, and this question is therefore wholly immaterial.

Kansas City v. Orr, 62 Kan. 61, 50 L.R.A. 783, 61 Pac. 397, 8 Am. Neg. Rep. 36; Dutton v. Weare, 17 N. H. 34, 43 Am. Dec. 590; Platz v. Cohoes, 89 N. Y. 219, 42 Am. Rep. 286; Black v. Lewiston, 2 Idaho, 276, 13 Pac. 80; Davidson v. Portland, 69 Me. 116, 31 Am. Rep. 253; Norris v. Litchfield, 35 N. H. 271, 69 Am. Dec. 546; Corey v. Bath, 35 N. H. 530; Sewell v. Webster, 59 N. H. 586; Wentworth v. Jefferson, 60 N. H. 158; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534; Gross v. Miller, 93 Iowa, 72, 26 L.R.A. 605, 61 N. W. 385; Schmid v. Humphrey, 48 Iowa, 652, 30 Am. Rep. L.R.A.1917A.

414; White v. Lang, 128 Mass. 598, 35 Am. Rep. 402; Carroll v. Staten Island R. Co. 58 N. Y. 136, 17 Am. Rep. 221; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L.R.A. 435, 19 Am. St. Rep. 442, 19 Atl. 178, 5 Am. Neg. Cas. 21; Knowlton v. Milwaukee City R. Co. 59 Wis. 278, 18 N. W. 17; Taylor v. Star Coal Co. 110 Iowa, 40, 81 N. W. 249; Illinois C. R. Co. v. Dick, 91 Ky. 434, 15 S. W. 665; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; Solarz v. Manhattan R. Co. 8 Misc. 656, 29 N. Y. Supp. 1123, affirmed in 11 Misc. 715, 32 N. Y. Supp. 1149.

The court was expressly authorized to dismiss this cause without prejudice to plaintiff's future action.

Schafer v. Weaver, 20 Kan. 294; Collins v. Metropolitan L. Ins. Co. 232 Ill. 37, 14 L.R.A.(N.S.) 356, 122 Am. St. Rep. 54, 83 N. E. 542, 13 Ann. Cas. 129; Oklahoma City v. McMaster, 196 U. S. 533, 49 L. ed. 589, 25 Sup. Ct. Rep. 324; Bode v. New England Invest. Co. 1 N. D. 121, 45 N. W. 197; Keehl v. Schaller, 6 Dak. 499, 50 N. W. 195; Harrison v. Remington Paper Co. 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314; Mason v. Kansas City Belt R. Co. 226 Mo. 212, 26 L.R.A.(N.S.) 914, 125 S. W. 1128; John Ii Estate v. Brown, 119 C. C. A. 458, 201 Fed. 242; Detroit v. Detroit R. Co. 134 Mich. 11, 104 Am. St. Rep. 606, 95 N. W. 992, 90 N. W. 411; Taylor v. Slater, 21 R. I. 104, 41 Atl. 1001; Seamster v. Blackstock, 83 Va. 232, 5 Am. St. Rep. 262, 2 S. E. 36; Newberry v. Ruffin, 102 Va. 73, 45 S. E. 733.

A covenant not to sue, given to one joint tort-feasor, does not release the other.

Gilbert v. Finch, 173 N. Y. 465, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; 34 Cyc. 1084; Hawkins v. Missouri P. R. Co. 182 Mo. App. 323, 170 S. W. 459; 7 N. C. C. A. 1003; McDonald v. Goddard Grocery Co. 184 Mo. App. 432, 171 S. W. 650; Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271.

Even where an absolute release for a consideration is executed on behalf of one not shown to be a joint wrongdoer, it will not operate to discharge the others who are responsible.

Wagner v. Union Stock Yards & Transit Co. 41 Ill. App. 410; Western Tube Co. v. Zang, 85 Ill. App. 63; Kentucky & I. Bridge Co. v. Hall, 125 Ind. 220, 25 N. E. 219; Turner v. Hitchcock, 20 Iowa, 310; Missouri, K. & T. R. Co. v. McWherter, 59 Kan. 351, 53 Pac. 135; Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548; Wilson v. Reed, 3 Johns. 175; Atlantic Dock Co. v. New York, 53 N. Y. 64; Thomas v. Central

R. Co. 194 Pa. 511, 45 Atl. 344; Iddings v. Citizens' State Bank, 3 Neb. (Unof.) 750, 92 N. W. 578; Hirschfeld v. Alsberg, 47 Misc. 141, 93 N. Y. Supp. 617; Pittsburg R. Co. v. Chapman, 76 C. C. A. 418, 145 Fed. 886; Sieber v. Amunson, 78 Wis. 679, 47 N. W. 1126.

The instruction as to the measure of damages was not erroneous.

McCarthy v. St. Louis Transit Co. 108 Mo. App. 317, 83 S. W. 298; Holden v. Missouri P. R. Co. 108 Mo. App. 665, 84 S. W. 133; Garard v. Manufacturers' Coal & Coke Co. 207 Mo. 242, 105 S. W. 767; Central Texas & W. R. Co. v. Gibson, — Tex. Civ. App. —, 83 S. W. 862; Lackland v. Lexington Coal Min. Co. 110 Mo. App. 634, 85 S. W. 397; Kendall v. Albia, 73 Iowa, 241, 34 N. W. 833; Hamilton v. Great Falls Street R. Co. 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; Gulf, C. & S. F. R. Co. v. Harriett, 80 Tex. 82, 15 S. W. 556; Harrison v. Ayrshire, 123 Iowa, 528, 99 N. W. 132; Bailey v. Centerville, 108 Iowa, 20, 78 N. W. 831; Muncie Pulp Co. v. Hacker, 37 Ind. App. 194, 76 N. E. 770; Kirkham v. Wheeler-Osgood Co. 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532, 18 Am. Neg. Rep. 661; Union Gold Min. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600, 22 Mor. Min. Rep. 213.

Brown, C., filed the following opinion:

The plaintiffs in error will be hereinafter called the defendants, and the defendant in error will be hereinafter called the plaintiff, in accord with their respective titles in the trial court.

The school district at Mountain View, Oklahoma on the 14th day of July, 1909, entered into two contracts, one for the construction of a school building and one for the installation of a heating and ventilating system in said building. The defendants had the contract for the construction of said building, and were to furnish all material and do all the work necessary to a complete structure, in accordance with certain plans and specifications, save the installation of the said heating and ventilating system. Lewis & Kitchens had the contract to install the heating and ventilating system, in accordance with certain plans and specifications. It was required by the plans and specifications for the building that a certain tank, which was a part of the heating and ventilating system to be installed by the said Lewis & Kitchens, was to be supported by the joists in the attic of the said building, and these joists were to be furnished and placed in said building by the defendants, and the defendants knew that the same were to be used as a support for said tank. The joists were made of pine lumber, size 2x6, and 12 or 14 feet in length, and were

placed 16 inches apart from center to center, and extended north and south from one wall to another. Said joists were of size and length, and placed the distance apart, as called for by the plans and specifications. The plaintiff was superintendent for Lewis & Kitchens, and had charge of installing the heating and ventilating system. After the defendants had finished their work in the attic where this tank was to be placed, but before they had fully completed the building and delivered it to the owner, the plaintiff went into the attic to place the tank, and, while placing the tank upon said joists, one of the joists broke, and the plaintiff fell some 12 or 15 feet and was considerably injured. The evidence tended to show that said joist broke by reason of being windshaken or worm-eaten. Plaintiff brought this action against the defendants to recover damages for the personal injuries received by the fall, basing his petition upon the above facts, with the allegation as to negligence as follows: ". . . Defendants were careless and negligent in putting in place and maintaining said weak, rotten, and defective joist, when they knew, or by the exercise of ordinary care could have known, of its condition; and when they knew the purpose said joist was intended to serve; and when they knew it would be necessary for this plaintiff and other workmen, while in and about their work, to walk over and upon and stand upon this and other joists; and when they knew that plaintiff and other workmen intended to work upon and about said joists; and when they knew, or, by the exercise of reasonable care, could have known, that said joist was liable to break and injure this plaintiff or other workmen."

The plaintiff recovered judgment against the defendants for \$3,000. Defendants filed a motion for a new trial, and same was overruled and exceptions allowed, and the case is brought here to have the action of the trial court reviewed. We deem it unnecessary, at this time, to make a fuller statement of facts, as same will more fully appear, where they are necessary to be stated, in the discussion of the various assignments of error to be considered by the court.

The first point urged by the defendants calls for a determination of the trial court's action in overruling a demurrer to the petition, a demurrer to the evidence, and refusing to direct a verdict in favor of the defendants.

The defendants claim that they owed the plaintiff no duty at the time he was injured, and that therefore there can be no liability. It is a familiar proposition that in every case involving actionable negligence, there are, of necessity, three constit-

uent elements, to its existence: First, the existence of a duty on the part of the person complained against to protect the complainant from the injury of which he complains; second, the failure of the defendant to perform that duty; third, injury to the plaintiff resulting from such failure of the defendant. And it is only when these elements are brought together unitedly that actionable negligence is constituted. The absence of an affirmative showing of any one of these essential elements renders the petition bad, or the evidence insufficient. *Loehring v. Westlake Constr. Co.* 118 Mo. App. 163, 94 S. W. 747; *Faurot v. Oklahoma Wholesale Grocery Co.* 21 Okla. 104, 17 L.R.A.(N.S.) 136, 95 Pac. 463; *Faris v. Hoberg*, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028; *Texas Co. v. Collins*, 42 Okla. 374, 141 Pac. 783; *Chicago, R. I. & P. R. Co. v. McIntire*, 29 Okla. 797, 119 Pac. 1008; *St. Louis & S. F. R. Co. v. Lee*, 37 Okla. 545, 46 L.R.A.(N.S.) 357, 132 Pac. 1072.

With these principles in mind we shall examine the facts of the case. The plaintiff was not in the employ of the defendants; there was no privity of contract existing. Therefore the relation of master and servant did not obtain. But the defendants had a contract with the school board to erect a building complete save the heating and ventilating system; the company for whom the plaintiff was working had the contract with the school board for installing the heating and ventilating system. Both contractors were carrying out the terms of their contracts at the same time; the defendants were doing the general construction work, and the plaintiff, for his company, was installing the heating and ventilating system. The defendants, by the terms of their contract, were to furnish and place the joists in the attic, upon which the plaintiff's company was to place the tank. It was not only necessary that the joists be furnished and installed in order that the defendants might complete the building, but it was also necessary that they be furnished and installed in order that the tank of the heating and ventilating system be supported; and the defendants knew that this was one of the purposes for which the joists were to be used. Now, did they owe the plaintiff any duty in the selection of the joists? In the case of *Delvin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, the defendant, who was a scaffold builder, was employed by a painter to construct a scaffold, and he defectively constructed it, and it gave way and killed a person who was in the employ of the painter, and the supreme court of New York held the defendant liable. In the case of *Loehring v. L.R.A.1917A.*

Westlake Constr. Co. 118 Mo. App. 163, 94 S. W. 747, the court had under consideration a proposition that involved the same principle that we have in the instant case, and the court, in the course of the opinion, said: "It is now well settled, in the law of negligence applicable to cases of this nature, that there are duties owing, the violation of which will constitute actionable negligence, in instances other than those arising out of privity of contract, and many such arising outside of the relation of master and servant, etc. The principle finds application in that class of cases where the injured party is rightfully on the premises, and is injured by the negligence of another under such circumstances as could reasonably have been foreseen, been contemplated, and the probable injury averted by ordinary care on the part of the person whose act caused the injury."

The supreme court of Illinois, in the case of *Flanagan v. Wills Bros. Co.* 237 Ill. 82, 127 Am. St. Rep. 315, 86 N. E. 609, announced the following doctrine: "One engaged in the construction of a building certainly owes to another engaged in the same work and exercising due care for his own safety the duty of exercising care to do his work in such a way as not to negligently injure the other."

See also *Heaven v. Pender*, L. R. 11 Q. B. Div. 503-509, 52 L. J. Q. B. N. S. 702, 49 L. T. N. S. 357, 47 J. P. 709, 19 Eng. Rul. Cas. 81; *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1092; *Young v. Waters-Pierce Oil Co.* 185 Mo. 634, 84 S. W. 929; *Appel v. Eaton & P. Co.* 97 Mo. App. 428, 71 S. W. 741; *Bill v. New York Expanded Metal Co.* 60 App. Div. 470, 69 N. Y. Supp. 989; *Kitchen v. Riter-Conley Mfg. Co.* 207 Pa. 558, 56 Atl. 1083, 15 Am. Neg. Rep. 678; 1 *Thomp. Neg.* § 688.

Thus it will be seen that the rule deducible from the authorities, supra, is that, whenever the circumstances attending the situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises, and if such care is not exercised by the party on whom the duty rests, and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties. Hence the defendants, who knew that the joists were to be used to support the tank of the heating and ventilating system, and whose duty it was to

select and install the same, if they knew, or, by the exercise of ordinary care, could have known, that the plaintiff might reasonably be expected to go upon the joists in installing the tank, owed the plaintiff the duty to exercise ordinary care in the selection of said joists, although the relation of master and servant did not exist.

The plaintiff was injured on Sunday, and the court permitted the plaintiff to testify, over the objection of the defendants, to a conversation that he had with the defendants' foreman, to the effect that the foreman told him to go ahead and work on Sunday, and that he, the foreman, carried the key, etc. The fact that the plaintiff was working on Sunday, probably in violation of the Sunday laws of the state, was immaterial, and of course any evidence that was introduced merely to show the fact that the plaintiff was working on Sunday, or that he was advised to work on Sunday by the foreman, was immaterial, for if the injury occurred by reason of the defendants' failure to use ordinary care to see that the joists were reasonably suitable for the purpose intended, the injury was as liable to occur on Monday, or any other secular day, as it was on Sunday. *Kansas City v. Orr*, 62 Kan. 61, 50 L.R.A. 783, 61 Pac. 397, 8 Am. Neg. Rep. 36, and cases therein cited. However, the evidence complained of was admissible as tending to show that the defendants, who were the general contractors on the building, had not yet fully completed the same and turned it over to the owners thereof.

The plaintiff first brought this action in the district court of Oklahoma county, and a demurrer was sustained to the petition; the order sustaining the demurrer being as follows: "It is therefore ordered, adjudged, and decreed by the court that said demurrer and the same is hereby sustained, to which the plaintiff in open court duly excepted and still excepts. Thereupon, upon request of the plaintiff, said plaintiff is allowed ten days in which to make his election whether or not he will stand upon the sufficiency of his amended petition."

Within four days after the demurrer was sustained, the plaintiff filed a motion to dismiss the cause without prejudice, and the court sustained the motion and made an order accordingly. The defendants urge that the court was without authority to dismiss the cause without prejudice, and that the order sustaining the demurrer was a final adjudication of the rights of the parties, and that the trial court erred in not permitting defendants to introduce in evidence the proceeding in the said district court to establish their plea of *res judicata*. The statutes of Oklahoma provide that the L.R.A.1917A.

plaintiff may dismiss the cause without prejudice to future action "before the final submission of the case to the jury, or to the court when the trial is by the court." Okla. Rev. Laws, 1910, § 5125.

The Oklahoma statute touching this matter is identical with the Kansas statute. In the case of *Ashmead v. Ashmead*, 23 Kan. star page 263, the supreme court of Kansas, in discussing the rights of the plaintiff under the above statute, said: "It will be conceded that, after the final submission of the case, the plaintiff had no right to a dismissal without prejudice. Up to that time she had such right, and could exercise it of her own option, without the consent of the defendant or the permission of the court. At that time her rights in that respect ceased. But has not the court the power, in its discretion, to permit a plaintiff, even after the final submission, to recall that submission, and dismiss without prejudice? It would be both strange and harsh if such power did not exist."

In the case of *Mason v. Ryus*, 26 Kan. 464, the court said: "After a demurrer to plaintiff's evidence has been sustained, and before any judgment is in fact entered, the right of the plaintiff to dismiss his action without prejudice ceases; but the court has a discretion to permit him to so dismiss. . . . The statutory right of the plaintiff to dismiss without prejudice may have ceased, but the discretionary power and control of the court over proceedings before it is not ended."

In *Schafer v. Weaver*, 20 Kan. 296, the court said: "Where a demurrer to evidence is submitted to the court, the submission is only conditionally final. It is final upon the condition that the court shall sustain the demurrer, . . . or if the court, in its discretion, shall reopen the case for the admission of evidence, or for the dismissal of the action without prejudice, then the submission is not final, or *at least the action of the court thereon is not final.*" (Italics are ours.)

In the instant case, the district court of Oklahoma county, at the time it made the order sustaining the demurrer to the petition, did not take final action in the case. It did not require the plaintiff at that time to elect as to whether or not he would stand upon the demurrer, and make the proper orders touching such election and finally disposing of this phase of the case; but it left the matter open for a period of ten days, thus necessarily implying that in the future the court would make other orders touching this phase of the case and finally disposing of same; and, before the court finally disposed of it, the plaintiff obtained leave of the court to dismiss the cause with-

out prejudice. We think that, under the holding of the Kansas court, *supra*, it was at least in the discretion of the court to allow this action to be taken. Having given such permission, the ruling, until reversed, is conclusive in any collateral inquiry, and it must be held in such subsequent inquiry that there had been no final adjudication; nothing which prevents a further inquiry as to the rights of the parties growing out of the alleged facts. *Mason v. Ryus, supra*.

After the injury plaintiff executed an instrument to Lewis & Kitchens, his employers, stating that, for a certain consideration, naming it: "I do agree and covenant that I shall never institute or prosecute any suit on account of my said injuries against said . . . L and . . . K, or either of them," etc.; and the defendants complain at the action of the trial court in refusing to permit the said instrument to be introduced in evidence in support of their answer setting up a release; the defendants claiming that the instrument executed to Lewis & Kitchens was a release, and that therefore, under the doctrine that the release of one joint tort-feasor operates as a release of all, the said instrument was competent evidence to support their said answer. We see no error in this regard. The contention as to the instrument being a release is not tenable; there is no room whatever to doubt the meaning of the instrument; the intentions of the parties were clearly expressed therein. Under the light of all the authorities, it is a covenant not to sue Lewis & Kitchens; therefore it is not such an instrument as could operate to discharge the defendants from liability, though Lewis & Kitchens be joint tort-feasors with the defendants in the infliction of the injury upon the plaintiff. 34 Cyc. 1084, and cases cited. *Hawkins v. Missouri P. R. Co.* 182 Mo. App. 323, 170 S. W. 459, 7 N. C. C. A. 1003; *McDonald v. Goddard*

Grocery Co. 184 Mo. App. 432, 171 S. W. 650; 24 Am. & Eng. Enc. Law, 293; *Matthey v. Gally*, 4 Cal. 62, 60 Am. Dec. 595; *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 344; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Chicago v. Smith*, 95 Ill. App. 335; *Bell v. Perry*, 43 Iowa, 368; *Arnett v. Missouri P. R. Co.* 64 Mo. App. 368; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140; *Spencer v. Williams*, 2 Vt. 209, 19 Am. Dec. 711; *Duck v. Maeu* [1892] 2 Q. B. 511, 62 L. J. Q. B. N. S. 69, 4 Reports, 38, 67 L. T. N. S. 547, 41 Week. Rep. 56, 57 J. P. 23; *Texarkana Teleph. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257.

The defendants insist that that part of instruction No. 15, defining measure of damages, which allows a recovery for loss of future wages and for future pain and suffering, is erroneous, in that it does not require the jury to find from the evidence that such damages are "certain to result." We see no error in the instruction as given, and in support of this view we refer to the case of *Midland Valley R. Co. v. Hilliard*, — Okla. —, 148 Pac. 1001, where this court upheld an instruction not nearly so favorable to the defendant as the instruction in the instant case. The other instructions complained of, we believe, fairly state the law applicable to this case.

From a careful consideration of the whole case we are convinced that no error of sufficient magnitude to warrant a reversal was committed, and that therefore the judgment should be affirmed.

Per Curiam:

Adopted in whole.

First petition for rehearing denied July 25, 1916; second petition denied October, 1916.

UNITED STATES SUPREME COURT.

FARMERS' & MECHANICS' NATIONAL BANK OF PHILADELPHIA

v.

RIDGE AVENUE BANK et al.

(240 U. S. 498, 60 L. ed. 767, 36 Sup. Ct. Rep. 461.)

Bankruptcy — distribution — priorities — partnership and individual creditors.

The lack of any partnership assets and

of any solvent partner does not disentitle a creditor of an individual partner in a bankrupt firm to be paid out of that partner's individual estate to the exclusion, if necessary, of the creditors of the partnership estate, upon the theory that such conditions create an exception to the general rule for the distribution of partnership and individual estates in bankruptcy, expressed in the Bankrupt Act of July 1, 1898, § 5, viz., that partnership creditors shall, in the first instance, be satisfied from the net proceeds of the partnership estate, and credi-

Note. — The decision in *FARMERS' & M. NAT. BANK v. RIDGE AVE. BANK*, rejecting the claimed exception, in case of a bankrupt firm, without assets or a solvent partner, to the rule prescribed by the terms of L.R.A.1917A.

the Act of 1898, for the distribution of assets, as between creditors of the firm and creditors of the individual partners, conclusively settles the point, and leaves no opportunity for annotation.

tors of an individual partner from the net proceeds of that partner's individual estate, since such an exception is not compatible with the other provisions of that section which empower courts of bankruptcy to adjudicate a partnership a bankrupt, and to administer the partnership estate so far as possible as any other estate, and authorize them to permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and to marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

For other cases, see Bankruptcy, I. in Dig. 1-52 N. S.

(April 3, 1916.)

CERTIFICATION by the United States Circuit Court of Appeals, Third Circuit, of a question as to the right of a creditor of an individual partner in a bankrupt firm to be paid out of that individual estate to the exclusion, if necessary, of the creditors of the partnership estate. Affirmative answer returned.

The facts are stated in the opinion.

Mr. J. Frank Staley for the Farmers' & Mechanics' National Bank:

Clause "f" of § 5 of the Bankruptcy Act lays down a positive and direct rule of distribution, and requires the appropriation of the net proceeds of the individual estate of each partner to the payment of such individual debts, and partnership creditors are entitled to share therein only after such individual debts have been paid in full. The existence or nonexistence of firm assets for distribution cannot affect or vary the rule.

Re Janes, 67 C. C. A. 216, 133 Fed. 912; Euclid Nat. Bank v. Union Trust & D. Co. 70 C. C. A. 485, 149 Fed. 975; Mills v. Fisher, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 150 Fed. 897; Re Wilcox, 94 Fed. 84; Re Daniels, 110 Fed. 745; Re Hull, 224 Fed. 796; Re Mills, 95 Fed. 269.

Historically, the rule of distribution provided by clause "f" is the re-enactment of the rule in equity governing the administration of the estates of insolvent partners, which has been in practice from the beginning of our judicial history.

Murrill v. Neill, 8 How. 414, 12 L. ed. 1135.

Mr. Frank R. Savidge for the Ridge Avenue Bank et al.:

Firm creditors share equally with separate creditors of the partners in individual assets, where there are no firm assets and no living solvent partner.

Lindley, Partn. 8th ed. p. 811, note, p. 855; Gilmore, Partn. pp. 438, 439; Parsons, Partn. 2d ed. p. 500; Collyer, Partn. 6th ed. p. 1459; Story, Partn. 7th ed. § 380. L.R.A.1917A.

See also Loveland, Bankr. 1912, § 273; Biapham, Eq. 9th ed. § 517; Re Carpenter, 7 Morrell, 270; Ex parte Taft, 16 Ves. Jr. 193, 33 Eng. Reprint, 957; Re Jewett, 1 Nat. Bankr. Reg. 491, Fed. Cas. No. 7,304; Re Knight, 2 Biss. 518, 8 Nat. Bankr. Reg. 436, Fed. Cas. No. 7,880; Re Downing, 1 Dill. 33, 3 Nat. Bankr. Reg. 748, Fed. Cas. No. 4,044; Re Rice, 9 Nat. Bankr. Reg. 373, Fed. Cas. No. 11,750; Re McEwen, 6 Biss. 294, 12 Nat. Bankr. Reg. 11, Fed. Cas. No. 8,783; Re Collier, 12 Nat. Bankr. Reg. 266, Fed. Cas. No. 3,002; Re Green, 116 Fed. 118, 8 Am. Bankr. Rep. 553; Conrader v. Cohen, 58 C. C. A. 249, 121 Fed. 801, affirming 118 Fed. 676; Re Gray, 208 Fed. 959; Re Kane, 11 Am. Bankr. Rep. 533; Smith v. Mallory, 24 Ala. 628; Davis v. Howell, 33 N. J. Eq. 72; Level v. Farris, 24 Mo. App. 445; Hundley v. Farris, 103 Mo. 78, 12 L.R.A. 254, 23 Am. St. Rep. 863, 15 S. W. 312; Colwell v. Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913; Thayer v. Humphrey, 91 Wis. 276, 30 L.R.A. 549, 51 Am. St. Rep. 887, 64 N. W. 1007; Harris v. Peabody, 73 Me. 262; Rodgers v. Meranda, 7 Ohio St. 179.

Mr. Chief Justice White delivered the opinion of the court:

The essential facts stated in the certificate of the court below are these: The firm of William Gray & Sons and its three partners, William J. Gray, Peter Gray, and Alexander J. Gray, were adjudged bankrupts. The same person was appointed trustee of the four estates. It resulted from charging separately against each estate the mere necessary and unquestioned expenses of administration that there was nothing whatever in the estate either of the partnership, of that of William J. Gray or of Peter Gray,—indeed in the latter there was nothing to defray the expenses of administration. As to the estate of Alexander J. Gray, after charging the expenses of administration there remained \$1,597.26. Creditors of the firm proved their debts against it, the Ridge Avenue Bank of Philadelphia being among the number, while only one creditor, the Farmers' & Mechanics' National Bank of Philadelphia, proved a debt against the individual estate of Alexander J. Gray, that debt exceeding the total sum of the estate. No creditor proved against the individual estate of William J. Gray or that of Peter Gray. Under these conditions the dispute which arose was whether the estate of Alexander J. Gray was to go wholly to the Farmers' & Mechanics' National Bank, the individual creditor, or was to be proportionately applied to the individual and firm creditors because of the absence of any firm estate for dis-

tribution. The district court directed the fund to be distributed between the Farmers' & Mechanics' National Bank, the creditor of the individual estate, and the creditors of the firm, and the question of law which the court below propounds to enable it to review this action of the district court, is as follows:

"When a partnership as such is insolvent, and when each individual member is also insolvent, and when the only fund for distribution is produced by the individual estate of one member, are the individual creditors of such member entitled to priority in the distribution of the fund?"

The solution of this question primarily depends upon an interpretation of subsection f of § 5 of the Bankruptcy Act of 1898, and secondarily upon a consideration of all the pertinent subsections of the section; indeed, of all the relevant provisions of the context of the act. Subsection f is as follows:

"f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." [30 Stat. at L. 548, chap. 541, Comp. Stat. 1913, § 9589.]

Let us first sift the respective contentions so as to reach the ultimate proposition required to be decided. In the first place, in favor of the right of the creditor of the individual partner to be paid, under the facts stated, out of the individual estate, to the entire exclusion, if necessary, of the creditors of the partnership estate, it is urged that such result is so unambiguously commanded by the rule of distribution established by the text of subsection f that there is no room for construction, but the simple duty arises to enforce the text, as to do otherwise would amount to judicial legislation. It is undoubted that this proposition is supported by largely the greater weight of opinion of the courts of the United States in enforcing subsection f. *Re Wilcox*, 94 Fed. 84 (1899); *Re Mills*, 95 Fed. 269 (1899); *Re Daniels*, 110 Fed. 745 (1901); *Re Janes*, 67 C. C. A. 216, 133 Fed. 912 (1904), reversing 128 Fed. 527; *Re Henderson*, 142 Fed. 588 (1906); *Euclyd Nat. Bank v. Union Trust & D. Co.* 79 L.R.A.1917A.

O. C. A. 485, 149 Fed. 975 (1906), affirming *Re Henderson*, supra; *Mills v. Fisher*, 16 L.R.A.(N.S.) 656, 87 C. C. A. 77, 159 Fed. 897 (1908); *Re Hull*, 224 Fed. 796 (1915).

On the other hand, to refute the proposition and to avoid the effect of the authorities sustaining it just referred to three contentions are relied upon. (a) It is said the absence of ambiguity in the general rule as stated in subsection f is conceded and the soundness of the authorities cited recognizing that fact is not disputed, but these concessions, it is declared, are negligible, since the fact that there were no partnership assets and no solvent partner causes this case to be an exception to the rule expressed in subsection f, hence not governed by it, and therefore makes it clear that the authorities cited are inapposite because they mistakenly applied the general rule to an exceptional case which that rule did not govern. (b) That this is demonstrated first by the fact that the general rule was as unambiguously expressed in the previous bankruptcy acts (§ 14 of the act of 1841 [5 Stat. at L. 448, chap. 9] and § 36 of the act of 1867 [14 Stat. at L. 534, chap. 176]), and yet, under those acts, the exception stated, which unquestionably governed in bankruptcy in England, where the general rule was the same, was also held to be controlling by judicial decisions in this country. This being true, the argument insists the inference is that Congress, in adopting the act 1898 without any expression excluding the continued operation of the exception which prevailed under the previous acts, must be considered as having impliedly recognized the continued force of that exception; that is, must be held to have substantially made that exception a part of the rule established under the act of 1898. And this view, it is insisted, is expressly sustained by the following decided cases under the act of 1898: *Re Green*, 116 Fed. 118 (1902); *Re Conrader*, 118 Fed. 676 (1902); *Conrader v. Cohen*, 58 C. C. A. 249, 121 Fed. 801 (1903), affirming *Re Conrader*, supra; *Re Janes*, 128 Fed. 527 (1904), reversed in 67 C. C. A. 216, 133 Fed. 912; and by the present case, *Re Gray*, 208 Fed. 959 (1913), and is in reason supported by the adjudged cases which upheld the asserted exception under the prior acts.

(c) That even if this be held to be not the case, as there is nothing in the act of 1898 repudiating the application and existence of the exception which prevailed under the previous acts, therefore, as a question of original investigation, that exception should be held to be equally applicable and controlling under the act now in force

as it was under the previous bankruptcy acts, since the general rule was as clearly stated in those acts as it is in this.

A twofold reply is made to these contentions: First, although admitting that the alleged exception prevailed in England, it is denied that it was authoritatively recognized in this country under the previous acts, and second, by insisting that even if it was, it is not applicable under the act of 1898 because the terms of that act make manifest that it was drawn for the purpose of preventing the method of distribution provided in subsection f from being subject to the exception relied upon.

As we are of opinion that it is to be conceded that if, under the prior acts, it was settled authoritatively and conclusively that the exception relied upon obtained and was fully recognized in practice, it would follow that the enactment of the same general rule without anything indicating a departure from the exception would justify the conclusion that it was the legislative intent to continue the exception, it results that, in order to answer the question propounded, the whole case comes to two inquiries: Was there such an authoritative exception to the general rule under the prior laws, and, if not, was the continued existence of such exception compatible with the rule of distribution established by subsection f of the present act as considered in the light of the context of § 5 of which it forms a part, and of the scope and operation of the act of 1898?

1. Undoubtedly in England, with the development of the general rule for the distribution of partnership and individual estates in bankruptcy as now formulated in subsection f of the present Bankruptcy Act, there also was evolved in practice the so-called exception here relied upon which was applicable in cases where there was no partnership estate to distribute and no solvent partner. We content ourselves with this statement, and do not refer to the adjudged cases in England establishing the rule, and those from which the alleged exception came to be evolved, since they were quite fully referred to in *Murrill v. Neill*, 8 How. 414, 12 L. ed. 1135, and will all be found stated in the fullest degree in the opinion of Lowell, Judge, in *Re Wilcox*, 94 Fed. 84. It is also true that this asserted exception came to be recognized and applied in adjudged cases in this country under the prior bankruptcy acts. The cases on this subject again are not referred to because they will also be found stated in the opinion in the *Wilcox Case*. But, while this is true, we think there is no ground for saying that the asserted exception had become so authoritatively established prior to the L.R.A.1917A.

adoption of the present law as to cause it to be in effect a part of the rule, since on the contrary, as will be seen by the references already made, its applicability was constantly disputed and its enforcement challenged. Nothing more is required to demonstrate this statement than a recurrence to *Murrill v. Neill*, supra, since in the opinion in that case, after considering the general rule of distribution as now stated in subsection f, and the alleged exception here under review, it was said: "It may be proper in this place to mention the two departures permitted by the court of chancery in England from the general rule pursued by that court, which departures were adverted to in a previous part of this opinion." After then stating the first exception, the one now in question was referred to as follows: "The second is that in which there are no joint effects at all. In this last instance it is said that the joint creditors may come in for dividends *pari passu* on the separate effects; though if there be joint effects, though of the smallest possible amount, this privilege would not be allowed. These exceptions it seems difficult to reconcile with the reason or equity on which the general rule is founded; they are but exceptions, however, and cannot impair that rule. They do not, for aught we have seen, appear to have been recognized by the courts of this country." p. 427.

2. Although the alleged exception was therefore clearly not so authoritatively established as to cause it to become a part of the rule by the enactment of the Bankruptcy Act of 1898, it yet remains to consider whether its existence is compatible with that act; that is, whether to permit it would be in accord with the rights which the act gave and the duty which it imposed to enforce them. In the first place it is to be observed that the Act of 1898 in the opening subsections of § 5 confers the power on courts of bankruptcy to adjudge a partnership a bankrupt and to administer the partnership estate so far as possible as any other estate,—an authority not conferred by the previous bankruptcy acts. In the second place, subsection f, establishing the rule of distribution, is immediately followed by subsection g, which provides as follows:

"The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The legislative mind must therefore have been immediately and directly concerned

with the enforcement of the rule of distribution expressed in subsection f, since that subject was thus immediately considered and provided for. And the significance of this provision and its effect upon the continued existence of the supposed authority to depart from the rule expressly provided for by permitting the alleged exception now relied upon will become quite clear by the briefest possible outline of some of the principal considerations involved in the origin and development of that assumed exception.

As pointed out in the opinion in *Murrill v. Neill*, supra, and as fully shown by the review of the English cases so carefully stated in *Re Wilcox*, supra, to which we again refer, that origin and development was this: It came to pass in England at an ancient date that with the establishment of the rule of distribution substantially as formulated in subsection f, it was recognized that a creditor of the joint or partnership estate would be permitted, if no objection was made, to prove his claim in a bankruptcy proceeding against an individual partner. This resulted from the fact that the power of the court over the separate or individual estate extended not only to the individual assets, but to the share of the individual bankrupt in the partnership assets, the court having power upon application, by ordering separate accounts to be kept, to protect the rights of all and secure a distribution conformably to the settled rule. While there is obscurity and consequent contrariety of opinion as to the reason upon which it was placed, it no doubt came to pass in a further state of evolution that both joint and separate creditors were allowed to prove their claims in bankruptcy against the separate estate, the practice of protecting the rights of each by an order requiring separate accounts disappearing and the creditors being relegated for the accomplishment of that result to a bill in equity to enforce and secure the distribution as provided in the rule. It is further certain that as in every case where an order was made allowing the joint creditor to prove against the separate estate of a partner such right would be frustrated by chancery proceedings, it came to pass that joint creditors were only allowed to prove against the separate estate upon condition that distribution would be made conformably with the general rule in every case where that course could be compelled by chancery proceedings. As it came further, however, to be appreciated that chancery could not afford relief in a case where there was no joint estate and no solvent partner, it resulted that in such a case the limitation as to distribution was treated as not applica-

ble, and therefore the alleged exception to the general rule arose,—an exception which, as pointed out by this court in *Murrill v. Neill*, supra, was but a failure to give effect to the rule, not because of the absence of right of the creditors to enjoy its benefit, but alone because the judicial power had at its command no remedy which it could apply to give effect to the legal right which undoubtedly existed.

When the origin and source of the so-called exception is thus appreciated and the comprehensive delegation of authority for the first time conferred by subsection g is considered, it would seem to be fairly inferable that at the very moment of the re-expression of the ancient rule in subsection f in terms free from ambiguity, the means of preventing its frustration in the guise of an exception or otherwise because of an assumed absence of judicial remedy to enforce the rule provided for. And this being true, it of course results that no possible reason can be found for refusing to give effect to the law by permitting the successful operation of the so-called exception now relied upon. In fact, irrespective of the considerations derived from the origin of such assumed exception, to which we have referred, when the positive commands of the statute are considered and the new power conferred by the act as to partnership estates is borne in mind, we see no escape from the conclusion that the powers conferred by subsection g are coincident with the duties which the act imposes, and amply efficient to secure and give effect to their performance. This, indeed, was the view hitherto indicated in *Miller v. New Orleans Acid & Fertilizer Co.* 211 U. S. 496, 53 L. ed. 300, 29 Sup. Ct. Rep. 176, where, after quoting subsection f of the act, it was said:

"To enforce these provisions the act compels (subdiv. d) the keeping of separate accounts of the partnership property and of the property belonging to the individual partners; the payment (subdiv. e) of the bankrupt expenses as to the partnership and as to the individual property proportionately; and permits (subdiv. g) the proof of the claim of the partnership estate against the individual estate, and vice versa, and directs the marshaling of the assets of the partnership estate and the individual estates 'so as to prevent preferences and secure the equitable distribution of the property of the several estates.'" p. 504.

It follows that the question propounded will be answered, Yes.

And it is so ordered.

ARKANSAS SUPREME COURT.

S. W. MORELAND, Appt.,

v.

STATE OF ARKANSAS.

(— Ark. —, 188 S. W. 1.)

Assault — taking liberties with woman.

1. A man is guilty of assault in taking hold of the arm of a married woman not his wife, against her will, with a request to kiss him, although before her marriage she had consented to be kissed by him.

For other cases, see Assault and Battery, I. in Dig. 1-52 N. S.

Criminal law — different offenses growing out of same transaction.

2. Conviction for the use of abusive words is not a bar to a prosecution for assault and battery upon the person to whom the words were addressed, as part of the same transaction, under a statute providing that a conviction shall be a bar to further prosecution for such offense, or for any misdemeanor embraced in the act committed.

For other cases, see Criminal Law, II. g, 2, in Dig. 1-52 N. S.

(July 10, 1916.)

APPPEAL by defendant from a judgment of the Circuit Court for Craighead County, convicting him of assault and battery. Affirmed.

Statement by Wood, J.:

This is an appeal from a conviction against the appellant for an assault and battery on the person of one Mrs. Ida Turner. Mrs. Turner testified substantially as follows: That she lived in the country; that on January 20, 1916, at about 9 o'clock in the morning, she went to visit her sister, who lived about a half mile away by the path or field road through which she was traveling. No one was with her except her baby. She met Dr. Moreland, who was traveling south and crossed Mrs. Turner's road. He was in his buggy, and after driving through the gate he stopped and waited until Mrs. Turner came close to him. She walked up in about ten steps of him, and he wanted to know where she was going to travel that morning, and after a few words of conversation he walked up and took hold of her arm, squeezed it, and said, "Are you well?" She replied, "No." He then said, "Kiss me this morning." She refused, and he pushed around some way and his beard scraped her face. Her baby screamed, and he said, "Are you going through the field?" She said, "Yes," and he said, "Now I will

open the gate for you." She refused to let him open the gate for her, and he said, "Ida, can't I come to see you?" And she replied, "No." Then he went on, and she continued her journey to her sister's. Dr. Moreland tried to kiss her about six years before, and at that time she objected to it, but said nothing about it. This time she reported the matter to her husband. She never told the doctor to take his hand off of her wrist, but stepped back for him to take it off. He just walked up and "kinda squeezed on her wrist," and she stepped aside and he walked up and took hold of her again. After he asked her to kiss him she told him to quit, and he did quit.

Dr. Moreland testified as follows: "I have known Mrs. Ida Turner all her life, and have acted as her family physician during that period of time. The facts have been stated pretty well. I did take hold of her wrist with my right hand, but she didn't step over to one side. About that time I asked her to kiss me and she said, 'No,' and the child cried about that time, and it passed off at that. She didn't object to my holding her wrist nor raise any outcry for help or cry. I didn't kiss her. When she said 'No,' I stopped right there. I am sixty-five years old."

On cross-examination, appellant testified that he had kissed the prosecutrix about six years ago; that he kissed her with her consent; she offered no resistance whatever. The reason he had for believing that his approaches would be acceptable to her on this occasion was their former relations.

It was agreed by the prosecuting attorney and the attorney for the appellant that the appellant had been charged with a breach of the peace for the use of abusive language in connection with this same transaction; that he was fined \$50 therefor, and that the fine had been paid. The conviction in that case was predicated upon the same testimony that had been introduced in this case.

The appellant asked the court to instruct the jury to return a verdict in his favor. He further asked that the court instruct the jury that he had already been convicted on a charge of a breach of the peace for abusive language, in which the same testimony was introduced as had been introduced in the present case, and that by reason of such conviction he could not be convicted on the present charge. The court refused these prayers for instructions, and gave instructions on its own motion, to which appellant excepted.

The above are all of the facts that are necessary to be stated for a correct determination of the issues presented by this appeal.

Note. — Taking liberties with woman as an assault, see annotation following this case, post, 142.
L.R.A.1917A.

Messrs. Basil Baker and Horace Sloan, for appellant:

The undisputed evidence shows that no criminal offense was committed, and the court should have directed a verdict for the defendant.

Clerget v. State, 83 Ark. 227, 103 S. W. 381; *Pratt v. State*, 49 Ark. 179, 4 S. W. 785; *Tuberville v. Savage*, 1 Mod. 3, 86 Eng. Reprint, 684; *Crawford v. State*, 21 Tex. App. 454, 1 S. W. 446; *Chambless v. State*, 46 Tex. Crim. Rep. 1, 70 S. W. 577.

The court erred in requiring the appellant to testify over his own objections, with reference to former convictions for assault.

Stanley v. Aetna Ins. Co. 70 Ark. 107, 66 S. W. 432; *Bergstrand v. Townsend*, 70 Ark. 600, 70 S. W. 307.

Defendant's plea of former jeopardy should have been sustained.

Richardson v. State, 56 Ark. 367, 19 S. W. 1052; *Ingle v. Batesville Grocery Co.* 89 Ark. 378, 117 S. W. 241; *Williams v. State*, 99 Ark. 149, 137 S. W. 927, Ann. Cas. 1913A, 1056; *Cypress Creek Drainage Dist. v. Wolfe*, 109 Ark. 60, 158 S. W. 960; *State v. Wondra*, 114 Minn. 457, 131 N. W. 496, Ann. Cas. 1912C, 667; *Com. v. Hawkins*, 11 Bush, 603, 1 Am. Crim. Rep. 65; *State v. Ingles*, 3 N. C. (2 Hayw.) 4.

Messrs. Wallace Davis, Attorney General, and Hamilton Moses, Assistant Attorney General, for the state:

Wood, J., delivered the opinion of the court:

The undisputed testimony shows that appellant was guilty of the crime charged. An "assault and battery is the unlawful striking or beating the person of another." Kirby's Dig. § 1584.

Mr. Bishop says: "The kind of physical force necessary to constitute an assault is immaterial." See 2 Bishop's New Crim. Law, § 28. Among the examples he gives to illustrate the text is: "The taking of indecent liberties with a woman; even laying hold of and kissing her against her will"—citing *Reg. v. Dungey*, 4 Post. & F. 99, 103. The author says (vol. 1, § 548): "Assault and battery [are] two offenses against the person and personal security, in the facts of most cases existing together, and practically regarded as one." "A battery," says he, "is any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent."

In *Mailand v. Mailand*, 83 Minn. 453, 455, 86 N. W. 445, it is said: "An intent to do violence is an essential ingredient of the offense, but the degree of violence is, of course, immaterial. The least or slight-

est wrongful and unlawful touching of the person of another is an assault."

See also Clark's Criminal Law, p. 228.

The presumption is that Mrs. Turner was a chaste woman, and there is no evidence to the contrary. The testimony of the appellant to the effect that he believed his approaches would be acceptable to her because he had kissed her and she had kissed him six years ago did not constitute an excuse or justification for his laying his hands upon her with the view of kissing her as he had done on the previous occasion. The undisputed proof shows that on the former occasion when he kissed her she was a single woman. Since that time she had married, and at the time of the alleged offense had her baby with her. The circumstances were entirely different.

Although the appellant had been the prosecutrix's family physician, as he says, all her life, that fact and the fact that he had kissed her before when she was a maiden did not justify him in laying his hands upon her before he knew whether or not she would consent to these advances. The presumption must be indulged that a virtuous woman would not have consented to be kissed under such circumstances. It was unlawful for appellant to kiss Mrs. Turner without her consent, and he had no right to presume from his past conduct and his professional relations with her that she would consent. The undisputed testimony shows that she did not consent. It is the sacred right of every woman to protect her virtue. Hence she can, if she will, hold her person aloof from the contaminating touch of any man of lecherous inclination. No man, whether his purpose be lascivious or otherwise, has any right to lay his hands upon a chaste woman, indulging the presumption that she will consent to an act which it would be unlawful for him to commit without her consent, and in the absence of proof to warrant the inference that Mrs. Turner did consent to the act of appellant in laying his hands upon her for the purpose of kissing her, it must be held that the conduct of appellant in doing so was an assault and battery within the meaning of the above authorities.

The appellant relies upon *Clerget v. State*, 83 Ark. 227, 103 S. W. 381, as supporting his contention that the evidence was not sufficient to convict him. In that case the utmost that evidence tended to prove was that Clerget told his companion Malone, while they were making the rounds to warn road hands to work, that "somewhere on our rounds there are some girls we can go to and have a good time." When they reached a certain residence, Clerget went in and gave the sign to Malone that

they had reached the place mentioned. Clerget went in and Malone followed him. Clerget was asking a young lady if anyone was there subject to road duty, and she replied that her brother was. Clerget commenced writing a warning notice to him, and then Malone touched the young lady upon the chin, which she indignantly resented. We hold upon these facts that Clerget was not guilty of an assault and battery. Clerget did not lay his hands upon the young lady, and the evidence was not sufficient to show a conspiracy between Clerget and Malone to do an unlawful act, and hence Clerget was not guilty. In that case Malone, of course, was guilty of an assault and battery, because he took undue liberty with the person of the young woman without her consent, just as appellant did with Mrs. Turner.

The court, therefore, upon the undisputed evidence, might have so declared as a matter of law. The judgment is right, and it is therefore unnecessary for us to consider the errors assigned in the rulings of the court in giving and refusing prayers for instructions, and in the admission of testimony.

2. Under the agreed statement of facts, to the effect that appellant was convicted for the offense of abusive language growing out of the same transaction, appellant claims that this prosecution is barred under the authority of § 5633 of Kirby's Dig. which reads, in part, as follows: "When-

ever any party shall have been convicted before . . . any justice of the peace . . . said conviction shall be a bar to further prosecution before any . . . justice of the peace or circuit court for such offense or for any misdemeanor embraced in the act committed."

But the offense of a breach of the peace by using abusive language is not embraced in the act of assault and battery. They are not of the same generic class, and one cannot be included in the other, although they may arise out of the same occurrence or transaction. This statute (§ 5633) was not intended to prevent the state from carving out and prosecuting for separate and distinct offenses growing out of the same occurrence or transaction. The statute was only designed to prevent more than one prosecution for one and the same act constituting the same offense. The use of insulting words is one offense, and assault and battery is an entirely separate and distinct offense, although the abusive and insulting words may have been used at the time of and in connection with the assault and battery. The use of the insulting words and the assault and battery were different acts. They were not "embraced in the act committed" within the sense of the statute.

There are no reversible errors in the record, and the judgment is therefore affirmed.

Annotation—Taking liberties with woman as an assault.

In this note it is not intended to include assaults with intent to commit rape, whether the female was capable of giving her consent or not.

Simple assault.

The rule upon which MORELAND v. STATE, ante, 140, is decided is that when a man takes improper liberties with the person of a female against her will, without reasonable grounds for believing that what he does will not be offensive to her, he is guilty of simple assault. *Norris v. State* (1888) 87 Ala. 85, 6 So. 371 (putting arms around woman and holding and forcibly pressing her while making indecent proposals); *Balkum v. State* (1896) 115 Ala. 117, 67 Am. St. Rep. 19, 22 So. 532 (putting arms around woman and making indecent proposal); *Walker v. State* (1902) 132 Ala. 11, 31 So. 557 (pinching woman's knee with fingers); *People v. Manchego* (1889) 80 Cal. 306, 22 Pac. 223 (laying violent hands upon female without intent to ravish, but with intent by the force used to overcome and seduce her); *Goodrum* L.R.A.1917A.

v. State (1878) 60 Ga. 509 (putting arm tenderly around the neck of a married woman, with no motive except a lecherous one, and repeating the act when repelled); *Ragsdale v. Ezell* (1899) 20 Ky. L. Rep. 1567, 49 S. W. 775 (putting arms around female and hugging and kissing her until she pulled away); *Hatchett v. Blacketer* (1915) 162 Ky. 266, 172 S. W. 533 (squeezing breast with hand); *Com. v. Merrill* (1860) 14 Gray (Mass.) 415, 77 Am. Dec. 336 (entering bedroom of daughter, handling her privates, and endeavoring to induce her to consent to intercourse); *Com. v. Hagenlock* (1885) 140 Mass. 125, 3 N. E. 36 (getting into bed with woman while she was asleep, and attempting to detain her when she awoke and got out, though not touching her person); *State v. White* (1892) 52 Mo. App. 285 (placing hand upon woman's arm, or retaining hold upon it, and soliciting sexual intercourse); *State v. Fulkerson* (1902) 97 Mo. App. 599, 70 S. W. 704 (placing hand upon woman's arm under circum-

stances indicating intent to solicit intercourse); *State v. McChesney* (1916) — Mo. —, 185 S. W. 197 (numerous acts of familiarity accompanying solicitation); *Wanzer v. State* (1894) 41 Neb. 238, 59 N. W. 909 (attempt by physician to get upon woman with his person exposed while giving her medical treatment); *Newell v. Whitcher* (1880) 53 Vt. 589, 38 Am. Rep. 703 (entering bedroom of female, sitting on the edge of the bed, upon the bedclothes covering her, and leaning over her while soliciting intercourse); *Doyle v. Com.* (1902) 100 Va. 808, 40 S. E. 925 (putting arm around prosecutrix and attempting to kiss her, and, upon her resisting, tightening his hold and putting his hand under her clothes, but releasing her upon demand); *Bartell v. State* (1900) 106 Wis. 342, 82 N. W. 142 (healer using massage treatment needlessly causing female patient to expose her body to his view for his evil purposes, and under those circumstances and for such evil purposes securing the opportunity of laying his hands upon her body, she submitting under belief that such exposure was necessary); *Rex v. Rosinski* (1824) 1 Moody, C. C. (Eng.) 198 (medical practitioner requiring patient needlessly to remove her clothing, assisting her in doing so on pretense that it was necessary to enable him to administer treatment, she protesting, but consenting under belief that it was necessary); *Reg. v. Williams* (1838) 8 Car. & P. (Eng.) 286 (having intercourse with woman by fraudulently personating her husband).

In *Rex v. Nichol* (1807) Russ. & R. C. C. (Eng.) 130, the court sustained a verdict of guilty of a common assault in the taking, by a male teacher, of indecent liberties with a female pupil, upon her testimony that what was done was against her will, though the circumstances indicated consent on her part, or at least no resistance, the court taking into consideration her age and the position of authority which he had over her as explaining her failure to resist.

While an indecent assault might be made upon the person of a lewd woman by fondling her person without her consent, evidence that she was unchaste should go to the jury upon the question as to whether she was consenting to the acts, and as to defendant's intent to injure her. *Wilson v. State* (1902) — Tex. Crim. Rep. —, 67 S. W. 106. See also *Mitchell v. Work* (1882) 13 R. I. 645.

In *People v. Bransby* (1865) 32 N. Y. 525, a prosecution for assault and bat-

tery, it was held that an instruction that if defendant took prosecutrix to a room and locked himself in with her, with intent to have connection with her, she being ignorant of such intent, then he was guilty of an assault, although she afterward consented, was a manifest legal error.

Aggravated assault.

In Texas the Code defines an aggravated assault to be, among other things, "where the instrument or means used is such as inflicts disgrace upon the person assaulted, as an assault and battery with a whip or cowhide;" and under such statutes it is held that taking familiarities with the person of a female against her will constitutes an aggravated assault within the terms of the statute. To bring any particular act of the nature under discussion within the statute, there must be shown an intent on the part of the man to injure the female, which injury need not, however, be physical, but may consist of injury to the feelings, such as the production of emotions of shame or constraint.

Thus, to constitute the placing of an arm around the shoulders of prosecutrix, and taking hold of her hand, an aggravated assault, there must be shown an intent thereby to injure her. *Crawford v. State* (1886) 21 Tex. App. 454, 1 S. W. 446.

And evidence that defendant merely placed his hand upon the arm of prosecutrix, in connection with an indecent proposal, did not show an aggravated assault, in the absence of a showing of intent to injure, if, from her character, conversations, and conduct, she invited the proposal. *Shields v. State* (1898) 39 Tex. Crim. Rep. 13, 44 S. W. 844.

So, in *Stripling v. State* (1904) 47 Tex. Crim. Rep. 117, 80 S. W. 376, in which the aggravated assault charged consisted of defendant putting his arm around a girl who was riding with him, and embracing or attempting to embrace her, it was held that he was entitled to an instruction to the effect that if he merely put his arm on the back of the buggy seat, and, in doing so, touched her, or if he took hold of her and endeavored to embrace her, though he had no intention of injuring her or her feelings, but believed, upon probable grounds, that the attempt would not be objected to by her or offensive to her, then he would not be guilty of the offense charged.

Likewise in *Chambless v. State* (1904) 46 Tex. Crim. Rep. 1, 79 S. W. 577, a prosecution for aggravated assault, con-

sisting of an attempt by defendant to kiss prosecutrix, where the evidence of defendant showed that he had no purpose to seize prosecutrix and compel her to kiss him against her will, but that, from her conversation with him, he believed she would agree to kiss him, he was entitled to an instruction submitting the question of intent to the jury, because there must be an intent to injure before there can be an assault, and, as the injury in this case would be to the feelings, the intent could not be presumed because no personal violence or battery was inflicted.

And *Stermer v. State* (1904) 46 *Tex. Crim. Rep.* 183; 78 S. W. 1072, in which defendant was convicted of aggravated assault, where it appeared that he was sleeping on the porch at a house where he was visiting, and arose in the night and entered the room of his wife's sister, the door of which was but 3 feet from that of his wife's room, and the alleged assault consisted of only raising the sister's nightgown, and defendant testified that he supposed he was entering his wife's room, and that he left as soon as he discovered his mistake, it was held that unless defendant intended to injure the sister by making an indecent proposal to her which would cause her some disagreeable emotion of the mind, such as shame or constraint, he was not guilty of an assault, and that he was entitled to instructions submitting such defense to the jury.

But it is an assault upon a woman to fondle her against her consent, or to lay hands upon her without her consent, and an intent to injure under such circumstances will be presumed, which presumption must be overcome to justify an acquittal of aggravated assault. *Combs v. State* (1909) 55 *Tex. Crim. Rep.* 332, 116 S. W. 595; *Floyd v. State* (1890) 29 *Tex. App.* 341, 15 S. W. 819.

There also must be shown an injury to the female, which likewise may consist of an injury to her feelings.

So, where there is some question as to whether the indecent familiarities with the female were against her consent or produced a sense of shame in her, the jury should be instructed that if defendant took such liberties with no intent to injure her, or if his conduct did not create in her mind a sense of shame or other disagreeable emotion, they would be authorized to acquit him. *Koen v. State* (1906) 50 *Tex. Crim. Rep.* 145, 95 S. W. 114.

Nor was an aggravated assault shown by testimony that defendant put his

hand on the private parts of prosecutrix, in the absence of any showing that the act produced any constraint or sense of shame in her. *Hawes v. State* (1898) — *Tex. Crim. Rep.* —, 44 S. W. 1094.

And it seems that a reasonable doubt in the minds of the jurors as to whether the female objected to the liberties taken with her person would require an acquittal of a charge of aggravated assault. *Saye v. State* (1908) 54 *Tex. Crim. Rep.* 430, 114 S. W. 804.

There must be an actual assault; that is, a touching of the person of the female against her will, or at least a manifestation of a purpose to do so, coupled with a present ability to accomplish such purpose.

So, in *Fuller v. State* (1903) 44 *Tex. Crim. Rep.* 463, 100 *Am. St. Rep.* 871, 72 S. W. 184, 13 *Am. Crim. Rep.* 90, it was held that the act of defendant in making a kissing sign to prosecutrix by puckering up his lips and smacking them, without touching her or giving any indication of an intention to attempt to use force to compel her to kiss him, did not constitute an assault, and a conviction of aggravated assault was reversed.

And requesting a woman to kiss defendant, and manifesting a purpose to embrace her, which she evaded by moving to another part of the room, did not constitute an aggravated assault. *Kiersey v. State* (1893) — *Tex. Crim. Rep.* —, 22 S. W. 37.

Likewise the mere solicitation of a female by a man to have intercourse does not constitute an assault, and the fact that she was injured in fleeing from him does not make it such. *Loid v. State* (1909) 55 *Tex. Crim. Rep.* 403, 116 S. W. 807.

Under the above statute, convictions for aggravated assault were sustained in the following cases, the acts upon which the charge was based, and which were done against the will of the female, being shown by parenthetical statements: *Thompson v. State* (1875) 43 *Tex.* 583 (entering bedroom of female and placing hand upon her person); *Ridout v. State* (1879) 6 *Tex. App.* 249 (the indecent fondling of the person of a female by a male); *Atkins v. State* (1881) 11 *Tex. App.* 8 (indecent familiarities with person of woman); *George v. State* (1881) 11 *Tex. App.* 95 (soliciting intercourse, and seizing woman about the neck); *Henkel v. State* (1889) 27 *Tex. App.* 510, 11 S. W. 671 (going to woman's room while she was asleep, and placing his hand on her shoulder and his face against her cheek, in imita-

tion of her husband, and retiring when recognized); *Young v. State* (1892) 31 *Tex. Crim. Rep.* 24, 19 S. W. 431 (going to pallet upon which a chaste married woman was sleeping, and lasciviously touching her person); *Webb v. State* (1896) 36 *Tex. Crim. Rep.* 41, 35 S. W. 380 (husband causing another to attempt to have intercourse with wife, for purpose of having ground for divorce); *Slawson v. State* (1898) 39 *Tex. Crim. Rep.* 176, 73 Am. St. Rep. 914, 45 S. W. 575 (undue familiarity with female to the extent of forcibly feeling of her private parts); *Sample v. State* (1908) 52 *Tex. Crim. Rep.* 505, 124 Am. St. Rep. 1103, 108 S. W. 685 (catching hold of female's dress and putting hand on her leg, under her dress); *Pitcock v. State* (1914) 73 *Tex. Crim. Rep.* 1, 163 S. W. 971 (going to room of female and requesting permission to sleep with her, and removing her hands from her face when she commenced to cry).

In *State v. Archer* (1908) 22 S. D. 137, 115 N. W. 1075, it was held that a charge of aggravated assault, under a statute describing such an offense as an assault perpetrated with an intent to commit a felony, could not be established by evidence of an assault by a man upon a married woman for the purpose of inducing her to consent to intercourse, as the only crime that would have been committed had he accomplished his pur-

pose would have been adultery by mutual consent, which would not have involved the element of assault.

Indecent assault.

In some states the offense which we are considering is described as an indecent assault.

Thus, in *State v. Quinn* (1908) 80 *Conn.* 546, 69 *Atl.* 349, entering bedroom and seizing sleeping woman by leg, and leaving when ordered by her to do so, without any explanation of his conduct, was held to constitute indecent assault.

And in *Rex v. Chong* (1914) 32 *Ont. L. Rep.* 66, 7 *Ont. Week. N.* 84, it was held, under a statute providing for punishment of everyone who "indecently assaults any female," an act which in itself is ambiguous may be interpreted in view of the surrounding circumstances and by words spoken at the time; so, where all defendant did was to take hold of a girl against her will, but he accompanied such act with an offer of money to go with him for an immoral purpose, he was properly convicted under the statute.

But, there being no crime known to the common law as indecent assault, a statute providing a punishment for indecent assault, but not defining such crime, will not support a conviction on such a charge. *State v. Comeaux* (1913) 131 *La.* 930, 60 *So.* 620.

R. L. S.

COLORADO SUPREME COURT.

UNITED STATES PORTLAND CEMENT COMPANY, Piff. in Err.,

v.

UNITED STATES NATIONAL BANK OF DENVER.

(— Colo. —, 157 *Pac.* 202.)

Banks — payment of check on forged indorsement — liability to payee.

The payee of a check may recover its proceeds from a bank which cashed it on a forged indorsement and collected it from the drawee.

For other cases, see *Banks*, IV. a, 3, b, (3), in *Dig.* 1-52 N. S.

(May 1, 1916.)

ERROR to the District Court for the City and County of Denver to review

Note. — As to right of holder of check against bank which cashes it on a forged indorsement and then collects it from the drawee, see annotation following this case, post, 148.

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a judgment sustaining a demurrer to a complaint in an action brought to recover an amount paid by defendant on a forged check. Reversed.

The facts are stated in the opinion.

Messrs. George Q. Richmond and Jacob J. Lieberman, for plaintiff in error:

The defendant bank is liable to the plaintiff for money had and received, and the amended complaint as amended therefore states a good cause of action.

1 *Morse, Banks & Bkg.* 4th ed. § 248; *Knoxville Water Co. v. East Tennessee Nat. Bank*, 123 *Tenn.* 364, 131 S. W. 447; *Farmer v. People's Bank*, 100 *Tenn.* 187, 47 S. W. 234; *Buckley v. Second Nat. Bank*, 35 N. J. L. 400, 10 *Am. Rep.* 249; *Talbot v. Bank of Rochester*, 1 *Hill*, 296; *Pickle v. Muse* (*Pickle v. People's Nat. Bank*) 88 *Tenn.* 380, 7 *L.R.A.* 93, 17 *Am. St. Rep.* 900, 12 S. W. 919; *Chism v. First Nat. Bank*, 96 *Tenn.* 641, 32 *L.R.A.* 778, 54 *Am. St. Rep.* 863, 36 S. W. 387; *Indiana Nat. Bank v. Holtsclaw*, 98 *Ind.* 85; *Graves v. American Exch. Bank*, 17 N. Y. 205.

Messrs. Rogers, Ellis, & Johnson, Percy Robinson, and Pierpont Fuller, for defendant in error:

The payee of a check, the indorsement of whose name has been forged or made without authority, cannot maintain suit against an intermediate bank which has cashed the check and paid the amount of the same to the forger out of its own funds.

National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229; Tibby Bros. Glass Co. v. Farmers' & M. Bank, 220 Pa. 1, 15 L.R.A.(N.S.) 519, 69 Atl. 280; J. N. Houston Grocer Co. v. Farmers' Bank, 71 Mo. App. 132; Rauch v. Bankers' Nat. Bank, 143 Ill. App. 625; Van Buskirk v. State Bank, 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778; Boettcher v. Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582, 5 Colo. 185, 40 Am. Rep. 142; Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank, 128 U. S. 26, 34, 32 L. ed. 342, 344, 9 Sup. Ct. Rep. 3.

Hill, J., delivered the opinion of the court:

A demurrer was sustained to the plaintiff's amended complaint. It declined to amend. For a first cause of action, among other things, it alleges that the Kirchhof Lumber Company was indebted to plaintiff for cement, etc.; that on February 7, 1914, the lumber company executed its check on the Denver National Bank, payable to the order of the plaintiff, for \$267, in payment of said indebtedness, and thereafter delivered and intrusted said check to one H. C. Snyder, as an employee of the plaintiff; that Snyder was its employee in the capacity of sales manager, with no authority to make, sign, or indorse any check, promissory note, or bill of exchange, or to collect the fund due or payable upon the same; that his authority was limited to the sale of Portland cement; that thereafter Snyder, without authority, and without the consent of the plaintiff, and against its interest, indorsed on said check the name of the plaintiff and the name of its secretary, J. E. Zahn, and on February 11, 1914, presented it, so indorsed by him, to the defendant bank, and received as payment thereof \$267, which sum has not, nor has any part thereof, been received by plaintiff, and which sum of money aforesaid has been paid to said defendant by the drawee bank upon the aforesaid check, and has been so received from said drawee bank by defendant; that the indorsement of said check by Snyder with the name of the plaintiff and its secretary was a forgery, and was made by said Snyder without any kind or character of authority, without warrant in law, L.R.A.1917A.

and without the consent of the plaintiff; that plaintiff has demanded from defendant payment of said sum so paid to it by Snyder on said check so forged; that the defendant has not paid it, or any part thereof, to plaintiff. This is followed with ten other alleged causes of action, which are substantially the same as the first, except that each is based upon a different check and for different amounts. The prayer is for judgment in the total amount of the eleven checks, viz., \$4,323.09, with interest.

It is well settled in this jurisdiction that the holder of a bank check cannot sue the bank upon which it is drawn for refusing payment, in the absence of proof that it was accepted by the bank or charged against the drawer. Van Buskirk v. State Bank, 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778; Boettcher v. Colorado Nat. Bank, 15 Colo. 16, 24 Pac. 582; Colorado Nat. Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

In this case the payee in the checks seeks to recover from another bank who accepted and paid these checks upon forged indorsements, and thereafter collected the amounts upon the checks from the bank upon which they were drawn. In such case the rule in Tennessee, New Jersey, Ohio, New York, and Indiana is that the payee can recover from a bank which accepted them from the forger and collected them from the drawee bank, as for moneys had and received, even though it has fully paid over and accounted for the same to the forger without knowledge or suspicion of the forgery. Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Knoxville Water Co. v. East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447; Buckley v. Second Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249; Shaffer v. McKee, 19 Ohio St. 526; Talbot v. Bank of Rochester, 1 Hill, 295; Johnson v. First Nat. Bank, 6 Hun, 124; Graves v. American Exch. Bank, 17 N. Y. 205; Indiana Nat. Bank v. Holtschaw, 98 Ind. 85. This same principle is laid down in vol. 1, 4th ed. of Morse on Banks & Banking, wherein, at page 483, the author states: "If a negotiable instrument having a forged indorsement come to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value for the paper, or has paid over the proceeds to the party depositing the instrument for collection."

These cases are based upon the theory of ratification by the payee of the collection of the check from the drawee, and that the collecting bank can then be held as for moneys had and received, and that the payment by the drawee bank to the collecting bank with

the forged indorsement thereon is evidence that the check was accepted and paid by the drawee bank, which acts the payee ratifies.

Counsel for the defendant in error concede that the cases last cited hold as indicated, but contend that the better rule is that announced in *Pennsylvania, Illinois, Missouri*, and by the Supreme Court of the United States, and which they claim is directly to the contrary, and to the effect that payment upon the forged indorsement by the drawee bank to the person who presents the forged check to it is not a payment of the check at all, for which reason there is no acceptance of it by the drawee bank, and until accepted a suit cannot be maintained against the drawee bank, or the intervening bank who first cashed it upon the forged certificate, and thereafter collected the amount from the drawee bank upon the strength of the forged indorsement. We cannot agree that the United State Supreme Court cases and those in *Illinois* and *Missouri* which follow so hold. The case of *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229, goes into the question in detail. There the payee brought suit against the bank upon which the check was drawn, upon the theory that the payment upon the forged indorsement to the forger operated as an acceptance by the bank of the check sufficient to authorize an action by the real owner to recover thereon as upon an accepted check. The court said: "No." The reason is readily apparent, for by this method the payee sought to ratify one portion only of the transaction, which would inure in his favor, and reject another part of the same act, committed at the same time, which would work against him. In other words, his ratification was of something which he expressly repudiates, namely, his forged indorsement to the check and the payment of the money. The court, in answering this contention, upon this theory (94 U. S. at page 347), says: "Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before."

The same line of reasoning is presented in *J. N. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App. wherein, at page 137, the court quotes with approval from the *Whitman* Case the following: "It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act; the other, an actual performance."

The same rule is followed in *Rauch v. Bankers' Nat. Bank*, 143 Ill. App. 625, L.R.A.1917A.

which was also a case where the payee brought the suit against the drawee bank. These cases are all relied upon by the defendant in error to sustain its position.

Under our former decisions we agree that the payee of a check cannot sue the drawee until after acceptance. We might also concede, if necessary, that the payment of a check upon a forged indorsement is not sufficient to give the payee thereof a right of action to compel the drawee to pay it over again to him, for so doing would be to allow the act which is expressly repudiated by the payee, so far as the payment is concerned, to be ratified by him as an acceptance of the check, but not as a payment of it; but such is not the case here. To the contrary, the plaintiff seeks, as we think he has the right to do, to ratify the collection of the check for him; in such case he ratifies the assumed payment of it, and the check is then paid; the drawee bank and the maker thereof are both released from paying it over again; the payee would be estopped from making such claim. The ratification is not upon the acceptance alone of the check by the drawee bank, but upon its collection by the defendant in error bank and payment by the drawee bank, all of which are ratified by the payee, and the suit is then against the collecting bank as for moneys had and received.

We are aware that the case of *Tibby Bros. Glass Co. v. Farmers' & M. Bank*, 220 Pa. 1, 15 L.R.A.(N.S.) 519, 69 Atl. 280, is in conflict with this conclusion. There, as here, the suit was by the payee of the checks against an intervening bank which had paid them upon forged indorsements and collected the amounts from the drawee bank; but we cannot subscribe to the reasons given. They are against the weight of authority, and also overlook the fact that the acts which the plaintiff seeks to ratify were not the drawee bank's acceptance of the checks, but their payment, and the intervening bank's collection of them. The *Pennsylvania* case says it applies the rule announced in *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229; but the facts are different. The ratification in the *Whitman* Case was the acceptance of the check only, so that the payee might bring suit against the drawee bank and compel it to pay the amount again, where the payee expressly repudiates the same act so far as its validity was concerned as a payment by the bank, or the right to charge it against the maker of the check.

It is conceded that the drawee bank would have a cause of action against the defendant in error for the amount of these checks. This is upon the theory that they had never been paid, and that the plaintiff could

still recover the amount from the maker of the checks, and that the maker in turn could prevent the drawee bank from charging the amount to his account. If the plaintiff in error had authorized the defendant in error bank to make these collections for it, the drawee bank could not recover back from the defendant in error bank, and the maker of the check could not prevent the drawee bank from charging the amount to its account. When the plaintiff

in error ratified this collection, the same result follows, and, the defendant in error bank not having accounted to it for the money (if the allegations of the complaint are true), it has its cause of action therefor.

The judgment will be reversed, and cause remanded for further proceedings not inconsistent with the views herein expressed.

Gabbert, Ch. J., and Teller, J., concur.

Annotation—Right of holder of check against bank which cashes it on a forged indorsement and then collects it from the drawee.

This note is supplementary to the note to *Tibby Bros. Glass Co. v. Farmers' & M. Bank*, 15 L.R.A. (N.S.) 519.

As to remedy of payee of check against one who has taken it on the indorsement of an unauthorized agent, see note to *A. Blum Jr.'s Sons v. Whipple*, 13 L.R.A. (N.S.) 211.

In the *Tibby Case* the court of last resort of Pennsylvania held that the payee of a check could not maintain an action for money had and received against a bank that cashed it upon a forged indorsement and then collected it from the drawee bank, basing its decision upon the theory that there is no privity of contract between the payee and the bank that cashes a check any more than there is between the holder of a check and the drawee bank. (See note to *Ballard v. Home Nat. Bank*, L.R.A.1916C, 164, as to right of holder of check to maintain action thereon against the drawee bank). But it is the only case in which this position is taken.

UNITED STATES PORTLAND CEMENT CO. v. UNITED STATES NAT. BANK, ante, 145, is in harmony with practically all decisions in which the question has been decided. The holding that the payee could maintain the action against the intermediary bank does not, however, imply that he could not collect from the drawee bank. (Courts are divided on this point. See note in L.R.A.1916C, 164, subd. II. c, 2 (c)). Nor does it imply that he could not recover from the drawer; but this question is not within the scope of this note.

Where a check payable to a particular person by mistake fell into the hands of another person of the same name, who indorsed it and had it cashed at a bank that collected it from the drawee, it was held in *Indiana Nat. Bank v. Holselaw* (1894) 98 Ind. 85, that the rightful L.R.A.1917A.

payee had a right of action against the bank that cashed it.

In *Johnson v. First Nat. Bank* (1875) 6 Hun (N. Y.) 124, affirmed in (1877) 68 N. Y. 616, a clerk in the employ of the payees, without authority to indorse their names, forged their names upon some checks that were payable to them, and transferred them to other persons for value without accounting to his employers. It was held, on the authority of *Talbot v. Bank of Rochester* (1841) 1 Hill (N. Y.) 295, that the payees could recover from a bank that had cashed and later collected the checks.

The decision in *Shaffer v. McKee* (1869) 19 Ohio St. 526, is to the same effect. The facts were similar except the immaterial fact that defendant, who had cashed the check on a forged indorsement and collected it from the bank, was not a bank, but an individual.

In *Knoxville Water Co. v. East Tennessee Nat. Bank* (1910) 123 Tenn. 364, 131 S. W. 447, the court said: "It is the settled law in Tennessee that a bank receiving and collecting a check upon a forged indorsement of the payee's name is liable to the payee for its proceeds, although the bank has fully paid over and accounted for same to the forger without knowledge or suspicion of the forgery. See *Farmer v. People's Bank* (1897) 100 Tenn. 187, 47 S. W. 234; *Pickle v. Muse* (*Pickle v. People's Nat. Bank*) (1890) 88 Tenn. 381, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919; *Chism v. First Nat. Bank* (1896) 96 Tenn. 641, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387. The authorities are reviewed in the case of *Farmer v. People's Bank* (Tenn.) supra, and it is there said that 'one coming into possession of such paper, either unindorsed or with a forged indorsement of the payee's name, could not successfully resist the title of the

true owner, or, if it has been converted into money, a demand for its proceeds.' The bank in that case received a check from a third party with the forged indorsement of the payee's name. The check was on a bank in a different town, and the receiving bank collected it and placed it to the forger's credit, permitting him to check out the proceeds. The bank was held liable upon the suit against it of the payee, for the amount of the check. Under the authority of this case, and in view of what we have previously said, we think defendant bank here is equally liable to the water company for the amount of the checks concerning which this suit is brought."

In *Crisp v. State Bank* (1915) 32 N. D. 263, 155 N. W. 78, where a check sent by mail was intercepted by the payee's husband, it was held that the payee could recover from a bank which had cashed the check on a forged indorsement, and collected from the drawee bank through a correspondent. The court said: "It is also quite clear, that, if a delivery to the plaintiff was in fact made or must be assumed, the action of trover will lie, since the defendant bank, in order to reimburse itself for the payment which was made to the husband, transmitted the check and collected the same from its correspondents, who in turn collected it from the drawee bank. So, too, it would seem that a person to whom a check is sent by mail, and which check is intercepted and cashed with a fraudulent indorsement thereon by a third party, may ratify the delivery without ratifying the forged indorsement. 'This brings us to the question,' says Mr. Justice Lurton, of the Supreme Court of the United States, then a member of the supreme court of Tennessee, 'as to whether this check was ever delivered to the complainant; for it is insisted that, if there has been no delivery to him, that he has no such title to the instrument as will enable him to maintain a suit against the bank. Whether this check was sent to complainant, and miscarried and fell into the hands of a stranger, or whether it was left with the bank to be credited to the complainant, who kept his account there, and by oversight this credit was not given, is all matter of conjecture. How this check ever reached the bank we are unable, from the proof, to determine. All we can say is that we are satisfied that it never came into the hands of complainant. Someone undoubtedly received it from Muse. By suing the bank upon

this check, complainant may and does ratify the receipt of the check from Muse. It is as if it had been received by an agent for the use and benefit of the complainant. *Omnis ratihabitio retrotrahitur et mandato priori equiparatur*—a subsequent ratification has a retrospective effect and is equivalent to a prior command. Broom, *Legal Maxims*, 837. "This is a rule," says Mr. Broom, "of very wide application." . . . "No maxim," remarks Mr. Justice Story, is better settled in reason or law than this maxim; . . . at all events, where it does not prejudice the rights of strangers." [*Fleckner v. Bank of United States* (1823) 8 Wheat. (U. S.) 363, 5 L. ed. 631.] As illustrative of the application of the rule, the author cites the case where the goods of A are wrongfully taken and sold. The owner may either bring trover against the wrongdoer, or may elect to consider him as his agent and adopt the sale and bring the action for the price. *Smith v. Hodson* (1791) 4 T. R. 211, 100 Eng. Reprint, 979. So in another case it was said: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent and by and with all the consequences which follow from the same act done by his previous authority." [*Wilson v. Tumman* (1843) 6 Mann. & G. 242, 134 Eng. Reprint, 879.] Broom, *Legal Maxims*, 871. The bank is not prejudiced by this subsequent ratification, for it dealt with the check as the property of the complainant, and undertook to pay to him or his order. The effect of this ratification is simply to make the check the property of the complainant. It does not ratify the collection of the check by one whose act in receiving it is subsequently ratified, and agency to receive a check payable to order implies no authority to indorse it in the name of the payee, or to collect it without such indorsement. In the case of *Dodge v. National Exch. Bank*, a certificate of indebtedness by the government to Dodge was remitted by mail to the paymaster for a check. The mail was robbed, and the certificate presented by the thief to the paymaster, and a check

demand. The latter, without requiring proof of the identity of the holder of the certificate, issued a check payable to Dodge or order, and took up the certificate. The indorsement of Dodge was forged, and the check paid. Subsequently Dodge sued the bank and recovered, the court holding that he might ratify the taking of the check for the certificate, and sue upon it as an accepted check. (1870) 20 Ohio St. 234, 5 Am. Rep. 648. See, to same effect, *Graves v. American Exch. Bank* (1858) 17 N. Y. 207. The decree of the chancellor is reversed, and judgment for complainant against the bank for the amount of the check, and interest from date of filing of bill and all the cost of the cause.' See *Pickle v. Muse* (*Pickle v. People's Nat. Bank*) (1890) 88 Tenn. 380, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919. The cases cited by counsel for appellant, namely, *Talbot v. Bank of Rochester* (1841) 1 Hill (N. Y.) 295; *Garthwaite v. Bank of Tulare*, (1901) 134 Cal. 237, 66 Pac. 326; *Buehler v. Galt* (1889) 35 Ill. App. 225; and *National Bank v. Millard* (1869) 10 Wall. (U. S.) 152, 19 L. ed. 897, in no way hold to a different doctrine. In the last case the action was brought against the drawee bank, and the court merely held that a payee of a check which was intercepted before delivery could not maintain an action against the drawee bank, as there was no privity between him and the bank; the bank's contract being with the maker of the deposit merely. In the case of *Buehler v. Galt* (Ill.) supra, there was no proof that the check ever reached the person to whom it was mailed, and the only question at issue was whether the mailing of it constituted a delivery. The court held that the post office in the case was the agent of the sender, and that the debt which it was sent to pay had never paid. In the case of *Talbot v. Bank of Rochester* (1841) 1 Hill (N. Y.) 295, *Talbot*, the owner of a certificate of deposit in the bank of L., caused it to be indorsed with directions that it should be paid to W. & Co., and then transmitted to them by mail, though without their knowledge or request. It never reached W. & Co., and was stolen on its way, and their names forged upon it, after which it came into the hands of the Bank of Rochester, the defendants, in the course of business, who collected the money on it from the Bank of L., supposing themselves to be the owners. But it was held in this case L.R.A.1917A.

that the owner of a certificate of deposit who indorses it payable to another, and sends it to him by mail without his knowledge, retains the property in it until the indorsee receives it, and that such a one had the election either to sue the Bank of Rochester, the intermediary bank, in trover, as for the conversion of the certificate, or to recover the amount in an action for money had and received. In this case, however, the indorsee of the certificate of deposit, W. & Co., asserted no right of ownership in it, and, provided that one who has the right of possession may assert that right, the case is authority for just such an action as is brought in the case at bar. It holds, in short, that an intermediary bank which cashes a check on a forged indorsement, and then collects that check from the drawee bank in order to reimburse itself, has converted that check. We can see no reason why, if [where] no ratification had been made, the owner or payee of the certificate of deposit would have been able to maintain an action of trover against the intermediary bank, the indorsee of such check could not do the same thing,—in other words, ratify or accept the delivery, though not the forgery. In the case of *Garthwaite v. Bank of Tulare* (1901) 134 Cal. 237, 66 Pac. 326, the questions before us were not considered nor involved."

Missouri-Lincoln Trust Co. v. Third Nat. Bank (1911) 154 Mo. App. 89, 133 S. W. 357, indirectly supports the general rule that the one who accepts a check on a forged indorsement and collects it from the drawee bank is the one who is liable. Of course, if there are any indorsers between the forger and the one who ultimately collects from the drawee, the last indorser has recourse to them. The draft in question had been paid, and the drawer refunded to the drawee and induced the last indorser to refund to it (drawer). The last indorser, instead of taking action against the prior indorsers, brought action against the drawer, alleging that he had induced it to refund by fraud and concealment of the fact that the draft had been paid by the drawee. It was held that no action could be maintained, either for money had and received or for deceit. The rights of the payee were not involved, so the case is not directly in point in the note, but the opinion contains an excellent discussion of the other principles involved. J. W. M.

CONNECTICUT SUPREME COURT OF ERRORS.

ANNIE KILDAY
v.
JACOB SCHANCUPP, Appt.

(— Conn. —, 98 Atl. 335.)

Specific performance — Statute of Frauds.

1. An action for specific performance is within the operation of a statute providing that no civil action shall be maintained upon an agreement for the sale of real estate unless the agreement is in writing signed by the party to be charged.

For other cases, see Specific Performance, I. b, in Dig. 1-52 N. S.

Contract — sale of real estate — sufficiency of description.

2. The description of property in a contract of sale as in a certain town is sufficient, although it is described merely as a certain number on a certain street, if the contract bears date at the town where the property is situated.

For other cases, see Contracts, I. e, 5, a, in Dig. 1-52 N. S.

Same — Statute of Frauds — sufficiency of signature.

3. The signature of the purchaser to a contract to purchase real estate is sufficient to satisfy the Statute of Frauds if the contract is prepared at his instance, and recites that the property is sold to him, although his signature does not appear at the end.

For other cases, see Contracts, I. e, 5, b, in Dig. 1-52 N. S.

(July 27, 1916.)

APPEAL by defendant from a judgment of the Superior Court for New Haven County in plaintiff's favor in an action for specific performance of a contract to purchase real estate, and for damages for failure to perform the contract. Affirmed.

Statement by Wheeler, J.:

On August 5, 1914, the plaintiff orally agreed to sell the defendant the two lots, 38 and 40 Emmett avenue, in Derby, Connecticut, for \$4,350, payable, \$50 in cash, the assumption of a mortgage for \$2,000 upon the property, and a note for \$1,500 secured by a second mortgage on the property, and the balance in cash at delivery of deed on or before September 1, 1914. In the afternoon of this day the defendant presented to the plaintiff and requested her

Note. — As to place of signature, under Statute of Frauds, see annotation following this case, post, 158.
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signature, which she made, to the following instrument:

J. Schancupp, Dealer in Diamonds, Watches, and Jewelry, 222 Main Street.

Derby, Conn., Aug. 5, 1914.

Sold to J. Schancupp #38-40 Emmett avenue three tenement house and lot 50 front by 150 deep, and one empty lot 50 by 150, next to second house, for the sum of \$4,350. Received by check deposit on the above \$50, same to apply to purchase price. Assuming mortgage of \$2,000 held by the Derby Savings Bank, and agree to take a second mortgage of \$1,500 for three years at 5 per cent. Balance of purchase price to be paid in cash on delivery of deeds. Deeds to pass hands on or before the 1st of September, 1914.

[Signed] Mrs. Annie Kilday.

In the presence of

Etta Kilday.

S. Liftig.

The defendant directed the daughter of plaintiff to make a copy of this paper and give the same to the plaintiff. He himself kept the original, and did not sign it, unless his name in the body of the instrument is held to be a signing. The defendant, at the delivery of the instrument to him, gave the plaintiff his check for \$50, written as follows:

Deposit on house and extra lot.

Birmingham National Bank.

Derby, Conn., Aug. 5, 1914.

Pay to the order of Mrs. Kilday fifty and 00/100 dollars.

J. Schancupp.

And the plaintiff cashed this. On August 6, 1914, the defendant told the plaintiff he did not intend to buy the property. On August 31, 1914, the plaintiff tendered the defendant a warranty deed of the premises and the mortgage deed required to be executed by him in accordance with said instrument, and requested the payment of the balance of the purchase price and the performance by the defendant of his part of the agreement. This the defendant refused to do, and declined to accept the deed. On August 5, 1914, plaintiff, believing she had sold her property to the defendant, moved out of the house and lived elsewhere for eight months. She then returned and resumed possession. On August 5, 1914, the plaintiff's property, which defendant agreed to pay \$4,350 for, was worth \$4,000.

Messrs. Abraham S. Aaronson and Arvine, Beers, & Woodruff, for appellant:

Specific performance of a written agree-

ment for the sale of real estate will not be decreed unless the property is described with reasonable certainty, either in the writing itself or by reference therein to records, maps, or facts.

McMahon v. Plumb, 88 Conn. 547, 92 Atl. 113; 29 Am. & Eng. Enc. Law, 848; Nichols v. Johnson, 10 Conn. 198; O'Sullivan v. Overton, 56 Conn. 105, 14 Atl. 300; May v. Ward, 134 Mass. 128; Riley v. Farnsworth, 116 Mass. 223; Grace v. Denison, 114 Mass. 17; Louisville Asphalt Varnish Co. v. Lorick, 29 S. C. 533, 2 L.R.A. 212, 8 S. E. 8; Mentz v. Newwitter, 122 N. Y. 491, 11 L.R.A. 97, 19 Am. St. Rep. 514, 25 N. E. 1044; Lewis v. Wood, 153 Mass. 321, 11 L.R.A. 143, 26 N. E. 862.

Defendant's signature to the contract to purchase was insufficient.

Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133; Atwood v. Cobb, 26 Am. Dec. 663, note.

The fact that the \$50 check was cashed, so that admittedly there was a payment of \$50 to the plaintiff on account of some sort of a transaction, is not at all conclusive with regard to the transaction.

Lester v. Kenne, 37 Conn. 9; Hurd v. Hotchkiss, 72 Conn. 472, 45 Atl. 11; Kimberly v. Fox, 27 Conn. 307.

The giving by defendant of \$50 was not part performance.

Lester v. Kinne, 37 Conn. 9; Eaton v. Whitaker, 18 Conn. 222, 44 Am. Dec. 586; Andrews v. Babcock, 63 Conn. 109, 28 Atl. 715; Wainwright v. Talcott, 60 Conn. 43, 22 Atl. 484; Linsley v. Tibbals, 40 Conn. 522.

Messrs. David J. McCoy and Walter J. Walsh, for appellee:

An agreement to purchase real estate may be such as not to warrant a decree of specific performance, but to warrant and sustain an award of damages for breach of it.

Dodd v. Seymour, 21 Conn. 479; Canterbury Aqueduct Co. v. Ensworth, 22 Conn. 613; Patterson v. Bloomer, 35 Conn. 57, 95 Am. Dec. 218; Platt v. Stonington Sav. Bank, 46 Conn. 476; Taylor v. Atwood, 47 Conn. 508; McMahon v. Plumb, 90 Conn. 281, 96 Atl. 958.

The contract proved was sufficient and binding under § 1089 of the Revised Statutes, because it was evidenced by a written memorandum and signed by the person sought to be bound.

Randall v. Latham, 36 Conn. 55; Foster v. Atwater, 42 Conn. 254; Schneider v. Norris, 2 Maule & S. 286, 105 Eng. Reprint, 388, 15 Revised Rep. 825; Saunderson v. Jackson, 2 Bos. & P. 238, 126 Eng. Reprint, 1257; Drury v. Young, 58 Md. 546, 42 Am. Rep. 343; Levine v. Dietz, 48 Misc. 593, 96 N. Y. Supp. 468; Lamaster v. Wilkerson, L.R.A.1917A.

148 Ky. 226, 136 S. W. 217; Property v. Parker, 1 Russ. & M. 625, 39 Eng. Reprint, 240; Johnson v. Dodgson, 2 Mees. & W. 658, 150 Eng. Reprint, 918; Merritt v. Clason, 12 Johns. 102, 7 Am. Dec. 286; Bluck v. Gompertz, 7 Exch. 862; Linsley v. Tibbals, 40 Conn. 522; Hodges v. Kowing, 58 Conn. 19, 7 L.R.A. 87, 18 Atl. 979; Woodruff v. Butler, 75 Conn. 679, 55 Atl. 167; Devine v. Warner, 76 Conn. 229, 56 Pac. 562.

Wheeler, J., delivered the opinion of the court:

The trial court held that there was no sufficient memorandum in writing to support a decree for specific performance, but that the plaintiff was entitled to a judgment for damages based upon the agreement for the sale of land. General Statutes, § 1089, provides that "no civil action shall be maintained . . . upon any agreement for the sale of real estate, or any interest in or concerning it, . . . unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent."

We have said that our statute does not make agreements not made in this way invalid, but prevents their proof unless by such a writing. Fisk's Appeal, 81 Conn. 433, 438, 71 Atl. 559.

It is immaterial whether the action be one for specific performance, or for damages for the breach of a contract of sale of land. The proof must be in the manner provided by our statute. And the agreement, in its essentials, must be the same in either action. Lord Farwell succinctly stated the principle in Wild v. Woolwich Borough Council [1910] 1 Ch. 35, 42: "It is perfectly clear that if there was no contract, there can be no damages for breach of contract, and any claim to compensation is out of the question."

But before specific performance will be decreed, something further must be shown than that the contract is made in accordance with the requirements of law. It must, in addition, be one of such a character as that the court will enforce its performance. The governing principles are clearly specified in our decisions. Patterson v. Bloomer, 35 Conn. 57, 63, 95 Am. Dec. 218; Platt v. Stonington Sav. Bank, 46 Conn. 476, 478.

The conclusion of the learned trial court is not necessarily erroneous, though the reason given may be.

If the memorandum by which the agreement was proved meets the requirements of the statute, a contract within the requirements of the statute has been established sufficient to support the action for damages,

or the action to secure specific performance, in the absence of equitable considerations which would lead a court in the exercise of its discretion to refuse to issue its decree.

The memorandum upon which the case must stand or fall is Exhibit B. When analyzed it discloses the parties to a contract of sale of land, the subject of sale described, a consideration, the terms of the sale, and the time of delivery of the deed. When the agreement was offered in evidence, the defendant duly excepted to its admission.

In two particulars only does the appellant attack the agreement: (1) Because of indefiniteness; (2) because it was not signed by the defendant.

The claimed indefiniteness of this agreement rests upon the description of the subject of the sale; viz., "#38-40 Emmett avenue three tenement house and lot 50 front by 150 deep, and one empty lot 50 by 150, next to second house."

In the body of the agreement the locality of Emmett avenue is not given. But the agreement bears date at Derby, Connecticut, and from this the inference of fact follows, in the absence of evidence to the contrary, that the property described in the agreement is located at Derby, Connecticut. This inference is rebuttable by parol proof, for example, that there was no such avenue or street in Derby. *Mead v. Parker*, 115 Mass. 413, 415, 15 Am. Rep. 110; *Kraft v. Egan*, 76 Md. 243, 252, 25 Atl. 469; *Shelinsky v. Foster*, 87 Conn. 90, 97, 87 Atl. 35, Ann. Cas. 1914C, 1007; *Hodges v. Kowling*, 58 Conn. 20, 21, 7 L.R.A. 87, 18 Atl. 979.

The agreement must have been signed by this defendant, since he is the party to be charged. This agreement was caused to be prepared by the defendant, and it begins, "Sold to J. Schancupp." This is the written declaration of the defendant himself that the plaintiff has sold him the property described upon the terms described, and likewise it is his written declaration of pur-

chase of this property upon the named terms. The statute is intended to relieve against fraud. To hold that this defendant by writing his name in the body of this instrument instead of at its end did not sign the instrument would help perpetrate, instead of prevent, a wrong.

An instrument signed by one in any part of it after the body of it is written, or signed in any part and when completed produced from his custody, must be taken to be the instrument of the party so signing. Under these circumstances he authenticates by his signature, or by the signature to the instrument produced from his custody, the instrument so signed, and such a signature fully meets the requirements of the Statute of Frauds. *New England Dressed Meat & Wool Co. v. Standard Worsteds Co.* 165 Mass. 328, 331, 52 Am. St. Rep. 516, 43 N. E. 112; *Penniman v. Hartshorn*, 13 Mass. 87; *California Canneries Co. v. Scatena*, 117 Cal. 447, 49 Pac. 462; *Drury v. Young*, 58 Md. 553, 42 Am. Rep. 343.

The authorities are equally decisive that the signature may be printed or written. *Schneider v. Norris*, 2 Maule & S. 286, 105 Eng. Reprint, 388, 15 Revised Rep. 825; *Drury v. Young*, 58 Md. 554, 42 Am. Rep. 343. And we have held that a signature by a rubber stamp, made by an agent duly authorized, is a signature within the statute. *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 346, 47 Atl. 675.

Exhibit B was properly admitted in evidence; it was not indefinite, and it was duly signed by the defendant.

No facts are found which would prevent a court of equity decreeing specific performance. Therefore the trial court would have been justified in decreeing specific performance, and was justified in rendering a judgment for damages upon the second prayer for relief.

There is no error.

The other Judges concur.

Annotation—Statute of Frauds: place of signature.

It is not intended to include sales by auctioneers or officers, or entries in a party's own book.

For printed or stamped signature under Statute of Frauds, including the use of printed letterheads or other printed blanks, etc., see the note to *Lee v. Vaughan Seed Store*, 37 L.R.A.(N.S.) 352.

For writing name in body of will as a signature thereto, see the note to *Meads v. Earle*, 29 L.R.A.(N.S.) 63.

For matter following signature as L.R.A.1917A.

part of contract, see the note to *Bonewell v. Jacobson*, 5 L.R.A.(N.S.) 436.

For the question of subscribing one's name under the word "surety" in written contract, as satisfying the Statute of Frauds, see the note to *Mead v. Winslow*, 23 L.R.A.(N.S.) 1197.

For written authorization of broker or agent to buy or sell land, as a memorandum of contract of sale sufficient to satisfy the Statute of Frauds, see the note to *Lusky v. Keiser*, L.R.A.1915C, 400.

It is a general rule as regards a sign-

ing under the Statute of Frauds, that "if the name be inserted in such a manner as to have the effect of authenticating the instrument, it is immaterial in which part of it the name be found." 2 Kent, Com. 511.

It is a well-established rule of law that a contract is signed within the meaning of the statute, whether the name of the party to be charged appears at the bottom, top, middle, or side of the paper." *Tingley v. Bellingham Bay Boom Co.* (1893) 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

"The signing will be sufficient in the caption or body of the memorandum, or by a subscription to it." *McConnell v. Brillhart* (1856) 17 Ill. 354, 65 Am. Dec. 661 (obiter).

A writing in the third person.

An unsubscribed writing in the third person is held to be sufficiently signed under the statute.

Thus, a contract written by the defendant, stating, "Mr. Wilmot Parker has agreed," but not otherwise signed, is sufficient to hold him under the Statute of Frauds. *Propert v. Parker* (1830) 1 Russ. & M. 625, 39 Eng. Reprint, 240.

Where Bridges writes, "John Bleakley agrees with J. R. Bridges to take the property," etc., this is a sufficient signing by Bridges under the statute. *Bleakley v. Smith* (1840) 11 Sim. 150, 59 Eng. Reprint, 851.

Where the contract was in two letters, the plaintiff writing in the third person, calling himself "Mr. O," and the defendant "Mr. F.," and the defendant replying calling himself "Mr. Foljambe," and the plaintiff "Mr. Ogilvie," the statute was satisfied. *Ogilvie v. Foljambe* (1817) 3 Meriv. 53, 36 Eng. Reprint, 21, 17 Revised Rep. 13.

A writing in the third person was held sufficient under the Bankrupt Statute, 6 Geo. IV. chap. 16, § 131, requiring a writing to be "signed." *Lobb v. Stanley* (1844) 5 Q. B. 574, 114 Eng. Reprint, 1366, Dav. & M. 635, 13 L. J. Q. B. N. S. 117, 8 Jur. 462.

Name in body of instrument.

Most of the cases upon the place of signature with reference to the Statute of Frauds have arisen where the name of the party in question appears in the body of the instrument. There seems to be no doubt that, if the name is inserted with the intent that it should be a signature, it will be sufficient irrespectively of its place in the instrument. And it is upon this general theory that instruments prepared by a party with his name

in the body have been considered as sufficiently signed.

In one case, however, it was claimed that it was not necessary that the name be introduced for the purpose of giving authenticity to the instrument, "if it be so inserted as to govern or be applicable to the whole substance of the writing." *Higdon v. Thomas* (1827) 1 Harr. & G. (Md.) 139. The court seemed to think that this theory was supported by the statement of Kent, Ch. J., in *Clason v. Bailey*, 14 Johns. (N. Y.) 487, where he said: "It is a point settled, that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom. . . . Forms are not regarded, and the statute is satisfied if the terms of the contract are in writing and the names of the contracting parties appear."

But the quotation from Kent's Com. supra, 2 Kent, Com. 511, suggests that the Maryland court misunderstood the statement in *Clason v. Bailey*, which indeed does not seem to indicate anything different from the general rule asserted in the chancellor's Commentaries.

It has been held that an instrument containing the name of a party in the body of it, where the instrument was prepared by him or where he wrote such name, was sufficiently signed by him under the Statute of Frauds. *KILDAY v. SCHANCUPP*, ante, 151.

This has been held—

—where the obligee in a bond for title wrote the bond, which was signed by the plaintiff's agent, *Higdon v. Thomas* (1827) (Md.) supra (reversing a judgment for the defendant);

—where a lessee wrote the lease and recorded it, not signing it himself, as he did not consider that necessary, and entered and occupied under it, *Traylor v. Cabanne* (1879) 8 Mo. App. 131;

—where a paper stating the receipt from the defendant of part of the purchase price was written by a third party at the defendant's direction, and was signed by the plaintiff, *Hall v. Misenheimer* (1904) 137 N. C. 183, 107 Am. St. Rep. 474, 49 S. E. 104 (where, however, the receipt was otherwise insufficient);

—where a third person by authority of both parties wrote the following: "\$5,000, 2 January, 1911; \$5,000, 2 January, 1912. J. A. Horn to pay the above to E. A. Wellman when he makes deed to Horn for Wellman's home place, 3 Oc-

tober, 1910," *Wellman v. Horn* (1911) 157 N. C. 170, 72 S. E. 1010 (holding that the vendee had sufficiently signed);

—where a contract in the handwriting of the defendant's agent, signed by the plaintiff, was delivered to the defendant, which was named as party of the first part, the contract beginning: "This agreement, entered into this 20th day of August, 1890, by and between the Bellingham Bay Boom Company, of Fairhaven, Washington, party of the first part, and J. H. Moore and others, respectively, whose names are hereto subscribed, parties of the second part, witnesseth" etc., *Tingley v. Bellingham Bay Boom Co.* (1893) 5 Wash. 644, 32 Pac. 737;

—where the memorandum was in the form of a contract (of hire of a servant) and was in the defendant's handwriting, and his name was introduced in it "so as to govern every material or operative part of the instrument," *Swim v. Amos* (1895) 33 N. B. 49 (where, however, it seems doubtful whether the minds of the parties ever met).

See also the obiter remarks in *Burris v. Starr* (1914) 165 N. C. 657, 81 S. E. 929, Ann. Cas. 1914D, 71.

For cases of bills or accounts, or of bought and sold notes, see those headings.

A contract of sale signed by the seller, in which the name of the buyer was written in the buyer's handwriting, was held sufficient to bind both parties, under the Iowa Statute of Frauds, in an action by the buyer against the seller. *Wise v. Ray* (1852) 3 G. Greene (Iowa) 430.

It may be noted that in a case where the question arose under the Insurance Statute, as matter of pleading, the court considered that an insurance policy delivered with the intent to enter into it was sufficiently signed if it contained the name and contract of the insurer, but was not signed at the foot. *Delaware Ins. Co. v. Pennsylvania F. Ins. Co.* (1906) 126 Ga. 380, 55 S. E. 330, 7 Ann. Cas. 1134.

But compare in this connection *Peoria M. & F. Ins. Co. v. Walser* (1864) 22 Ind. 73.

A contract for the sale of land to a corporation, written by the secretary, on one of its letterheads signed by the vendor, and naming the corporation, together with a letter written by the secretary to the president on another of its letterheads, referring to the contract, which letter was handed by the secretary to the vendor, sufficiently shows a signing by the vendee under the Statute of Frauds. *I. R. A. 1917A.*

Anderson v. Wallace Lumber & Mfg. Co. (1902) 30 Wash. 147, 70 Pac. 247.

A memorandum showing that the writer took a deed for property on a certain trust, the writer describing himself by his initials, and not subscribing the paper, is sufficiently signed under the Statute of Frauds. *Smith v. Howell* (1857) 11 N. J. Eq. 349, where the court said: "From a review of all the authorities, I think it may be considered as settled that it is not required, by the letter or spirit of the statute, that the signature of the party should be subscribed to a declaration of trust; but that it is sufficient if the writing is authenticated by the party as his writing, for the purpose of declaring the trust."

In *Traylor v. Cabanne* (1879) 8 Mo. App. 131, supra, the court said: "The intent to finally execute was shown, and this was regarded as fully accomplished by the parties. It is accordingly sufficient, so far as the Statute of Frauds is concerned, that the lessee's name, written by himself, appears in the first clause containing the usual description of the parties, in the third person."

In other cases it has been held that the statute was not satisfied, as the name was not intended as a signature.

Thus, where the agent of the buyer wrote out a memorandum of sale to the buyer, naming him, which the seller signed and delivered to the agent, it was held that the buyer could not be held as having signed the writing under the Statute of Frauds. The court said: "If the signature is placed at the close, at the ordinary place of signature, the inference is that it was so placed as the final execution of the instrument. This inference, however, does not necessarily arise where the name is found at the commencement or in the body. In such case there should be some evidence, either in the form of the instrument or the circumstances attending the signature, showing that it was the intention of the party thereby to execute it." *McMillen v. Terrell* (1864) 23 Ind. 163. See also, to the same effect, *McMillen v. Smith* (1864) 23 Ind. 168.

Where a contract for land, naming the parties, was written by one of the vendees and signed by the vendors, the court, in holding it not sufficiently signed by the vendees under the Statute of Frauds said: "It is, we think, clear that the names of the appellees, in the connection in which we find them, were not designed as signatures, nor written there for the purpose of authenticating the instrument, but were written in that

connection for an entirely different purpose,—that of identification. The language is in the usual form of introduction to such an instrument, and the entire instrument, including the location of the names of all the parties, is in the usual form,—the form that would have been used had the paper been drawn tentatively without the intention of signing it. It was necessary to identify the parties to this instrument, and the names of the appellees appear with the names of all the parties, in that portion of the instrument where the names of the parties are usually mentioned for the purpose of identification. If the language used had been introduced with the express statement that it was to identify the parties, it would not be more clear than it is that such was its purpose." *Sutherland v. Munsey* (1916) — Va. —, 89 S. E. 882.

In *Guthrie v. Anderson* (1891) 47 Kan. 383, 28 Pac. 164, rehearing in (1892) 49 Kan. 416, 30 Pac. 459, it was held that a contract to sell to A, signed by B, which A "prepared, or caused to be prepared," will not bind A, there being nothing to indicate that he intended the name as a binding signature and the contract nowhere stating that he agreed to do anything.

In *Boardman v. Spooner* (1866) 13 Allen (Mass.) 353, 90 Am. Dec. 196, the court said and held: "The stamping of the purchasers' name and a date on the bill and memorandum of weights at some time while these papers were in their possession, without evidence when or for what purpose this was done, did not show that they had adopted such a stamp as a signature, and affixed it to the instruments with the intent to bind themselves thereby. This may have been done for their own convenience, to show the date of the reception of the papers. If designed as the signature of a memorandum, obligatory on the vendees, we should expect to find the papers in the custody of the party for whose benefit, and not of the one by whom, they were signed. We do not regard the mere fact that, when these papers were produced at the trial by the defendants, they were found to be so stamped, as a circumstance which either a court or jury would be at liberty to treat as proof of a signature by the party to be charged."

Other cases have held that the instrument was not sufficient, as it was not intended to be a final agreement.

Thus, where a document containing the names of the parties, concluding, "as witness our hands," but not signed, L.R.A.1917A.

was sent by one party to the other party, it was insufficient, it not being shown it was intended as a final agreement. *Hubert v. Treherne* (1842) 3 Mann. & G. 743, 133 Eng. Reprint, 1338.

Where Caton wrote out a memorandum for an agreement, stating: "In the event of marriage between the undermentioned parties, the following conditions, as a basis for a marriage settlement, are mutually agreed upon," and referred in various clauses to "Mrs. H." and to "Mr. Caton" and to "the Rev. B. R. C.," this was not sufficient under the Statute of Frauds. *Caton v. Caton* (1867) L. R. 2 H. L. (Eng.) 127, 36 L. J. Ch. N. S. 886, 6 Eng. Rul. Cas. 256, where Chelmsford, Lord Chancellor, said: "The cases upon this point cited in the course of the argument established that the mere circumstance of the name of a party being written by himself in the body of a memorandum of agreement will not of itself constitute a signature. It must be inserted in the writing in such a manner as to have the effect of 'authenticating the instrument,' or 'so as to govern the whole agreement,' to use the words of Sir William Grant in the case of *Ogilvie v. Foljambe* (1817) 3 Meriv. 53, 36 Eng. Reprint, 21, 17 Revised Rep. 13, or, in the language of Mr. Justice Coleridge in *Lobb v. Stanley* (1844) 5 Q. B. 574, 114 Eng. Reprint, 1366, Dav. & M. 635, 13 L. J. Q. B. N. S. 117, 8 Jur. 462, 'so as to govern what follows.' Now, I cannot think that the occurrence of Mr. Caton's name in the manner in which it appears can possibly be taken to govern the entire memorandum, although the whole of it is in his handwriting." It also appeared that the instrument was not intended by the parties as an agreement.

The name of a party inserted by him in the body of a memorandum of instructions to his attorney is not a sufficient signature to bind him under the Statute of Frauds, where it does not appear that the insertion was intended to give authenticity to the instrument. *Stokes v. Moore* (1786) 1 Cox, Ch. Cas. 219, 29 Eng. Reprint, 1137, 1 Revised Rep. 24.

Of course, the preparation of an instrument by an agent is not sufficient if the agent had not authority to make the instrument. *Hawkins v. Chace* (1837) 19 Pick. (Mass.) 502, infra, under "Bills or accounts."

Thus, the printing of the name of the seller in the body and on the back of his order blanks, which are to be filled up by an agent whose only authority is to

submit orders, is not a sufficient signing to hold the seller under the Statute of Frauds. *Lee v. Vaughan's Seed Store* (1911) 101 Ark. 68, 37 L.R.A.(N.S.) 352, 141 S. W. 496, where the court said: "There must be a writing, stamping, or printing of the name of the party to be charged, in person or through a duly authorized agent, with the intention of authenticating and finally adopting the writing as his own. There is no proof to that effect in this record."

Bills or accounts.

A bill on the defendants' printed form, beginning with the name of the plaintiffs, followed by "bought of" the defendants, etc., and sent by the defendants to the plaintiffs, is sufficiently signed by the defendants under the Statute of Frauds. *Schneider v. Norris* (1874) 2 Maule & S. 286, 105 Eng. Reprint, 388, 15 Revised Rep. 825.

In *Saunderson v. Jackson* (1800) 2 Bos. & P. 238, 126 Eng. Reprint, 1257, where the plaintiff ordered goods, the defendants gave him a bill on which was printed: "London. Bought of," followed by the printed name and address of the defendants, and the court considered this a sufficient signing by the defendants (but there was a later signed letter of the defendants referring to the order).

A memorandum of an account which, below the date, was headed, "Robert Barry to G. Coombe, Dr.," all in Barry's handwriting, and signed by Coombe, was sufficient under the Statute of Frauds, as a memorandum in writing signed by Barry. *Barry v. Coombe* (1828) 1 Pet. (U. S.) 640, 7 L. ed. 295, where the court said: "The form is not regarded nor the place of signature."

But a bill written by a third person commencing with the name of the buyer followed by "bought of" the seller and the particulars, will not bind the seller if it was merely prepared by his direction, as the third person should be shown to have been authorized by the seller to make and sign a memorandum. *Hawkins v. Chace* (Mass.) supra.

Bought and sold notes.

It is not intended to do more than include examples of the rule in this particular.

A memorandum for the sale of goods made by a broker, the agent of both parties, stating their names, is sufficiently signed under the Statute of Frauds to hold the buyer. *Merritt v. Clason* (1815) 12 Johns. (N. Y.) 102, L.R.A.1917A.

7 Am. Dec. 286; *Clason v. Bailey* (1817) 14 (N. Y.) Johns. 484. In the latter case Kent, Ch. J., said: "The counsel for the plaintiff in error do not contend against the position that this was a sufficient subscription on his part. It is a point settled that if the name of a party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom."

A memorandum in the form of a bought note with the buyer's name at the top, written by the agent of both parties, and delivered to the buyer, will bind him under the Statute of Frauds. *Durrell v. Evans* (1862) 1 Hurlst. & C. (Eng.) 174, 9 Jur. N. S. 104, 31 L. J. Exch. N. S. 337, 7 L. T. N. S. 97, 10 Week. Rep. 665.

A sold note stating a sale to the buyer, his name being typewritten, is sufficient, where the typewriting of the buyer's name is done by the broker, the agent of both parties. *Dinuba Farmers' Union Packing Co. v. J. M. Anderson Grocer Co.* (1916) 193 Mo. App. 236, 182 S. W. 1036.

In *New England Dressed Meat & Wool Co. v. Standard Worsted Co.* (1896) 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112, an action by seller against buyer, the memorandum was made by the broker and was as follows: "Mar 24/93 Bought of New Eng. D. M. & W. Co. about 2000 to 2500 lbs F. C. and all they make for thirty days say up to 10,000 to 15,000 lbs at 40 cts. net cash 1 % brokerage to me for ac. Standard Worsted Co." The court said: "It is immaterial that the defendant's name appears in the body of the memorandum instead of as a signature at the end of it, that the name was written by the defendant's agent and broker instead of by one of its officers."

Name at top of instrument.

An instrument with the name at the top has been held sufficiently signed under the Statute of Frauds.

Thus, it was held sufficient to bind the defendant, *James Crookford*, under the Statute of Frauds, where he wrote an agreement to sell, beginning, "I, James Crookford, agree," and delivered it to the plaintiff. *Knight v. Crookford* (1794) 1 Esp. (Eng.) 189, 5 Revised Rep. 729.

So a statement of suretyship on a copy of a lease, stating, "I, James Pat-

terson, do hereby agree to be responsible," etc, sealed, but not signed, was held sufficient. *Sayers v. Patterson* (1876) 2 W. N. C. (Pa.) 334.

In *Saunders v. Hackney* (1882) 10 Lea (Tenn.) 194, it was held that a deed of land in the handwriting of the grantor, beginning, "I, Thomas Kirkpatrick," but unsigned, was sufficient.

But a certificate of sale beginning, "I, Joseph C. Brown, sheriff," and signed, "John K. Walker, deputy sheriff," is not well signed under the Statute of Frauds, the sheriff's name not being inserted as the sheriff's signature. *Evans v. Ashley* (1843) 8 Mo. 177.

Names at the top were also held sufficient as a signing—

—where, in a contract for the sale of cotton, the names of the vendees were written by them at the top, the contract stating, "I sold to the above gentlemen," etc., and being signed by the vendor, *Penniman v. Hartshorn* (1816) 13 Mass. 87;

—where a memorandum for sale was written by the sellers on their letterhead and kept in their safe, *Drury v. Young* (1882) 58 Md. 546, 42 Am. Rep. 343;

—where an offer of a lease was in the defendant's handwriting unsigned, but written on a sheet of memorandum paper at the head of which was printed, "from" and the name and address of the defendant, *Torret v. Cripps* (1879) 27 Week. Rep. (Eng.) 706, 48 L. J. Ch. N. S. 567.

See also *Barry v. Coombe* (1828) 1 Pet. (U. S.) 640, 7 L. ed. 295, supra, "Bills or accounts;" *Durrell v. Evans* (1862) 1 Hurlst. & C. (Eng.) 174, 9 Jur. N. S. 104, 31 L. J. Exch. N. S. 337, 7 L. T. N. S. 97, 10 Week. Rep. 665, supra, "Bought and sold notes;" *Myers v. Moore* (1907) 78 Neb. 448, 110 N. W. 989, infra, under "Where the statute requires the writing to be 'subscribed.'" Compare *Re Clifford* (1873) 2 Sawy. 428, Fed. Cas. No. 2,893, infra, under the same heading.

Where the defendants drew up a letter addressed to themselves for one of their clerks to sign, expressing the agreement between them, and he signed it, the names of the defendants as addressees were a sufficient signing under the Statute of Frauds. *Evans v. Hoare* [1892] 1 Q. B. (Eng.) 593, where Denman, J., said: "If the party sued has authorized an agent to lay before the party suing a document containing his name in full as that of the party with whom

the contract is to be made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing, and he thereupon signs, I think that there is a sufficient agreement or memorandum thereof, signed by a party authorized thereunto," within § 4 of the Statute of Frauds."

But there was held to be no signing by the vendor where the vendee, being at the vendor's hotel took a letterhead bearing the vendor's name as proprietor and wrote below it the vendee's address and a letter addressed to the vendor, and signed and handed it to the vendor. *Hucklesby v. Hook* (1900) 82 L. T. N. S. (Eng.) 117.

Signing across face.

The words "Guaranteed, Belcher," written by the guarantor across the face of an account, were sufficient under the Statute of Frauds. *Great Western Printing Co. v. Belcher* (1907) 127 Mo. App. 133, 104 S. W. 894.

See also the following cases infra, under "Where the statute requires the writing to be 'subscribed:.'" *Coon v. Rigden* (1878) 4 Colo. 275; *California Canneries Co. v. Scatena* (1897) 117 Cal. 447, 49 Pac. 462.

In this connection reference may be made to *Bluck v. Gompertz* (1852) 7 Exch. (Eng.) 862, 21 L. J. Exch. N. S. 278, where the defendant wrote and signed a conditional guaranty, and later wrote across its face what was in effect a statement of the performance of the conditions with a slight alteration, and this was signed by the plaintiff, and it was held that the defendant had sufficiently signed.

Signing as a witness.

An agreement for a marriage settlement subscribed as a witness by the person that was to furnish the money, who knew its contents, but who was not a party to the instrument, was held binding upon such subscriber. *Welford v. Beazely* (1747) 3 Atk. 504, 26 Eng. Reprint, 1090.

In *Wallace v. Roe* [1903] 1 I. R. (Ir.) 32, it was held that where one party has signed, an agent of the other party signing after the word "witness" will be held to sign for his principal.

Signing before the end.

In *Argenbright v. Campbell* (1808) 3 Hen. & M. (Va.) 159, it was held that a bond signed at the foot of the penal clause, above the condition, was sufficiently signed as to the whole.

Where part of the description of land was below the vendor's signature and it was found that the words were there when he signed, it was held that the whole was sufficiently signed under the Statute of Frauds: *Coote v. Borland* (1904) 35 Can. S. C. 282. Compare, *infra*, under "Where the statute requires the writing to be 'subscribed,'" *McGivern v. Fleming* (1884) 12 Daly, (N. Y.) 289, 66 How. Pr. 300.

But a writing made and signed by the mortgagees with the assent of the mortgagors, at the foot of a mortgage without bond, stating that the amount was reduced to a certain sum payable in five years, did not bind the mortgagors. *Cabot v. Haskins* (1825) 3 Pick. (Mass.) 95.

Where the statute requires the writing to be "subscribed."—*New York*

Most of the cases under such statutes have occurred in New York, where the statute was changed with the intent, as the courts considered, to change the law, and in this state it is held that "subscribed" means "signed at the end."

A change in the statute from "signed" to "subscribed" was held, in regard to a contract for the sale of goods, to require a subscription, as distinguished from a broker's note with the names of the parties inserted (but the note was otherwise insufficient). *Davis v. Shields* (1841) 26 Wend. (N. Y.) 341, reversing (1840) 24 Wend. 322. This holding was followed as decisive in *James v. Patten* (1851) 6 N. Y. 9, 55 Am. Dec. 376, a case where the suit was on a memorandum of sale written by the seller, the defendant, which contained the names of the parties, but was not signed.

Thus, an unsubscribed memorandum of a broker is insufficient. *Johnson v. Mulry* (1867) 4 Robt. (N. Y.) 401, affirmed in (1872) 51 N. Y. 634, on another ground; *Dennison v. Carnahan* (1851) 1 E. D. Smith (N. Y.) 144 (obiter).

So an unsubscribed bill of goods will not bind the seller. *Coe v. Tough* (1889) 116 N. Y. 273, 22 N. E. 550.

(In *Coles v. Bowne* (1844) 10 Paige (N. Y.) 526, the chancellor considered that, in the case of a sale of lands since the change in the statute, the auctioneer's memorandum must be subscribed, although it was expressly declared to be otherwise by the statute as to the sale of goods at auction.)

The signature on an order for goods L.R.A.1917A.

must be underneath or at the end; if in the middle, it does not validate the part above it. *McGivern v. Fleming* (N. Y.) *supra*, where the court below had allowed a recovery for the items above the signature.

Although the court held that the case was not one to which the Statute of Frauds applied, it considered that the defendant had sufficiently signed under the statute where the facts as stated by the court were: "An order on a blank printed by defendant, with its name and address at the top, for the sale of the goods in question to the plaintiffs, giving the terms of sale, time of delivery, and price of each item of goods, was signed by one of the plaintiffs. At the foot of the order was a printed guaranty of the price, coupled with the privilege of canceling the order signed, in print, with the name of defendant. An unsigned letter to plaintiffs' firm, with defendant's name and address on the letterhead, acknowledging the entry of plaintiffs' order, was delivered to one of the plaintiffs. The defendant's president testified that the plaintiffs' order was placed upon its books as an order; but that its counsel later advised it that it was invalid." *Goldowitz v. Henry Kupfer & Co.* (1913) 80 Misc. 487, 141 N. Y. Supp. 531.

—other states.

It will be seen that the views taken in some other states, that "subscribed" means no more than "signed," are not supported by very satisfactory cases; the Colorado and California decisions, *infra*, perhaps hardly required such a holding, and the Nebraska case did not arise under the Statute of Frauds.

In Colorado it has been held that the word "subscribed" was satisfied where a bill of sale had written across its face a receipt for the purchase money signed by the seller. *Coon v. Rigden* (1878) 4 Colo. 275, where the court said: "Our statute requires that the memorandum shall be subscribed by the party to be charged. The term 'subscribed' is a substitute for the term 'signed,' used in the English Statute, 29 Charles, and is held, 'in its habitual use, and according to both its popular and literary signification, to require a signature at the end of a printed or written instrument,' *James v. Patten* (1851) 6 N. Y. 13, 55 Am. Dec. 376; *Davis v. Shields* (1841) 26 Wend. (N. Y.) 350. The bill of sale and the receipt are evidently but parts of an entire contract. The one evidences the sale, and the other the payment of the

purchase money. Why it was written across the face of the bill of sale does not appear. It may have been for want of space at the bottom of the page, or the whim of the party who drafted it. It is immaterial. The receipt stands at the end of the contract, and is subscribed by Yeager. This is a subscription of the entire contract as much as if the receipt followed the bill of sale upon the same or the next page. To say otherwise would be an unwarranted refinement in testing the ordinary business transactions of daily life by the requirements of the statute."

The California statute requiring the writing to be subscribed was held in the Federal court to require a signing at the end. Thus, a memorandum for the sale of goods was held insufficient as to the vendor under the California statute requiring it to be subscribed by the party to be charged (here the vendor), where, at the head of the paper, the name of the vendor was printed, but the memorandum was not subscribed, nor was the name of the vendor anywhere written in the document. *Re Clifford* (1873) 2 Sawy. 428, Fed. Cas. No. 2,893.

But the California court seems to take a different view. Thus, a statement of sale written by the buyer's agent, which took up all the paper, was signed across its face by the seller, and this was held to be a sufficient signature under the Statute of Frauds, although the writing was by the statute to be "subscribed." *California Canneries Co. v. Scatena* (1897) 117 Cal. 447, 49 Pac. 462, where the court stated that the New York rule was based on a change in the statute from "signed" to "subscribed."

And in Nebraska no different meaning is given to "subscribe" than to "sign."

Thus, where a statute required a contract for the sale of lands between a broker and the owner to be in writing and "subscribed" by both parties, it was held that if the broker's (the plaintiff's) name was placed at the top of one page of the contract in question, by himself, and for the purpose of authenticating and giving force and effect to the contract, he subscribed the contract within the meaning of the statute. *Myers v. Moore* (1907) 78 Neb. 448, 110 N. W. 989. The court said: "In our Statute of Frauds (Comp. Stat. chap. 32) the words 'subscribed' and 'signed' are used interchangeably as verbal equivalents. . . . The only inference to be drawn from the indiscriminate use of the two words in the Statute of Frauds is that L.R.A.1917A.

the word 'subscribed' is not to be taken in its literal meaning, but in its popular sense as the equivalent of the word 'signed.' A signature placed at the top or in the body of an instrument for the purpose of authenticating it satisfies a statutory requirement that the instrument shall be signed."

In Kentucky the statute requires the writing to be "subscribed at the end or close." Thus, an advertisement with the printed signature of the auctioneers pasted, before the sale, above a memorandum afterward signed by the vendee, is not sufficiently signed by the vendor or his agent under the Statute of Frauds to enable the vendor, under the Kentucky rule, to sue, as this could not have been intended as a signature, nor was it, as the statute required, "subscribed at the end or close" of the writing. *Kaiser v. Jones* (1914) 157 Ky. 607, 163 S. W. 741.

Miscellaneous.

While beyond the scope of this note, it may be noted that where an auctioneer wrote the name of the purchaser, the defendant, on the side of a printed advertisement of sale, thus "S. G. Finley, \$50," this was a sufficient signing by the defendant under the Statute of Frauds. *Proctor v. Finley* (1896) 119 N. C. 536, 26 S. E. 128.

A policy of insurance signed by the president of the insurance company, having on the back a memorandum at the foot of which the names of the president and secretary are printed, is sufficiently signed, as to the memorandum on the back, within the Statute of Frauds. *Equitable Life Assur. Soc. v. Meuth* (1911) 145 Ky. 160, 140 S. W. 157, Ann. Cas. 1913B, 661, rehearing in (1911) 145 Ky. 746, 141 S. W. 37, where it is not clear that this question was properly raised. B. B. B.

NEBRASKA SUPREME COURT.

ROBERT B. HOWELL

v.

BEE PUBLISHING COMPANY et al.,
Appts.

(— Neb. —, 158 N. W. 358.)

Injunction — against publication of falsehood.

The publication of political matter in a

Headnote by ROSE, J.

Note. — As to the right to an injunction against a nonlibelous publication affecting

newspaper cannot be enjoined merely because it is false or misleading, such relief being forbidden by the following constitutional provisions: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives, and for justifiable ends, shall be sufficient defense."

For other cases, see Injunction, I. in Dig. 1-52 N. S.

(June 3, 1916.)

APPEAL by defendants from a judgment of the District Court for Douglas County in plaintiff's favor in a suit to enjoin the publishing of an article relating to his candidacy for the office of governor. Reversed.

The facts are stated in the opinion.

Messrs. Rosewater & Cotner and W. J. Connell, for appellants:

Plaintiff has mistaken his remedy, and cannot use the injunctive process of the court to determine in advance just what a citizen may write or publish upon a given subject.

Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; *Dailey v. Superior Ct.* 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458; *Marx & H. J. Clothing Co. v. Watson*, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; *Dopp v. Doll*, 13 Ohio L. J. 335; *Life Asso. of America v. Boogher*, 3 Mo. App. 173; *Stuart v. Press Pub. Co.* 83 App. Div. 467, 82 N. Y. Supp. 401; *State ex rel. Liversey v. Judge of Civil Dist. Ct.* 34 La. Ann. 741; *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 23 L.R.A. (N.S.) 839, 122 N. W. 473.

The injunction prayed for should have been refused for the reason that it sought to interfere with the constitutional right of the freedom of the press.

Lindsay & Co. v. Montana Federation of Labor, 37 Mont. 264, 18 L.R.A. (N.S.) 707, 127 Am. St. Rep. 722, 96 Pac. 127; *Dailey v. Superior Ct.* 112 Cal. 94, 32 L.R.A. 273, 53 Am. St. Rep. 160, 44 Pac. 458; *Marx &*

H. J. Clothing Co. v. Watson, 168 Mo. 133, 56 L.R.A. 951, 90 Am. St. Rep. 440, 67 S. W. 391; *New York Juvenile Guardian Soc. v. Roosevelt*, 7 Daly, 188; *Dopp v. Doll*, 13 Ohio L. J. 335; *Life Asso. of America v. Boogher*, 3 Mo. App. 173; *Stuart v. Press Pub. Co.* 83 App. Div. 467, 82 N. Y. Supp. 401; *State ex rel. Liversey v. Judge of Civil Dist. Ct.* 34 La. Ann. 741; *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 23 L.R.A. (N.S.) 839, 122 N. W. 473.

The whole article complained of must be construed as an entirety; and, as such, is not libelous, false, or incorrect.

18 Am. & Eng. Enc. Law, pp. 983, 984.

The article complained of was actually written by the plaintiff to the public, and was a privileged publication of a copy of a document admitted in the petition to be genuine, which bore on the candidacy of one seeking public office.

Laing v. Nelson, 40 Neb. 252, 58 N. W. 846; *Arnold v. Ingram*, 151 Wis. 488, 138 N. W. 111, Ann. Cas. 1914C, 976.

Messrs. Brome & Brome for appellee.

Rose, J., delivered the opinion of the court:

This is a suit in equity to enjoin the publication of an article relating to the candidacy of plaintiff for the office of governor of Nebraska. At the primary election August 18, 1914, plaintiff aspired to be the Republican nominee, but before becoming a candidate he had made and published the following statement:

I have felt very much complimented by the suggestion of my name for governor, and as much as I should like to serve this state in that honorable capacity, yet I am more strongly inclined to carry on the work of public ownership in this city. As a result I will not be a candidate at the coming primary, but will devote my energies to the water plant and to a campaign for lower electric rates through the development of a public lighting and power plant under the control of the Metropolitan Water District.

Omaha, June 16, 1914. R. B. Howell.

personal or political rights, see annotation following this case, post, 160.

For other annotation of interest in connection with *HOWELL v. BEE PUB. CO.* see note to *Cowan v. Fairbrother*, 32 L.R.A. 829, on "Constitutional freedom of speech and of the press;"

—note to *M. Steinert & Sons Co. v. Tegen*, 32 L.R.A. (N.S.) 1013, on injunction against publishing or circulating statements relative to industrial disputes by labor union.

As to the bearing of the constitutional L.R.A. 1917A.

right to free speech and action upon civil service laws, see note to *State ex rel. Buell v. Frear*, 34 L.R.A. (N.S.) 480, at page 482.

That equity will not interfere to enforce or protect purely political rights, see annotation to *Shoemaker v. Des Moines*, 3 L.R.A. (N.S.) 382. On the right to injunction in matters connected with initiative and referendum, see annotation in 50 L.R.A. (N.S.) at p. 215. On injunctions in connection with recall elections, see annotation in 50 L.R.A. (N.S.) at p. 230.

Afterward plaintiff departed from the purpose thus announced and became an active candidate. August 17, 1914, the day before the primary election, the statement quoted, including the date, "June 16, 1914," was reproduced in the Omaha Evening Bee, under the following head lines:

Howell Will Not Run.

His Announcement Explaining Why His Friends Should Not Cast Their Votes for Him.

Defendants are the publisher and the editor of the Omaha Evening Bee, a daily newspaper. On plaintiff's petition they were restrained by the district court August 17, 1914 as follows: "It is hereby ordered that the defendants, and each, be and they hereby are restrained and enjoined from printing, publishing, circulating, delivering or mailing any newspaper or other publication to the voters of Nebraska, or to any person or persons within said state, or copy or edition of said newspaper containing any notice or statement of any kind or nature whatsoever, the publication of which states or declares that the plaintiff is not a candidate for the Republican nomination for governor of the state of Nebraska, at the primary election to be held August 18, 1914, until the further order of the court."

On appeal defendants take the position that the censorship thus exercised by the trial court is forbidden by the following provisions of the state Constitution: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives, and for justifiable ends, shall be a sufficient defense." Const. art. 1, § 5.

Was the restraining order properly granted? The answer depends on the meaning of the Constitution. The freedom of the press was not a liberty enumerated in the Magna Charta, but was a subsequent growth of several centuries. After the printing press became a means of disseminating information and opinions relating to the church and the state, all printed matter was subjected to censorship or supervision. This power was first exercised by the church, and afterward by the Crown. A printer was required to obtain a license. For publishing seditious opinions such punishment as mutilation, whipping, imprisonment, banishment, and death was inflicted. The practice of supervising manuscripts in advance of publication was finally abandoned, but the press was subsequently restricted by vigorous prosecutions for libel L.R.A.1917A.

and by cruel interpretations of the law on that subject. The doctrine that the truth was no justification for its publication originated in the Star Chamber. Trials for seditious libels became a reproach to the Anglo-Saxon civilization. The use of governmental power in England to limit the activity of the press extended to the American Colonies. In replying to an inquiry by English commissioners concerning the condition of Virginia in 1670, Gov. Berkeley said: "I thank God there are no free schools, nor printing; and I hope we shall not have, these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."

The use of the printing press in Virginia was prohibited or restricted until Revolutionary times. In New England official licensors exercised a censorship over the press in the seventeenth century, and in Massachusetts printing was hampered by legal restraints until a few years before the Declaration of Independence. The evils calling for a different attitude toward printing were fresh in the public mind when the first American Constitutions were framed. The first amendment of the Constitution of the United States contains the provision that Congress shall make no law abridging the freedom of the press. The powerful agency of the press in the evolution of just and efficient government, and the indefensible restrictions imposed upon publishers, were understood generally when provisions similar to those quoted from the Nebraska Constitution were inserted in the fundamental law of many of the states. In the light of history, some of the leading purposes disclosed by the language of the Constitution cannot be misunderstood. The power to exercise a censorship over political publications, as formerly practised, is taken away. The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government. The truth, when published with good motives and for justifiable ends, contrary to the doctrine of the Star Chamber, is a defense in an action for libel, either civil or criminal. It follows that a court cannot use its equity powers to prevent the publication of political matter merely on the ground that it is untruthful or misleading, its truthfulness and its publication for good motives and for justifiable ends being a defense in an action at law.

The power of a court of equity to protect from improper publications the administration of justice and property, contract, per-

sonal, or other rights guaranteed by either the state or Federal Constitution, is not presented or decided.

The restraining order should not have been granted.

Reversed and dismissed.

Hamer, J., not sitting.

Sedgwick, J., concurring:

The majority of the court declare in the syllabus: "The publication of political matter in a newspaper cannot be enjoined merely because it is false or misleading," because the Constitution provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives, and for justifiable ends, shall be a sufficient defense."

The opinion does not define what is "political matter," and does not say why the fact that it is a defense in an action for libel, to prove that the publication was for good motives and for justifiable ends, should prevent a court of equity from interfering. I do not recall any more important proposition than the one that is so decided in this opinion. No provision of our Constitution has been more litigated and discussed by the courts than the provision that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." The discussion started in the courts before our Constitution was adopted; and, in fact, long before the Federal Constitution was adopted, it was much discussed in the courts of England. I suppose that it is the intention of the opinion in this case to hold that

publication in a newspaper will not be enjoined under any circumstances, because every person may freely speak, write, and publish on all subjects. Several hundred years ago this was announced as the law in England, but the English courts have entirely abandoned the doctrine, and at the present time the courts of England deal with injury to personality by writing and publishing in the same manner that they deal with any other torts. There has been a most remarkable growth in this country in the same direction. In *Francis v. Flinn*, 118 U. S. 385, 30 L. ed. 165, 6 Sup. Ct. Rep. 1148, the Supreme Court of the United States announced the dictum that "in the eyes of the law" damages are an adequate remedy for all publications; but a very few years later, in the famous case of *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L.R.A.(N.S.) 874, 31 Sup. Ct. Rep. 492, that court sustained an injunction restraining the defendants "from printing, issuing, publishing, or distributing" certain matters which were alleged to be injuries to the plaintiffs. This shows a remarkable growth in the direction of requiring courts of equity to restrain wrongdoing when there is no other remedy to prevent it, and this does not seem to me to be a violation of the Constitution. Those who publish are "responsible for the abuse of that liberty," and it is the abuse of the liberty that is enjoined, and not the liberty itself.

There are some reasons given in the brief for reversing the judgment in this case which seem to call for reversal. I am not satisfied with the discussion in the majority opinion, nor with the statements of the law in the syllabus.

Annotation—Injunction against nonlibelous publication affecting personal or political rights.

Notwithstanding so much is said in *HOWELL v. BEE PUB. CO.* ante, 160, about the constitutional right of free speech, the last paragraph in the opinion leaves the case open to the construction that the real basis of decision was either that there is no such thing as a right of immunity from the circulation of false and misleading, though nondefamatory, statements not affecting a property right, or, assuming such right of immunity to exist, that it is not one which a court of equity will protect.

As bearing upon the question whether any such right exists, the reader is referred to the annotation to *Corliss v. E. W. Walker Co.* 31 L.R.A. 283, on "The L.R.A. 1917A.

law of privacy;" and to *Henry v. Cherry*, 24 L.R.A.(N.S.) 991, and *Foster-Milburn Co. v. Chinn*, 34 L.R.A.(N.S.) 1137, on "Right of action for using photograph or name for advertising purposes."

If such a right exists, however, there is no reason why it should not receive the protection of courts of equity, other than the old rule that the jurisdiction of the court is based on property, and injury to property, actual or prospective, and does not extend to a matter affecting a purely personal right; and this rule has stood in the way of relief in some of the cases hereinafter cited in this note.

The general question of equitable protection of personal rights is treated in

the notes to *Chappell v. Stewart*, 37 L.R.A. 783, and *Itzkovitch v. Whitaker*, 1 L.R.A.(N.S.) 1147, in which it is pointed out that there have always been some clearly defined exceptions to the general rule, and that there is a progressive tendency on the part of the courts to protect personal rights, though often under the pretense of protecting a fictitious property right. For other instances in which equity has intervened to protect a personal right, see notes to *Baker v. Libbie*, 37 L.R.A.(N.S.) 944, and *Press Pub. Co. v. Monroe*, 51 L.R.A. 360, on "Injunction against publication or sale of letters;" to *Kirk v. Wyman*, 23 L.R.A.(N.S.) 1188, on the "Right to injunction against being sent to the pesthouse;" to *Tedescki v. Berger*, 11 L.R.A.(N.S.) 1060, and *Weidner v. Friedman*, 42 L.R.A.(N.S.) 1041, on "Right of owner or occupant of neighboring property to enjoin the maintenance of a house of prostitution;" and note to *Flint v. Hutchinson Smoke Burner Co.* 16 L.R.A. 243, on "Injunction against false statements as to plaintiff's property or business."

In England, the courts of equity have been relieved from any necessity of searching for rights of property on which to base their jurisdiction by the Act of 1873, § 25, subsec. 8, which gives power to grant an injunction in all cases "in which it shall appear to the court to be just or convenient that such order should be made." Under such a statute the English courts are entirely free to grant injunctions to protect personal rights, including the right of reputation, and injunctions against libels are in fact granted.

Research has failed to disclose the existence of any case similar to *HOWELL v. BEE PUB. Co.*, with the exception of *Schwartz v. Edrington* (1913) 133 La. 235, 47 L.R.A.(N.S.) 921, 62 So. 660, Ann. Cas. 1915B, 1180, in which it was held that the privilege of free publication guaranteed by the Federal and state Constitutions did not include the right to publish what purported to be a signed petition, as expressing the sentiment, not of the publisher, but of the signers, after the signers had disowned and repudiated it as having been signed under a misapprehension, and that the continued publication of the names of such signers in that connection might be enjoined.

The following cases are included herein as being of possible interest:

In *Singer Mfg. Co. v. Domestic Sewing Mach. Co.* (1873) 49 Ga. 70, 15 Am. Rep. 674, it was held that an injunction would

not lie at the suit of the successful competitor for an award of merit at a fair to restrain a rival from publishing a statement that its machine had been reported by the committee making the award as the best, notwithstanding the statement was untrue in fact and calculated to injure the credit of complainant's business and advance the business of the defendant, no right of property being affected thereby.

In *Consumers' Gas Co. v. Kansas City Gaslight & Coke Co.* (1890) 100 Mo. 501, 18 Am. St. Rep. 563, 13 S. W. 874, it was held that equity would not interfere to prevent one from asserting a claim of exclusive privilege in the manufacture and sale of a commodity where there was no interference with the property of the complainants other than the mere claim of such exclusive privilege or franchise.

An injunction to restrain the publishing of a biography not alleged to contain anything scandalous, libelous, or false, sought upon the ground that such publication was an injury to the feelings of the plaintiffs, who were the widow and children of the subject thereof, was denied in *Corliss v. E. W. Walker Co.* (1893) 31 L.R.A. 283, 57 Fed. 434, on the broad ground that the jurisdiction of the court is based on property and injury to property, actual or prospective, and does not extend to a matter affecting an exclusively personal right.

That an injunction may be granted against a publication which involves a breach of confidence is held in *Lindsey v. Le Seuer* (1913) 29 Ont. L. Rep. 648, affirming (1913) 27 Ont. L. Rep. 588, where one who had been given access to private papers for the purpose of preparing a biography for a series called "Makers of Canada" was held to have impliedly contracted that the subject of his biography would be depicted in a favorable light; and therefore was enjoined from publishing or causing to be published any book containing any extracts from or copies of documents, or any information avowedly obtained from such collection, where he assumed an unsympathetic attitude towards the subject of his biography, and depicted him rather as a "puller down" than as a maker of Canada.

In *Judson v. Zurhorst* (1907) 30 Ohio C. C. 9, it was held that the court would not enjoin a publication because it was injurious to complainant's reputation, where he failed to show that any property rights would be at all interfered with.

In a considerable number of cases the courts have based their jurisdiction nominally on an alleged property right, when in reality the only real right involved was one of reputation or other personal right. As, for instance, in the case of injunction against publishing private letters, such as *Woolsey v. Judd* (1855) 4 Duer (N. Y.) 379, where the letters had no property value and the injunction was sought merely to protect the writer against pain and humiliation, yet the court placed the relief on the specific basis of an alleged property right.

It is correctly said in *Brandreth v. Lance* (1839) 8 Paige (N. Y.) 24, 34 Am. Dec. 368, that the real purpose of such an injunction as granted in *Gee v. Pritchard* (1818) 2 Swanst. 403, 36 Eng. Reprint, 670, 19 Revised Rep. 87, is "not to prevent the publication of her letters on account of any supposed interest she had in them as literary property, but to restrain the publication of a private correspondence as a matter of feeling only." But Lord Chancellor Eldon said, in the English case referred to, that he deemed "the jurisdiction of the court to be, if not entirely, mainly, relative to the question whether the plaintiff has or has not property;" and that it did not profess to give relief against wounded feelings.

So it has been held that equity cannot restrain the publication of private letters when they are of no value as literary property, although such publication may be with the view of wounding the feelings of individuals, or of gratifying a perverted public taste. *Wetmore v. Scovell* (1842) 3 Edw. Ch. (N. Y.) 515; *Hoyt v. Mackenzie* (1848) 3 Barb. Ch. (N. Y.) 320, 49 Am. Dec. 178.

In *Perceval v. Phipps* (1813) 2 Ves. & B. 19, 35 Eng. Reprint, 225, 13 Revised Rep. 1, an injunction against the publication of letters written by the plaintiff was denied where it was not shown that such letters constituted literary property, or that their publication would involve any breach of contract.

In *Greene v. United States Dealers' Protective Assn. & Mercantile Agency* (1886) 39 Hun (N. Y.) 300, it was held that, assuming the courts had the right to enjoin the publication of defamatory matter, an injunction would not be granted to restrain the publication of the complainant's name as a delinquent debtor where the falsity of the charge was not alleged or proved, but, on the contrary, counsel admitted the truth of the statement that the complainant could, L. R. A. 1917A.

but did not, pay, since in such case he neither made out a case for equitable relief, nor came into court with clean hands.

In *Raymond v. Russell* (1887) 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544, it was held that it was not within the jurisdiction of a court of equity to restrain the publication in the records and books of a mercantile agency of the name and business standing of the plaintiff.

In *Murray v. Gast Lithographic & Engraving Co.* (1894) 8 Misc. 36, 28 N. Y. Supp. 271, it was held that, conceding that the plaintiff had suffered a personal injury—one to his mental sensibility—by the unauthorized publication of a portrait of his infant daughter, the law could not take cognizance thereof and afford compensation for a sentimental injury independent of redress for a wrong involving physical injury to person or property, and therefore that he was not entitled to injunctive relief against further publication.

In *Atkinson v. John E. Doherty & Co.* (1899) 121 Mich. 372, 46 L. R. A. 219, 80 Am. St. Rep. 507, 80 N. W. 285, an injunction against the use of the name and portrait of a deceased person on a cigar label was denied to his widow upon the ground that the injury to the feelings in such a case is not one that the law can redress.

One who advertises his goods in such a manner as to lead the public to believe that another is in some way connected with his enterprise may be enjoined from so doing at the instance of such other, although they are not rivals in trade, where the effect of his act is to expose such other to a probable risk of litigation. *Walter v. Ashton* [1902] 2 Ch. (Eng.) 282, 5 B. R. C. 336, 71 L. J. Ch. N. S. 839, 18 Times L. R. 445, 51 Week. Rep. 131, 87 L. T. N. S. 196.

Upon the same ground it was held in *Routh v. Webster* (1847) 10 Beav. 561, 50 Eng. Reprint, 698, that the directors of a joint stock company might be enjoined from using complainant's name in a prospectus stating that he was a trustee for the company.

In *Edison v. Edison Polyform Mfg. Co.* (1907) 73 N. J. Eq. 136, 67 Atl. 392, it was held, partly on the theory that the complainant had a property right in his portrait, and partly on the theory that he was exposed to the risk of pecuniary loss, that the unauthorized use of his name by a company and as a part of its corporate title, and the use of his portrait for advertising purposes in connection with a certificate falsely purporting

to be his, stating that the corporation was compounding a medicine according to a formula devised by him,—was such an act as equity would enjoin.

In *Edison v. Thomas A. Edison Jr., Chemical Co.* (1904) 128 *Fed.* 957, an injunction was sought by Thomas A. Edison, the inventor, against a company called the Thomas A. Edison, Jr., Chemical Company, of which the son of the inventor was originally a member, to restrain the use of the name "Edison" and word "Wizard" in connection with certain ink tablets and an electric vitalizer not invented by the complainant. The bill proceeded on the assumption that the value of the complainant's inventions rested largely upon his wide reputation as a successful inventor, and that any fraudulent practices by the defendant, causing the public to believe that worthless or inferior articles were sold by the complainant, not only worked a fraud on the public, but injuriously affected the complainant's reputation and income. The court denied the complainant an injunction, saying: "Putting the case made by the bill and demurrer in the most favorable light for the complainant, and disregarding the objections above discussed, it amounts in principle to this, viz., that the defendant, by advertisements or otherwise, knowingly and falsely informs the public, to the detriment of the business reputation of the complainant and consequent impairment of his income, that the Magno-Electric Vitalizer and ink tablets, in which the defendant deals, are of the manufacture of the complainant, notwithstanding the fact that the latter is in no way connected with the manufacture or sale of such articles or devices. But the bill does not charge the defendant with menace, intimidation, or coercion of any kind toward customers of the complainant, or with any direct attack upon his property or conduct of his business; nor does it allege that the acts complained of have created, or, if repeated, will create, any liability on the part of the complainant to third persons. Further, the case as presented is, indeed, one only of constructive, indirect, or implied libel or defamation by the defendant of the business reputation of the complainant, and consequent diminution of his income. To hold that, on the facts admitted by the demurrer, the complainant is entitled to the relief he prays, would establish a dangerous precedent, calculated to produce confusion in the business world, open wide a door to

fraud, and result in much greater evil to the public than that suffered by the victims of the defamation."

In *Clark v. Freeman* (1848) 11 *Beav.* 112, 50 *Eng. Reprint*, 759, 17 *L. J. Ch. N. S.* 142, 12 *Jur.* 149, a noted medical man was refused an injunction to restrain a chemist from selling pills or other medicines under the complainant's name and under the false representation that they were sold on behalf of or under the sanction or approbation of the complainant. The court stated that it could interfere in cases of mischief being done to property by the fraudulent misuse of a person's name by another, but pointed out that the complainant was not in the habit of manufacturing and selling pills and such remedies as the defendant sold. This case has been the subject of considerable criticism, and in *Maxwell v. Hogg* (1867) *L. R.* 2 *Ch. (Eng.)* 307, 36 *L. J. Ch. N. S.* 433, 16 *L. T. N. S.* 130, 15 *Week. Rep.* 467, Lord Cairns said that it always appeared to him that *Clark v. Freeman* might have been decided in favor of the plaintiff on the ground that he had a property in his own name.

And in *Dockrell v. Dougall* (1898) 78 *L. T. N. S. (Eng.)* 840, it was held that a physician was not entitled to enjoin the unauthorized use for advertising purposes of a statement made by him that he had prescribed a certain mineral water for his patients and had used it himself with beneficial results, where the use of his name was not such as to injure his reputation or property.

But in *Mackenzie v. Soden Mineral Springs Co.* (1891) 27 *Abb. N. C.* 402, 18 *N. Y. Supp.* 240, an injunction was granted against the unauthorized publication by a company of alleged letters in the name of a physician, who was a throat specialist, recommending a certain medical preparation of the company, the ground of the decision in the case being that the publication was calculated to damage the complainant in his professional standing and name.

In *Von Thodorovich v. Franz Josef Beneficial Asso.* (1907) 154 *Fed.* 911, an injunction was granted to restrain the use of the name and portrait of Emperor Franz Josef by a beneficial association in such a way as to induce former subjects of the Emperor to believe that the association was under the latter's special patronage and concern, and thus work a fraud on them.

In *Vassar College v. Loose-Wiles Biscuit Co.* (1912) 197 *Fed.* 982, it was held

that an injunction would not be granted at the instance of Vassar College to restrain a manufacturer of candy called "Vassar Chocolates," the packages containing which and the advertisements whereof employed the name of Vassar, a likeness of a young lady in scholastic garb and wearing a mortar board hat, an imitation of the college penant, a college yell, and an imitation of the college seal, with the words "Vassar Chocolates" and "Always fresh" substituted for the words "Vassar College" and "Purity and Wisdom," respectively, the college as a public institution having no right of privacy which it could preserve by injunction, and the injury, if any, being psychological rather than real.

In *Roberson v. Rochester Folding Box Co.* (1902) 171 N. Y. 538, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442, it was held that the unauthorized publication of one's likeness by another person for advertising purposes will not support an action for an injunction, on the theory that it is an invasion of a "right of privacy."

Since the decision in the *Roberson Case*, the New York legislature has passed a statute forbidding the use of a person's name or picture without his or her consent, or the consent of parent or guardian, for the purposes of advertising a trade, and giving to any person whose portrait or name is so used the right to maintain an action for an injunction, or an action for damages, with a clause authorizing the jury to give exemplary damages. This statute was held constitutional in *Rhodes v. Sperry & H. Co.* (1908) 193 N. Y. 223, 34 L.R.A. (N.S.) 1143, 127 Am. St. Rep. 945, 85 N. E. 1097, and was also held to warrant the issuance of an injunction to prevent the display of a person's photograph in a trading stamp store which was equipped with show cases where the photographs of numerous persons were displayed. The constitutionality of this statute was also upheld in *Wyatt v. James McCreery & Co.* (1908) 126 App. Div. 650, 111 N. Y. Supp. 86. And in *Kunz v. Bosselman* (1909) 131 App. Div. 288, 115 N. Y. Supp. 650, an injunction was granted under this statute, restraining one engaged in publishing and selling portraits from publishing and offering for sale another's photograph without her consent. This statute has also been held to authorize an injunction against the use of the plaintiff's name without his consent in connection with the marketing of moving picture films I.L.R.A.1917A.

purporting to show the wreck of a vessel upon which the plaintiff had been a wireless operator, and to represent him in an operator's uniform. *Binns v. Vita-graph Co.* (1913) 210 N. Y. 51, L.R.A. 1915C, 839, 103 N. E. 1108, Ann. Cas. 1915B, 1024. But such statute has been held not to warrant the issuance of an injunction in favor of a person who had written an autobiography, against the publication of his picture by a newspaper in connection with a so-called history of his life. *Jeffries v. New York Evening Journal Pub. Co.* (1910) 87 Misc. 570, 124 N. Y. Supp. 780. Nor does it so operate as to prohibit a newspaper publication from using or publishing in a single issue the name and portrait of a person without his consent having first been obtained. *Moser v. Press Pub. Co.* (1908) 59 Misc. 78, 109 N. Y. Supp. 963. In this case the court said: "If the publication of a portrait can, under this statute, be prohibited in a daily newspaper, the publication of a name could also be prohibited without such written consent having been first obtained; so that the publication of a daily newspaper in this state, showing and giving an accurate account of occurrences throughout the civilized world, would be an impossibility, as no publishing corporation would undertake to successfully defend the numerous law suits that might deluge them if the persons within this state whose names were published (without their written consent) in each issue asserted their rights under this statute. It would seem as if the statement of this proposition ought to bear its own refutation, even without regard to the infringement of the constitutional guaranty of a free press."

As pointed out by Judge Parker in the *Roberson Case*, *Marks v. Jaffa* (1893) 6 Misc. 290, 26 N. Y. Supp. 908, recognizing the right of an actor to enjoin the publication of his photograph for the purpose of soliciting votes on the comparative popularity of himself and another actor, and relying upon *Schuyler v. Curtis* (1892) 64 Hun, 594, 19 N. Y. Supp. 264, falls with the latter case, which was reversed in (1895) 147 N. Y. 434, 31 L.R.A. 286, 49 Am. St. Rep. 671, 42 N. E. 22.

On the other hand, that the right of a private individual to be protected in the representation of his portrait in any form is a property as well as a personal right, belonging to the same class of rights as the right to prevent the reproduction of a private manuscript or paint-

ing, or the publication of private letters, is declared in *Corliss v. E. W. Walker Co.* (1894) 31 C. C. A. 283, 64 Fed. 280.

An injunction against the publication of the picture of an actress, taken by flashlight while she was playing in tights in a theater, was granted *ex parte*

in the case of *Manola v. Stevens*, 4 Harvard L. Rev. 195, citing *New York Times* of June 15, 18, 21, 1890. But it was said that on the time set for argument of the motion to make the injunction permanent, no one appeared in opposition.
E. S. O.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF EDWARD L. ROGERS, Deceased.

HARRIET M. ROGERS, Appt.

(245 Pa. 206, 91 Atl. 351.)

Will — bequest for life — failure to dispose of remainder.

1. A bequest of personalty to one for life, with power of disposition, without a disposition of the remainder, passes the fee, although testator expresses the desire that care should be exercised in the investment and reinvestment of the assets.

For other cases, see Wills, III. g, 2, in Dig. 1-52 N. S.

Same — bequest of remainder — what constitutes.

2. A provision in a clause bequeathing property to testator's children, referring to "any other interest that may eventually come to them from my estate," does not convey the remainder of personalty bequeathed to the wife for life, with power of disposition, so as to prevent her taking a fee.

For other cases, see Wills, III. g, 2, in Dig. 1-52 N. S.

(May 4, 1914.)

APPEAL by the widow of testator from a decree of the Orphans' Court for Montgomery County, dismissing exceptions to the adjudication of the auditing judge in settling the estate of Edward L. Rogers, deceased. Reversed.

The facts are stated in the opinion.

Mr. James W. Laws, for appellant:

The decision of the court below can only be sustained on the hypothesis that a partial intestacy could not be avoided by any reasonable construction of testator's will.

Note. — For a discussion of the effect of a power of disposition to enlarge a life estate expressly given into a fee, see note appended to *Steff v. Seibert*, 6 L.R.A. (N.S.) 1186, on "Power to create remainder after life estate with absolute power of disposal," and supplemental annotation on the same subject, appended to *Chewning v. Eason*, 39 L.R.A. (N.S.) 805.

The question as to what intention in regard to the nature of the estate to be taken by a devisee may be deduced from a power of disposition is considered in a note to *Re L.R.A.1917A*.

Keene's Estate, 221 Pa. 201, 70 Atl. 706; *Fuller's Estate*, 225 Pa. 629, 74 Atl. 623; *Caslow v. Strausbaugh*, 233 Pa. 69, 81 Atl. 927; *Snyder v. Baer*, 144 Pa. 278, 13 L.R.A. 359, 22 Atl. 897; *Witmer v. Delone*, 225 Pa. 450, 74 Atl. 347; *Hardaker's Estate*, 204 Pa. 181, 53 Atl. 761; *Huber v. Hamilton*, 211 Pa. 289, 60 Atl. 789; *Henninger v. Henninger*, 202 Pa. 207, 51 Atl. 749; *Kiefel v. Keppler*, 173 Pa. 181, 33 Atl. 1043; *Boyle v. Boyle*, 152 Pa. 108, 34 Am. St. Rep. 629, 25 Atl. 494; *Freeman's Estate*, 227 Pa. 154, 75 Atl. 1063; *Forsythe v. Forsythe*, 108 Pa. 129; *Smith v. Fulkinson*, 25 Pa. 109; *Nevins's Estate*, 7 Pa. Dist. R. 761.

The present decision removes the control of the use of both the income and principal from the hands of the widow, and places the control in the hands of the two daughters, in flat violation of the plain intention of the testator's will.

Watson's Estate, 241 Pa. 271, 88 Atl. 433.

If it should be held that testator died intestate as to the residue of his estate, after his wife's death, his widow is entitled to have set aside for her absolutely one third of the personal property, notwithstanding the fact that she has a life estate in the whole residue.

Freeman's Estate, 227 Pa. 154, 75 Atl. 1063.

Mr. H. Gordon McCouch, for appellees:

An heir at law can be disinherited only by an express devise, or by necessary implication; and this implication must be so strong that an intention to the contrary cannot be supposed.

Corr's Estate, 202 Pa. 391, 51 Atl. 1032; *Espy's Estate*, 207 Pa. 459, 56 Atl. 1005.

Artificial and arbitrary canons of construction, by which certain forms of ex-

Weien, 18 L.R.A. (N.S.) 463, in connection with which reference may be made to the subsequent cases of *Loosing v. Loosing*, 25 L.R.A. (N.S.) 920, and *Louisville Trust Co. v. Snively*, L.R.A.1915B, 153.

As to power of one to whom an estate has been devised for life with power to consume, to convey good title, see note to *Allen v. Hirlinger*, 13 L.R.A. (N.S.) 458.

On effect of bequest for life of chattels consumable in the use, see note to *Seabrook v. Grimes*, 16 L.R.A. (N.S.) 483.

pression are presumed to have certain meanings, are only to be used in doubtful cases; and they are subservient to the great rule as to intent, and are made to aid, not to override, it.

Woelpper's Appeal, 126 Pa. 562, 17 Atl. 870; Allen v. Hirlinger, 219 Pa. 56, 13 L.R.A. (N.S.) 458, 123 Am. St. Rep. 617, 67 Atl. 907; Arnold v. Muhlenberg College, 227 Pa. 321, 76 Atl. 30; Tyson's Estate, 191 Pa. 218, 43 Atl. 131; Gourley's Estate, 238 Pa. 62, 85 Atl. 999.

The presumption that a power to consume passes a fee does not prevail against the manifest intention of the testator to the contrary.

Fassitt v. Seip, 240 Pa. 406, 87 Atl. 957; Gourley's Estate, 238 Pa. 62, 85 Atl. 999; Keown's Estate, 238 Pa. 343, 86 Atl. 270; Briggs v. Caldwell, 236 Pa. 369, 84 Atl. 823; Dickinson's Estate, 209 Pa. 59, 58 Atl. 120; Allen v. Hirlinger, 219 Pa. 56, 13 L.R.A. (N.S.) 458, 123 Am. St. Rep. 617, 67 Atl. 907; Freeman's Estate, 220 Pa. 343, 69 Atl. 816.

The widow is not entitled to give away either income or principal, or to use the same for any purpose other than that expressed. If it were so used, her action would be a "fraud on the testator and his will," and the property could be traced and recovered by those entitled in remainder.

Tyson's Estate, 191 Pa. 218, 43 Atl. 131; Gross v. Strominger, 178 Pa. 66, 35 Atl. 852; Trout v. Rominger, 198 Pa. 91, 47 Atl. 960.

Potter, J., delivered the opinion of the court:

This is an appeal from the decree of the orphans' court of Montgomery county, dismissing exceptions to the adjudication in the estate of Edward L. Rogers, deceased. In his will the testator gave legacies of \$10,000 to each of his three children and provided as follows: "And as to all the rest, residue and remainder of my estate, real, personal or mixed, of whatever nature or kind, or wheresoever situate at the time of my decease, I do hereby give, devise and bequeath to my beloved wife, Harriet M. Rogers, for and during her natural life, with full power to sell or dispose of any of my real estate, securities of any and all kinds, in such a manner as she may desire, with the request however that care be taken in the investment or reinvestment of any money that may not be actually required for living expenses, or other necessities, with the wish that she may at any and all times be liberal in regard to her own comforts and not feel that it is necessary to be unduly economical, especially so if my estate so warrants it."

L.R.A.1917A.

There was no gift over of the estate.

Upon the audit of the executor's account, the widow, who had elected to take under the will, claimed that she was entitled to the residuary estate absolutely. The auditing judge, however, held that she was given only a life estate, with power of sale and the right to consume as much as may be actually required for living expenses and necessities. Exceptions filed by the widow were dismissed and the adjudication was confirmed. The widow has appealed. The general rule is that a gift for life without a gift over passes the whole estate. This is not a rule of law, but a rule of construction in aid of discovery of the testator's intention. Tyson's Estate, 191 Pa. 218, 43 Atl. 131. In that case, however, there was an absolute devise over, and the residue after the life estate passed under the will. In Brownfield's Estate, 8 Watts, 465, the testator gave his wife "one third of my personal estate, during her life, after my just debts paid," without any disposition over. Mr. Justice Kennedy said: (p. 469) "The wife was entitled to receive it to dispose of as she pleased, there being no limitation over of it after her death."

In Diehl's Appeal, 36 Pa. 120, a testator gave to his wife a tract of land during her lifetime, "together with all my bonds and notes, to have and to hold the same. Also, all my personal estate, whatsoever will be left after my decease, to have and to hold the same during her natural lifetime"—without making any disposition over. It was held that the bonds and notes became the absolute property of the testator's widow. In Shower's Estate, 211 Pa. 297, 60 Atl. 789, 791, our Brother Mestrezat said (p. 303): "We concede the rule invoked by the appellants that a gift of the income of an estate, with no limitation over of the principal, is an absolute gift of the property or fund itself."

In Merkel's Appeal, 109 Pa. 235, a testator gave to his wife "my remaining personal property, it may be money, or whatsoever kind it will to her full ownership as long as she doth live." He also provided: "I recommend that my hereinafter named executor shall see after that her money does not become lost."

In disposing of this case Mr. Justice Paxson said: "The language of the will above quoted is ample to vest the personal estate of the testator absolutely in his widow. It is a gift for life, without any limitation over, and without the intervention of a trustee. . . . The recommendation to his executor to see that his widow's money 'does not become lost' are precatory words, and since *Re Pennock*, 20 Pa. 268, 59 Am.

Dec. 718, have never been held sufficient to convert a devise or bequest into a trust."

In the present case the request that care be taken in the investment of the money is merely precatory, and the provision giving to the wife full power to sell or dispose of the estate is the controlling language of the residuary cause of the will. In *Freeman's Estate*, 220 Pa. 343, 69 Atl. 816, there was a provision which relieved the wife as life tenant from giving security, and it was held that if it had been intended to give an absolute estate, these words would be meaningless. Therefore they were regarded as sufficient to take the case out of the general rule.

In the present case, in a former clause of the will, after speaking of bequests which he had made to his two daughters, the testator makes further reference to "any other interest that may eventually come to them from my estate." We do not, however, regard these words as necessarily having the effect of limiting the wife to an estate for life. They may apply to real estate of which testator died seised, which would descend to the daughters if not consumed by the wife. These words might also apply to any portion of the personal estate which the daughters might eventually receive from their mother. The testator evidently contemplated the possibility that the widow would not consume the entire principal of the estate, in which event she would naturally bequeath part of it to her children, or, in the event of her dying intestate, they would inherit from her. There is also a presumption of the first taker having a fee, in spite of subsequent words which appear to be repugnant. See language of Mr. Chief Justice Mitchell, in *Allen v. Hirlinger*, 219 Pa. 56, 58, 13 L.R.A. 458, 123 Am. St. Rep. 617, 67 Atl. 907. At any rate, we are not satisfied that the language used indicates a clear intention on the part of the testator to restrict the gift to the widow to a life estate only, nor do we regard it as sufficient to overcome the established rules of construction that would give to her the personal property, absolutely. In many of our cases language much stronger has been held not to have the effect of cutting down the wife's interest to a life estate. Thus, in *Follweiler's Appeal*, 102 Pa. 581, testator gave and bequeathed "all the rest, residue and remainder of my goods, chattels, debts, ready money, effects and other of my estate whatsoever and wheresoever, both real and personal, every part and parcel thereof unto my wife Mary, to keep and enjoy during her lifetime, and after her death what shall be left shall be divided equally, my heirs and her heirs, share and share alike." It was held that L.R.A.1917A.

the widow would take any personal property absolutely, but took a life estate only in the realty. Mr. Justice Trunkay said (102 Pa. 583): "If there were any personalty, the appellant [widow] would take it absolutely. But the realty is not subject to the same rule."

The principle of this decision was recognized and followed in *Cox v. Sims*, 125 Pa. 522, 17 Atl. 465, and the same principle was again cited and approved in *Taylor v. Bell*, 158 Pa. 651, 38 Am. St. Rep. 857, 28 Atl. 208, 209, where Mr. Justice Green said (p. 655): "In the present case the widow has the right to use the residuary estate as she may deem best for her own advantage. This would entitle her to an absolute estate in the personalty because it includes a power of disposition."

In that case, however, as to the real estate, there was no power of sale; while in the case now before us, the wife was given power to dispose of the real estate, if necessary. In *Boyle v. Boyle*, 152 Pa. 108, 34 Am. St. Rep. 629, 25 Atl. 494, it appeared, as set forth in the syllabus, that a will provided as follows: "As to my worldly goods, after my just debts are paid, I give and bequeathed to my beloved wife, all my property, real and personal, for her support, during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children."

It was held that the words of the will imported an absolute gift, and gave a fee with all its incidents. In *Hardaker's Estate*, 204 Pa. 181, 53 Atl. 761, the wife was given the estate during her natural life, with power of disposition by will. It was held that she took an absolute, and not merely a life, estate in all the property possessed by the husband at the time of his death.

In the case now under consideration the residue of the estate was given to the wife "for and during her natural life, with full power to sell or dispose of any of my real estate, securities of any and all kinds in such a manner as she may desire." This was followed by the precatory words as to care in investment of money not actually required for living expenses or other necessities. We cannot, under the authorities above cited, regard these latter words, nor the words in the former clause of the will, referring to any interest that may eventually come to his daughters from his estate, as expressing a clear intent upon the part of the testator to limit the interest of the wife to a life estate. We think an absolute estate in the personalty passed to the wife.

The first, third, fourth, fifth, seventh,

eighth, ninth, and tenth assignments of error are sustained. The decree of the Orphans' Court is reversed, and it is ordered

that the record be remitted to the court below, that distribution may be made in accordance with this opinion.

WEST VIRGINIA SUPREME COURT OF APPEALS.

H. R. CARPER et al.,

v.

UNITED FUEL GAS COMPANY, Plff. in Err.

(— W. Va. —, 89 S. E. 12.)

Mines — oil and gas lease — duty to develop.

1. In an oil and gas lease, creating a specific term, imposing an alternative duty upon the lessee to drill a well within a specified period or pay a stipulated rental for delay, and providing for like postponement of development through successive periods within the term, there is no implied covenant for diligent operation merely to make the lease profitable to the lessor. The delay rentals provided for are deemed to be full satisfaction and compensation for postponement of operation.

For other cases, see Mines, II. b, 4, a, in Dig. 1-52 N. S.

Same — duty to drill offset wells.

2. Nor is there an implied covenant in such a lease, operative within the period of postponement, to drill offset wells on the leased premises for prevention of loss of the subject-matter of the lease, the oil or gas, or both, as the case may be, by drainage through wells on adjacent or neighboring lands.

For other cases, see Mines, II. b, 4, a, in Dig. 1-52 N. S.

Same — notice of termination.

3. But there is an implied condition that, in the event of such drainage, or imminent danger thereof, the lessee will, upon the demand of the lessor, drill a well on the leased premises, for such purpose, within the last period for which the delay rental has been or shall be accepted, or commence one within said period, and diligently prosecute the work on it, accompanied by notice of intention to refuse to receive further payments of rentals, and declare a forfeiture of the lease for failure to drill the same.

For other cases, see Mines, II. b, 4, a, in Dig. 1-52 N. S.

Same — payment of rentals.

4. Under such a lease, the lessor is not entitled to recover damages for failure to drill offset wells to prevent drainage, while the lessee exercises his optional right to

pay money in lieu of drilling, and the lessor accepts it.

For other cases, see Mines, II. b, 4, a, in Dig. 1-52 N. S.

Contract — construction — addition of terms.

5. Judicial power to make additions to the terms of contracts on the theory of implication, in the process of construction, is measured and limited by necessity in the effectuation of the intention of the parties.

For other cases, see Contracts, II. a, in Dig. 1-52 N. S.

Same — unexpressed provisions.

6. If an implied condition will adequately protect from the results of a contingency which it is evident the parties did not intend to disregard, but for which they made no express provision, and will be less onerous to one of them than a covenant for such purpose would be, the principle of equity governing in construction, and the limitation of necessity upon additions by implication, make it the duty of the court to adopt the condition, not the covenant, as an unexpressed provision of the contract.

For other cases, see Contracts, II. a; Covenants and Conditions, II. a, in Dig. 1-52 N. S.

(May 16, 1916.)

ERROR to the Circuit Court for Roane County to review a judgment in plaintiffs' favor in an action brought to recover damages for breach of alleged implied covenants and promises in an oil and gas lease. Reversed.

The facts are stated in the opinion.

Messrs. C. C. Douthitt, Kemble White, C. Powell, and R. G. Altizer, for plaintiff in error:

This being an action of assumpsit, the promise to pay the sum demanded is the gist of the action, and must be expressly alleged, whether such promise be express or implied. The declaration, containing no such averment, was insufficient, and the demurrer thereto should have been sustained.

Waid v. Dixon, 55 W. Va. 191, 46 S. E. 918; Wolf v. Spence, 39 W. Va. 491, 20 S. E. 610; Grass v. Big Creek Development Co. 75 W. Va. 719, L.R.A.1915E, 1057, 84 S. E. 756.

The verdict is not supported by sufficient proof of circumstances from which an obligation on the part of the defendant can be implied to have drilled wells on the land of the plaintiffs, nor by sufficient proof of any loss or injury which the plaintiffs suffered by reason of its failure so to do.

Headnotes by POFFENBARGER, J.

Note.—As to liability of the lessee in oil or gas lease for damages for failure to develop the leased premises during the term for which he has paid delay rental, see annotation following this case, post, 178. L.R.A.1917A.

McGraw Oil & Gas Co. v. Kennedy, 65 W. Va. 595, 28 L.R.A.(N.S.) 959, 64 S. E. 1027; Grass v. Big Creek Development Co. 75 W. Va. 719, L.R.A.1915E, 1057, 84 S. E. 756.

The acceptance of the stipulated payments for the right to postpone operations is a bar to the present action.

Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368; Ammons v. South Penn Oil Co. 47 W. Va. 610, 35 S. E. 1004; Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 104 Am. St. Rep. 773, 73 N. E. 222, 2 Ann. Cas. 444; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Daughetee v. Ohio Oil Co. 151 Ill. App. 102; Harris v. Ohio Oil Co. 57 Ohio St. 118, 48 N. E. 502, 19 Mor. Min. Rep. 157; J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. 48 Tex. Civ. App. 555, 107 S. W. 609; Howerton v. Kansas Natural Gas Co. 81 Kan. 553, 34 L.R.A.(N.S.) 34, 106 Pac. 47.

The rights granted by the lessor are not divisible.

Allegheny Oil Co. v. Snyder, 45 C. C. A. 604, 106 Fed. 764; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Davis v. Wells, F. & Co. 104 U. S. 159, 26 L. ed. 686.

Therefore, even if the property of the lessor was being affected by drainage, the lessor, by accepting payments under a contract which vested in the lessee the right to hold or operate, at its election, was by each acceptance of rental, after such condition arose, continuing in the lessee the right to hold or operate.

Pyle v. Henderson, 65 W. Va. 41, 63 S. E. 702; Smith v. Root, 66 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1005; Aye v. Philadelphia Co. 193 Pa. 451, 74 Am. St. Rep. 696, 44 Atl. 555, 20 Mor. Min. Rep. 177; Hall v. South Penn Oil Co. 71 W. Va. 82, 76 S. E. 124; Grass v. Big Creek Development Co. 75 W. Va. 719, L.R.A.1915E, 1057, 84 S. E. 756.

Messrs. Pendleton, Mathews, & Bell, for defendants in error:

The declaration is sufficient, and the demurrer was properly overruled.

1 Chitty, Pl. 10th Am. ed. by Perkins, 1847, pp. 307-309, 552-556; Hogg, Pl. & Forms, 234-242; Kennaird v. Jones, 9 Gratt. 183; Payne v. Grant, 81 Va. 164; Bashar v. Pittsburg, C. C. & St. L. R. Co. 73 W. Va. 39, 79 S. E. 1009; Hall v. Philadelphia Co. 74 W. Va. 172, 81 S. E. 727.

An ordinary oil and gas lease contains an implied covenant that the lessee will reasonably develop the leased premises for oil and gas.
L.R.A.1917A.

Jennings v. Southern Carbon Co. 73 W. Va. 215, 80 S. E. 368; Kellar v. Craig, 61 C. C. A. 366, 126 Fed. 630; Thornton, Oil & Gas, 129, 182, 183; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Adams v. Stage, 18 Pa. Super. Ct. 308; Core v. New York Petroleum Co. 52 W. Va. 276, 43 S. E. 128; Venedocia Oil & Gas Co. v. Robinson, 71 Ohio St. 302, 104 Am. St. Rep. 773, 73 N. E. 222, 2 Ann. Cas. 444; Baker v. Stow, 30 Ohio C. C. 728; J. M. Guffey Petroleum Co. v. Oliver, — Tex. Civ. App. —, 79 S. W. 884; Howerton v. Kansas Natural Gas Co. 82 Kan. 367, 34 L.R.A.(N.S.) 46, 108 Pac. 813; Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Logan Natural Gas & Fuel Co. v. Great Southern Gas & Oil Co. 61 C. C. A. 359, 126 Fed. 623; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; McIntosh v. Robb, 4 Cal. App. 484, 88 Pac. 517; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 801; Powers v. Bridgeport Oil Co. 238 Ill. 397, 87 N. E. 381; New American Oil & Min. Co. v. Troyer, 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329, 3 Mor. Min. Rep. 688; Guffy v. Hukill, 34 W. Va. 49, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754; American Window Glass Co. v. Williams, 30 Ind. App. 685, 66 N. E. 912; Rorer Iron Co. v. Trout, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; Munroe v. Armstrong, 96 Pa. 307; J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. 48 Tex. Civ. App. 555, 107 S. W. 609; Harris v. Ohio Oil Co. 57 Ohio St. 118, 48 N. E. 502, 19 Mor. Min. Rep. 157; Hall v. South Penn Oil Co. 71 W. Va. 82, 76 S. E. 124.

The object of an oil and gas lease is the development of the oil and gas, in which both the lessor and lessee are interested, and it is the lessee's duty to fully develop the property, and in such manner as to protect in a reasonable way the oil and gas under the property from drainage by wells on adjoining property.

Brown v. Vandergrift, 80 Pa. 142; Kleppner v. Lemon, 176 Pa. 503, 35 Atl. 109, 18 Mor. Min. Rep. 404; Guffy v. Hukill, 34 W. Va. 49, 8 L.R.A. 759, 26 Am. St. Rep. 901, 11 S. E. 754; McKnight v. Manufacturers' Natural Gas Co. 146 Pa. 185, 28 Am. St. Rep. 790, 23 Atl. 164, 17 Mor. Min. Rep. 429; Munroe v. Armstrong, 96 Pa. 310; Ray v. Western Pennsylvania Natural Gas Co. 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065, 17 Mor. Min. Rep. 374; Bradford Oil Co. v. Blair, 113 Pa. 83, 57 Am. Rep. 442, 4 Atl. 218; Ohio Oil Co. v. Harris, 1 Ohio N. P.

132; *Ohio Oil Co. v. Kelley*, 9 Ohio C. C. 511, 6 Ohio C. D. 470; *Harris v. Ohio Oil Co.* 57 Ohio St. 118, 48 N. E. 502, 19 Mor. Min. Rep. 157; *Kleppner v. Lemon*, 29 Pittsb. L. J. N. S. 346; *Thornton, Oil & Gas*, 143; *Beatty-Nickle Oil Co. v. Smethers*, 49 Ind. App. 602, 96 N. E. 19; *Barnard v. Monongahela Natural Gas Co.* 216 Pa. 362, 65 Atl. 801; *Powers v. Bridgeport Oil Co.* 238 Ill. 397, 87 N. E. 381; *Harness v. Eastern Oil Co.* 49 W. Va. 232, 38 S. E. 662; *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377.

When its terms will permit it, under the rules of law, an oil lease will be so construed as to promote development and prevent delay and unproductiveness.

Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 584, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65; *Conrad v. Morehead*, 89 N. C. 31; *Munroe v. Armstrong*, 96 Pa. 307; *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 613, 20 Mor. Min. Rep. 377; *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065, 17 Mor. Min. Rep. 374; *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *Smith v. Root*, 66 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1005; *Brown v. Vandergrift*, 80 Pa. 142; *Kleppner v. Lemon*, 176 Pa. 503, 35 Atl. 109, 18 Mor. Min. Rep. 404; *Guffy v. Hukill*, 34 W. Va. 49, 8 L.R.A. 750, 26 Am. St. Rep. 901, 11 S. E. 754; *McKnight v. Manufacturers' Natural Gas Co.* 146 Pa. 185, 28 Am. St. Rep. 790, 23 Atl. 164, 17 Mor. Min. Rep. 429; *Bradford Oil Co. v. Blair*, 113 Pa. 83, 57 Am. Rep. 442, 4 Atl. 218; *Harris v. Ohio Oil Co.* 57 Ohio St. 118, 48 N. E. 502, 19 Mor. Min. Rep. 157.

The rental money provided to be paid in case a well should not be drilled in the specified time is in the nature of a penalty, and not of an alternative condition, or as liquidated damages. Such provision will not be held to turn the contract into a speculative lease for rental only, and to entitle the lessee to postpone development indefinitely.

Ray v. Western Pennsylvania Natural Gas Co. 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065, 17 Mor. Min. Rep. 374; *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 89, 34 S. E. 923, 20 Mor. Min. Rep. 284; *Munroe v. Armstrong*, 96 Pa. 310; *Steelsmith v. Gartlan*, 45 W. Va. 33, 44 L.R.A. 107, 29 S. E. 978, L.R.A.1917A.

19 Mor. Min. Rep. 315; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; *Smith v. Root*, 66 W. Va. 633, 30 L.R.A.(N.S.) 176, 66 S. E. 1005; *Harris v. Michael*, 70 W. Va. 356, 73 S. E. 934.

There is an implied covenant in an oil and gas lease requiring the lessee to drill a sufficient number of wells on the leased premises to protect the lines from drainage by wells drilled on adjacent territory, and the remedy for the breach of such covenant is by action at law for damages caused by such breach.

Archer, Oil & Gas, 393-437; *Harness v. Eastern Oil Co.* 49 W. Va. 232, 38 S. E. 662; *Ammons v. South Penn Oil Co.* 47 W. Va. 610, 35 S. E. 1004; *South Penn Oil Co. v. Edgell*, 48 W. Va. 348, 86 Am. St. Rep. 43, 37 S. E. 596, 21 Mor. Min. Rep. 106; *Core v. New York Petroleum Co.* 52 W. Va. 276, 43 S. E. 128; *Lowther Oil Co. v. Miller-Sibley Oil Co.* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; *Miller v. Lorentz*, 39 W. Va. 164, 19 S. E. 391; *Rose v. Nicholas*, Wythe, Ch. 268; 15 Cyc. 264; *Miller v. Lake*, 24 W. Va. 555.

Equity will not take jurisdiction to specifically enforce implied covenants in an oil and gas lease, nor will it cancel a lease for breach of an implied covenant, in the absence of fraud.

Colgan v. Forest Oil Co. 194 Pa. 234, 75 Am. St. Rep. 695, 45 Atl. 119, 20 Mor. Min. Rep. 338; *Young v. Forest Oil Co.* 194 Pa. 243, 45 Atl. 121, 20 Mor. Min. Rep. 345; *Harness v. Eastern Oil Co.* 49 W. Va. 232, 38 S. E. 662; *Core v. New York Petroleum Co.* 52 W. Va. 276, 43 S. E. 128; 24 Cyc. 922, 923.

Messrs. Harper & Baker, Davis, Swartz, & Templeman, Arthur E. Young, Charles N. Kimball, and Walter S. Sugden, amici curiæ.

Poffenbarger, J., delivered the opinion of the court:

A judgment for \$785.42 was rendered against the plaintiff in error, in an action of assumpsit for damages for the breach of alleged implied covenants and promises in an oil and gas lease, under which no wells have been drilled and on which the stipulated delay rentals have been accepted, to develop the property with due diligence and protect it from drainage. The recovery is an unprecedented one, and some of the questions developed on the hearing are novel and highly important in their bearings.

Though leased as one containing 213 acres, more or less, the actual area of the tract seems to have been only 140 acres.

Subject to the lease, a portion of it was conveyed to Susan J. Carper, as containing 40 acres, but its actual area is only about 25. The lease for a term of ten years, and as much longer as oil or gas shall be produced under it, was executed February 24, 1906, and bound the lessee, the South Penn Oil Company, to complete a well on the premises within three months from its date, or pay \$53.25, in advance, for each three months of delay in the completion thereof. Provision was made for payment of the rental to the lessors, or deposit thereof to their credit in the Roane County Bank at Spencer. Free gas for domestic purposes on the premises was reserved to the lessors. On February 1, 1907, the South Penn Oil Company assigned the lease to the Hope Natural Gas Company, and that company assigned the gas right under it to the United Fuel Gas Company, by a deed dated June 30, 1910, the assignee assuming all the obligations of every kind and character imposed by the lease in favor of the lessors. From the date of the lease down to the date of the trial, the delay rentals have been paid, but no well has been drilled on the premises.

The drainage, if any, affects the portion of the land conveyed to Susan J. Carper more directly and particularly than the residue, but, in the deed to her, a proportional part of the rents or royalties of any well drilled on the land so conveyed, under the existing lease, determinable by the relative quantities of the tract conveyed and retained, was reserved. Susan J. Carper, though thus jointly interested with the plaintiffs in the yield of any well that may be drilled on the land so conveyed to her, did not join in this action, but a release of any cause of action she has for failure to drill offset wells, executed to the United Fuel Gas Company, is relied upon as a severance of the joint cause of action, excusing her nonjoinder in the action. She owned two other neighboring or adjoining tracts in addition to the 46 acres, all covered by leases held by the defendant, and released the company from damages to all of these tracts by reason of the non-drilling of offset wells, in consideration of an agreement for quarterly payments of \$37.50.

The two wells by which drainage, if any, is most likely to occur, are nearer to the 46-acre portion than to the residue of the leased tract. One of them is 476 feet from that part, but probably three times as far from the other. The second is 575 feet from that part, and considerably farther from the nearest portion of the other, a sharp angle thereof. At much greater distances, varying from the quarter of a mile L.R.A.1917A.

to a mile, are other wells, practically all around the leased tract, and on leases held by the defendant. All productive of gas, some in very large quantities, they prove the field to be a good one, and indicate the existence of gas in the tract covered by the lease here involved. Wells Nos. 115 and 231 on the G. R. Petit and H. C. Abbott tracts, respectively, and situate 476 and 575 feet, respectively, from the 46-acre tract, are connected with the defendant's large transportation lines, leading out of the gas field to distant markets, by means of movable gates, but it is denied that gas in any considerable quantities has been used from either of them.

In so far as right of recovery is asserted in the declaration and evidence, on the ground of duty to drill, merely because the premises are shown to be gas-producing territory, the case is obviously bad. By their written lease, the plaintiffs expressly assented to delay in drilling, and agreed to accept, in satisfaction thereof, specified pecuniary compensation, which has been paid. In other words, they took a conditional covenant from the lessee to complete a well within a specified period, or pay, periodically, in lieu thereof, stipulated sums of money, and provided a like option for the lessee as to subsequent successive periods of like length. The lessee having elected to pay the money instead of drilling, as it was expressly authorized to do, the lessors have accepted it. To permit them now to recover damages for an omission to which they have assented, and for which they have been compensated according to a standard or measure fixed by their own solemn contract, would violate a fundamental principle of the law of contracts. However obvious the adaptability of their land to successful mining operation and mineral production may have become by developments on neighboring lands, they have suffered no denial of right except delay to which they have assented. They still have their gas, and have been compensated for the delay.

No implied covenant on the part of an oil or gas lease for diligent operation, or operation at all, under such conditions, has ever been suggested or declared by this or any other court. There are some decisions properly holding that, in the absence of a provision for delay compensable in money, and any other consideration, there is an implied covenant to search for the mineral, because there is no substantial consideration for such lease, unless it impliedly contains a covenant for exploration. *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; *Tennessee Oil, Gas & Mineral Co. v. Brown*, 65 C. C.

A. 524, 131 Fed. 696. In the first of these two cases, the court distinctly holds that an implied covenant to drill a well was the sole consideration for the lease, and it was impliedly put in because none was expressed. The lease provided for a \$50 forfeiture, but the court held that to have been intended to operate only as a penalty, not as compensation for delay. In the other, there was an express covenant to explore, and the instrument recited no consideration, wherefore the court treated the covenant as the sole consideration. Silence of a lease as to what constitutes its consideration gives latitude to the court for ascertainment thereof in the course of construction. All authorities agree that acceptance of a stipulated delay rental must be treated as full compensation for mere delay. An implication cannot stand against an express agreement. In so far as it is inconsistent with the terms of the agreement, it must yield.

As matter of actual decision, the doctrine of implied covenants in mineral leases has thus far been limited to those cases in which it has been invoked to supply a consideration when none has been expressed, to make effective the principle of surrender by operation of law, when the premises have been abandoned after discovery of mineral, and delay rentals have ceased, and to prevent loss of the subject-matter of the lease by drainage through wells on adjacent lands. In all these cases, it applies without contravention of any of the rules or principles governing the construction of contracts. The generality of the terms in which it is usually expressed cannot consistently be regarded as an indication that it has no legal limitation, nor as a warrant for its application under such conditions as would make it destroy express stipulations or defeat the plain intention of the parties.

Its invocation on the ground of drainage, under the circumstances of this case, is an effort to carry it a step beyond the cases in which it has been previously applied by this court. All of them, without exception, have stood upon allegations of drainage after discovery of oil or gas and cessation of delay rental. In none of them could it be contended the injury threatened or inflicted had been compensated by a money payment, or a covenant to accept money by way of compensation, as it is here. Drainage can be prevented only by the drilling of offset wells; and the lessor has assented to delay in drilling, and agreed to accept a money rental as the equivalent of the drilling of a well, or as compensation for the nondrilling thereof. So the appeal to the letter of the contract, in resistance of the L.R.A.1917A.

effort to apply the doctrine of an implied covenant to protect the property from drainage, is literally and logically irresistible. Its literal force can be broken only by the application of legal principles allowing restraint of general terms to the extent of working out the intention of the parties, as disclosed by the nature of the subject-matter of the contract, the situation and purposes of the parties, and the circumstances under which the contract was made. *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915; *Raleigh Lumber Co. v. Wilson & Son*, 69 W. Va. 598, 602, 72 S. E. 651; *Brodie v. Clator*, 8 W. Va. 599; *Bank of United States v. Beirne*, 1 Gratt. 265, 42 Am. Dec. 551. To say the lessor intended to permit the oil and gas in his land to be withdrawn from it otherwise than through wells drilled on it under the lease, and thus to let it go to other persons, for nothing, as an incident of his procurement of a small money rental for two, five, or ten years, would be inconsistent with reason, and contrary to the legal principles governing the relation of landlord and tenant or licensor and licensee. For the rental reserved, he is neither selling his oil or gas, nor relinquishing his ownership thereof, nor consenting to severance or abstraction thereof. He expects it to remain in the land until the rental period ends, whether it ceases by the drilling of a well or expiration of the term. Nor can it be doubted that the lessee contemplated the same result. Neither could have intended that he should take out the mineral through wells on other lands. The words of his lease contemplate his extraction of the oil and gas through wells to be drilled by him on the land, and so emphatically deny any such intent on his part. The rental is for delay, not destruction. If, by the negligence or misfeasance of a tenant, the demised property is materially injured, he is liable for the resultant damages, and the landlord may recover the amount thereof from him within the term notwithstanding he has paid the rent or is bound to pay it. *Moses v. Old Dominion Iron & Nail Works Co.* 75 Va. 95, 102. If a tenant commit waste, an action lies against him. The landlord is not limited to his rent as compensation. In these cases, there need not be an express covenant against waste, nor an express agreement to pay the resulting damages. They are implied, if not expressed.

Though, strictly speaking, the relation of landlord and tenant does not obtain between these parties, the lessee not having discovered oil or gas on the premises, there is a similarity of situation affording ground for some sort of relief or protection. But,

if such ground did not exist, some implied provision would have to be read into the lease to make it effectuate the clear intent and purposes of the parties. Without it, the lessor would be powerless to protect his property. He could not drill offset wells without violation of his lease, and, owing to the peculiar qualities of oil and gas, and property rights of adjacent owners, he could not prevent operations on adjoining tracts. Failure of the lessee to drill offset wells might result in total loss of the real subject-matter. Since the lessee pays rent only for delay, the reading in of an implied provision for drilling to prevent drainage is not inhibited by the rules of construction, for all the words of the lease are given effect. None of them are rendered meaningless or deprived of operation. They are merely limited in their operation to the purposes for which they were inserted. Nothing is destroyed but a mere implication, arising from the use of general terms, and the rules of interpretation permit its destruction as a means of carrying out the manifest intent of the parties, arising from consideration of the whole contract in the light of its subject-matter and purpose. *Raleigh Lumber Co. v. Wilson*, 69 W. Va. 598, 603, 72 S. E. 651; *Carnegie Natural Gas Co. v. South Penn Gas Co.* 56 W. Va. 402, 49 S. E. 548. Words and clauses in a deed or contract are not always allowed the utmost latitude of which they are ordinarily capable. It suffices to find one reasonable and substantial function for each of them. *White v. Bailey*, 65 W. Va. 573, 577, 23 L.R.A.(N.S.) 232, 64 S. E. 1019.

If the relation of landlord and tenant had subsisted between the parties, authorities above referred to and others not mentioned could be readily, and, no doubt, consistently, invoked as sustaining the theory of liability for damages for breach of an implied covenant to protect the leased premises from drainage, notwithstanding acceptance of the delay rentals. Unless the estate vested by an oil and gas lease differs from an ordinary tenancy, on account of the peculiar nature of the subject-matter or the purpose and terms of the lease, they would fully sustain it. But that relation had not been established when the acts complained of here took place. Until oil or gas is found, the lease gives a mere right of exploration, and the lessee has no vested estate. After discovery of minerals, he has a conditional estate for years, in the nature of a tenancy of the surface. *South Penn Oil Co. v. Snodgrass*, 71 W. Va. 438, 43 L.R.A.(N.S.) 848, 76 S. E. 961; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; *Lowther Oil Co. v. L.R.A.* 1917A.

Miller-Sibley Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656. As regards damages for breach of a lease contract, by the lessee, without an entry upon the premises, the right of the lessor is perhaps not the same as that of a landlord. He must do what he can by reasonable effort to reduce or mitigate the damages resulting from the breach of the contract. *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L.R.A.(N.S.) 1130, 125 Am. St. Rep. 954, 57 S. E. 253; *Robrecht v. Marling*, 29 W. Va. 765, 2 S. E. 827. Being in possession, he has power and opportunity to do so. In the case of a technical tenancy, he is not in possession, and mitigation of the damages is not so clearly within his power.

Be that at it may, an implied covenant to prevent drainage, giving a right of action for damages for a breach thereof, is not necessary nor essential to preservation or conservation of the minerals during the specific optional term created by the lease. If a condition less onerous than a covenant will effectuate the manifest intention of the parties, as to a matter not specifically provided for in the lease, and adequately protect the subject-matter of the contract, the court may justly and consistently regard it as the provision intended. Both covenants and conditions are frequently used in all sorts of contracts. They are equally known to courts, lawyers, and laymen, and either may have been intended by the parties, as an unexpressed safeguard against a contingency, and the courts may recognize one of them as an implied provision, with as much propriety as characterizes such recognition of the other. And, if either will accomplish the purpose obviously intended, and one is less burdensome to either of the parties than the other, the adoption of the less onerous one is made obligatory by the rule applicable to the addition of terms to contracts on the theory of implication. Nothing is to be so added otherwise than upon the ground of necessity. *White v. Bailey*, 65 W. Va. 573, 23 L.R.A.(N.S.) 232, 64 S. E. 1019; *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Jackson ex dem. Boyd v. Lewis*, 17 Johns. 475; *Waterford & W. Turnp. v. People*, 9 Barb. 161; *Morgan v. Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743; *Hamlyn & Co. v. Wood & Co.* [1891] 2 Q. B. 488, 60 L. J. Q. B. N. S. 734, 65 L. T. N. S. 286, 40 Week. Rep. 27; *The Moorcock*, L. R. 14 Prob. Div. 64, 58 L. J. Prob. N. S. 73, 60 L. T. N. S. 654, 37 Week. Rep. 439, 6 Asp. Mar. L. Cas. 373; *Stirling v. Maitland*, 5 Beat & S. 840, 122 Eng. Reprint, 1043, 34 L. J. Q. B. N. S. 1, 11 L. T. N. S. 337, 13 Week. Rep. 76; *Butler*

v. Manchester, S. & L. R. Co. L. R. 21 Q. B. Div. 207, 57 L. J. Q. B. N. S. 564, 60 L. T. N. S. 89, 38 Week. Rep. 726, 52 J. P. 611. Accordingly, if it is doubtful whether a clause in a deed is a condition subsequent, breach of which would divest an estate, or a covenant, breach of which would merely create a liability for damages, the courts universally hold it to be a covenant, because less burdensome and drastic in its operation and effect than such a condition. *Millan v. Kephart*, 18 Gratt. 9; 4 Kent, Com. 14th ed. 152. This is only a rule of construction emanating from a general principle, and made to carry it into effect. An exactly opposite rule, applicable in a different situation, may apply the same principle. The rule is subordinate; the principle it enforces, paramount. The latter is the parent of the former. Construction and interpretation always proceed upon lines of equity, fairness, and reason, when the terms of the instrument are broad enough to admit the influence of such considerations. No contract will be so construed as to inflict unreasonable hardship, unless the terms clearly impose it. "Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy, though conditions and limitations are not readily to be raised by mere inference and argument. The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will, after all, depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case." 4 Kent, Com. 14th ed. 152.

Under the circumstances disclosed by the record of this case, typical of possibilities under thousands of leases held in the state, an implied obligation on the part of the lessee to drill a well for protection against drainage, upon necessity therefor and the lessor's demand for such action, within any rental period for which rent has been paid, with notice of intention to refuse to accept further rentals, and right in the lessor to declare a forfeiture of the lease for noncompliance with such demand, will afford full and ample protection from such losses as are complained of here. To effect this, it is only necessary to read the lease as creating a term for the prescribed number of years, with a covenant to drill a well within a prescribed period, or pay money for delay in drilling, a forfeiture clause for nonperformance, and a condition that the lease shall be void unless, in the event of drainage, the lessee shall, upon demand of L.R.A.1917A.

the lessor, drill a well for protection against it, within the last period for which rental has been paid, or commence one within such period and prosecute the work of completing it with reasonable diligence. This imposes duty upon both lessor and lessee, but no rule of law or construction forbids that. The parties could have provided for this purpose either an absolute or qualified condition or a covenant with or without a clause of forfeiture for nonperformance. The qualified condition is the mildest and most equitable of the three provisions. It protects the lessor and affords the lessee an opportunity to determine questions of expediency and hazard, arising upon a contingency. It cannot reasonably be assumed that the lessee would have bound himself to drill without a demand, or upon demand, had the parties seen fit to make an express provision for the contingency. On the contrary, it must be assumed that he would have preferred to subject himself to the qualified condition, dividing the duty and hazard between himself and the lessor, and leaving it optional with him to say whether he would risk the expenditure incident to the drilling of a well. As the lessee required no express provision for his protection, in case of drainage, it must be assumed, too, that he would have been willing to accept a right of forfeiture for failure to drill upon demand. These considerations, as well as the general principles adverted to, point unerringly to the measure or provision to be adopted here as an implied provision of the contract.

Moreover, this conclusion harmonizes with the general scheme of the lease. It does not contemplate reception of both delay rentals and damages as the equivalent of well rentals or oil royalties. One of its provisions is that the completion of a well shall be and operate as a full liquidation of the delay rentals during the remainder of the term. If the lessor may take the delay rentals and then sue for damages for non-drilling, measuring them by the stipulated well rentals or oil royalties, he virtually obtains both delay rentals and royalties from wells. The construction here adopted renders this conflict with the spirit and terms of the lease impossible.

The construction upon which this action is based not only subjects the lessee to a burden unnecessary for adequate protection of the lessor, gives the latter greater right than is essential to the preservation of his minerals, and conflicts with a provision of the lease, but also puts it in the power of the lessor to assert inequitable demands against the lessee. Whether drainage occurs or not is often indeterminable with any reasonable degree of certainty. In such

cases, the former may take his rentals as they become due, remain absolutely silent as to any desire that the land be drilled, in view of the uncertainty as to its productiveness, and then, after the lapse of years, bring an action for damages for breach of the implied covenant. By his conduct, he may indicate his entire satisfaction with the rentals, or his preference therefor, and later set up an unconscionable demand for damages. The construction adopted here imposes duty upon both parties, respecting a matter of mutual interest, and puts it beyond the power of either to take any undue advantage of the other. Under this construction, there is no right of action for damages. Plaintiff's remedy was a demand for the drilling of wells, refusal to accept further rentals, and, on failure to drill, a declaration of forfeiture by the execution of a new lease to a third party, or otherwise.

As the declaration sets forth all the ex-

press covenants and terms of the lease, claims implied covenants to drill within the term of the lease, and especially an implied covenant to protect from drainage by the drilling of wells, avers no wells have been drilled on the land, and is silent as to whether the delay rentals have been paid, the demurrer thereto should have been sustained. If the rentals were paid, the express covenant was fully discharged, and payment thereof is not negated. Read as a whole, the declaration shows the demand is founded solely upon the alleged implied covenants to drill within the term, notwithstanding payment of the rentals, and to drill for prevention of drainage, while the delay rentals are paid and received.

For the reasons stated, the judgment will be reversed, the verdict set aside, the demurrer to the declaration sustained, and the case remanded, with leave to amend the declaration.

Annotation—Liability of the lessee in oil or gas lease for damages for failure to develop the leased premises during the term for which he has paid delay rental.

The question as to the effect of a provision for minimum royalties or an annual rental on the right to forfeit a mining lease for failure to prosecute work is covered in notes appended to Chauvenet v. Person, 11 L.R.A.(N.S.) 417, and Smith v. Root, 30 L.R.A.(N.S.) 176.

As pointed out in the notes referred to, the acceptance of delay rental or minimum royalty precludes the lessor from forfeiting the lease for failure to develop during the term covered by the delay rental or minimum royalty. And in line with this rule it has also been held that if the lessor accepts the specified consideration for delay in development, he is as much bound by it as if the end of the paid period was the time limit stipulated in the original contract; and he cannot make complaint of the lessee's failure to develop until the expiration of such time. *New American Oil & Min. Co. v. Wolff* (1906) 166 Ind. 705, 76 N. E. 255; *New American Oil & Min. Co. v. Troyer* (1905) 166 Ind. 402, 76 N. E. 253, 77 N. E. 739; *Consumers' Gas Trust Co. v. Littler* (1904) 162 Ind. 320, 70 N. E. 363. And in harmony with this rule is the holding in *CARPER v. UNITED FUEL GAS CO.* ante, 171, to the effect that the lessor cannot hold the lessee in an oil or gas lease for damages for failure to develop the leased premises during the term for which he has accepted a delay rental or minimum royalty, if gas or oil wells

have not been developed, and the lessee's only interest in the premises is his license or permission to develop the same.

This rule, however, does not apply where the lessee has in part developed the leased premises and produced wells; in such case he is liable to the lessor for breach of his implied covenant sufficiently to develop the land to protect it from wells on adjoining property, although the lessor has received a rental or royalty upon the oil or gas produced from the land leased. *Daughetee v. Ohio Oil Co.* (1914) 263 Ill. 518, 105 N. E. 308; *Culbertson v. Iola Portland Cement Co.* (1912) 87 Kan. 529, 125 Pac. 81, Ann. Cas. 1914A, 610; *Grass v. Big Creek Development Co.* (1915) 75 W. Va. 719; *L.R.A.1915E*, 1057, 84 S. E. 750. And it has been held that the lessor is entitled to recover damages for breach of an agreement faithfully and diligently to work mines on the leased premises, and also to claim a forfeiture of the lease for such breach and on other grounds. *Pollak v. Stouts Mountain Coal & Coke Co.* (1913) 184 Ala. 331, 63 So. 531.

It has also been held that where the lessee covenants to begin operations on the leased premises and complete a well within a designated time, and, for a failure so to do, to pay a designated sum, and, if he neither develops the land nor pays the money specified, he is to forfeit

all rights under his lease,—if he, on these grounds, forfeits all rights under his lease, the forfeiture does not occur until after his failure to pay the agreed rental; and hence he is liable to the lessor for this rental, and the lessor may also enforce against him the forfeiture provisions. *Galey Bros. v. Kellerman* (1889) 123 Pa. 491, 16 Atl. 474, 17 Mor. Min. Rep. 164.

Compare with *Clemenger v. Flesher* (1916) — *Tex. Civ. App.* —, 185 S. W. 304, holding that, under a very similar contract, the lessor had the option either to declare upon the contract and recover the specified rentals, or declare the lease void; but he was not entitled to both remedies, since they were inconsistent.

A. G. S.

MARYLAND COURT OF APPEALS.

ROYAL ARCANUM, Appt.,

v.

LOUISA C. VITZTHUM.

(128 Md. 523, 97 Atl. 923.)

Insurance — disappearance — suspension — validity of by-law.

A by-law suspending members of a mutual benefit society who disappear is reasonable, so as to be binding upon a member who agreed to be bound by by-laws subsequently passed, and therefore, in case of suspension for disappearance, no recovery can be had on the certificate.

For other cases, see Insurance, III. a, in Dig. 1-52 N. S.

(May 17, 1916.)

APPEAL by defendant from a judgment of the Superior Court of Baltimore City in plaintiff's favor in an action brought to recover the amount alleged to be due on a benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. A. C. Trippe and J. McC. Trippe, for appellant:

The payment under the seven years' presumption of death is no protection to the appellant against future claims and recovery.

Sprigg v. Moale, 28 Md. 497, 92 Am. Dec. 698; *Chew v. Tome*, 93 Md. 251, 48 Atl. 701.

The disappearance law is reasonable in its provisions.

Ross v. Modern Brotherhood, 120 Iowa, 692, 95 N. W. 207; *Clarkson v. Supreme Lodge*, K. P. 99 S. C. 134, 82 S. E. 1043; *Thomas v. Knights of Maccabees*, 85 Wash. 665, L.R.A.1916A, 750, 149 Pac. 7; *Supreme Conclave, I. O. H. v. Rehan*, 119 Md. 95, 46 L.R.A.(N.S.) 308, 85 Atl. 1035, Ann. Cas. 1914D, 58; *Arold v. Supreme Conclave, I. O. H.* 123 Md. 678, 91 Atl. 829; *Fuller v.*

Baltimore & O. Employes' Relief Asso. 67 Md. 433, 10 Atl. 237.

Nonpayment of an assessment ends the member's good standing.

Freckman v. Supreme Council, R. A. 96 Wis. 133, 70 N. W. 1113; *Mutual F. Ins. Co. v. Miller Lodge*, 58 Md. 474.

Vitzthum's status being uncertain, defendant could not and did not know what its rights were, and could not waive them.

Dague v. Grand Lodge, B. R. T. 111 Md. 103, 73 Atl. 735; 29 Am. & Eng. Enc. Law, 1093; *Caledonia Ins. Co. v. Traub*, 80 Md. 224, 30 Atl. 904; 16 Am. & Eng. Enc. Law, 941; *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329, 59 Am. Rep. 709, 10 N. E. 225; *Schimp v. Cedar Rapids Ins. Co.* 124 Ill. 356, 16 N. E. 229.

The mere designation of a person as beneficiary by a member of a mutual benefit society does not confer upon the person so designated any vested rights in the fund payable upon the death of the member.

Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112; *Arold v. Supreme Conclave, I. O. H.* 123 Md. 675, 91 Atl. 829.

A member of the society, as such, has no interest or property in the benefit, but simply the power to appoint someone to receive it.

Bacon, Ben. Soc. 3d ed. p. 227; *Maryland Mut. Benev. Asso. v. Clendinen*, 44 Md. 433, 22 Am. Rep. 52; *Arold v. Supreme Conclave, I. O. H. supra.*

"No act of the plaintiff or payment of any assessment by her or anyone else can restore him to membership." And his membership failing, the plaintiff has no ground of action against the defendant.

Pollak v. Supreme Council, R. A. 40 Misc. 274, 81 N. Y. Supp. 943; *Dvorak v. Bohemian Roman Catholic First Central Union*, 170 Ill. App. 624.

Mr. Samuel Want, for appellee:

Any by-law which goes to the extent of forfeiting insurance rights under conditions not provided for at the time of the issuance of the certificate is unreasonable and void.

Campbell v. American Ben. Club Fraternity, 100 Mo. App. 249, 73 S. W. 342; *Morton v. Supreme Council, R. L.* 100 Mo. App. 76,

Note. — As to validity and effect of by-law of mutual benefit society suspending member who disappears, see annotation following this case, post, 182. L.R.A.1917A.

73 S. W. 259; *Ayers v. Grand Lodge*, A. O. U. W. 188 N. Y. 280, 80 N. E. 1020; *Ancient Order*, U. W. v. Brown, 112 Ga. 545, 37 S. E. 890; *Coghlan v. Supreme Conclave*, I. O. H. 86 N. J. L. 41, 91 Atl. 132; *Tebo v. Supreme Council*, R. A. 89 Minn. 3, 93 N. W. 513; *Langan v. American Legion of Honor*, 34 Misc. 629, 70 N. Y. Supp. 663; *Schack v. Supreme Lodge*, F. B. 9 Cal. App. 584, 99 Pac. 989; *Parks v. Supreme Circle* B. A. 83 N. J. Eq. 131, 89 Atl. 1042; *Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066; *Sautter v. Supreme Conclave*, I. O. H. 76 N. J. L. 763, 71 Atl. 232; *Hayes v. German Beneficial Union*, 35 Pa. Super. Ct. 142; *Samberg v. Knights of Modern Maccabees*, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25; *Arold v. Supreme Conclave*, I. O. H. 123 Md. 675, 91 Atl. 829; *Donnelly v. Supreme Council*, C. B. L. 106 Md. 425, 124 Am. St. Rep. 499, 67 Atl. 276; *Supreme Conclave*, I. O. H. v. Rehan, 119 Md. 92, 46 L.R.A.(N.S.) 308, 85 Atl. 1035, Ann. Cas. 1914D, 58; *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112.

A recovery can be had against a fraternal order on the presumption of death arising from seven years' unexplained absence.

McLaughlin v. Sovereign Camp, W. W. 97 Neb. 71, L.R.A.1915B, 756, 149 N. W. 112; *Butler v. Supreme Ct.* I. O. F. 53 Wash. 118, 26 L.R.A.(N.S.) 293, 101 Pac. 481; *Miller v. Sovereign Camp*, W. O. W. 140 Wis. 505, 28 L.R.A.(N.S.) 178, 133 Am. St. Rep. 1095, 122 N. W. 1126; *Kennedy v. Modern Woodmen*, 149 Ill. App. 471.

The fact of disappearance does not reflect upon the validity of the insurance, where the premiums are paid after the disappearance takes place, or are tendered and refused.

Supreme Commandery, O. K. G. R. v. *Everding*, 20 Ohio C. C. 689, 11 Ohio C. D. 419.

Pattison, J., delivered the opinion of the court:

Upon the application of *William Vitzthum*, a certificate of membership in the *Royal Arcanum*, a fraternal benefit association, was, on the 16th day of November, 1889, issued to him. The certificate provided that, upon the conditions therein mentioned, his wife, *Louisa C. Vitzthum*, was to be paid at his death, out of the widows' and orphans' benefit fund, the sum of three thousand dollars (\$3,000). In his application is found the following clause: "I do hereby . . . agree that . . . any concealment of facts by me in this application, or my suspension or expulsion from or voluntarily severing my connection with the order, shall forfeit the rights of myself and L.R.A.1917A.

my family, or dependents, to all benefits and privileges therein. I agree to make punctual payments of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules, and usages of the order now in force or which may hereafter be adopted by the same."

The certificate issued thereon contained, among others, the provision that, the payment to the beneficiary was to be made only "upon condition that said member complies in the future with the laws, rules, and regulations now governing said council and fund or that may hereafter be enacted by the supreme council to govern said council and fund," and only "in accordance with and under the provisions of laws governing said fund, upon satisfactory evidence of the death of said member and upon the surrender of said certificate, provided that said member is in good standing at the time of his death," etc.

In 1900 the supreme council of the association adopted and enacted the following by-laws.

"Section 400. (1) An officer or member of a council who has knowledge that a member had disappeared shall at once inform the council thereof and thereupon report of such disappearance shall be forwarded to the supreme secretary, together with the date as nearly as may be determined of the disappearance, the circumstances attending the same, the last address or residence of the member given by him or appearing upon the collector's books, and of the beneficiary or beneficiaries of such member.

"(2) The supreme secretary shall immediately send by registered mail to such member, at his said address or residence, a copy of this chapter of the general laws, making a record of such sending, and mail notice thereof to the secretary of the council, etc.

"(3) A member who shall fail or neglect to furnish to the council either by presenting himself in open council at a stated meeting and then and there declaring the same, and having due record made of such declaration, or by writing over his own signature delivered by the supreme secretary, his address, including both place of business, if any, and his residence, within six consecutive months after date of such mailing to said member by the supreme secretary, shall stand suspended from all rights, benefits, and privileges of the order upon and after the date upon which said period of six months expires, and no assessments nor dues shall thereafter be received from him or on his account, and no action on the part of said council or any officer thereof

shall be required as essential to such forfeiture and suspension," etc.

We will assume that this law was regularly and properly passed, as there is nothing in the record to show that it was not so passed. *Supreme Conclave, I. O. H. v. Rehan*, 119 Md. 94, 46 L.R.A.(N.S.) 308, 85 Atl. 1035, Ann. Cas. 1914D, 58.

William Vitzthum, on the 26th day of April, 1910, abandoned his business, left his home, wife, and family in the city of Baltimore, and was not again heard from by them or his brethren of the association, although diligent efforts were made to discover his whereabouts, until July 20, 1914, when he was found in a hospital in the city of New York, where he died a short time thereafter on August 4, 1914. In the meantime, in August, 1913, he, pursuant to the by-law to which we have just referred, had been suspended from all rights, benefits, and privileges of the order, and from and after such time no assessments were received by the order.

This suit was brought by the wife, his beneficiary under the aforesaid policy or certificate of membership, to recover the amount named in the certificate. The chief question presented by this appeal, which is raised by the demurrers to the third and fourth pleas, is whether the plaintiff's right to recover was affected by her husband's suspension from the benefits and privileges of the order under said by-law, when, at the time he became a member of the order, there was no by-law permitting or authorizing it to suspend one of its members for the cause mentioned in the subsequently passed by-law.

It will be seen that the question here presented is a narrow one. The facts as we have stated them are, in substance, those stated in the pleas, and were therefore admitted by the demurrers filed to such pleas. The demurrers were sustained by the court below, and the case was then tried upon the remaining pleas, resulting in a verdict for the plaintiff, upon which a judgment was entered.

This court said in the recent case of *Supreme Conclave, I. O. H. v. Rehan*, supra: "That, where a member of a fraternal benefit society agrees in his application for membership to be bound by the rules or laws then in force, or which might be thereafter adopted, the society, after he has become a member, may enact reasonable rules and amendments, and bind him to their observance." *Arold v. Supreme Conclave, I. O. H.* 123 Md. 678, 91 Atl. 820.

In that case this court quoted with approval from *Lange v. Royal Highlanders*, 75 Neb. 188, 10 L.R.A.(N.S.) 666, 121 Am. L.R.A. 1917A.

St. Rep. 786, 106 N. W. 224, 110 N. W. 1110, where it is said that a member of a fraternal benefit society "who agrees in his application, or has the agreement incorporated in his policy or benefit certificate, that he will comply with the by-laws of the company then in force or thereafter to be adopted, is bound by subsequent by-laws the same as those in force at the time his certificate was issued, provided that such subsequent by-laws are reasonable in their nature, and are properly adopted in conformity of the rules of the order, and the statutes governing such association."

We must therefore, in deciding the question presented, determine whether the by-law here involved is a reasonable one. In *Supreme Conclave, I. O. H. v. Rehan* the fraternal association passed a by-law relieving the order, under certain conditions, of the payment of any part of the amount named in the certificate, and, under other conditions, of the payment of a part only of such amount, where the member, sane or insane, committed suicide. In that case there was no "suicide law" of the association in force at the time the certificate was issued to and accepted by the member, of whom the plaintiff was the beneficiary, and, as in this case, the question was whether said by-law was a reasonable one and binding upon the plaintiff. We there said: In some jurisdictions "it is held that such a retroactive law is valid so far as it relates to members committing suicide while sane, but is invalid so far as it attempts to affect the rights of the beneficiary where the member has taken his own life while insane. This is the position taken by the New York, Virginia, Minnesota, and some other courts, and is based upon reasons manifestly sound and just to both parties to the contract."

The court then, after quoting from some of the cases, said: "We therefore hold, upon what we regard as the safer, sounder, and more reasonable rule upon this question, that the after-enacted by-law before us is not binding upon the plaintiff if her husband took his own life while insane, but that it is binding upon her if he committed suicide while sane."

In one instance the act was an involuntary one, an act of a mentally irresponsible person, while in the other it was the free and voluntary act of a sane person.

The trouble in cases like the one before us is not in ascertaining the law applicable thereto, but in determining the question whether the new or after-enacted law is reasonable. In deciding this question reference should be had to the nature and purpose of the contract, read in the light of the objects of the order.

This law imposes no hardship upon the member, nor does it deprive him of any vested right acquired under the contract with the defendant. It does not prevent him from changing his domicile or abode. He may do so with impunity; but, should he disappear from his home and his whereabouts be unknown to the order, the law is then invoked, and, if he cannot be located within six months from the time when the first effort is made by the order to so locate him, or if he does not comply with the provisions of the by-law within such time, he is suspended from the rights and benefits of the order. This is not at all inconsistent with his agreement, made with the defendant at the time he was admitted into the order; for at such time he expressly agreed that, should he voluntarily sever his connection with the order, such act of his should forfeit the rights of himself, family, and dependents, to all benefits and privileges of the order.

It cannot be successfully contended that, in a practical sense, at least, he had not severed his connection with the order. He had abandoned his business, left his home, and deserted his wife and children, and gone to parts unknown to them, and of whom they heard nothing for more than four years, and then only through another notifying them of his illness in a hospital, where he shortly thereafter died. It may also be added that no assessment was paid by him after his disappearance, and, so far as the testimony adduced in the case discloses, no provision was made by him for the payment of the same. As a reason for the passage of the by-law it is stated in the fourth plea that "The experience of the defendant in the disappearance of its members showed that there was a large and increasing number of such cases involving moral turpitude and conduct unbecoming members of the order and causing embarrassment in the collection and disbursement of the widows' and orphans' benefit fund out of which benefits are paid, and that

these disappearances led to the assertion of claims for benefits against the defendant, based upon the presumption of death after seven years, and the payments of such claims under the judgments of the courts, or otherwise, did not protect the defendant against a second claim under the members' benefit certificate, and that the lives of disappeared members did not attain the normal expectancy of life upon which the table of assessments is based, and the widows' and orphans' benefit fund, out of which benefits are paid, is impaired thereby, and that said disappearances are increasing from year to year, and the danger to the security of said fund is annually growing greater, . . . that in some cases the payment of the dues and assessments after disappearance becomes a speculative matter, with the idea that after seven years the full amount of the benefit may be obtained, . . . and that the spirit of our laws and the fundamental idea of our order are violated by those payments by outside parties, which serve in most cases to keep among our brotherhood an unworthy member, and in some cases to carry out an unworthy speculation."

The by-law involved in this case, we think, is not unreasonable, and is therefore binding upon the plaintiff. Having reached this conclusion, the demurrers to the pleas, in our opinion, should have been overruled, and, as the essential facts in the case, as shown by the evidence taken at the trial, are practically undisputed, and are consistent with the statement of facts contained in the pleas, it will serve no useful purpose to send the case back for a new trial to be determined upon such facts. We will therefore reverse the judgment below without granting a new trial. There are other questions presented by the appeal, but the effect of our ruling upon the demurrers make it unnecessary to pass upon them.

Judgment reversed without a new trial, with cost to the appellant.

Annotation—Validity and effect of by-law of mutual benefit society suspending member who disappears.

Generally, as to reasonableness of new by-laws as implied condition of consent to change of by-law, see annotation to *Olson v. Court of Honor*, 8 L.R.A.(N.S.) 521.

As to subsequent by-law excluding or reducing liability in case of suicide, see annotation to *Supreme Conclave, I. O. H. v. Rehan*, 46 L.R.A.(N.S.) 308, and *Ledy v. National Council, K. & L. S.* L.R.A.1915D, 1095. L.R.A.1917A.

Provisions for the suspension of members upon their disappearance appear to be of recent origin. Such provisions are closely related to those which provide that no absence or disappearance of a member without proof of actual death shall entitle a beneficiary to recovery. (As to validity of such provisions, see note to *Keith v. Modern Woodmen*, L.R.A.1915B, 793.) Provisions of the latter kind relate to

the character of evidence necessary to establish a cause of action, while the effect of those first mentioned is to work a suspension of the member upon his disappearance, and thus terminate the contract of insurance.

The decision in *ROYAL ARCANUM v. VITZNUM*, ante, 179, upholding a by-law, passed after the insured became a member, providing for the suspension of members of a mutual benefit society who disappear, the insured having agreed by the terms of his application and certificate of membership to be bound by by-laws subsequently passed, is supported by *Apitz v. Supreme Lodge*, K. L. H. infra, 183.

In *McLaughlin v. Sovereign Camp*, W. W. (1914) 97 Neb. 71, L.R.A.1915B, 756, 149 N. W. 112, however, it was held that, in the absence of evidence that the insured was alive when the by-law was adopted, an insurer could not defeat a recovery on a certificate on the life of one who had disappeared, on the ground of a violation of a by-law adopted three years after the insured had last been heard from, which provided that any member who should abscond, remove, or depart from his home or last place of residence, and remain away for a period of one year, and not report to the clerk of his camp, his location, with postoffice address, should thereby forfeit his membership, and his beneficiary certificate should become null and void, and which also provided that the absence or disappearance of a member from his last known place of residence for any length of time should not be sufficient evidence of the death of such member, and that no right should accrue under his certificate, since it was clear that if the insured's death occurred before the adoption of the by-law, there could have been no violation of it by him. It was unnece-

ssary for the court in this case to pass upon the reasonableness of the by-law in question.

In *Supreme Ruling*, F. M. C. v. Hoskins (1914) — *Tex. Civ. App.* —, 171 S. W. 812, where the local secretary of a benefit society whose risks were taken over by the defendant order also acted as the defendant's collector, and knew that the person insured by the certificate in suit had disappeared, and that his whereabouts were unknown, and communicated those facts to the benefit society and to the defendant, but no attempt was made to suspend the insured, and his dues were received, and no notice was given the one paying them that proof of the member's location or residence was necessary, it was held that the defendant was precluded from asserting that the insured was suspended by virtue of a by-law providing that any member who should abscond, remove, or depart from his home, or last place of residence, and remain away for a period of one year, and not report to the secretary of his chapter his location, his postoffice address, should thereby forfeit his membership, and his certificate should become null and void, and that the secretary should not receive from any person any monthly assessment, special assessment, dues or fines for or on account of any member who had been absent, and whose residence had been unknown for one year, but that he should notify the person offering to make such payments that proof of the member's location or residence was necessary, and should at once suspend the member, and report his action to the supreme secretary, with his reasons therefor, together with the postoffice address of the beneficiary and the last known residence of the member.

J. T. W.

ILLINOIS SUPREME COURT.

LIZZIE APITZ, Plff. in Certiorari,
v.

SUPREME LODGE KNIGHTS & LADIES
OF HONOR.

(274 Ill. 196, 113 N. E. 63.)

Evidence — presumption — from seven years' absence — time of death.

1. No presumption of death at any particular time arises from absence unaccounted for for a period of seven years.

For other cases, see *Evidence*, II. c, 3, in *Dig.* 1-52 N. S.
L.R.A.1917A.

Insurance — by-law suspending disappearing member — validity.

2. A by-law of a mutual benefit society, suspending a member who disappears, is reasonable, so as to be within the operation of a provision in the certificate requiring members to conform to rules subsequently adopted.

For other cases, see *Insurance*, III. a, in *Dig.* 1-52 N. S.

(June 22, 1916.)

Note. — As to presumption of time of death of one presumed to be dead after seven years' absence, unheard of, see notes to *Butler v. Supreme Court*, I. O. F. 26

CERTIORARI to the Appellate Court, Second District, to review a judgment reversing a judgment of the Circuit Court for Winnebago County in plaintiff's favor in an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

The facts are stated in the opinion.

Mr. Roy F. Hall, for plaintiff in certiorari:

At the end of seven years, death is presumed, and the right to sue then exists; the claim of death can then be proved, but the particular time of death within the seven years may be determined from the circumstances of each particular case.

Whiting v. Nicholl, 46 Ill. 230, 92 Am. Dec. 248.

The presumption that deceased lived at the end of seven years may be overcome by stronger conflicting presumptions; as where that of innocence conflicts with the presumption of life, in which the latter gives way and the presumption of innocence obtains.

Reedy v. Millizen, 155 Ill. 636; Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232.

The contract will be liberally construed in favor of the insured, and strictly construed against the insurer, and where two interpretations, equally reasonable, are possible, that construction should be adopted which will enable the beneficiary to recover.

Grand Legion, K. A. v. Beaty, 224 Ill. 346, 8 L.R.A.(N.S.) 1124, 79 N. E. 565, 8 Ann. Cas. 160; Zeman v. North American Union, 263 Ill. 304, 105 N. E. 22; Terwilliger v. National Masonic Acci. Asso. 197 Ill. 9, 63 N. E. 1034.

In construing the contract between the beneficiary member and the corporation, the application, the constitution and by-laws existing at that time, and the certificate are construed together as the contract between the parties.

Fullenwider v. Supreme Council, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222; Love v. Modern Woodmen, 259 Ill. 102, L.R.A.—, —, 102 N. E. 183; Covenant Mut. Life Asso. v. Kentner, 188 Ill. 431, 58 N. E. 966; Niblack, Ben. Soc. 2d ed. § 26; Peterson v. Gibson, 191 Ill. 365, 54 L.R.A. 836, 85 Am. St. Rep. 263, 61 N. E. 127; Metropolitan Safety Fund Acci. Asso. v. Windover, 137 Ill.

434, 27 N. E. 538; United Brotherhood C. & J. v. Fortin, 107 Ill. App. 306.

Even where an association has power to make a by-law which shall enter into and change an existing contract, yet the by-law must purport on its face to apply to existing contracts, and, in the absence of a clear intention to do so, the law presumes that the by-law was intended to have a prospective effect only.

Kaemmerer v. Kaemmerer, 231 Ill. 154, 83 N. E. 133; Modern Woodmen v. Weiland, 109 Ill. App. 340; Haley v. Supreme Ct. of Honor, 139 Ill. App. 478.

A by-law passed after the issuance of a benefit certificate will not be held to be retroactive and applicable to certificates then in force unless the intention that it shall be so operative is expressly declared, or must necessarily be implied from its language.

Marshall v. Modern American Fraternal Order, 184 Ill. App. 224.

Messrs. Carpenter & St. John and Ashcraft & Ashcraft, for defendant in certiorari:

The contractual relation is unilateral, and the member is not bound to pay or maintain his membership.

Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222.

The beneficiary has no interest in a benefit certificate during the life of the member.

Hoeft v. Supreme Lodge, K. H. 113 Cal. 91, 33 L.R.A. 174, 45 Pac. 185; 1 Bacon, Ben. Soc. 3d ed. § 291, p. 705; Railway Pass. & F. C. Mut. Aid & Ben. Asso. v. Leonard, 82 Ill. App. 214; Van Frank v. United States Masonic Benev. Asso. 158 Ill. 560, 41 N. E. 1005; Hansen v. Supreme Lodge, K. H. 140 Ill. 301, 29 N. E. 1121; Benes v. Supreme Lodge, K. L. H. 231 Ill. 134, 14 L.R.A.(N.S.) 540, 121 Am. St. Rep. 304, 83 N. E. 127; 2 May. Ins. § 552.

The contract between Apitz and the defendant association provided it could be changed by subsequent laws.

Quinn v. North American Union, 162 Ill. App. 319.

The by-law covering disappearance applied to the contract existing between Apitz and the association.

Pride v. Switchmen's Union, 178 Ill. App. 434; Murphy v. Nowak, 223 Ill. 301, 7 L.R.A.(N.S.) 393, 79 N. E. 112; Supreme Council, R. A. v. McKnight, 238 Ill. 349, 87 N. E. 299; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065.

L.R.A.(N.S.) 294, and McLaughlin v. Sovereign Camp, W. W. L.R.A.1915B, 756; and see also Quaker Realty Co. v. Starkey, L.R.A.1915D, 176, and Page v. Modern Woodmen, L.R.A.1916F, 438. The general subject of presumption of death from ab-

sence is discussed in the note to Modern Woodmen v. Ghromley, L.R.A.1915B, 728.

As to validity and effect of by-law of mutual benefit society, suspending member who disappears, see Royal Arcanum v. Vitzthum, ante, 179, and note.

The by-laws are legal and reasonable.

1 Bacon, Ben. Soc. § 185; Supreme Commandery, K. G. R. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Supreme Lodge, K. P. v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; Supreme Lodge, K. P. v. Trebbe, 179 Ill. 348, 70 Am. St. Rep. 120, 53 N. E. 730; Pold v. North American Union, 261 Ill. 433, 104 N. E. 4; Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 20 N. E. 479; Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1126; Ellerbe v. Faust, 119 Mo. 653, 25 L.R.A. 149, 25 S. W. 390; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Langnecker v. Grand Lodge, A. O. U. W. 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293; Gilmore v. Knights of Columbus, 77 Conn. 55, 107 Am. St. Rep. 17, 58 Atl. 223, 1 Ann. Cas. 715; Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893; Ury v. Modern Woodmen, 149 Iowa, 706, 127 N. W. 665; Pride v. Switchmen's Union, 178 Ill. App. 434.

The by-law enacted in 1899, limiting the time in which suit could be brought after the death of a member, was a valid and legal by-law.

Lesh v. United States Fidelity & G. Co. 239 Ill. 502, 88 N. E. 208; 19 Am. & Eng. Enc. Law, 2d ed. 264; Riddlesbarger v. Hartford F. Ins. Co. 7 Wall. 386, 19 L. ed. 257; Peoria M. & F. Ins. Co. v. Whitehill, 25 Ill. 466; Metropolitan Acci. Asso. v. Clifton, 63 Ill. App. 152; Heffron v. Rochester German Ins. Co. 119 Ill. App. 566; Ronan v. Michigan Mut. L. Ins. Co. 96 Ill. App. 355; May, Ins. 4th ed. § 478; Caywood v. Supreme Lodge, K. L. H. 171 Ind. 410, 23 L.R.A.(N.S.) 304, 131 Am. St. Rep. 253, 86 N. E. 482, 17 Ann. Cas. 503.

The by-laws relied upon were properly proved and in evidence.

Supreme Lodge, K. P. v. Kutscher, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; Supreme Lodge, K. P. v. Trebbe, 179 Ill. 348, 70 Am. St. Rep. 120, 53 N. E. 730; 1 Bacon, Ben. Soc. p. 154; Knights & Ladies of America v. Weber, 101 Ill. App. 488; Richardson v. Union Cong. Soc. 58 N. H. 188; 1 Thomp. Corp. § 943; Sayre v. Louisville Union Benev. Asso. 1 Dur. 143, 85 Am. Dec. 613.

Farmcr, J., delivered the opinion of the court:

Defendant in certiorari is a fraternal benefit association. December 29, 1894, it issued a benefit certificate to August F. Apitz in which plaintiff in certiorari was named as beneficiary. Apitz disappeared from his home November 7, 1905, and has not since been heard from. Plaintiff in

certiorari, as beneficiary, brought an action in assumpsit in the circuit court of Winnebago county on the certificate September 23, 1913. By one count of the declaration Apitz's death was alleged to have occurred on the day of his disappearance; by another, that his death occurred within one year from the time of his disappearance; and by a third count, that it occurred at the end of seven years from the date of his disappearance. Defendant in certiorari filed the general issue, and also gave notice it would rely upon two by-laws, §§ 3 and 9, known as the "limitation" and "disappearance" by-laws. Section 3 (the limitation by-law), which limited the time within which a beneficiary might bring suit to one year from the date of the member's death, in the view we take of the case, need not be set out or discussed. The trial court instructed the jury that, if Apitz did not die within one year from the date of his disappearance, the verdict should be for defendant, and submitted an interrogatory for the jury to find specially whether he died within one year from November 7, 1905 (the date of his disappearance), which the jury answered affirmatively, and by their general verdict found for plaintiff in the sum of \$1,480. The court, after requiring a remittitur of \$355, overruled a motion for a new trial and rendered judgment on the verdict for \$1,045. On appeal to the appellate court for the second district, that court reversed the judgment, with a finding of fact that Apitz died November 7, 1912, and that, under the by-laws of defendant, to which the certificate sued on was subject, he stood suspended after November 7, 1906, and that the plaintiff had no cause of action upon the certificate. The case comes to this court by writ of certiorari.

We agree with the appellate court that there was no evidence introduced on the trial to justify the finding of the jury that the death of Apitz occurred within a year from the date of his disappearance, nor, in fact, that his death occurred at any particular time. Apitz was never seen or heard of after November 7, 1905. No reasons for nor explanation of his disappearance were proven on the trial, and the fact of his death rests upon the presumption of law from seven years' absence. The finding of fact by the appellate court may be treated as a finding that Apitz did not die within a year from the date of his disappearance. The plaintiff in certiorari paid the benefit assessments for one year after her husband's disappearance, including November, 1906, when she was notified by defendant in certiorari that the payments of assessments would no longer be received.

The legal presumption from his continued absence for seven years establishes the fact of Apitz's death, and the time he is first to be accounted as dead is the end of the period of seven years. In the absence of evidence to the contrary there is no presumption that death occurred at any particular time, but at the end of the period of seven years' absence, on grounds of public policy, the law presumes him to be dead. *Whiting v. Nicholl*, 46 Ill. 230, 92 Am. Dec. 248; *Johnson v. Johnson*, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Donovan v. Major*, 253 Ill. 179, 97 N. E. 231. The main question, therefore, for our consideration, is whether § 9 of the by-laws of defendant in certiorari is valid and was binding on Apitz. Said § 9 is as follows: "Sec. 9. It shall be the duty of a relief fund member of the order to notify the secretary of his lodge of any permanent change of residence, and, as far as practicable, to keep the secretary advised of his postoffice address. If any such member shall so fail and shall change his residence or usual place of abode, or shall disappear from the place or neighborhood in which he shall have usually resided, and his residence shall not be known to his family or the secretary of his lodge, and cannot be ascertained after reasonably diligent inquiry, and such disappearance shall be continued for one year, such member shall stand suspended as in case of suspension for the nonpayment of assessments or dues, and the financial secretary of his lodge shall not receive the assessment or dues from any person. If such member shall reappear and shall make known his place of abode and shall desire to become reinstated, he may avail himself of the privilege of the reinstatement law of the order by complying with the requirements of the same within the time required, as in case of reinstatement of members suspended for nonpayment of assessments or dues."

Plaintiff in certiorari contends said by-law is unreasonable and does not apply to the contract between Apitz and defendant in certiorari. The trial court held the by-law to be binding and valid when it instructed the jury that, if Apitz did not die within one year from the date of his disappearance, the verdict should be for the defendant, and plaintiff in certiorari assigned no cross-error upon that ruling. The appellate court approved that ruling, and, under the condition of the record as presented to us, we might decline to consider the question now raised as to the effect of said by-law upon the contract. However, we have considered the question, and are of opinion the by-law is valid and applicable to the contract between Apitz and defendant in certiorari. The contract was not materially I.R.A.1917A.

different from many other fraternal insurance contracts passed upon by this court. It was conditioned upon the member conforming in all respects to the laws, rules, and usages of the society "now in force or which may hereafter be adopted by the same," and it was agreed that in case of Apitz's suspension from the order he should forfeit the right of his beneficiaries to all benefits and privileges under the contract. Section 9 was adopted after Apitz had joined the society. We have held that the beneficiary has no vested interest in the certificate, and, where the contract between the member and the society reserves the right to the society to amend or change the by-laws, and the member agrees to be bound thereby, and accepts the certificate under those conditions, subsequently enacted by-laws are binding upon him. *Supreme Council, R. A. v. McKnight*, 238 Ill. 349, 87 N. E. 299, and cases there cited. "A party cannot claim the right to have a contract remain unaltered when the contract itself provides that it may be changed." *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065.

We are of opinion the by-law (§ 9) was not invalid as being unreasonable. By-laws of a similar nature have been sustained in *Kelly v. Supreme Council, C. M. B. A.* 46 App. Div. 79, 61 N. Y. Supp. 394, and in *McGovern v. Brotherhood, L. F. & E.* 21 Ohio C. D. 243, affirmed without an opinion in 85 Ohio St. 460, 98 N. E. 1128. The by-law was no more unreasonable than by-laws passed subsequent to issuing the benefit certificate, forfeiting the benefit when the insured changed his employment to certain prohibited occupations or committed suicide, and such by-laws have been sustained. *Supreme Lodge, K. P. v. Kutscher*, 179 Ill. 340, 70 Am. St. Rep. 115, 53 N. E. 620; *Supreme Lodge K. P. v. Trebbe*, 179 Ill. 348, 70 Am. St. Rep. 120, 53 N. E. 730; *Ellerbe v. Faust*, 119 Mo. 653, 25 L.R.A. 149, 25 S. W. 390; *Langnecker v. Grand Lodge, A. O. U. W.* 111 Wis. 279, 55 L.R.A. 185, 87 Am. St. Rep. 860, 87 N. W. 293; *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893.

Plaintiff in certiorari insists proper preliminary proof was not made on the trial to justify admitting the by-law in evidence. No cross-error was assigned by plaintiff in certiorari on the appeal to the appellate court upon this ruling, nor was the specific objection that it was not shown the by-law was adopted by a two-thirds vote of all the members present at a regular meeting or session of the Supreme Lodge made at the trial. A consideration of the proof, however, satisfies us that there was no error

committed by the trial court in admitting the by-law in evidence as a by-law of the society. Apitz stood suspended after the expiration of a year from the date of his disappearance, and under said by-law (§ 9)

his contract was forfeited and all right of recovery of benefits barred.

The judgment of the Appellate Court is affirmed.

OKLAHOMA SUPREME COURT.

SAMUEL C. DAVIS, Plff. in Err.,

v.

C. E. FOLEY.

(— Okla. —, 159 Pac. 646.)

Judgment — action to enforce.

1. An action may be maintained upon a judgment, although the judgment creditor has the right to issue an execution thereon. For other cases, see *Judgment*, VI. a, in Dig. 1-52 N. S.

Limitation of actions — judgment.

2. An action may be brought in the courts of this state upon a judgment obtained in the United States court for the Indian Territory, at any time within ten years after the rendition of such judgment; the proper statute of limitations applicable thereto being § 4487, Mansfield's Digest of the Laws of Arkansas, in force in the Indian Territory at the time the judgment was rendered.

For other cases, see *Limitation of Action*, III. i, in Dig. 1-52 N. S.

(July 25, 1916.)

ERROR to the District Court for Tulsa County to review a judgment in plaintiff's favor in an action brought to recover the amount due on a judgment obtained by plaintiff against defendant in the United States Court. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Biddison & Campbell, for plaintiff in error:

The right of action on the judgment in this case was barred by the statutes of limitation.

Patterson v. Rousney, — Okla. —, 159 Pac. 636; Anderson v. Kennedy, — Okla. —, 152 Pac. 123; Hanly v. Carneal, 14 Ark. 524; Warner v. Bartle, 39 App. Div. 91, 56 N. Y. Supp. 585; 25 Cyc. 987; Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244; Osborne v. Lindstrom, 9 N. D. 1, 46 L.R.A. 715, 81 Am. St. Rep. 516, 81 N. W. 72; Clay v. Iseminger, 187 Pa. 108, 41 Atl. 38;

Headnotes by BURFORD, C.

Note. — For right to sue upon domestic judgment upon which execution may be issued, see annotation following this case, post, 189.
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Wrightman v. Boone County, 82 Fed. 412, 31 C. C. A. 570, 60 U. S. App. 100, 88 Fed. 435.

Messrs. H. D. Mason, Horace Speed, Gray Carroll, C. S. Walker, and Remington Rogers, for defendant in error:

The right of plaintiff to have execution issued on his first judgment did not preclude his right to sue thereon.

Hummer v. Lamphear, 32 Kan. 439, 49 Am. Rep. 491, 4 Pac. 865; Ames v. Hoy, 12 Cal. 11; Fletcher v. Hickman, 91 C. C. A. 353, 165 Fed. 403.

A statute of limitation runs against a right of action only from the time when such right of action is subjected to the said statute.

Wakeman v. Peter, — Okla. —, 152 Pac. 455; Lewis v. Lewis, 7 How. 778, 12 L. ed. 910; Sohn v. Waterson, 17 Wall. 596, 21 L. ed. 737; Southgate v. Frier, 8 Okla. 435, 57 Pac. 841; Swamp Land Dist. v. Glide, 112 Cal. 90, 44 Pac. 451.

Where a new statute of limitations is passed shortening the period in which a suit can be brought on a right of action, the statute will be given prospective effect only, unless it clearly appears that the legislature intended it to have a retrospective effect.

25 Cyc. 991; Crothers v. Edison Electric Co. 149 Fed. 606; Re Mosher, 24 Okla. 61, 24 L.R.A.(N.S.) 530, 102 Pac. 705, 20 Ann. Cas. 209; Southgate v. Frier, 8 Okla. 435, 57 Pac. 841; Friedmann v. McGowan, 1 Penn. (Del.) 436, 42 Atl. 723; Wood, Limitations of Actions, 3d ed. §§ 11, 12.

The statute of limitations which controlled when this action was brought was not intended to be given a retrospective effect.

Crothers v. Edison Electric Co. 149 Fed. 606; Moore v. Brownfield, 7 Wash. 26, 34 Pac. 199; Swamp Land Dist. v. Glide, 112 Cal. 90, 44 Pac. 451; Gillette v. Hubbard, 3 Mont. 416; Rotchford v. Union R. Co. 25 R. I. 70, 54 Atl. 932; Friedmann v. McGowan, 1 Penn. (Del.) 436, 42 Atl. 723; Re Mosher, 24 Okla. 61, 24 L.R.A.(N.S.) 530, 102 Pac. 705, 20 Ann. Cas. 209; Southgate v. Frier, 8 Okla. 435, 57 Pac. 841; Huber v. Zimmerman, 8 Okla. 573, 58 Pac. 737; Anderson v. Kennedy, — Okla. —, 152 Pac. 123.

In the absence of an express provision in the statute as to a definite period after said

statute goes into effect during which actions may be brought on causes which have already accrued, the statute will be construed to have a prospective effect only.

Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886; *Wrightman v. Boone County*, 82 Fed. 412, 31 C. C. A. 570, 60 U. S. App. 100, 88 Fed. 435; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Crothers v. Edison Electric Co.* 149 Fed. 606; *Gilbert v. Ackerman*, 159 N. Y. 118, 45 L.R.A. 118, 53 N. E. 753; *Slover v. Union Bank*, 115 Tenn. 347, 1 L.R.A. (N.S.) 528, 89 S. W. 399; *Baer v. Choir*, 7 Wash. 638, 32 Pac. 776, 36 Pac. 286; *Packscher v. Fuller*, 6 Wash. 537, 33 Pac. 876; *Moore v. Brownfield*, 7 Wash. 26, 34 Pac. 199; *Swamp Land Dist. v. Glide*, 112 Cal. 90, 44 Pac. 451; *Rotchford v. Union R. Co.* 25 R. I. 70, 54 Atl. 932; *Lewis v. Lewis*, 7 How. 778, 12 L. ed. 910; *Anderson v. Kennedy*, — Okla. —, 152 Pac. 123; *Richardson v. Mackay*, 4 Okla. 328, 46 Pac. 546; *Southgate v. Frier*, 8 Okla. 435, 57 Pac. 841; *Huber v. Zimmerman*, 8 Okla. 573, 58 Pac. 737; *Re Mosher*, 24 Okla. 61, 24 L.R.A. (N.S.) 530, 102 Pac. 705, 20 Ann. Cas. 209; *Keagy v. Wellington Nat. Bank*, 12 Okla. 33, 69 Pac. 811.

Burford, C., filed the following opinion:

On September 9, 1901, C. E. Foley obtained judgment against Samuel C. Davis in the United States district court for the northern district of the Indian Territory, sitting at Muskogee, Oklahoma. On June 13, 1911, Foley commenced an action against Davis on said judgment in the district court of Tulsa county, Oklahoma. The defendant demurred to the petition which was overruled, and then pleaded the statute of limitation. The cause was submitted to the court upon the pleadings and judgment given for plaintiff, from which judgment defendant appeals.

But two questions are raised upon the appeal: First. Could the plaintiff maintain an action on his judgment during the time that he had the right to issue an execution thereon? Second. Was the statute of limitation of Oklahoma, extended in force at statehood over the whole state, comprising in part what was originally Indian Territory, a bar to plaintiff's cause of action, or is the same governed by that portion of Mansfield's Digest of the Laws of Arkansas in force in the Indian Territory at the time the judgment was recovered?

Upon the first proposition we have no doubt of the plaintiff's right to maintain the action. Although the question has apparently not been directly passed upon in this state, actions upon judgments have been upheld in this court (*Reaves v. Turner*, 20 L.R.A.1917A.

Okla. 492, 94 Pac. 543; *Chitty v. Gillett*, — Okla. —, L.R.A.1916A, 1181, 148 Pac. 1048), and in the courts of the Indian Territory (*Minter v. Green*, 3 Ind. Terr. 761, 49 S. W. 48). The exact question raised has been passed upon against the contention of plaintiff in error by the circuit court of appeals of the eighth circuit in *Fletcher v. Hickman*, 91 C. C. A. 353, 165 Fed. 403, and again the same case reported in *Hickman v. Fletcher*, 115 C. C. A. 595, 195 Fed. 907. So the question was decided in the same way, at least inferentially, in *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426, and has been directly passed upon in many of the states. See *Hummer v. Lamphear*, 32 Kan. 439, 49 Am. Rep. 491, 4 Pac. 865; *Ames v. Hoy*, 12 Cal. 11; *Field v. Sims*, 96 Ala. 540, 11 So. 763; *Davidson v. Nebaker*, 21 Ind. 334, 83 Am. Dec. 350; *Simpson v. Cqchran*, 23 Iowa, 81, 92 Am. Dec. 410; *Greathouse v. Smith*, 4 Ill. 541; *Clark v. Goodwin*, 14 Mass. 237; *Sheehan & L. Transp. Co. v. Sims*, 28 Mo. App. 64; *Kelly v. Hamblen*, 98 Va. 383, 36 S. E. 491; *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849; *Hickman v. Macon County (C. C.)* 42 Fed. 769; *Denton v. Baker*, 24 C. C. A. 476, 48 U. S. App. 235, 79 Fed. 189-194. Many other authorities are collected in 2 Black on Judgments, § 958, and 2 Freeman on Judgments, § 432.

A few of the states of the Union hold to the other doctrine, but the great weight of authority, both at common law and under various statutes, is in favor of the right of action. Upon principle it would seem that the right to sue upon a judgment ought to be maintained. The judgment is an evidence of indebtedness which the plaintiff ought to be allowed to enforce in any lawful way possible. The remedy by execution is but one way of enforcing it; that remedy may be inadequate. It is not to be assumed that the plaintiff will continue to renew his judgment by suit upon it where the remedy by execution would be to afford him full relief. If he does use this right for the purpose of harrassing the judgment debtor such party may relieve himself of his embarrassment by paying the debt which the judgment of the court has said was just and due to the plaintiff.

The second proposition as to the application of the statute of limitation is clearly determined by *Patterson v. Rousney*. — Okla. —, 159 Pac. 636, recently decided upon rehearing, and not yet reported. In that case it was said: "Where a promissory note, executed and payable in the Indian Territory, was subjected to the running of the statute of limitation as contained in § 4483, Mansfield's Digest, Statutes of Arkansas, for a period of time

prior to the erection of the state, an action was instituted thereon after the admission of the state into the Union in the courts of this state. Held that the cause of action on said note was governed, as to the length of time necessary to constitute a bar thereto, by § 4483, Mansfield's Digest, and not by the laws of Oklahoma Territory extended over the state by the Constitution."

The section of Mansfield's Digest in force in the Indian Territory applicable to the present case is § 4487, which reads as follows: "Actions on all judgments and de-

crees shall be commenced within ten years after the cause of action shall accrue, and not afterwards."

It is apparent, therefore, that this being the controlling statute of limitation under the doctrine of *Patterson v. Rousney*, supra, the plaintiff brought his action within time, and the court properly rendered judgment for him.

Judgment affirmed.

Per Curiam:

Adopted in whole.

Annotation—Right to sue upon domestic judgment upon which execution may be issued.

The citation of cases in this note is confined to those which expressly pass upon the question whether the right to maintain an action upon a domestic judgment is affected by the fact that the judgment creditor may also enforce it by issuing an execution thereon, and does not embrace the cases which decide the question solely by implication. Its scope does not embrace such questions as whether the issuance of an execution is such an election of remedies as to preclude the filing of a bill in equity to enforce the judgment; nor whether an action is maintainable in a superior court upon a judgment recovered in an inferior court, or in a Federal Court upon a judgment recovered in a state court, or vice versa; nor whether the suit may be brought in the same court in which the judgment was rendered.

Although, as stated in *DAVIS v. FOLEY*, ante, 187, there is a difference of opinion as to whether an action will lie upon a domestic judgment during the time within which execution may issue, the actual difference between the cases which affirm and those which deny the right to maintain such an action is not so great as might be supposed, since those which affirm the right do so on the theory that the judgment creditor obtains some additional advantage by his suit, such as (at common law) the recovery of interest on the amount of the judgment, or, under modern statutes making it a lien on real property, the prolongation of such lien; while those which deny the right do so only where it is not shown that some additional advantage will be obtained. The difference of opinion accordingly is narrowed to the question whether the additional advantage will be presumed, or whether it must be alleged and proved.

Inasmuch as at common law the right of a judgment creditor to issue execution was originally limited to a year and a day

after the rendition of the judgment, some of the earlier cases¹ held that the statutory right to issue execution could be regarded as a cumulative rather than as an exclusive remedy only after the expiration of that period; but in later cases² it has been expressly held that the action would lie within the year and day, as well as after; and in most instances the rule is stated without qualification that an action will lie at any time after the rendition of the judgment, notwithstanding the right to issue execution thereon.³

¹ Thus in *Kingsland v. Forrest* (1850) 18 Ala. 519, 52 Am. Dec. 232, it was held that although it may be doubted whether an action of debt will lie upon a judgment within the year and day from the time of its rendition, which was the time limited by the common law within which execution could be issued thereon, a statutory provision that when an execution has been issued within the year and day and has not been returned satisfied, an alias execution may be issued on the same judgment within ten years, does not take away the common-law right to sue in debt on the judgment, but the remedy given by the statute is cumulative merely.

And see also to the same effect *Elliot v. Holbrook* (1851) 33 Ala. 659; *McConnico v. Stallworth* (1869) 43 Ala. 389; *Calhoun v. Whittle* (1876) 56 Ala. 138 (dictum); *Wilson v. Taylor* (1889) 89 Ala. 368, 8 So. 149 (dictum); *Field v. Sims* (1893) 96 Ala. 540, 11 So. 763; *Stewart v. Peterson* (1899) 63 Pa. 230; *Fox v. Burns* (1860) 2 Ohio Dec. Reprint, 311, 2 West. L. Month. 387.

² *Kaufman v. Richardson* (1904) 142 Ala. 429, 110 Am. St. Rep. 40, 37 So. 678, 4 Ann. Cas. 169; *Clark v. Goodwin* (1817) 14 Mass. 237; *Sweetser v. Fox* (1911) 43 Utah, 40, 47 L.R.A.(N.S.) 145, 134 Pac. 599, Ann. Cas. 1916C, 620 (dictum).

³ *Ames v. Hoy* (1858) 12 Cal. 11; *Fletcher v. Hickman* (1908) 91 C. C. A. 353, 165 Fed. 403 (Dist. of Colorado); *Denison v. Williams* (1822) 4 Conn. 402; *Ives v. Finch*

The cases which uphold the right to sue at any time do so, however, upon the

theory that some substantial advantage is obtained thereby.⁴

(1859) 28 Conn. 112; *Bashor v. Beloit* (1911) 20 Idaho, 592, 119 Pac. 55 (under a statute providing that an action upon a judgment or decree may be commenced within six years after its entry); *Great-house v. Smith* (1842) 4 Ill. 541; *Albin v. People* (1868) 46 Ill. 372, (dictum) *Young v. Cooper* (1871) 59 Ill. 121 (dictum); *Davidson v. Nebaker* (1863) 21 Ind. 334, 83 Am. Dec. 350; *Gould v. Hayden* (1878) 63 Ind. 443 (dictum); *Palmer v. Glover* (1881) 73 Ind. 529 (dictum); *Campbell v. Martin* (1882) 87 Ind. 577 (dictum); *Becknell v. Becknell* (1886) 110 Ind. 42, 10 N. E. 414; *Thomson v. Lee County* (1867) 22 Iowa, 206 (dictum); *Simpson v. Cochran* (1867) 23 Iowa, 81, 92 Am. Dec. 410; *Burnes v. Simpson* (1872) 9 Kan. 658; *Hummer v. Lamphear* (1884) 32 Kan. 439, 49 Am. Rep. 491, 4 Pac. 865; *Treat v. Wilson* (1902) 65 Kan. 729, 70 Pac. 893; *Sheehan & L. Transp. Co. v. Sims* (1887) 28 Mo. App. 64; *Hickman v. Macon County* (1890) 42 Fed. 759 (C. C. E. D. Mo.); *Haupt v. Burten* (1898) 21 Mont. 572, 69 Am. St. Rep. 698, 55 Pac. 110; *Eldredge v. Aultman* (1892) 35 Neb. 884, 37 Am. St. Rep. 476, 53 N. W. 1008; *Mandlebaum v. Gregovich* (1897) 24 Nev. 154, 50 Pac. 849 (and see also *Solen v. Virginia & T. R. Co.* (1880) 15 Nev. 313 where the question is exhaustively discussed but not decided); *Morse v. Pearl* (1892) 67 N. H. 317, 68 Am. St. Rep. 672, 36 Atl. 255; *Merritt v. Fowler* (1894) 76 Hun, 424, 27 N. Y. Supp. 1047 (dictum); *Harris v. Steiner* (1900) 30 Misc. 624, 62 N. Y. Supp. 752; *Headley v. Roby* (1834) 6 Ohio 521; *Brooks v. Todd* (1854) 1 Handy (Ohio) 169; *Harter v. Harter* (1895) 4 Pa. Dist. R. 211; *Fullmer v. Pine Twp.* (1896) 17 Pa. Co. Ct. 482 (dictum); *Bettman v. Cowley* (1898) 19 Wash. 207, 40 L.R.A. 815, 53 Pac. 53 (dictum); *Citizens' Nat. Bank v. Lucas* (1901) 26 Wash. 417, 56 L.R.A. 812, 90 Am. St. Rep. 778, 67 Pac. 252.

The judgment creditor is not confined to a proceeding by *scire facias* to revive a judgment, but may bring an action to recover the amount due in the same way that he may sue upon any other demand. *Haven v. Baldwin* (1857) 5 Iowa, 503.

In *Houghton v. Raymond* (1848) 1 Sandf. (N. Y.) 682, it was held that the court would refuse to stay the plaintiff's proceedings in an action of debt commenced on a judgment recently recovered, for the purpose of increasing its amount to \$100, so as to obtain a remedy against the debtor's thing in action, and thus to compel payment of the demand.

An action may be maintained by a judgment creditor to enforce a judgment for the foreclosure of a mortgage, declaring indebtedness therein ascertained to be a lien upon the mortgaged land, and directing a sale to satisfy the indebtedness, although he may also have a remedy for the enforcement of the judgment by a sale within five years from its entry. *Rowe v. L.R.A.* 1917A.

Blake (1893) 99 Cal. 167, 37 Am. St. Rep. 46, 33 Pac. 864.

⁴ In *Clark v. Goodwin* (1817) 14 Mass. 237, it is said in support of the rule that "there may be good reason for it. The interest of the money arising on the judgment can only be recovered by an action of debt upon the judgment. For the execution issues for the principal sum only; and property may be discovered which may be secured by the process of foreign attachment which could not be touched by an execution against the debtor and the estate in his hands."

In *Ames v. Hoy* (1858) 12 Cal. 11, it is said: "The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien; and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that a defendant may be vexed by repeated judgments on the same cause of action is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt."

And in *Kaufman v. Richardson* (1904) 142 Ala. 429, 110 Am. St. Rep. 40, 37 So. 673, 4 Ann. Cas. 168, it is said that it is no argument to say that the plaintiff should not be permitted to oppress the defendant with the costs of another suit on the judgment, and that a complete answer is that the defendant may avoid this by satisfying the judgment. But compare *Lee v. Giles* (1830) 1 Bail. L. (S. C.) 449, 21 Am. Dec. 476, in footnote 11, *infra*.

At common law where a party had recovered a judgment in a personal action and suffered a year and a day to elapse without taking out execution, he was driven, in order to reach the fruits of it, to a new action of debt upon the judgment. The statute of Westminster 2, 13 Edw. I. Stat. 1, chap. 45, first gave a writ of *scire facias* in such a case, as was the law previously in real actions. The right to resort to the former action still remained, and it seems to be the settled doctrine that it might be maintained as well within the year as afterwards; so that even though the party might issue execution he could still sue an original in debt. It is laid down in the Year Book, 43 Edw. III. 2 b, that "if one recover upon a statute merchant, the statute gives an execution by *capias* and also against the land, notwithstanding he can have a writ of debt." This authority is relied upon as establishing the point by the most respectable of our standard writers. *Comyns's Dig. "Debt."* A. 2; 2 Bacon, Abr. title "Debt," A.; *Selwyn*, N. P. 616, 7th Am. ed. It is not a valid objection to the action

It is held that the right to sue upon a judgment as soon as it is rendered is neither barred nor suspended by the issuing of an execution,⁵ though it has been held that after a plaintiff has taken out his execution on a judgment and placed it in the hands of an officer for levy and satisfaction, he cannot maintain an action of debt on the judgment while the officer is proceeding in due course to levy and satisfy the execution.⁶ And an action of debt on a judgment may be maintained notwithstanding an officer who has failed

to serve an execution issued thereon has, on being sued for his neglect, satisfied the judgment creditor.⁷

The common-law right to sue on a judgment immediately upon its rendition is not affected by a statute providing for the suspension of execution in certain cases for a stated period of time.⁸

In some states, however, the courts, to avoid unnecessary and vexatious litigation, refuse to allow the maintenance of an action on a judgment during the time within which execution may be issued,⁹

that at the time it was commenced the plaintiff could have proceeded by execution upon the original judgment. The reason for this was that at common law the plaintiff could have execution only for the amount of the judgment without interest. In order to recover that he must resort to a new action; and though this reason does not exist in Pennsylvania, yet there may be another and equally good reason for it here, which is that it is necessary to secure a new or continue the old lien upon the land of the debtor. *Stewart v. Peterson* (1869) 63 Pa. 230.

⁵ *Morse v. Pearl* (1892) 67 N. H. 317, 68 Am. St. Rep. 673, 36 Atl. 255; *Wells, F. & Co. v. Vansickle* (1901) 112 Fed. 398 (C. C. D. Nev.).

An action may be maintained upon a judgment although an execution issued thereon has not been returned. *Linton v. Hurley* (1873) 114 Mass. 76; *Wilson v. Hatfield* (1877) 121 Mass. 551; *Hale v. Angel* (1823) 20 Johns. (N. Y.) 342.

The fact of an execution being in the officer's hands does not preclude the maintenance of an action on the judgment. *White River Bank v. Downer* (1857) 29 Vt. 332.

An action upon a judgment may be maintained although an alias execution was subsequently issued thereon on which the debtor has been arrested and committed to prison. *Moor v. Towle* (1854) 38 Me. 133.

An action may be maintained on a judgment upon which an execution has been issued and levied upon land and returned to the court for condemnation, and the land ordered to be sold, where no sale was in fact made and the judgment has not been otherwise paid. *Boyd v. Mann* (1878) 9 Baxt. (Tenn.) 349.

The levy of an execution on an equity of redemption which failed because the debtor had a homestead right in the equity levied upon of greater value will not bar an action on the judgment. *Whittemore v. Carlin* (1879) 58 N. H. 576.

⁶ *Thatcher v. Lyons* (1898) 70 Vt. 438, 67 Am. St. Rep. 677, 41 Atl. 428.

⁷ *Allen v. Holden* (1812) 9 Mass. 133, 6 Am. Dec. 46.

⁸ *McDonald v. Butler* (1855) 3 Mich. 558; *Smith v. Mumford* (1828) 9 Cow. (N. Y.) 26; *Church v. Cole* (1841) 1 Hill (N. Y.) 645.

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⁹ *Smith v. Belmont & N. Iron Works* (1875) 11 Bush (Ky.) 390; *Cundiff v. Trimble* (1899) 21 Ky. L. Rep. 657, 52 S. W. 940; *Vandiver v. Hammet* (1851) 4 Rich. L. (S. C.) 509; *Ligon v. McNeil* (1853) 6 Rich. L. (S. C.) 377; *Lee v. Giles* (1829) 1 Bail. L. (S. C.) 449, 21 Am. Dec. 476.

In *Welles v. Dexter* (1791) 1 Root (Conn.) 253 (which is overruled by later Connecticut cases), it was held that an action of debt upon judgment is not sustainable unless it appears by the plaintiff's declaration that he could not have the effect of his judgment without it; otherwise the action will be considered as unnecessary and vexatious.

In *Pitzer v. Russel* (1871) 4 Or. 124, it was held, after a review of a number of decisions bearing upon the question, that neither the common law nor the practice in the various states, nor anything inherent in the subject based on sound reason, gives to a judgment creditor an absolute right of action on a domestic judgment, unless such action is necessary in order to enable the plaintiff to have the full benefit of his judgment.

In *Parks v. Young* (1889) 75 Tex. 278, 12 S. W. 986, it was held that a second action cannot be maintained upon a judgment which is not dormant, the court saying that a defendant should not be subjected to the costs of a second suit on a judgment upon which execution may issue, and that besides the courts do not sit to do a futile act.

In *Stevens v. Stone* (1901) 94 Tex. 415, 86 Am. St. Rep. 861, 60 N. W. 959, it is said: "Where no advantage can accrue to a plaintiff in a judgment by a second suit upon it, we fail to see that there is any propriety in allowing such suit. It is a narrow view of the subject, as we think, to say that the judgment is an evidence of debt, and that a debt will support a cause of action. The purpose of judicial actions is to afford remedies for the enforcement of rights, and where the result of a suit prosecuted to success is to give the plaintiff no better remedy for the enforcement of his right than he had before, no reason other than technical one can exist for permitting its prosecution. Since equity discourages a multiplicity of suits and will in a proper case enjoin vexatious litigation, and since under our blended system equitable principles in every case

without the showing of some special and adequate cause therefor,¹⁰ while in others certain conditions and limitations are prescribed by statute.

In view of the fact that the question is now settled in virtually every jurisdiction, either by decision or legislative enactment,

it is not worth while to enter upon any discussion of the correctness of the assumption that the right to maintain an action at any time after rendition of judgment was recognized at common law. The question, however, is one upon which the courts have differed.¹¹

have their full scope and effect, it would seem that our court should never allow a suit upon a judgment unless it should be made to appear that the second judgment would be more efficacious than the first. Yet it is broadly held by the great weight of authority that a judgment will support an action without allegation and proof of any additional advantage to be secured by the second recovery. It may be that the American courts which hold that there is an absolute right to sue upon a judgment proceed upon a misapprehension of the ruling of the English courts. It seems that at common law interest upon a judgment was not recoverable by an execution upon it, and that therefore a second action upon it was necessary in order to secure the interest. Also in some cases a second judgment gave the judgment creditor the right to a *capias* for the satisfaction of his debt when he did not have that right under his first judgment. Therefore we are inclined to hold with the intimation of this court in former cases (*Johnson v. Murphy* (1856) 17 *Tex.* 216; *Parks v. Young* (1889) 75 *Tex.* 278, 12 *S. W.* 986) that a judgment creditor cannot maintain an action upon his judgment without showing some advantage to be gained thereby."

¹⁰ In *Heavrin v. Lack Malleable Iron Co.* (1913) 153 *Ky.* 329, 155 *S. W.* 729, it is said that it is the rule that the only action that can be brought on a judgment against the party against whom the original judgment was rendered is an action to enforce the judgment on a return of no property found, and that the reason for the rule is that, having already recovered one judgment against the party sued, there is no necessity for a second judgment; but that this rule does not apply where it is sought to hold liable on the judgment one not named therein, but who was the real defendant in the action.

In *Pinckney v. Singleton* (1833) 2 *Hill, L. (S. C.)* 343, it was held that the act of 1827, which permits execution to issue without renewal and be enforced at any time within four years, but which does not say that no new action shall be brought while the execution is of force, does not preclude a party from bringing an action of debt on a judgment against an executor suggesting a devastavit within that time.

Though the court will not permit a fresh suit to be brought on a judgment when by the second judgment no new remedy is obtained, and when the only effect of the suit would be to increase costs and harass the defendant, a suit by foreign attachment may be brought on a judgment within the *L.R.A.* 1917A.

time during which execution may issue, since by the process of attachment the plaintiff may subject to the satisfaction of his judgment property of an absconding debtor which could not be reached by any common-law execution. *Shooter v. McDuffie* (1850) 5 *Rich. L. (S. C.)* 61.

An action may be maintained upon a judgment notwithstanding it is not dormant where it appears that a new judgment thereon will be available in a jurisdiction beyond the state where the defendant has property which, owing to the limitation laws of that jurisdiction, cannot be reached under the first judgment. *Stevens v. Stone* (1901) 94 *Tex.* 415, 86 *Am. St. Rep.* 861, 60 *S. W.* 959.

In *San Antonio v. Routledge* (1907) 46 *Tex. Civ. App.* 196, 102 *S. W.* 756, it is held that wherever it is made to appear that a second judgment may be in any respect more available than the first, an action upon it may be maintained regardless of whether the judgment sued upon is dormant or not.

In *Pelletier v. Freer* (1862) 12 *Lower Can. Rep.* 199, it was held that if an action can be brought at all upon a domestic judgment, it can only be maintained upon proof of the allegation that the defendant is about to leave the province with intent to defraud his creditors.

¹¹ In *Lee v. Giles* (1830) 1 *Bail. L. (S. C.)* 449, 21 *Am. Dec.* 476, it is said: "It seems to have been made a question, whether an action could be brought in any court within the year and the day; and dicta are to be found on both sides of the question. Upon reference to the original case, in the *Year Book*, 43 *Edw. III.* 2, b, I think, so far as that may be regarded as authority, it determines that it may be brought only after the year and the day. In 2 *D'Anvers, Abr.* 500, *Debt (O.)*, and 7 *Vin. Abr.* 352, *Debt (O.)*, it seems to have been so understood, for they both refer to it under the head of 'at what time,' the action may be brought. In both it is said: 'If a man had recovered a debt, he might have an action of debt on this judgment after the year.' Selwyn says: 'Debt lies upon a judgment within or after the year after the recovery,' but he refers to the same law and to no other. Selwyn, *N. P.* 445. And the same doctrine is to be found in *Comyns's Dig. Debt. (A. 2.)*, but the reference there also is to the case in the year book 43 *Edw.* In *Espinasse, N. P. Dig.* pt. 1. p. 196, speaking of the action of debt on judgment, it is said, 'this was the common-law remedy in cases where execution had not been sued out before the expiration of the year and day after judgment. But the statute of Westminster 2, d, chap.

46, having given the remedy by *scire facias* on the judgment, that is the practice now. But the whole matter depends on the question whether a judgment is operative for a year and a day at common law; for if it is, why within that time have any other remedy? No sensible reason can be given why there should be, whilst it cannot escape observation that it would be uselessly oppressive if there were. I can never sanction the idea that a new action should be permitted by way of punishing the debtor for not paying his debt. There is something barbarous in it, and wholly inconsistent with the mild, benignant, and just spirit of the common law. As long as the judgment is operative, the creditor has the means of enforcing payment; and if the debtor can pay, an execution is as effectual as another

suit, and more expeditious. To allow successive actions to be brought in the inferior tribunals, in particular, for the purpose of increasing the debt, until an additional remedy against the body could be obtained, would, in my humble judgment, be making the law the instrument, in the hands of individuals, of vengeance and oppression. Why provide by law that the body of an individual shall not be taken for a debt less than £20, currency, say \$12.24, if, by this speedy process, the poor or unfortunate being who has contracted a debt of \$10 may have his debt increased in a few weeks to double the amount, and his body incarcerated, when, at the contracting of the debt, the creditor did not look to any such security nor the debtor to such a responsibility."

E. S. O.

UNITED STATES SUPREME COURT.

NEW YORK, PHILADELPHIA, & NORFOLK RAILROAD COMPANY, Plff. in Err.,

v.

PENINSULA PRODUCE EXCHANGE OF MARYLAND.

(240 U. S. 34, 60 L. ed. 511, 36 Sup. Ct. Rep. 234.)

Carriers — connecting — delay beyond own line — Carmack amendment.

1. Damages for the loss of the market because of unreasonable delay in transportation occurring anywhere en route are comprehended by the provision of the Carmack amendment of June 29, 1906, § 7, to the act of February 4, 1887, § 20, which makes the initial carrier of an interstate shipment liable to the holder of the bill of lading for "any loss, damage, or injury to such property" caused by it or by any carrier in the chain of transportation, despite any agreement or stipulation to the contrary, with the right of recovery over against the carrier at fault in the amount of such "loss, damage, or injury" as the former carrier may have been required to pay to the owners of the property.

For other cases, see *Carriers*, III. j, in *Dig.* 1-52 N. S.

Appeal — error to state court — harmless error — instructions — evidence.

2. A judgment of the highest state court which affirms a judgment against a carrier for the damages sustained by a shipper through a decline in market value, due to an unreasonable delay in the transportation of an interstate shipment, will not be reversed because the trial court, by its in-

structions, erroneously permitted the jury to award as damages the amount of such decline in value without reference to a limitation in the bill of lading and in the carrier's published tariff that the carrier's liability for loss or damage is to be computed on the basis of the value of the shipment plus the freight at the time and place of shipment, unless a lower value is agreed upon, or because the trial court erroneously excluded such tariff with its conditions when offered in evidence, where, upon the facts as the highest court finds them to be, the agreed maximum of liability as stipulated is not exceeded by the judgment. For other cases, see *Appeal and Error*, VII. m, 4, a, (3), in *Dig.* 1-52 N. S.

(January 24, 1916.)

ERROR to the Court of Appeals of the State of Maryland to review a judgment affirming a judgment of the Circuit Court for Somerset County in plaintiff's favor in an action brought to recover damages due to defendant's unreasonable delay in the transportation of an interstate shipment. Affirmed.

The facts are stated in the opinion.

Messrs. Henry Wolf Bickel and Frederic D. McKenney, for plaintiff in error:

Plaintiff in error is under no liability to the shipper unless the Carmack amendment is sufficiently broad in its scope to include liability for delay occurring on the line of a connection.

Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 423; *Wabash R. Co. v. Pearce*, 192 U. S. 179, 48 L. ed. 397, 24 Sup. Ct. Rep. 231.

Note. — The above case, or course, settles the point that damage from delay in transportation, though without physical damage to the property, is embraced in the phrase, "loss, damage, or injury to such property," within the provisions of the Car-L.R.A.1917A.

mack amendment in relation to the liability of the initial carrier. The general subject of the liability of a connecting carrier for loss beyond its own line is discussed in the note to *Roy v. Chesapeake & O. R. Co.* 31 L.R.A.(N.S.) 1.

The Carmack amendment carefully confines the liability imposed on the initial carrier to loss, damage, or injury caused by it or by any common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line or lines such property may pass; and this liability is not coextensive with the common-law liability of the individual carriers.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 491, 56 L. ed. 516, 523, 32 Sup. Ct. Rep. 205; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 649, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391.

Delay in itself is not a cause of action; it must be negligent delay.

Story, Bailm. 9th ed. § 545A; *Schouler*, Bailm. & Carr. 3d ed. § 488; *Hutchinson*, Carr. 3d ed. § 653; *Pennsylvania R. Co. v. Clark*, 118 Md. 514, 85 Atl. 613.

In cases of delay there is no presumption as to the line on which the delay occurred, but plaintiff must localize the delay on the line of the carrier selected by him for suit.

East Tennessee, V. & G. R. Co. v. Johnson, 85 Ga. 497, 11 S. E. 809; *Almand v. Georgia R. & Bkg. Co.* 95 Ga. 775, 22 S. E. 674; *Hutchinson*, Carr. 3d ed. 1590; 6 Cyc. 490, note 40, p. 491; *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich. 609, 5 N. W. 1031.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148.

Delay is a distinct and separate cause of action from loss, injury, or damage to property.

But, if an initial carrier may be held for the delay of the connecting carrier if such delay causes damage or injury to the property, it would still remain to determine whether the initial carrier could be held where such delay caused no loss, damage, or injury to the property, but only loss, damage, or injury to the shipper consequent upon conditions having no reference to the actual transportation of the goods. To sustain such liability would involve the carrier in a liability uncertain in extent and speculative in character,—a liability which would contravene the public interest.

J. C. Shaffer & Co. v. Chicago, R. I. & P. R. Co. 21 Inters. Com. Rep. 8.

Provisions of bills of lading requiring that notices of claims for loss or damage to shipments shall be filed within a specified time are not sufficient to justify a demand for a similar notice where the shipment has been delayed. "Loss or damage to the property, and injury to the shipper resulting from loss of market, are quite distinct."

Johnson v. Missouri, K. & T. R. Co. 107 App. Div. 374, 95 N. Y. Supp. 182; D L.R.A.1917A.

Klass Commission Co. v. Wabash R. Co. 80 Mo. App. 164; *Leonard v. Chicago & A. R. Co.* 54 Mo. App. 293; *Frey v. New York C. & H. R. R. Co.* 114 App. Div. 747, 100 N. Y. Supp. 225; *Kramer v. Chicago, M. & St. P. R. Co.* 101 Iowa, 178, 70 N. W. 119, 1 Am. Neg. Rep. 229.

Plaintiff seeks to recover upon a liability which not only is not offered in the tariffs of the carrier, but is specifically contrary to the contract of transportation into which the carrier, through the medium of its tariffs, offers to enter.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648. Ann. Cas. 1914A, 501; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A. 1915B, 450, 34 Sup. Ct. Rep. 526. Ann. Cas. 1915B, 593; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391.

Mr. James E. Ellegood, for defendant in error:

The status of the common law respecting carriers' liability, the Federal statute itself, its purpose, scope, and remedial provisions, must speedily remove any ambiguity, if there be any, in the language.

Hamilton v. Rathbone, 175 U. S. 420, 44 L. ed. 222, 20 Sup. Ct. Rep. 155; *United States v. Lexington Mill & Elevator Co.* 232 U. S. 410, 58 L. ed. 662, L.R.A. 1915B, 774, 34 Sup. Ct. Rep. 337.

The statute, original and amendments, is remedial, and, by the universal rule, must receive a liberal construction to effectuate its intent as an entirety; but that which is contended for would defeat its purpose in part; that is, as a remedy for relief for "any loss," except for loss or damaged goods. This is not to be tolerated unless the words of the statute compel it.

Washington Market Co. v. Hoffman, 101 U. S. 112, 116, 25 L. ed. 782, 784.

Its operation may be restrained or enlarged beyond the ordinary import of the words when the purpose of the statute and public policy require it.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

It is with the right of the person sustaining the loss, and not with any specific cause of injury to the property, that the statute is concerned.

New York, P. & N. R. Co. v. Peninsula Produce Exch. 122 Md. 216, 89 Atl. 433.

The liability imposed by the statute is the liability imposed by the common law.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 492, 57 L. ed. 314, 315, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; Galveston, H. & S. A. R. Co. v. Wallace, 50 L. ed. 517, and note, 223 U. S. 481, 32 Sup. Ct. Rep. 205; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 671, 57 L. ed. 690, 698, 33 Sup. Ct. Rep. 397.

The common-law duty required the carrier to transport and deliver within a reasonable time; and any failure of this duty within a reasonable time renders the carrier liable for all the consequences.

Philadelphia, W. & B. R. Co. v. Lehman, 56 Md. 233, 40 Am. Rep. 415.

The duty to deliver safely, and the duty to deliver in due time, are distinct obligations.

Baltimore & O. R. Co. v. Whitehill, 104 Md. 310, 64 Atl. 1033; Philadelphia, B. & W. R. Co. v. Diffendal, 109 Md. 509, 72 Atl. 193, 458; Baltimore, C. & A. R. Co. v. William Sperber & Co. 117 Md. 602, 84 Atl. 72; Philadelphia, W. & B. R. Co. v. Lehman, *supra*.

Mr. Justice Hughes delivered the opinion of the court:

On May 26, 1910, the Peninsula Produce Exchange of Maryland delivered to the New York, Philadelphia, & Norfolk Railroad Company at Marion, Maryland, a carload of strawberries for transportation to New York city. The conditions of the transportation were set forth in the bill of lading issued by the railroad company. The property was delivered at destination some hours later than the customary time of arrival, and this action was brought to recover damages for the failure to transport and deliver with reasonable despatch. Judgment in favor of the shipper was affirmed by the court of appeals of Maryland, 122 Md. 215, 89 Atl. 433.

The plaintiff in error, in its brief, states that "the questions involved are two—"

"1: Does the Carmack amendment [34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592] impose on the 'initial carrier' liability for delay occurring on the line of its connection without physical damage to the property?"

"2. Was the plaintiff entitled to recover because its shipment failed to arrive in time for the market of May 28th, when the regulations under which the shipment moved were published in tariffs duly on file with the Interstate Commerce Commission, and specifically provided: 'No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon'?"

L.R.A.1917A.

The first question, arising from the fact that it did not appear that the delay occurred on the line of the initial carrier (the defendant) was raised by an unsuccessful demurrer to the declaration, and both questions were presented by prayers for instructions which were denied.

The amendment of § 20 of the interstate commerce act, known as the Carmack amendment (act of June 29, 1906, chap. 3591, § 7, 34 Stat. at L. 584, 595, Comp. Stat. 1913, § 8592), provides "that any common carrier . . . receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier . . . to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier . . . from the liability hereby imposed."

We need not review at length the considerations which led to the adoption of this amendment. These were stated in Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 199-203, 55 L. ed. 167, 179-181, 31 L.R.A. (N.S.) 7, 31 Sup. Ct. Rep. 164. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only for "loss, damage, or delay" occurring on its own line. This "burdensome situation" was "the matter which Congress undertook to regulate." And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled "as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies," was within the power of Congress. The rule, said the court in defining the purpose of the Carmack amendment, "is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility." And, again, we said in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148, that this legislation embraces "the subject of the liability of the carrier under a bill of lading which he must issue." "The duty to issue a bill of lading and the liability thereby assumed are covered in full, and

though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject." *Id.* p. 506.

It is now insisted that Congress failed to accomplish this paramount object; that while unity of responsibility was secured if the goods were injured in the course of transportation or were not delivered, the statute did not reach the case of a failure to transport with reasonable despatch. In such case it is said that, although there is a through shipment, the shipper must still look to the particular carrier whose neglect caused the delay. We do not think that the language of the amendment has the inadequacy attributed to it. The words "any loss, damage, or injury to such property," caused by the initial carrier or by any connecting carrier, are comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination. It is not necessary, nor is it natural, in view of the general purpose of the statute, to take the words "to the property" as limiting the word "damage" as well as the word "injury," and thus as rendering the former wholly superfluous. It is said that there is a different responsibility on the part of the carrier with respect to delay from that which exists where there is a failure to carry safely. But the difference is with respect to the measure of the carrier's obligation; the duty to transport with reasonable despatch is none the less an integral part of the normal undertaking of the carrier. And we can gather no intent to unify only a portion of the carrier's responsibility. Further, it is urged that the amendment provides that the initial carrier may recover from the connecting carrier "on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property;" and this, it is said, shows that the "loss, damage, or injury" described is that which may be localized as having occurred on the line of one of the carriers, and therefore should be limited to physical loss or injury. But we find no difficulty in this, as the damages required to be paid by the initial carrier are manifestly regarded as resulting from some breach of duty, and the purpose is simply to provide for a recovery against the connecting carrier if the latter, as to its part of the transportation, is found to be guilty of that breach. The view we have expressed finds support in the explicit terms of the act of January 20, L.R.A.1917A.

1914, chap. 11, 38 Stat. at L. 278, which provides "that no suit brought in any state court of competent jurisdiction against a railroad company . . . to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the act to regulate commerce . . . shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of \$3,000." If the language of § 20 can be regarded as ambiguous, this legislative interpretation of it as conferring a right of action for delay, as well as for loss or injury to the property in the course of transportation, is entitled to great weight.¹ *Alexander v. Alexandria*, 5 Cranch, 1, 7, 8, 3 L. ed. 19-21; *United States v. Freeman*, 3 How. 556, 564, 565, 11 L. ed. 724, 727, 728; *Cope v. Cope*, 137 U. S. 682, 688, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222.

The second question, as stated, is sought to be raised under the stipulation of the bill of lading (being one of the conditions filed with the tariffs under the interstate commerce act) that the carrier is not bound to transport "by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable despatch." See *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; *Atchison, T. & S. F. R. Co. v. Robinson*, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556. But the argument upon this point is not addressed to the issue, as recovery was not sought or permitted, except for a failure to transport with reasonable despatch. The declaration alleged that the berries "were to be transported with safety, and with reasonable despatch, and delivered . . . in safe condition and with reasonable diligence;" that the defendant, or its connecting lines, did not "transport or deliver the same with reasonable despatch;" and that the damage was due to their failure to use "due and reasonable diligence." The court instructed the jury that it became the duty of the defendant and all connecting lines "to use reasonable care, diligence, and exertion in forwarding and transporting and deliver-

¹ The language of the Carmack amendment has been construed in various decisions by state courts as embracing damages for delay. *Ft. Smith & W. R. Co. v. Awbrey*, 39 Okla. 270, 134 Pac. 1117; *Southern P. Co. v. Lyon*, — Miss. —, 66 So. 209; *Pecos & N. T. R. Co. v. Cox*, — Tex. Civ. App. —, 150 S. W. 265; *Norfolk Truckers Exch. v. Norfolk Southern R. Co.* 116 Va. 466, 82 S. E. 92. *Contra*, *Byers v. Southern Exp. Co.* 165 N. C. 542, 81 S. E. 741.

ing" the berries, and that if the jury should believe that the defendant and the connecting lines, or any of them, "did not use such care, diligence, and exertion," and that by reason of the failure so to do the berries arrived "too late for the market of the day on which they would have arrived if they had been forwarded and transported with such care, diligence, and exertion, and that the plaintiff thereby sustained loss, then their verdict should be for the plaintiff." As the court of appeals of Maryland said, the ground of the action was "the failure to carry with reasonable despatch, and the loss of marketability is mentioned as the element of damage." That is, the reference to the market said to have been lost was merely for the purpose of calculating damages which were sought solely because of lack of reasonable diligence, and not upon the allegation of any added duty with respect to a particular train or market. The stipulation invoked does not attempt to limit the duty of the carrier to transport with reasonable despatch, and we are not called upon to consider its effect in any other aspect.

The instructions, however, permitted the jury to award as damages the amount of the decline in value, due to the delay, at the place of destination, without stating the limitation set forth in the tariff of the plaintiff in error as filed: and this tariff, with the accompanying conditions, duly offered in evidence, was excluded. It was conceded by the court of appeals that these rulings were erroneous, but the court found that they worked no harm to the plaintiff in error. The condition in the bill of lading and in the filed tariff provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." Treating the rate charged for the transportation as based upon assent to this provision, the court of appeals construed the stipulation not as changing the basis of liability, but as limiting the amount of the recovery in any event to the value of the property at the time and place of shipment, no other value having been agreed upon. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.1917A.

L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Wells, F. & Co. v. Neiman-Marcus Co.* 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, Ann. Cas. 1915D, 593; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351. It appeared from the evidence that the berries were sold in New York city at an average price of 6½ cents a quart. It was also proved that the decline in value due to the delay was from 2 to 3 cents a quart. The jury gave a verdict for \$180.48, which included \$153.60, principal, and \$26.88 interest. That is, the jury gave damages at the rate of 2 cents a quart for the 240 crates (7,680 quarts) shipped. The court held that it could not be said, as the defendant contended, that there was no proof of actual damage from the delay; and that, so far as the maximum liability fixed by the filed tariff was concerned, the court was justified in taking the value of the berries at the time and place of shipment as being at least equal to the 2 cents a quart allowed. Upon this point the court of appeals said: "It may be judicially assumed that their value at the time and place of shipment was at least equal to the 2 cents per quart which the jury allowed as damages and in the view we have taken of the case no just purpose would be served in reversing the judgment and subjecting the parties to the expense of a new trial." That is to say, upon the facts as the state court found them to be, the agreed maximum of liability as stipulated was not exceeded.

We cannot say, in the light of the evidence, that the state court denied to the plaintiff in error any Federal right in holding as it did with respect to the amount of the value of the berries at the time and place of shipment, and in this view we are unable to conclude that, in disposing of the Federal questions, there was any error which would require, or justify, a reversal. Judgment affirmed.

UNITED STATES SUPREME COURT.

SOUTHERN EXPRESS COMPANY, Plff. in Err.,
v.
JOHN BYERS.

(240 U. S. 612, 60 L. ed. 825, 36 Sup. Ct. Rep. 410.)

Evidence — documentary — carrier's rate schedules.

1. Rate schedules of an interstate carrier on file with the Interstate Commerce

Commission are admissible in evidence in an action against it to recover damages for delay in the delivery of an interstate shipment on the issue of the validity and effect of a provision in the bill of lading by which the carrier undertook to limit its liability to a specified sum.

For other cases, see Evidence, IV. l, in Dig. 1-52 N. S.

Damages — mental anguish — carrier's liability.

2. Damages for mental suffering only are not recoverable from a carrier on account of its delay in the delivery of an interstate shipment.

For other cases, see Damages, III. o, 2, a, in Dig. 1-52 N. S.

(April 3, 1916.)

ERROR to the Supreme Court of the State of North Carolina to review a judgment affirming a judgment of the Superior Court for Buncombe County in plaintiff's favor in an action brought to recover damages for mental anguish on account of delay of defendant in the delivery of an interstate shipment. Reversed.

The facts are stated in the opinion.

Messrs. Julius C. Martin, Thomas S. Rollins, George H. Wright, and Robert C. Alston, for plaintiff in error:

The liability of a common carrier for mental anguish growing out of loss, injury,

Note. — The subject of mental anguish as an element of damages is discussed at length in the note to *Western U. Teleg. Co. v. Chouteau*, 49 L.R.A. (N.S.) 206, and other notes there referred to. These notes include cases, arising out of telegrams concerning a corpse; see pages 234, 319, 334, 335.

Generally, as to mental anguish as element of damages in action for breach of contract relative to corpse, see note to *Beaulieu v. Great Northern R. Co.* 19 L.R.A. (N.S.) 564.

Other annotation on mental anguish as element of damages may be found by consulting the Index to L.R.A. Notes under the title, "Damages," subtitle, "Mental Anguish."

The principle declared in *SOUTHERN EXP. CO. v. BYERS*, that in interpreting and enforcing the acts of Congress in relation to interstate shipments, the courts will apply the principles of the common law as accepted and enforced by the Federal courts rather than by the courts of the state in which the action arises, is also exemplified in the cases dealing with the effect of the Carmack amendment on state regulations as to stipulations limiting liability of carrier for loss of or damage to goods. See on this point notes to *Adams Exp. Co. v. Croninger*, 44 L.R.A. (N.S.) 257, and *Louisville & N. R. Co. v. Miller*, 50 L.R.A. (N.S.) 819.

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or delay of a shipment moving in interstate commerce, is to be controlled by the law as ascertained and administered by the Federal judiciary, which does not permit recovery.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 505, 57 L. ed. 314, 319, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 649, 57 L. ed. 683, 687, 33 Sup. Ct. Rep. 391; *Slater v. Mexican Nat. R. Co.* 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581; *Western U. Teleg. Co. v. Brown*, 234 U. S. 542, 58 L. ed. 1457, 34 Sup. Ct. Rep. 955, 5 N. C. C. A. 1024; *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453, 36 Sup. Ct. Rep. 177; *Western U. Telegh. Co. v. Wood*, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; *Western U. Teleg. Co. v. Cook*, 9 C. C. A. 680, 15 U. S. App. 445, 61 Fed. 624; *Felton v. Bullard*, 37 C. C. A. 1, 94 Fed. 781; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 605; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295; *Western U. Teleg. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 92; *Western U. Teleg. Co. v. Chouteau*, 49 L.R.A. (N.S.) 221, note; *Chapman v. Western U. Teleg. Co.* 88 Ga. 767, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Chase v. Western U. Teleg. Co.* 10 L.R.A. 464, 44 Fed. 554; *Crawson v. Western U. Teleg. Co.* 47 Fed. 544; *Kester v. Western U. Teleg. Co.* 55 Fed. 603; *Gahan v. Western U. Teleg. Co.* 59 Fed. 433; *Western U. Teleg. Co. v. Hill*, 163 Ala. 18, 23 L.R.A. (N.S.) 648, 50 So. 248, 21 Am. Neg. Rep. 1, 19 Ann. Cas. 1058; *Kennon v. Gilmer*, 131 U. S. 22, 26, 33 L. ed. 110, 112, 9 Sup. Ct. Rep. 696; *McDermott v. Severe*, 202 U. S. 600, 611, 50 L. ed. 1162, 1168, 26 Sup. Ct. Rep. 709; *Tyler v. Western U. Teleg. Co.* 54 Fed. 634; *Butner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; *Davis v. Western U. Teleg. Co.* 46 W. Va. 48, 32 S. E. 1026.

The contract of carriage is inconsistent with the conception that mental damages may be allowed.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148; *George N. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 286, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; *Telfair County v. Webb*, 119 Ga. 916, 47 S. E. 218; *Atlanta Ice & Coal Co. v. Mixon*, 126 Ga. 457, 55 S. E. 237.

No brief was filed for defendant in error

Mr. Justice McReynolds delivered the opinion of the court:

Claiming damages solely on account of mental anguish occasioned by failure promptly to deliver a casket and grave clothes intended for his wife's burial, and accepted by plaintiff in error with knowledge of the facts at Asheville, North Carolina, for transportation to Hickory Grove, South Carolina, Byers recovered a judgment against it for \$250, and this was affirmed by the supreme court of North Carolina. 165 N. C. 542, 81 S. E. 741.

In defense the Express Company averred: That while engaged in interstate commerce it received the described articles at Asheville and transported them to Hickory Grove; that, as required by act of Congress approved June 29, 1906 [34 Stat. at L. 504, chap. 3591, Comp. Stat. 1913, § 8563], and amendments, it had filed a schedule of rates with the Interstate Commerce Commission; that at time of shipment it issued a bill of lading limiting liability to \$50; that it had paid the shipper the full amount expended by him in purchasing the articles; that no present liability exists, and especially under the laws of the United States it is not responsible for such damages as those specified.

There was put in evidence a duly executed receipt for \$64.17, "being in full payment for one coffin delivered to Southern Express Company at Asheville, North Carolina, on April 1st, 1912, by John Byers, to be shipped to Sarah Moore, Hickory Grove, South Carolina;" and Byers testified that "the Southern Express Company paid him for all the money he had paid out on the casket and other things contained in the shipment, but did not pay him anything for damages." The bill of lading was also introduced. It specified no value and undertook to restrict the carrier's liability to \$50. Clause 1 is copied in the margin.¹ Objection was sustained to a seasonable offer by the company to prove its schedules

of rates on file with the Interstate Commerce Commission.

Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon acts of Congress, the bill of lading and common-law principles accepted and enforced by the Federal courts. In order to determine the validity and effect of restrictions upon liability contained in such bills, it is important, if not indeed essential, to consider the applicable schedules on file with the Commission. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; *Chicago, St. P. M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; *Wells, F. & Co. v. Neiman-Marcus Co.* 227 U. S. 469, 57 L. ed. 600, 33 Sup. Ct. Rep. 267; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; *Boston & M. R. Co. v. Hooker*, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, Ann. Cas. 1915D, 593; *George M. Pierce Co. v. Wells, F. & Co.* 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; *New York, P. & N. R. Co. v. Peninsula Produce Exch.* 240 U. S. 34, 60 L. ed. 511, ante, 193, 36 Sup. Ct. Rep. 230.

It was plain error to exclude the rate schedules.

Having been requested in apt time, the trial court refused to charge the jury as follows: "As the shipment which is alleged to have been delayed was a shipment in interstate commerce, and as the damage claimed by the plaintiff is damage for mental suffering only on account of the delay of the delivery of said shipment, the court instructs the jury that under the evidence in this case the plaintiff is not entitled to

11. In consideration of the rate charged for carrying said property which is regulated by the value and classification thereof and is based upon a valuation of not exceeding \$50 for any shipment of 100 pounds or less, and not exceeding 50 cents per pound for any shipment in excess of 100 pounds, unless a greater value is declared at time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars (\$50) on any shipment of 100 pounds or less, and for not exceeding 50 cents per pound on a shipment weighing more than 100 pounds, and said property is valued at, and the liability of this company is hereby limited to, the value above stated, unless a greater value is declared at the time of shipment, and the charge for value paid or agreed to be paid therefor; and in case of partial loss or damage the company shall not be liable for more than such proportion of the same as \$50 if 100 pounds or less in weight, or 50 cents per pound if weight exceeds 100 pounds, or the value declared bears to the actual value if greater.

declared at the time of shipment, and the charge for value paid or agreed to be paid therefor; and in case of partial loss or damage the company shall not be liable for more than such proportion of the same as \$50 if 100 pounds or less in weight, or 50 cents per pound if weight exceeds 100 pounds, or the value declared bears to the actual value if greater.

If the said property is offered for shipment under the special rates named in sections "D" and "E" of the existing Official Express Classification, it is agreed that the value of the same does not exceed ten dollars (\$10) per package, said rates not applying on packages of greater value.

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recover any such damage; the jury is therefore directed to render a verdict for the defendant." This instruction should have been given.

The action is based upon a claim for mental suffering only,—nothing else was set up and the proof discloses no other injury for which compensation had not been made. In such circumstances as those presented here, the long-recognized common-law rule permitted no recovery; the decisions to this effect "rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation." Cooley, *Torts*, 3d ed. page 94. The lower Federal courts, almost without exception, have adhered to this doctrine, and in so doing we think they were clearly right upon principle and also in accord with the great weight of authority. *Chase v. Western U. Teleg. Co.* 10 L.R.A. 464, 44 Fed. 554; *Crawson v. Western U. Teleg. Co.* 47 Fed. 544; *Wilcox v. Richmond & D. R. Co.* 17 L.R.A. 804, 3 C. C. A. 73, 8 U. S. App. 118, 52 Fed. 264; *Tyler v. Western U. Teleg. Co.* 54 Fed. 634; *Kester v. Western U. Teleg. Co.* 55 Fed. 603; *Western U. Teleg. Co. v. Wood*, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; *Gahan v. Western U. Teleg. Co.* 59 Fed. 433; *McBride v. Sunset Teleph. Co.* 96 Fed. 81; *Stansell v. Western U. Teleg. Co.* 107 Fed. 668; *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295; *Alexander v. Western U. Teleg. Co.* 126 Fed. 445; *Rowan v. Western U. Teleg. Co.* 149 Fed. 550;

Western U. Teleg. Co. v. Burris, 102 C. C. A. 386, 179 Fed. 92; *Kyle v. Chicago, R. I. & P. R. Co.* 105 C. C. A. 151, 182 Fed. 613. But see *Beasley v. Western U. Teleg. Co.* 39 Fed. 181.

In *So Relle v. Western U. Teleg. Co.* (1881) 55 Tex. 308, 40 Am. Rep. 805, the supreme court of Texas held the addressee of a message might recover damages of a telegraph company because of mere mental suffering. Subsequently the courts of Alabama, Iowa, Kentucky, Nevada, North Carolina, and Tennessee approved and enforced a like rule; those of Dakota, Florida, Georgia, Illinois, Indiana, Kansas, Minnesota, Mississippi, Missouri, New York, Ohio, Oklahoma, Virginia, and West Virginia definitely rejected the innovation. Many of the pertinent cases are reviewed in *Western U. Teleg. Co. v. Chouteau* (1911) 28 Okla. 664, 115 Pac. 879, Ann. Cas. 1912D, 824, 3 N. C. C. A. 879, 49 L.R.A.(N.S.) 206, and note; the general subject is discussed and the authorities cited in *Sutherland on Damages*, 3d ed. §§ 975 et seq., *Sedgwick on Damages*, 9th ed. §§ 43 et seq., and *Shearman & Redfield on Negligence*, 6th ed. §§ 756 et seq.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice McKenna and Mr. Justice Holmes concur in the result.

WEST VIRGINIA SUPREME COURT OF APPEALS.

WELCH PUBLISHING COMPANY, Appt.,
v.

JOHNSON REALTY COMPANY et al.,
Exrs., etc., of Matthew Maun, Deceased.

(— W. Va. —, 89 S. E. 707.)

Real property — conveyance — town lot.

1. An oral contract for the sale of a town lot having a certain number and dimensions fixed by the plat, made by designation of its location in the absence of the plat, and

Headnotes by POFFENBARGER, J.

Note. — The question whether a contract which purports to describe the premises by number of acres may be satisfied by a conveyance of that number of acres out of a large tract which otherwise answers the description is considered in the annotation following *Roberts v. Bennett*, L.R.A.1916C, 1100.
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misdescribing it as regards dimensions, is interpreted as being a sale of the entire lot, not a sale of a portion thereof determinable by the frontage mentioned in the erroneous description by dimensions.

For other cases, see *Contracts*, II. d, 2, a, in *Dig.* 1-52 N. 8.

Same — description.

2. A town lot, like a farm or tract of land, is an entity in itself, and a description of it as the subject-matter of a contract of sale is not restricted by further descriptive matter merely purporting to give its dimensions, without any intimation of intent to sell less than the entire lot.

For other cases, see *Contracts*, II. d, 2, a, in *Dig.* 1-52 N. 8.

The effect of a mistake of fact by defendant on right to the specific performance of a contract induced thereby, including mistake as to the quantity of land to be conveyed, is treated in the note to *Rudisill v. Whitener*, 15 L.R.A.(N.S.) 81.

Rescission — contract to sell land — mistake.

3. A mistake on the part of the vendor of such a lot as to its area or dimensions, inducing a sale thereof at a smaller price than he would have asked had he been cognizant of its size, not in any way occasioned or concealed by conduct of the vendee, constitutes no ground for the rescission of the contract, nor does his inadvertent failure to specify a portion of the lot as the subject of the sale at the price named.

For other cases, see Vendor and Purchaser, I. c, in Dig. 1-52 N. S.

Specific performance — mistake.

4. Nor, if he has permitted the vendee to take possession of the lot, partly perform the contract, and alter his position by improvement of the property and location of his business thereon, will such mistake justify refusal of a court of equity to compel specific performance of the contract.

For other cases, see Specific Performance, I. c, 1, in Dig. 1-52 N. S.

Same — purchase subject to rights of vendee.

5. One who has purchased land in the possession of another under an executory contract of sale, either oral or written, takes it subject to the contractual right of such other person, and, if the latter has right to have specific performance of the contract by his vendor, the second purchaser holds the legal title, if he has obtained it, in trust for the equitable owner, and will be required by a court of equity to convey it to him.

For other cases, see Specific Performance, I. c, 1, in Dig. 1-52 N. S.

(May 9, 1916.)

A PPEAL by plaintiff from a decree of the Circuit Court for McDowell County dismissing a bill filed to compel specific performance of a contract for the sale of a town lot. **Reversed.**

The facts are stated in the opinion.

Messrs. Cook, Litz, & Harman, Strother, Taylor, & Taylor, and J. J. Swope for appellant.

Poffenbarger, J., delivered the opinion of the court:

The decree complained of dismissed a bill having for its purpose specific performance of a contract of sale of a certain lot in the town of Welch, having a frontage on Wyoming street of seventy feet, and a cross bill, or answer in the nature of a cross bill, having for its purpose enforcement of specific performance of the same contract for the purchase of only a portion of said lot, having a frontage of 50 feet on Wyoming street, upon the theory of lack of a complete and enforceable agreement, by reason of failure of the parties to come to an understanding as to the identity of the subject-matter of L.R.A.1917A.

the negotiations. A subsidiary and incidental purpose of the bill was the restraint by injunction of an action for unlawful entry and detainer instituted by the defendants. Of course, the injunction was dissolved. From the decree, the plaintiff has appealed.

The contract, if any, is very informal, and, according to the plaintiff's contention, altogether verbal, but partly performed. The lot belonged to the estate of Matthew Mann, and was within a power of sale and disposition conferred upon the executors and trustees of his will, Isaac T. Mann and Edwin Mann. Though the executors were not cognizant of the fact, the verbal agreement of purchase set up by the plaintiff was made for it and on its behalf by H. D. Hatfield, then one of its promoters, and later a stockholder. At the date of the agreement the corporation had not been formed, but was in contemplation. Isaac T. Mann says he dealt only with H. D. Hatfield, and that the corporation was not known in the transaction. They had one or more informal conversations about a site for the office of a newspaper known as the McDowell Recorder, the plant of which had been burned out some time before the promoters of the corporation by which it was rehabilitated entered into their preliminary agreement. When that agreement was made, the work of procuring the site was delegated to Dr. Hatfield. He, as well as his associates, had in view a location on one of four lots belonging to the Mann estate, and all fronting on Wyoming street, running north and south through the town and in front of the courthouse. These four lots, constituting a block with an alley at each end and in the rear, were numbered 4, 5, 6, and 7, from north to south; the last being opposite the corner of the courthouse grounds and near the McDowell County National Bank. Both Dr. Hatfield and Isaac T. Mann were connected with that bank, the former being its president, and the latter its vice president. Dr. Hatfield asked I. J. Rhodes, cashier of the bank, to have Mr. Mann put prices on all of the four lots, and the request was made by letter, owing to inability to get in communication by telephone. With the letter Mr. Rhodes inclosed a rough pencil diagram of the four lots, made on the back of a deposit slip, and within the diagram of each lot he placed the price which had formerly been fixed upon it, \$1,000 for No. 4, \$1,500 for No. 5, \$1,500 for No. 6, and \$2,000 for No. 7. The letter was dated October 30, 1911, and read in part as follows: "The price that I put on these two lots for you two years ago for this same purpose was an average of \$1,500 for each 50 foot lot, \$2,000 for the lot nearest the bank, and \$1,000 for the lot further

away, and \$1,500 for the two center lots. I am inclosing herewith a rough pencil sketch of these lots, and I think from what the doctor said this afternoon that the lot further out, or the \$1,000 one, would be the one which he thinks they would prefer. He desires that you signify your willingness to this price so that they can go ahead at once with temporary building."

On November 5, 1911, Mr. Mann replied to the letter as follows: "I have your letter of October 30th, 1911, regarding the Matthew Mann estate lots in the town of Welch, and in reply would say that the figures suggested by you of \$1,000, \$1,500, and \$2,000, respectively, are correct; and you are authorized to sell the lot on the alley farthest from the courthouse, with a frontage of 50 feet on Wyoming street and 80 feet on the alley, at \$1,000. I am willing to make the terms satisfactory to the purchaser."

It is not shown that Dr. Hatfield ever saw either of these letters or the sketch. He says he never saw the letter, and that he has no recollection of having seen the diagram. Mr. Rhodes does not say he did. His testimony is that he communicated the contents of Mr. Mann's letter to Dr. Hatfield, not that he read or exhibited it to him, and that he is not sure that he showed him the diagram, but says he is of the opinion that it was made at the time of their conversation and before the letter of October 30th was written. Both agree, however, that the prices of the lots were made known in some manner.

The exact date of the decision of the promoters to take lot No. 4, the \$1,000 lot, does not clearly appear. Some of the oral testimony seems to place it after that of the letter of November 5th, but the correspondence seems to indicate that the choice had already been made when it took place. However that may be the choice was largely determined by the area of that lot. At first the four lots were supposed to be equal in point of area. At least the promoters so regarded them. On investigation, however, they discovered that the original plat of the lot gave it a frontage of 80 feet and a depth of 125 feet. By survey it was further discovered that its actual frontage was 70 feet. The diagram made by Mr. Rhodes gave each of the lots a frontage of 50 feet and a depth of 80 feet. Mr. Mann says in his testimony he realized the diagram was incorrect, and that he never had any intention at any time to sell Dr. Hatfield the entire lot. He further says it is his recollection that he told him he would not sell him the entire lot, but admits that he is not positive that at their earlier conferences they agreed on any certain number of feet. He L.R.A.1917A.

says he understood only a small lot was desired. Dr. Hatfield is quite positive that in his conversations with Mr. Mann about the lot the size of it was never discussed. In one place he says it was never discussed, at all, and in another that he does not think it was ever discussed.

Under this open and indefinite contract for the purchase of a lot the plaintiff, or its promoters, erected a temporary building on the portion of lot No. 4 which Mr. Mann says he agreed to sell for the purpose, early in November, 1911. In the same year they built a small coal house on the other portion thereof. Some time in the year 1913, but, Col. J. J. Swope, plaintiff's manager, says, before they had any notice of the dispute as to the area of the lot, they built an addition to the building first put up, which extends over onto the disputed strip of 20 feet. After the controversy had arisen, some time in the year 1914, they erected another building on the disputed strip, called the stock room.

In the meantime, a deed bearing date March 22, 1912, executed by the executors and trustees of the estate of Matthew Mann, and conveying to H. D. Hatfield a portion of lot No. 4, having a frontage of 50 feet on Wyoming street and running back the full depth of the lot, 125 feet, to a 15-foot alley, with the exception of a parallelogram in the northwest corner 29 feet by 35 feet, claimed adversely by one Mrs. Effler, was deposited in the McDowell County National Bank for delivery on payment of \$1,000. There is uncertainty as to the exact date of the origin of the controversy as to the size of the lot. Dr. Hatfield says he thinks a memorandum of data for the preparation of the deed furnished to him by Col. Swope, was delivered to Judge J. French Strother, a stockholder, with directions to prepare a deed for the lot, and he thinks it was prepared as directed, and that Mr. Mann refused to execute it on account of the dispute as to the description. He says he gave the controversy but little attention, because he was busy with other matters and thought it would work itself out in the course of time. He further says Mr. Rhodes told him there was another deed at the bank, evidently the one above described, and that he replied he would let him know about it later.

The Johnson Realty Company, plaintiff in the action of unlawful entry and detainer, seems to have purchased all of block No. 2, of which lot No. 4 is a part, except the portion of said lot for which a deed was tendered by the executors to H. D. Hatfield. The answer avers that the executors on March 21, 1913, conveyed to the Johnson Realty Company the 20-foot strip

of lot No. 4 which is in controversy, and the grantee in that deed denies possession of that portion of the lot by the plaintiff at the date thereof. But there is direct, positive, and uncontradicted evidence that the coal house, at least, was built on the disputed strip long before the purchase of the Johnson Realty Company, and the evidence tends to prove that the addition to the printing plant building extending over onto that strip was made before that conveyance. Plaintiff's possession was manifestly sufficient to put the purchaser upon inquiry as to its title, which would have led to a full disclosure of such title as it had. Such facts are the equivalent of full notice.

The exact status of Mr. Rhodes as agent need not be defined. In some respects he was, no doubt, agent for each of them—of Mann for some purposes and Hatfield for others. He made the inquiry as to prices for the latter. He quoted the prices for the former. For the former he told the latter he could have the lot on the alley farthest from the courthouse for \$1,000, and described it as having a frontage of 50 feet on Wyoming street. In making the sketch, representing it as having such dimension, he cannot be regarded as having been the agent of the latter; for he says nothing as to how he obtained the erroneous impression under which the incorrect representation was made. He does not say he exhibited the paper to Dr. Hatfield after it was made, and the latter has no recollection of ever having seen it. Total lack of proof of any direction to make it or communication of data from which to prepare it is obvious. If Mr. Mann knew it was incorrect, and intended to sell only a part of the lot, he utterly failed to bring that fact to the attention of anybody. His letter indicated no purpose to sell only a part of the lot. On the contrary, it in terms proposed a sale of the lot and then misdescribed it as to its dimensions.

A lot in a town plat is an entity like a farm or tract of land, and is usually dealt with as such. A sale of a farm or tract by name or general description is a sale in gross, and the acreage is not the basis of the contract, even though it is mentioned by way of description. A sale of a lot the identity, location, and dimensions of which are found in a town plat, must be regarded in much the same way. It is not a sale by the front foot or by fractional part, unless the terms of the contract make it so. The parol evidence, as well as the sketch shows all the parties knew there were four platted town lots in the block. Mr. Rhodes's letter asserts prices had been put on them as such L.R.A.1917A.

two years before the date thereof. His sketch showed no fractional lot, covered all the land in the block, and fixed prices by the lot. His injury was for prices on them, and his sketch showed them occupying all the land between the two alleys. This inquiry was made by one of the promoters. So they understood there were four lots in the block. They said nothing about a division or purchase of a fraction. A special feature of the inquiry was as to the price of lot No. 4, not by name, but by location, and it was responded to specifically. Nobody seems to have known it by number at that time. The sketch gave none of the numbers, nor did either letter mention a number. The request for the inquiry seems to have been made by location only. None of the parties seem to have had the plat before them or to have remembered the numbers. If they had had it, the descriptions would, no doubt, have been given by the numbers, and it would have revealed the error as to the area of No. 4.

Though Rhodes may be regarded as having been a mere medium of communication, not an agent of either party, the vendor must be regarded as having spoken from the sketch and letter of October 13, 1911, and they may be considered upon the inquiry for his meaning and intent as he expressed them, and it is that intent, not something he entertained, but failed to express, that determines what the contract was, or whether a contract resulted. So regarded, his letter must be taken to have related to lot No. 4, not a fractional part thereof. Evidently he either did not know the size of the lot, or neglected to qualify his acceptance of the offer of purchase. He says he did know it, but he most assuredly failed to mention his intent to sell only a part, or to make known the departure of the sketch from the fact. Hence he made the contract under a mistake as to the area of the lot or by mistake in the acceptance of the offer of purchase or grant of the option accepted by the vendees. Proof of such a mistake does not negative the existence of a contract. Many of them are founded upon mistakes, but they are contracts nevertheless. In the legal sense of the terms, the minds of the parties met, notwithstanding the mistake. It is not the actual intent, but the expressed intent, that determines such questions.

Mistakes under the influence of which parties make contracts, or mistakes in the formulation thereof, often afford ground for relief in equity. But to have such effect the mistake ordinarily must be mutual, or the mistake of one party must have been induced or caused by fraud on the part

of the other. In either of these cases, a court of equity will rescind the contract. *Biggs v. Bailey*, 40 W. Va. 188, 38 S. E. 499; *Brown v. Rice*, 26 Gratt. 467; *Kerr, Fr. & Mistake*, 413. A mistake made in the expression of the contract is always fatal; for in that case the written contract is not the one actually made. *Kerr, Fr. & Mistake*, 413. "If the mistake is not in the expression of the agreement, but in some fact materially inducing it, the mere knowledge in the one party of a mistake in the other party does not, in the absence of a duty to disclose, or other special circumstances, constitute a sufficient ground in equity for avoiding the agreement." *Kerr, Fr. & Mistake*, 414; *Merchants' Bank v. Campbell*, 75 Va. 455.

But in granting such relief equity does not declare there was no contract. Its jurisdiction stands upon the assumption that there is one and is interposed to relieve from it. In this respect there is a marked distinction between equity jurisdiction to rescind a contract, and jurisdiction to compel specific performance, founded upon the theory of discretion. In the former case the power of the court seems not to be discretionary, but in the latter it is to some extent at least. In the former the injured party cannot, as a general rule, obtain any relief from his contract in a court of law. In the latter he may recover damages for nonperformance, and this right is the basis of the discretionary power of courts of equity to refuse specific performance, when applications are made to them for enforcement of hard or oppressive bargains.

A unilateral mistake, not induced by the opposite party, may therefore be sufficient to justify a court in refusing to decree specific performance of the contract. *Pom. Spec. Perf.* § 252; *Kerr, Fr. & Mistake*, p. 411; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258. Whether the mistake developed here would justify the exercise of such discretion, it is unnecessary to decide, for a reason hereinafter to be stated.

The mistake did not warrant rescission of the contract, because it was purely unilateral. Neither the plaintiff nor its assignor or agent was in any way responsible for the terms of the letter of November 5, 1911, or the message delivered under the authority it conferred. If the vendor intended to say something he did not say, or misapprehended the meaning of the words he used, that was his mistake. If he did not know the size of the lot, that was an oversight on his part for which the vendee was not responsible. If the promoters discovered the error as to the size of the lot, L.R.A.1917A.

there is no proof that they concealed their information from the vendors or did anything to hide the truth from them. Had they done so, their conduct might have afforded ground for absolute relief by way of rescission. *Merchants' Bank v. Campbell*, supra.

The mistake, therefore, could only be relied upon in resistance of the application for specific performance, and as ground for an appeal to the discretion of the court. In the absence of part performance of the contract, it might be sufficient for that purpose. Whether it would or not, it is not necessary to say. The entry upon the land and improvement thereof create a powerful equity in the plaintiff, to which the court cannot shut its eyes. The vendors need not have admitted the vendees into possession in advance of the execution of the deed. Having permitted them to enter and thus to alter their position and situation to such an extent, by improvement of the lot and location of their business thereon, that no legal remedy will adequately compensate for the breach of the contract as made, the vendors are clearly estopped from setting up their own mistake in resistance of completion of the contract. Part performance, such as has taken place here, creates an equity of such overpowering strength that courts everywhere permit it to take verbal contracts out of the statute of frauds, on the ground that the legislature could never have intended it to operate in such cases, even though they are within its letter. And every legislative body within the sphere of English civilization, from the British Parliament down to that of the smallest territory, has acquiesced in that interpretation. Having such potency and merit, it is surely sufficient to constitute an estoppel against an equity, not at all relieving from the contract, but sufficient only to induce a court of equity to remit the parties to their legal rights.

The brief of the appellees suggests a variance of the evidence from the bill as to the parties to the contract, but the bill and the evidence, taken altogether, show the purchase was made for the plaintiff company.

From the principles and conclusions here announced, it results that the plaintiff has right to enjoin the prosecution of the possessory action, and also to have the contract of sale of the lot specifically performed. As the Johnson Realty Company purchased the 20-foot strip of lot No. 4, and obtained the legal title thereto, with notice of the plaintiff's equitable title, it holds the legal

title as a trustee for the plaintiff, wherefore it will be required to make conveyance thereof to the plaintiff, with a covenant of special warranty.

As the contract was informal and indefinite and related to so much of lot No. 4 as belonging to the Matthew Mann estate, the conveyance to be made by the executors and trustees of that estate will omit the small parallelogram in the northwest cor-

ner of the lot, held by Mrs. Ester under a claim of title by adverse possession.

The decree complained of will be reversed, the injunction reinstated and made perpetual, relief granted the plaintiff as above indicated, and the cause remanded for execution of the decree here pronounced.

Petition for rehearing denied September 12, 1916.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LOUIS K. LIGGETT COMPANY

v.

HARRY A. WILSON et al., Appts.

(224 Mass. 456, 113 N. E. 184.)

Landlord and tenant — assignment for creditors — re-entry — effect.

The interest of the tenant ceases when the landlord acts upon a condition in the lease that, in case of the tenant's assignment for benefit of creditors, the lessor shall have the right to re-enter the premises and again repossess the same and relet them as the agent of the lessee and hold the lessee liable for the deficiency, so that he can recover no rent accruing after re-entry, although the lease also provides that no action by the lessor shall deprive him of his full legal rights against the lessee because of any unpaid rentals under the terms of the lease.

For other cases, see Landlord and Tenant, II. d, 1, in Dig. 1-52 N. S.

(June 21, 1916.)

APPEAL by defendants from an order of the Municipal Court of Boston, Appellate Division, dismissing the report made by the Trial Court to it in an action brought to recover rent alleged to be due and unpaid which had resulted in rulings in plaintiff's favor. Reversed.

The facts are stated in the opinion.

Messrs. Horace G. Allen and Harry W. Conant, for appellants:

Where a landlord enters for breach of the conditions of a lease and resumes possession, the liability for rent ceases, and the only liability of the tenant is upon the covenants, if any, in the lease which survive entry. Rent is based on occupation,

Note.—As to effect of re-entry by landlord after bankruptcy of, or assignment for creditors by, tenant, upon latter's liability for subsequent rent, see annotation following this case, *post*, 208.
L.R.A.1917A.

and, occupation having ceased, the rent ceases.

Woodbury v. Sparrell Print, 187 Mass. 426, 73 N. E. 547; Vogel v. Piper, 89 N. Y. Supp. 431; Hall v. Gould, 13 N. Y. 127; Cotting v. Hooper, L. & Co. 220 Mass. 273, 107 N. E. 931; Bowditch v. Raymond, 146 Mass. 109, 15 N. E. 285; Re Lake, 2 Low. Dec. 544, Fed. Cas. No. 7,991; Re Shaffer, 124 Fed. 111; Re Hevenor, 144 N. Y. 271, 39 N. E. 393; Re Ellis, 98 Fed. 967.

Messrs. Gaston, Snow, & Saltonstall and Gaspar G. Bacon, for plaintiff:

If the lessor, after resuming possession, makes a reasonable attempt to relet, but is unsuccessful, he can recover from the lessee "a sum of money equal in amount to the rent."

Weeks v. International Trust Co. 60 C. C. A. 236, 125 Fed. 370; McCready v. Lindenhorn, 172 N. Y. 400, 65 N. E. 208; Joyce v. Spafford, 101 Ill. App. 422; Way v. Reed, 6 Allen, 364; Woodbury v. Sparrell Print, 187 Mass. 426, 73 N. E. 547.

The lessee being in default under the terms of the lease at the time suit was brought, the defendants are personally liable under the guaranty set forth in said lease.

Roth v. Adams, 185 Mass. 341, 70 N. E. 445; Bothfield v. Gordon, 190 Mass. 567, 5 L.R.A.(N.S.) 764, 112 Am. St. Rep. 341, 77 N. E. 639.

Loring, J., delivered the opinion of the court:

The lease here in question manifestly is drawn by one who did not appreciate the meaning of the legal terms which he used, or, speaking with more accuracy, which he attempted to use. For the difficulty which we have in construing the lease arises from the fact that the person who drew it did no more than make an attempt at using legal terms. The lease is badly drawn, and no construction can be given to it which is not open to question.

Before undertaking to determine the true construction of the lease in question, it is

well to have a clear understanding of the clauses found in leases which are evidently the foundation of the clause here in question, and of the purposes for which those clauses are adopted.

Where a lessee becomes bankrupt (or otherwise unable to meet his obligations) unless some clause providing for the contingency is inserted in the lease, the lessee continues to be the owner of the term created by the lease, and all that the lessor can get is such dividend on the amount of the rent as the bankrupt lessee can pay. To protect the landlord against that contingency it is not uncommon to insert in leases a clause providing: (1) That the leasehold estate shall be conditioned upon the lessee not becoming bankrupt (or otherwise unable to pay his debts); and (2) that if the lessee does become bankrupt (or otherwise unable to pay his debts) the lessor may enter and end the leasehold estate for condition broken. If the contingency arises, and the lessor does enter and end the leasehold estate, the loss to the lessor mentioned above is avoided.

The terms of the condition authorizing the lessor to re-enter and end the leasehold estate (in case the lessee becomes bankrupt or otherwise unable to pay his debts) usually inserted in leases in this commonwealth, are in substance these: The lease is made on condition that if the lessee fails to perform any of the covenants or be declared bankrupt or insolvent, or if an assignment be made of the lessee's property, or if this leasehold interest should be taken on execution, then the lessor may "terminate this lease, enter upon the said premises, and, expelling the lessee and removing its effects (forcibly if necessary), without being deemed guilty of any manner of trespass, and without prejudice to any rights or remedies hereunder, repossess the same as of their former estate." This, for example, was the form of the right of re-entry in the lease in question in *Woodbury v. Sparrell Print*, 187 Mass. 426, 73 N. E. 547, and in *Cotting v. Hooper, L. & Co.* 220 Mass. 273, 107 N. E. 931.

But it was found in practice that when a lessor, to protect himself against this loss, was forced to enter and end the leasehold estate, he might not be able to let the estate for as large a rent as that reserved in the lease, and so lost the benefit of the bargain which the lease gave him. In recent years it has been not uncommon for parties to insert in leases a clause to protect the landlord against the loss of his bargain under such circumstances. For example: In the lease in question in *Woodbury v. Sparrell Print*, *ubi supra*, it was provided that on such termination of the lease:

"The lessee shall be liable to the lessor for all loss and damage sustained by the lessors on account of the premises remaining unleased, or being let for the remainder of the term for a less rent than that herein reserved."

Another covenant to protect the landlord in such a contingency is that found in the lease in question in *Cutting v. Hooper, L. & Co.* *ubi supra*. The covenant in that case was that the lessee would indemnify the lessor (as in *Woodbury v. Sparrell Print*, *ubi supra*), "or at the election of the lessors the lessee will upon such termination pay to the lessors as damages such sum as at the time of such termination represents the difference between the rental value of the premises for the remainder of the said term and the rent and other payments herein named." A third covenant of this kind is that found in the lease in question in *Weeks v. International Trust Co.* 60 C. C. A. 236, 125 Fed. 370. The clause in the lease in question in that case required the lessee to pay to the lessor during the term for which the lease originally was to have run, the difference between the rent reserved in the lease and the amount received by the lessor on reletting the premises at the lessee's risk.

In the case at bar the judge who tried the case found that on the keys being delivered to the lessor on or about November 18, 1914, he "took possession of said premises under the terms of said lease."

The plaintiff's contention is that by taking possession on November 18th under the terms of the lease he did not terminate the leasehold estate created by the lease.

In support of this contention he argues that the provision found in the clause of the lease here in question¹ does not provide in terms that upon the lessor entering the term shall come to an end. Nor that when he did "repossess the same" he should repossess the same as of his former estate.

¹ Conditioned that in case of nonpayment of the rent at the time and in the manner above provided, or should the lessee be declared a bankrupt or make an assignment for the benefit of his creditors, or if default shall be made in any of the covenants or agreements herein contained, the said lessor shall have the right, without notice, to enter the said premises either by force or otherwise, and to again repossess the same, and to relet the said premises as the agent of the said lessee and to receive the rents due by these presents, and hold the said lessee liable for any deficiency, it being understood that neither this nor any other action on the part of the lessor shall in any wise deprive said lessor of its full legal rights against the lessee because of any unpaid rentals under the terms of this lease."

On the contrary it provides that upon repossessing the same he should have the right "to relet the said premises as the agent of the said lessee, and to receive the rents due by these presents," and after that it is provided: "It being understood that neither this nor any other action on the part of the lessor shall in any wise deprive the said lessor of its full legal rights against the lessee because of any unpaid rentals under the terms of this lease."

We do not think that the last clause is important. It is usual to insert such a clause in leases, to make sure as a matter of precaution that when a lessor enters and terminates a lease he does not lose his right to the rents which had theretofore accrued. In the lease in question in *Cotting v. Hooper, L. & Co. ubi supra*, the clause inserted for that purpose was: "Without prejudice to any remedies which might otherwise be . . . used for arrears of rent or preceding breach of covenant."

Seemingly this clause was taken from such a clause in leases. We are of opinion that this clause in the lease here in question should not be construed to have any other or different effect.

The objection to the construction urged by the plaintiff is that if it is the true construction of this clause the clause is altogether futile. If all that this clause gives to the lessor is a right (in case the lessee becomes a bankrupt or makes an assignment for the benefit of his creditors, etc.) to take possession of the premises as agent of the lessee and relet them on the lessee's account, it might as well have been left out of the lease. If that is the true construction of the lease, all that the lessor is entitled to in case he enters under this clause and relets the premises is to recover what he can for the rents due him from the original lessee. The rents due from the subtenant in such a case would belong to the original lessee, and not to the lessor. If the effect of the entry by the lessor does not put an end to the tenant's leasehold estate it is hardly conceivable that the parties would have inserted this clause in the lease. More than that, this whole clause begins with the word "conditioned." It is a clause making the leasehold estate created by the lease a conditional term. It is true that it does not in terms state that the lease shall be terminated if the condition takes place and an entry is made by the lessor for condition broken. But that goes with the fact that the clause creates a condition. It is also true that this clause provides that the lessor, upon entering, shall have a right "to again repossess the same." The usual clause is as already stated, that the lessor shall have a right "to repossess

the same as of his former estate." It is to be observed that the clause does not provide that the lessor shall have the right to "repossess the same" as agent of the lessee. The right given is "to repossess the same." When the lessor has repossessed the same, then he is given the right "to relet the same premises as agent of the lessee."

Having in mind the futility of the clause if it is construed as the plaintiff contends, and having in mind that the clause is a clause which made the tenant's leasehold estate a conditional one, we are of opinion that by its true construction when the lessor exercised the right given him of entering and repossessing himself of the same, it must be construed to mean that when the lessor entered under the clause he repossessed himself of the property as of his former estate.

The other provision to be dealt with in construing this clause of the lease is the provision that upon entering the lessor shall have a right "to relet said premises as the agent of said lessee, and to receive the rents due by these presents, and holding the said lessee liable for any deficiency." On its face this would seem to be a clause like that in *Weeks v. International Trust Co. ubi supra*, and to provide that each month during the remainder of the term which would otherwise have continued in existence, the lessor may recover from the lessee the difference between the amount named as rent in the lease and the sum for which the premises have been let at the lessee's risk for that month.

Apparently the defendants who guaranteed the due performance of the covenants and agreements of the lease are pecuniarily able to respond, and for that reason it is now for the interest of the plaintiff in the case at bar to contend that the lease here in question has not come to an end. But that was not the situation when the lease was made. If that had been the situation then there would have been no occasion for inserting in the lease the clause here in question. More than that, if the lessor had been content to rely solely on the responsibility of the guarantors when the lessee made an assignment for the benefit of its creditors, it would not have entered under this clause of the lease. It is manifest that this clause was inserted in the lease, and the entry under it was made by the lessor (the plaintiff) to obtain security in addition to that given by the defendants' guaranty. The lease and the plaintiff's action must be construed in the light of the events which obtained when the lease was drawn and the entry was made.

We are of opinion that the leasehold estate came to an end when the keys were

delivered to the lessor on November 18, 1914. It follows that the plaintiff was not entitled to recover rent for the month of November. The declaration in the case at bar is a declaration to recover rent, and not a declaration to recover a sum of money equal in amount to the rent less such sum as the lessor had received on reletting the premises.

The whole lease is not before us. We do not know whether it contains a covenant which would enable the lessor to recover rent for the portion of the month of November which had expired before the keys were surrendered on November 18th. This question was not dealt with at the argument. Under these circumstances we are of opinion that the case should stand for further

proceedings in the municipal court in spite of the finding² made by the judge who tried the case, which would seem to justify a recovery under some form of pleading of the sum found to be due.

The entry must be: Order dismissing appeal must be reversed. The case to stand for further proceedings in the Municipal Court.

So ordered.

² The judge found: "4. That Louis K. Liggett Company, the lessor, after having repossessed the premises on or about November 18, 1914, has made reasonable effort in the interest of the lessee as well as its own, to obtain a new tenant and has to date been unsuccessful."

Annotation—Effect of re-entry by landlord after bankruptcy of, or assignment for creditors by, tenant, upon latter's liability for subsequent rent.

As to provability in bankruptcy of claim under a covenant indemnifying against loss of rent, or accelerating future rent in event of default, see note to *Re Roth*, 31 L.R.A.(N.S.) 270. As to vesting of title to leasehold in lessee's trustee in bankruptcy as dependent upon acceptance by trustee, see note to *Re Frazin*, 33 L.R.A.(N.S.) 745. As to whether provisions in lease accelerating maturity of future rents and giving lessor right to take possession upon default in payment of rentals or upon insolvency of lessee are alternative or concurrent, see annotation to *Re Miller Bros. Grocery Co.* L.R.A.1916B, 1101. And as to liability for rent of premises occupied by receiver or assignee for creditors, see note to *Link Belt Machinery Co. v. Hughes*, 59 L.R.A. 673.

The general rule seems to be that re-entry of a landlord pursuant to the terms of the lease for condition broken in that the tenant has become bankrupt or made an assignment for creditors terminates the lease and precludes recovery from the tenant of unpaid rentals for the balance of the term, in the absence of an express stipulation to the contrary, the only liability in such a case being on covenants which survive entry. Likewise the rule is that re-entry under a lease for condition broken, such as the bankruptcy of the tenant, terminates the lease, in the absence of express stipulation to the contrary, general covenants not being sufficient to work a continuance of the relation of landlord and tenant.

These rules find support in *LOUIS K. L.R.A.1917A.*

LIGGETT CO. v. WILSON, ante, 205, wherein it was held that the interest of a tenant ceases when the landlord acts upon a condition in the lease that in case of the tenant's assignment for creditors the lessor may re-enter, repossess, and relet the premises as the agent of the lessee, and hold the lessee liable for the deficiency, so that no rent accruing after such re-entry can be recovered from the lessee, although the lease also provided that no action by the lessor should deprive him of his full rights against the lessee because of any unpaid rentals under the terms of the lease; the court maintaining that the latter provision was not important, but rather must be regarded as having been inserted as a precaution that the lessor, upon entering and terminating the lease, should not lose his rights with respect to rents theretofore accrued.

And in *Galbraith v. Wood* (1914) 124 Minn. 210, 50 L.R.A.(N.S.) 1034, 144 N. W. 945, Ann. Cas. 1915B, 609, where the lease expressly provided that, upon bankruptcy of the lessee, the lessors might declare the term ended and re-enter the premises, and that such termination and re-entry should in "no manner act as a forfeiture of any rent due or to grow due, or the right of said lessors to the performance of the covenants and agreements by said lessee to be kept and performed as specified herein," it was said that the lessors upon bankruptcy of the tenant could not re-enter the premises without terminating the lease, and therefore that the lessee could not be held to the performance of all the covenants of the lease, including

the payment of rent for the balance of the term, as the lease did not give such a right; the rule being that upon termination of a lease for condition broken the lessor is not, in the absence of an express agreement, entitled to recover rent subsequently to become due.

So, in *Re Winfield Mfg. Co.* (1905) 137 Fed. 984, it was held that the mere fact that a lease provided that upon the filing of a petition in bankruptcy the entire rent reserved for the term of the lease should immediately become due and payable, and that in such a case the lessors might proceed as in case of a breach of a covenant under the lease, did not entitle the lessor to recover the rent for that part of the term extending beyond the time when he accepted a surrender of the lease and reassumed possession of the leased property after the bankruptcy of the tenant. This case, by agreement of counsel, was sent back to the referee, who in a supplemental report found that there was no acceptance of the receiver's attempted surrender, but nevertheless the landlord's claim for priority was denied upon the ground that the time of filing the petition in bankruptcy fixes the status of persons entitled to priority. (1905) 140 Fed. 185.

And it has been held that rent after re-entry cannot be recovered by the lessors unless a reasonable effort has been made to relet the premises, where the lease provides that after re-entry, as expressly provided for upon insolvency of the lessee, the lessors "may, at their discretion, relet the premises at the risk of the lessee, who shall remain for the residue of said term responsible for the rent herein reserved, and shall be credited with such amounts only as shall be by the lessors actually realized." *International Trust Co. v. Weeks* (1906) 203 U. S. 364, 51 L. ed. 224, 27 Sup. Ct. Rep. 69, affirming (1905) 71 C. C. A. 417, 139 Fed. 5. And see same case on former appeal in (1903) 60 C. C. A. 236, 125 Fed. 370, which reversed (1902) 116 Fed. 898.

Another case of material interest in connection with the present question is *Lamson Consol. Store Service Co. v. Bowland* (1902) 52 C. C. A. 335, 114 Fed. 639, which involved the question of the right to prove a claim for unaccrued rent in bankruptcy, but in which the court, in part at least, discussed the question from the viewpoint of the liability of the lessee therefor. In this case a store-service apparatus was leased, with a condition that, if any instalment

of rent should remain unpaid for sixty days, the rent for the entire term should at once become due, and that in case of bankruptcy the lessor might re-enter and thereby "determine all rights and interests the said lessee may have in such system." It was also provided that no removal of the system by the lessor during the term "on account of the determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of this lease." The lessee became bankrupt on the day before an instalment of rent, which was payable quarterly in advance, became due, whereupon the lessor took possession of the leased apparatus and filed a claim for the rent for the entire balance of the term of the lease, claiming that the failure to pay the instalment due on the day following the filing of the petition in bankruptcy precipitated the maturity of the entire rental for the unexpired balance of the term; but the court rejected the claim, and, after asking what were the rights of the lessor in respect to the rents which had not accrued when the petition in bankruptcy was filed, among other things said: "It is entirely competent to contract that the consequence of a default in the payment of an instalment of interest for the use of money, or of rent for the use of property, shall be the preciptancy of the maturity of the principal of the money loaned, or of future instalments for the rental of the property in respect to which default has been made. Rent is the compensation for the use and enjoyment of the thing rented, and is ordinarily demandable whether the tenant actually enjoy the use and possession of the subject of the rent or not, unless the failure is due to some fault of the letter. But in this case the letter demands that the lessee shall continue to pay rent, although it has repossessed itself of the thing for the enjoyment of which the rent is to be paid. The resumption of possession by a lessor operates as a surrender of the lease, and puts an end to the liability of the lessee for future rents, unless otherwise provided. . . . In the lease here under consideration, the lessor has reserved the right to resume possession in quite a number of contingencies, the effect of which the contract declares shall be to 'determine all right and interest the said lessee may have in said system.' Without more, it cannot be that the lessee shall be liable for the future rents, when the effect of the act of the lessor has been to determine all of

his right and interest in the subject of the lease. Forfeitures are never favored, and when it is claimed that the lessor of property may resume possession of the subject-matter of the lease, and continue to hold the lessee liable for future rents, although deprived of the use and enjoyment of the thing leased, the terms of the bond must be exceedingly plain. Liability under such circumstances for future rents would be in the nature of a penalty, and the covenant by which the lessor may have both the use of the thing rented, and the compensation which the lessee was to pay for its use, must be so specific as that no other reasonable interpretation can be placed upon it. . . . The contention is that under the provision quoted the lessor may resume possession of the leased property upon the happening of any one of the contingencies mentioned, without the surrender of the lease as a consequence. The catalogue of contingencies authorizing a resumption of possession and a removal of the leased mechanism is followed by a declaration as to the effect of the lessor's act, in these words, 'and thereby determine all right and interest the said lessee may have in said system.' The necessary consequence of a determination of the lessee's right and interest at the election of the landlord must be to put an end to the lessee's liability for future rents, in the absence of some specific agreement otherwise. That this was the intention of the parties seems very plain from the last sentence of the clause, which provides that 'no removal of said system made by the lessor . . . on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of this lease.' It is plain, then, that if the lessor has resumed possession and removed the system for any reason other than the termination of 'the lessee's tenancy,' or some 'default by the lessee,' the effect must be the usual and legal consequence of a resumption of possession by a lessor,—the determination of the lease. The reference to a removal 'on account of any determination of the lessee's tenancy' refers to the 7th paragraph of the lease, providing for notice to the lessor 'of any determination of the lessee's tenancy in said store, so that the lessor may have the right to remove said system, if necessary, without hindrance on the part of the landlord.' The only other case, then, in which a removal by the lessor of the system is not to constitute a surrender of the lease is when the posses-

sion has been recovered in consequence of some 'default by the lessee.' On what authority has the lessor taken possession of the leased store service? That the lessor did take possession about the date of the adjudication in bankruptcy is reported by the referee. But on what ground in this justified? Unless the appellant can show that this conceded possession was taken upon some ground which kept the lease alive, the appeal must fail. It was stated at the bar, and in the printed brief of counsel, that 'the Lamson Consolidated Store Service Company, in accordance with its custom in case of bankruptcy, removed its system from the store of the bankrupt, as a protection to its own business, and to prevent such system from falling into the hands of persons unauthorized to use the same.' An adjudication of bankruptcy against the lessee would seem to justify the lessor in recovering possession. But the result would be the surrender of the lease. Thereafter no right to exact future rents would remain. If this appellant has the right to collect future rents after recovering the possession and enjoyment of the leased property, it must make out a clear case. . . . Inasmuch as the agreement does not provide in express terms that the liability of the lessee should continue after the re-entry of the lessor, we must conclude that no liability for future rents was intended."

But where the landlord re-enters upon the bankruptcy of the tenant, under the terms of the lease, as agent of the tenant to relet the premises for his benefit, the tenant being liable for any deficiency between the rent reserved in the lease and the rent collected from the one to whom the premises are relet after the re-entry, such a re-entry does not terminate the lease, and an action may be maintained against the tenant for any deficiency, but not until the expiration of the lease, as the amount of the deficiency, if any, cannot be sooner determined. *Kamioner v. Balkind* (1916) 93 Misc. 458, 158 N. Y. Supp. 310.

And see *Re Collington* (1900) 4 Am. Bankr. Rep. (Fed.) 250, wherein it was said that although a landlord could not prove up unaccrued rent against the estate in bankruptcy, he "can doubtless hold the lessee" for a probable deficiency, the latter having covenanted to pay any deficiency upon a re-entry for covenant broken and a re-letting of the premises at a lesser rental than that called for in the lease, such a re-entry and re-letting having been made. G. J. C.

MAINE SUPREME JUDICIAL COURT.

PHILIP HOWARD
v.
CHARLES M. HARRINGTON.

LUCIUS H. DUNCAN
v.
HERBERT W. KEEP.

(114 Me. 443, 96 Atl. 769.)

Office — incompatibility — mayor and judge.

1. The acceptance by the mayor of a city of the office of judge of the police court ipso facto vacates the office of mayor, where, under the statutes, the mayor is charged with the duty of prosecuting certain offenses before the police judge.

For other cases, see Officers, I. c, in Dig. 1-52 N. S.

Election — contest — regularity of ballot — equal division of opinion of court.

2. A ballot in a contested election case cannot be counted if the judges of the court are equally divided in opinion upon the question.

For other cases, see Elections, V. in Dig. 1-52 N. S.

Same — writing duplicate name.

3. A ballot is not made illegal by writing in the name of a candidate already appearing on the printed form.

For other cases, see Elections, III. b, in Dig. 1-52 N. S.

Same — duplication of name — writing and sticker.

4. A ballot is not nullified by placing the name of a candidate thereon both in writing and by sticker.

For other cases, see Elections, III. b, in Dig. 1-52 N. S.

Same — discrepancy in count of ballots — return accepted.

5. The count as made by the election officers, and not that found at the time of an election contest, should be accepted where there is nothing to show absence of opportunity for tampering with the ballots in the interim.

For other cases, see Elections, V. in Dig. 1-52 N. S.

Appeal — election contest — procedure.

6. An election contest cannot be sent to the law court on report, where the statute provides a hearing by the single justice, and appeal from his decision to the remaining justices.

For other cases, see Elections, V. in Dig. 1-52 N. S.

(March 1, 1916.)

Note. — As to incompatibility of offices at common law, see annotation following this case, post, 216.
L.R.A.1917A.

PETITIONS to determine the results of an election in the City of Rockland for the offices of mayor and alderman. Petitions dismissed.

The facts are stated in the opinion.

Mr. Philip Howard for petitioners.

Messrs. A. S. Littlefield, E. K. Gould, and M. W. Weymouth for respondents.

Savage, Ch. J., delivered the opinion of the court:

These petitions are brought under the provisions of Revised Statutes, chap. 6, § 70, to determine the results of the election, March 1, 1915, in the city of Rockland, so far as concerns the mayor and one alderman.

I. The Howard Petition.

The petitioner and the respondent were both candidates for the office of mayor. The respondent was declared elected. The petitioner claims that a majority of the legal ballots were cast for him, but that the counting officers refused to count ballots, on the ground that they were defective, that should have been counted for him, and counted defective ballots for the respondent, which should not have been counted. The case is also concerned with some ballots which were cast by men who, it is claimed, were paupers, and so disqualified, and with the ballot of one man claimed to have been illegally registered. There is also a controversy as to the number of ballots actually cast for each party in ward 1. The conclusion we have reached makes it unnecessary to consider any of these questions.

It is admitted that the petitioner was appointed judge of the police court of Rockland by the governor March 17, 1915; that the appointment was confirmed; that a commission issued to him March 24, 1915, and that since then he has been legally holding that office and performing its duties. And the respondent sets up in his answer, and now contends, that the offices of mayor of Rockland and of judge of the police court of Rockland are incompatible, both under the Constitution and at common law, and that the petitioner, even if elected mayor, vacated his election ipso facto by being appointed judge of the police court and accepting that office. He therefore contends that the petitioner has now no right, title, or interest in the office of mayor, and for that reason is not entitled to prosecute this petition.

It is well settled that one person cannot hold two incompatible offices, and that the acceptance of the later office vacates ipso facto the prior one. In this state the question was first discussed in Opinion of

Justices, 3 Me. 484. It was there considered that the offices of sheriff and justice of the peace were incompatible, on the ground that sheriffs belong to the executive department of the state, and justices of the peace to the judicial, and that for one person to hold both of these offices would be in violation of the Constitution, article 3, § 2, of which provides that "no person or persons belonging to one of these departments [legislative, executive, and judicial] shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

In *Bamford v. Melvin*, 7 Me. 14, the offices of deputy sheriff and justice of the peace were held to be incompatible, for the reason given in 3 Me. 484, *supra*. In *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251, this court said: "Where one has two incompatible offices, both cannot be retained. The public has a right to know which is held and which is surrendered. It should not be left to chance, or the uncertain and fluctuating whim of the office holder to determine. The general rule, therefore, that the acceptance of and qualification for an office incompatible with one then held is a resignation of the former, is one certain and reliable, as well as one indispensable for the protection of the public."

And the court in that case held that an acceptance of the office of deputy sheriff was a surrender of the office of trial justice. See to same effect, *Pooler v. Reed*, 73 Me. 129.

That the judge of the police court of Rockland belongs to the judicial department of the state cannot be questioned. The court was created under that provision of the Constitution (art. 6, § 1) which declares that "the judicial power of this state shall be vested in a supreme judicial court, and such other courts as the legislature shall, from time to time, establish."

Whether a mayor of a city belongs to the executive department of the state we think is a question which need not now be expressly decided. It has been pointed out that a distinction may exist between a municipal officer whose functions relate exclusively to local concerns of the particular community, and one whom the law vests with powers and charges with duties which concern the general public. *Atty. Gen. ex rel. Moreland v. Detroit*, 112 Mich. 145, 37 L.R.A. 211, 70 N. W. 450; 1 Dill. Mun. Corp. § 58. In this state the duties of a mayor are not limited to the performance of mere municipal functions and attending to the municipal business. As will be seen hereafter, he is charged by the Public Statutes with certain duties which concern the public

interest. He is required specially to enforce certain criminal statutes enacted for the general public good, and which are a part of the general machinery adopted to suppress crime and promote the public well-being. We think there is much ground for holding that he is a part of the executive department of the state, within the meaning of the Constitution. But it is unnecessary in this case to decide that question. We prefer to place our decision upon another ground.

The answer to the question before us does not necessarily depend upon constitutional or statutory provisions. The doctrine of the incompatibility of offices is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is: What constitutes incompatibility? This question has been answered by the courts with varying language, but generally with the same sense. We cite a few examples:

"Two offices are incompatible when the holder cannot in every instance discharge the duties of each. . . . The acceptance of the second office, therefore, vacates the first." *Rex v. Tizzard*, 9 Barn. & C. 418, 109 Eng. Reprint, 155. This language is cited with approval by this court in *Stubbs v. Lee*, *supra*.

"Incompatibility . . . must be such as arises from the nature of the duties, in view of the relation of the two offices to each other." *Bryan v. Cattell*, 15 Iowa, 538.

Incompatibility arises "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both." *Abry v. Gray*, 58 Kan. 148, 48 Pac. 577.

"Incompatibility between two officers" exists when there "is an inconsistency in the functions of the two." *People ex rel. Ryan v. Green*, 58 N. Y. 295.

"The functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices." *Kenney v. Goergen*, 36 Minn. 190, 31 N. W. 210.

"The test of incompatibility is the character and relation of the offices, as . . . where the functions of the two offices are inherently inconsistent and repugnant." *State ex rel. Metcalf v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226.

"The true test is whether the two offices are incompatible in their natures, in the rights, duties, or obligations connected with or flowing out of them." *State ex rel. Clawson v. Thompson*, 20 N. J. L. 689.

The foregoing cases may also be cited in support of the doctrine that acceptance of

the latter of two incompatible offices vacates the former. See also *Cotton v. Phillips*, 56 N. H. 220; *People ex rel. Whiting v. Carrique*, 2 Hill, 93; *Van Orsdall v. Hazard*, 3 Hill, 243; *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; 3 Comyns's Dig. title Officer (K. 5); *Mechem*, Pub. Off. § 420. An office holder is not at common law ineligible to appointment or election to another and incompatible office, but the acceptance of the latter vacates the former.

Now, to apply those principles to the present case: The police court of Rockland has a civil and a criminal jurisdiction. It has exclusive jurisdiction under its charter over all such offenses committed within the limits of the city of Rockland as are cognizable by trial justices. P. & S. Laws of 1909, chap. 368. It has jurisdiction of violations of any statute where the offense is not of a high and aggravated nature. Rev. Stat. chap. 133, § 4. It has exclusive jurisdiction of all offenses against the ordinances and by-laws of the city of Rockland. P. & S. Laws 1903, chap. 114, § 3. It has jurisdiction of all offenses against the prohibitory liquor statute, except for keeping drinking houses and tipping shops and for being common sellers of intoxicating liquor. Rev. Stat. chap. 29, § 60. It may, on complaint, cause to be arrested all persons charged with felonies, offenses, and misdemeanors, and, when an offense is found to be one not within its jurisdiction for trial, it may cause the offender to recognize with sufficient sureties to appear before the supreme judicial court. Rev. Stat. chap. 133, § 5.

The charter of the city of Rockland (P. & S. Laws 1905, chap. 122) provides as follows:

Sec. 3. "The mayor of said city shall be the chief executive officer thereof; it shall be his duty to be vigilant and active in causing the laws and regulations of the city to be executed and enforced; to exercise a general supervision over the conduct of all subordinate officers, and cause neglect or violations of duty to be punished."

Sec. 5. "The executive powers of said city generally, and the administration of police and health departments, . . . shall be vested in the mayor and aldermen."

The statutes of this state (chapter 29, § 65) provides that "the mayor and aldermen, . . . in every city, . . . shall make complaint and prosecute all violations of this chapter [the prohibitory liquor law], and promptly enforce the laws against drinking houses."

For wilful neglect or refusal, after being furnished with written notice of a violation signed by two persons competent to be witnesses in civil suits, containing the L.R.A.1917A.

names and residences of the witnesses to prove the offense, to institute proceedings therefor, he shall be fined not less than twenty nor more than fifty dollars.

The municipal officers, of whom the mayor is one (Rev. Stat. chap. 1, § 6, ¶ 25), are specially required by statute promptly to enforce the laws against houses of ill fame (Rev. Stat. chap. 125, § 9), and against gambling rooms (Rev. Stat. chap. 126, § 1), and in each case "to make complaint against any person . . . in their respective municipalities, when there is probable cause to believe such person . . . guilty of a violation" of the statute. It is made the duty of the mayor "forthwith to proceed to sue" for an election bet or wager made, as soon as he has the proper evidence. Rev. Stat. chap. 6, § 97. We think it is unnecessary to go further in this direction.

In many instances in the statutes the mayor, either alone or as one of the municipal officers, is charged with the performance of duties, and for neglect or refusal to perform the same is made liable to fine or forfeiture, criminally or civilly. And the police court of Rockland has exclusive jurisdiction upon complaint to try the mayor for such neglect or refusal in some classes of cases, and may hold the offender for the supreme judicial court in others. And where the forfeiture is recoverable in an action at law, it likewise has jurisdiction, sometimes exclusive. See Rev. Stat. chap. 4, §§ 53, 57, 112; chap. 6, § 98; chap. 23, § 92; chap. 28, §§ 42, 46, 53; chap. 44, § 5; chap. 124, § 11; chap. 128, § 10. It needs no argument to show that the mayor cannot be respondent and judge of the police court at the same time. If he is judge, he cannot be prosecuted in that court for his defaults as mayor, nor anywhere else in cases within the exclusive jurisdiction of that court.

Discussion cannot make the situation clearer. As mayor it would be the duty of the petitioner to prosecute certain classes of offenses, if any have been committed, in the police court. As judge of the police court it is his duty to hear and determine complaints for offenses which come within these classes. He cannot do both. He cannot be both prosecutor and judge. The duties are repugnant. He can only perform the duties of one office by neglecting to perform the duties of the other. It is not for him to say in a particular instance which he will perform and which he will not. The public has a right to know with certainty. *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251. Thence it is that two such offices must be held to be incompatible. And we are all of opinion that when one who has the office of mayor of

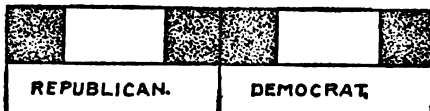
Rockland, or one who has the right of office, accepts the incompatible office of judge of the police court, he thereby abandons, surrenders, and vacates ipso facto such election, or right of election, as he had to the office of mayor.

Since the petitioner has vacated and surrendered his right to the office of mayor, we think that he cannot maintain this petition. The ultimate purpose of the petition is to oust the respondent by showing that the petitioner is entitled to the office. And it is only when a petitioner "is entitled by law to the office claimed by him" (Rev. Stat. chap. 6, § 71), that the justice hearing the case may issue an order to the party unlawfully claiming or holding said office, commanding him to yield up said office to the officer who has been adjudged to be lawfully entitled thereto (§ 73). The petitioner has now no interest in the proceeding. *Heald v. Payson*, 110 Me. 204, 85 Atl. 576; *Libby v. English*, 110 Me. 449, 86 Atl. 975; *Murray v. Waite*, 113 Me. 485, 94 Atl. 943.

II. The Duncan Petition.

The petitioner and the respondent were both candidates for the office of alderman in ward 1, and the respondent was declared elected.

At the hearing it was agreed that each had received an equal number of the ballots before the court. This included four disputed ballots, three for the petitioner and one for the respondent. The total number is not stated in the record. In one case the voter made an X in a dark space or square at the left of the open white square, above the party designation, within which latter square it is claimed was the appropriate place to mark, thus:



Upon the question whether this ballot should be counted for the respondent, the justices are evenly divided in opinion. Therefore it cannot be counted.

On two ballots the voters erased the name of the respondent, and wrote underneath "L. H. Duncan." Under the rule laid down in *Bartlett v. McIntire*, 108 Me. 161, 79 Atl. 525, we think these ballots should be counted for the petitioner.

On one ballot the voter placed a petitioner's sticker upon and partly covering the name of the respondent. He also wrote L.R.A.1917A.

underneath the name of the petitioner in full. We think, under the rule in *Crosby v. Libby*, 114 Me. 35, 95 Atl. 329, this ballot should be counted for the petitioner. Upon the ballots before us, then, the petitioner holds the three disputed ballots already counted for him in the tie vote, and the respondent loses one, which so far gives the petitioner one majority.

However, another question is presented. There is evidence offered by the respondent that at the count of the ballots in ward 1, at the close of the election, there were ninety-seven straight ballots for each party; that is, the petitioner had ninety-seven straight ballots, and the respondent ninety-seven. At the time the ballots were counted in court, April 16, 1915, the straight ballots for the respondent were only ninety-four in number, and those for the petitioner were ninety-nine; and, as we understand the record, it was upon these ballots, with the addition of split ballots, that the result was tied. There is no explanation of the discrepancy. The testimony is undisputed. No witness was called by the respondent to contradict. The ward returns were not offered in evidence. No officer who at any time had custody of the ballots was called upon to show that there had been no opportunity for tampering with them. It does appear that the ballots had been several times inspected by interested parties, but the counts, if any were made, do not appear. Under these circumstances we all think the actual count in ward meeting should be taken as the truth. Three votes should be added to those counted for the respondent, and two deducted from the petitioner's count. And the result upon the whole is that the respondent has a majority of four.

III. Procedure.

We think these cases are not properly before the law court on report, and were it not for the fact that the term of the offices in dispute is drawing towards the end, and that the shortness of the time will probably not permit the cases to go through the statutory channels before the end, the proper course would be to remand them for hearing before a single justice. Although, by reason of the exigency thus disclosed, we have persuaded ourselves with much reluctance to consider the cases on their merits, we cannot let the occasion pass without calling attention to the correct procedure.

The statute provides for a hearing by a single justice and an appeal from his decision and judgment to the remaining jus-

tices. It requires the appellant to cause copies of the petition, pleadings, findings, and testimony, upon which such judgment is rendered, approved by the justice before whom the hearing is had, to be printed and transmitted to the chief justice within twenty days after such appeal is taken, with written argument thereon. Section 72, chap. 6. In these cases there has been no decision and judgment. There has been no appeal. The cases have not been transmitted to the chief justice. They have not been printed. But the cases have been sent before us on report, and are entered on the law docket.

We think that the law court as such has no jurisdiction of these cases. The statute provides that, on appeal, the justices of the court "shall consider said cause immediately, and decide thereon and transmit their decision to the clerk of the county where the suit is pending, and final judgment shall be entered accordingly." The law court is a statutory court of limited jurisdiction. The justices of the supreme judicial court are not the law court, except when they are sitting and acting within the limits of the jurisdiction of the law court. By statute causes may be reported to the law court. Rev. Stat. chap. 79, § 46. But there is no provision for the report of a case to the justices of the supreme judicial court. There are provisions in other statutes by which cases may be transmitted to the chief justice, argued in writing, considered, and decided by the justices, and and their decision transmitted directly to the clerk of the county in which the suit is pending. In such cases the justices never consider the matters as in law court. The cases are not entered on the law docket. The decisions are not certified to the clerk of the law court for record, nor are mandates of the decisions sent by him to the clerk below. The justices certify their decision directly to the latter clerk, as is the provision in the election statute under consideration.

A petition to determine a contested election is not an action at law. It is not a bill in equity. It is a special statutory proceeding, which confers upon a single justice, and upon the other justices on appeal, jurisdiction to inquire into and determine contested election cases. The evident purpose of the statute is to provide a simple, inexpensive, and prompt remedy for one who has been unlawfully deprived of the fruits of an election. It takes the place of quo warranto to oust an officer who has not been legally elected, to be followed by mandamus to install the rightful claimant.

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It is true that the statute says that the petitioner "may proceed as in equity;" but that does not make the petition a bill in equity, nor make an election contest one of equitable jurisdiction. In *Bartlett v. McIntire*, 108 Me. 161, 79 Atl. 525, this court, holding that the findings of the single justice do not on appeal have the same force as in appeals in equity, said: "The procedure is somewhat anomalous. It is true that § 70 of chapter 6 provides that the claimant 'may proceed as in equity' by petition returnable before any justice of the supreme judicial court; but it does not say that he shall bring a bill in equity, and the subsequent proceedings bear slight resemblance to those required by the equity rules. Moreover, § 72 provides that an appeal from the decision of the single justice shall set forth the reasons therefor. This is not required in an appeal in equity, but is in probate appeals; and the appeal itself is taken, not to the law court as such, but to the justices. A careful consideration of the entire statute and its object leads to the conclusion that the purpose of the legislature in providing for an appeal was to obtain the decision of the appellate justices de novo upon all disputed questions both of law and fact, and the clause in the statute providing that the claimant 'may proceed as in equity' was used merely in contradistinction to proceedings on the law side of the court, with its stated terms and more rigid rules of procedure."

In all election cases heretofore, with one exception, within the experience of the present members of the court, the statutory procedure has been strictly followed. In one case, in which there was an appeal properly transmitted, the justices, for convenience, heard oral arguments during a term of the law court, but the case was not entered on the law docket.

And it may be questioned whether the immediate parties, by consenting to this procedure, have effectively waived the requirements of the statute. Certainly waiver cannot confer jurisdiction upon the law court. Besides, the question of the validity of an election to public office affects public interests, as well as private ones, and it may be doubted whether, under such circumstances, a party should be permitted to waive. However this may be, despite the fact that these cases are irregularly before us on report, rather than on appeal, they have been argued in writing as the statute provides, and have been considered by all the justices as the statute contemplates.

The order in each case will be:
Petition dismissed, with costs.

Annotation—Incompatibility of offices at common law.

- I. Scope, 216.**
- II. General rules, 216.**
- III. Incompatible offices, 222.**
- IV. Compatible offices, 224.**
- V. Effect of incompatibility:**
 - a. General rule, 225.**
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I. Scope.

This note is limited to a discussion of the question of incompatibility as existing between public offices. Cases involving private offices are not included, whether one or both of the offices involved are of a private nature.

This note does not go into the question of the propriety of the appointment by an official body of one of its own number to a second office within the body's gift, but views cases of that kind only from the angle of the compatibility of the offices.

Cases in which one of the offices in question is that of attorney, barrister, or counselor are omitted, inasmuch as it is not the holding of the office that is complained of in such cases, but the practice of the profession. For instance, there is no objection to a judge being an attorney, rather the contrary, but it is everywhere viewed as improper for a judge to engage in the practice of his profession while holding his judicial office.

The question of the remedy to compel vacation of an incompatible office is not within the scope of this note.

Inasmuch as the question of the validity of the official acts performed by an officer who has lost his title because of incompatibility is determined by the general rules governing *de facto* officers and officers who wrongfully retain offices rightfully gotten possession of, that question is not taken up here. The discussion here goes no further than to point out which office is retained and which lost in the event of incompatibility.

The earlier cases on the right of a person to hold two judicial positions at the same time may be found in a former note in this series.¹

Upon the question as to what constitutes offices within constitutional or statutory provisions against two offices, see

the note on that subject on a subsequent page of this volume.²

II. General rules.

The settled rule of the common law prohibits a public officer from holding two incompatible offices at one time. This rule has never been questioned, and its correctness and propriety are so well established as to be assumed without discussion in practically every case in which the matter of common-law incompatibility arises. While some authorities say that the law does not favor the multiplication of offices in one person, they mean no more than that one person cannot hold two incompatible offices at one time. "The doctrine of the incompatibility of offices," says one court,³ "is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is: What constitutes incompatibility? This question has been answered by the courts with varying language, but generally with the same sense."

While it is true that many courts have discussed the question of incompatibility, and that, almost without exception, they have agreed upon the general underlying principles, it is nevertheless a fact that none of them have attempted to formulate a definition of the term applicable to all cases. When it comes to stating what constitutes incompatibility, the courts invariably evade the formulation of a general definition, and content themselves with a discussion of specific cases and the particular facts which, in separate instances, have been looked upon as creating incompatibility. This, together with the fact that two cases scarcely ever arise involving the same offices, has made this subject one of specific cases rather than general rules.

A few rules, however, have been laid down by the courts in their efforts to generalize. For instance, the courts are practically unanimous in holding that mere physical inability to perform the duties of both offices personally does not constitute incompatibility.⁴ Some courts, however, have been of the opinion that

¹ Appended to *State v. Jones*, 8 L.R.A. (N.S.) 1107.

² Appended to *Groves v. Barden*, post, 228.

³ *HOWARD v. HARRINGTON*, ante, 211.

⁴ *State ex rel. Crawford v. Anderson* (1912) 155 Iowa, 271, 136 N. W. 128, Ann. Cas. 1915A, 523, infra, footnote 7; *Abry v. Gray* (1897) 58 Kan. 148, 48 Pac. 577, infra, L.R.A.1917A.

footnote 73; *Dyche v. Davis* (1914) 92 Kan. 971, 142 Pac. 264, infra, footnote 6; *State ex rel. Young v. Hays* (1908) 105 Minn. 399, 117 N. W. 615, infra, footnote 6; *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636, infra, footnote 23; *People ex rel. Ryan v. Green* (1874) 58 N. Y. 295, affirming, so far as this question is con-

physical inability to perform the duties of both does constitute incompatibility where neither of the offices involved can be executed by deputy.⁵

The closest the courts have come to

defining incompatibility is to substitute the word "inconsistency" therefor. In a number of cases it has been said that incompatibility consists in an inconsistency in the functions of the two offices.⁶

cerned (1874) 5 Daly, 254, *infra*, footnote 6; *State ex rel. Metcalf v. Goff* (1887) 15 R. L. 505, 2 Am. St. Rep. 921, 9 Atl. 226.

In *State v. Buttz* (1877) 9 S. C. 156, however, an action involving the offices of solicitor and member of the Federal House of Representatives, after quoting a definition to the effect that offices are incompatible "when, from the multiplicity of business in them, they cannot be executed with care and ability," the court says that, applying such definition to the case in hand, "it is very manifest that the two offices in question are wholly incompatible."

⁵ In *State v. Parkhurst* (1802) 9 N. J. L. 427, in holding the offices of United States Senator and clerk of courts incompatible, the court says: "It is said by Lord Coke, 4 Inst. 100, that offices are said to be incompatible or inconsistent when, from the nature or multiplicity of business in them, they cannot be executed with care and ability by the same person at the same time." Subsequently, after holding that the office of clerk cannot be executed by deputy, the court continues: "If the relator, holding a seat in the Senate of the United States, can neither execute this office by himself nor by any other in his stead, it necessarily results, according to the doctrine of Lord Coke, that the two offices are incompatible and inconsistent. They cannot be executed by the same person at the same time."

And in *State ex rel. Moore v. Lusk* (1871) 48 Mo. 242, in holding the offices of county clerk and clerk of the circuit court not to be incompatible, the court says that their only incompatibility consists in the fact that both courts may be sitting at the same time, so that the clerk must be personally absent from one. "But this difficulty," the court says, "has never been recognized in Missouri as necessarily constituting incompatibility in a legal sense, inasmuch as in one or even in both of the courts the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound."

⁶ In *People ex rel. Ryan v. Green* (1874) 58 N. Y. 205, affirming, as far as the point under consideration is concerned (1874) 5 Daly, 254, it is said: "Physical impossibility is not the incompatibility of the common law, which existing, one office is *ipso facto* vacated by accepting another. Incompatibility between two offices is an inconsistency in the functions of the two; as judge and clerk of the same court,—officer who presents his personal account subject to audit, and officer whose duty it is to audit it. . . . The force of the word in its application to this matter is that, from the nature and relations to each other, L.R.A.1917A.

of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one toward the incumbent of the other."

In holding in *Kenney v. Goergen* (1886) 36 Minn. 190, 31 N. W. 210, the offices of deputy clerk of the district court and court commissioner not to be incompatible, the court says: "To render two offices incompatible at common law, so that the acceptance of one would *ipso facto* vacate the other, the functions of the two must be inconsistent, as where an antagonism would result in the attempt by one person to discharge the duties of both offices. But where one is not subordinate to the other, and the relations of the one to the other are not repugnant and inconsistent, then the two are not incompatible. . . . We can see no ground for holding these two offices incompatible at common law. The one is not subordinate to the other, and neither officer can interfere with or has any supervision over the other."

The court, in *State ex rel. Young v. Hays* (1908) 106 Minn. 399, 117 N. W. 615, assigns the following reasons for holding compatible the offices of county superintendent and superintendent of county schools: "The one is not subordinate to the other, and no necessary antagonism would result from the attempt of one person to discharge the duties of both offices. . . . Incompatibility does not depend upon the physical inability of one person to discharge the duties of both offices. The test is the character and relation of the offices; that is, whether the functions of the two are inherently inconsistent and repugnant."

In holding the offices of professor of systematic zoology and taxidermy and curator of birds, mammals, and fishes in the state university, and game warden for the extension of the state hatchery of fishes, not incompatible, the court in *Dyche v. Davis* (1914) 92 Kan. 971, 142 Pac. 264, says: "Offices are incompatible when the performance of the duties of one in some way interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. It is an inconsistency in the functions of the two offices. It is difficult to give a definition which will have universal application. . . . No incompatibility is discovered between the duties of fish and game warden and professor of systematic zoology and taxidermy and curator of birds, mammals, and fishes. Indeed, Professor Dyche's long study, research, and experience in the subjects included in his professorship were considered by the chancellor and regents of the

It is doubtful, however, whether this statement throws much light on the subject.

In some cases the courts seem inclined

University and the governor as fitting him especially for the highly important duties of fish and game warden and the problems to be solved in the extension of the state hatchery. Instead of being inconsistent or incompatible, duties performed and experience gained in one station would enable the incumbent the more intelligently and effectually to do the duties of the other."

And see *HOWARD v. HARRINGTON*, ante, 211.

It is said in *State ex rel. Crawford v. Anderson* (1912) 155 Iowa, 271, 136 N. W. 128, Ann. Cas. 1915A, 523, that "the principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices, and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time." Applying the general principle to the facts involved, it is held that, where the statutes provide for two justices of the peace for each township, and also give the mayor of a town or city the jurisdiction of a justice of the peace, the statutes make it apparent that the lawmaking power considered it for the public good and convenience to have three judicial officers in every township, and that this plain purpose cannot be thwarted by permitting the mayor of a city to accept the office of justice of the peace.

In *State v. Buttz* (1877) 9 S. C. 156, an action involving the offices of solicitor and member of the Federal House of Representatives, the court says: "It is certain that the nature and duties of these two offices are such as that every consideration of public policy renders it improper for one incumbent to retain them both."

In *People ex rel. Earwicker v. Dillon* (1899) 38 App. Div. 539, 56 N. Y. Supp. 416, the court holds incompatible the offices of town clerk and justice of the peace, for the following reason: "Under the provisions of chapter 20 of the General Laws, . . . 'the supervisor, town clerk, and the justices of the peace, or any two of such justices, shall constitute the town board in each town.' This town board is authorized to audit the accounts of the justices of the peace, as well as of the town clerk. . . . The respondent Smith, if permitted to hold both of these offices, may either have two votes in deciding upon his own claims before the town board, or the town board must be deprived of the full number of members provided for by law. In either event considerations of public policy would be overlooked for the personal aggrandizement of the individual."

In *People ex rel. Russell v. Fire Comrs.* (1894) 76 Hun, 146, 27 N. Y. Supp. 548, L.R.A.1917A.

to the view that the question of incompatibility is largely one of public policy.⁷ When it is considered, however, how

where the court was of the opinion that it was contemplated by the statute that the chief engineer of the fire department should have at least four firemen to assist him, that being the minimum number authorized to be appointed, it was held that, it being the duty of the assistant engineer to act in the chief's place in his absence, the offices of fireman and assistant engineer were incompatible, inasmuch as, "in the event of the disability from any cause of the chief engineer, the assistant engineer, acting in his place and stead, if he is at the same time a fireman, would have only three firemen to assist him, and to that extent the department would be crippled and its efficiency impaired." The court says further that "the law does not favor the multiplication of offices in one person, and . . . where such multiplication has a tendency to impair the public service, it will be held that the occupant must surrender the one or the other."

"But what is meant by incompatible?" the court asks in *Bryan v. Cattell* (1864) 15 Iowa, 538. "Does it cover every case where the incumbent places himself in such a position that he cannot, for the time being, discharge the duties of the first office? Or does it embrace those cases where the nature of the duties of the two offices is such as to render it improper, from considerations of public policy, for him to retain both? . . . Looking to the common law, we are of the opinion that the incompatibility must be such as arises from the nature of the offices, or their relation to each other. Or, as Mr. Bouvier has it: 'They are such as are subordinate to, or interfering with, each other; for example, a man cannot be at once judge and clerk of the same court.' Bayley, J., in *Rex v. Tizzard* (1829) 9 Barn. & C. 418, 109 Eng. Reprint. 155, 4 Man. & R. 400, 7 L. J. K. B. N. S. 275 [infra, footnote 8], says: 'The two offices are incompatible where the holder cannot in every instance discharge the duties of each.' And that incompatibility, as here used, must be such as arises from the nature of the duties, in view of the relation of the two offices to each other, seems to have its foundation in reason." Then, applying what has been said to the case in question, which involves the effect on the office of district attorney of the acceptance of the office of captain of volunteers, the court proceeds: "Suppose the plaintiff in this case had been permitted by his superior officers to return and attend all the courts of his district, would it have been claimed that because he was captain he was disqualified from discharging such duties? Or suppose he had been so connected with the service that his regiment had been retained in the state, or stationed in the county of his residence, would his right to discharge the duties of the former office have been disputed? It seems to us clearly not. And if not, it is plain that there is

much difficulty has been involved in defining public policy, this attempt at definition will be seen to have little value.

nothing in the nature of the two offices incompatible with each other."

And see *State ex rel. Klick v. Wittmer* (1914) 50 Mont. 22, 144 Pac. 648, *infra*, footnote 10.

⁸ On the grounds that the office of prosecutor of the pleas is subordinate to the office of attorney general, it is held in *State ex rel. Clawson v. Thompson* (1846) 20 N. J. L. 689, that the two are incompatible. While the prosecutor is not accountable to the attorney general for the performance of his duties, nor removable at his will, yet, it being his business to perform the attorney general's duties in case of the latter's absence from the county, in the exercise of those duties and in the enjoyment of the emoluments of his office he is held to be under the control of the attorney general whenever that officer attends the sessions of court in person.

The offices of major general of a division of the militia, and colonel of a regiment inseparably attached to a brigade of the division commanded by the major general, are held, in the following language, to be incompatible: "For the same person to be commander and commanded—to be superior and subordinate at the same time, above his brigadier in one capacity, and below him in another—contradicts every notion of military authority and discipline, unless, as the argument for the defendant supposes, when acting in his higher capacity, he abandons his lower capacity, or vice versa; the admitted necessity for which is the strongest proof of the incompatibility of the two offices which can be imagined. Again, the only legal security that, when acting as colonel, the defendant will obey the orders of his brigadier, is wholly lost by this union of offices, since . . . he alone as major general could appoint and designate the members of a court-martial on himself as colonel." *State v. Brown* (1857) 5 R. I. 1.

In *Rex v. Tizzard* (1829) 9 Barn. & C. 418, 109 Eng. Reprint, 155, an action involving the offices of alderman and town clerk, it is said: "The common clerk has to attend corporate meetings and take minutes of their proceedings. If that be not done faithfully, he may be removed from his office, and upon that question he would have a vote in his character of alderman. Thus, then, he would fill the two incompatible situations of master and servant."

And it is held in *Dyer's Case* (1557) 2 Dyer. 158b, 73 Eng. Reprint, 344, that an appointment as a justice of B. R. vacates a patent as justice of C. B., because "the authority of B. R. drowns every other inferior authority."

In *Reg. v. Smith* (1848) 4 U. C. Q. B. 322, the offices of district councilor and district treasurer are held incompatible "on account of the repugnancy and impolicy of the office L.R.A.1917A.

In a less general way, it has been said that offices are incompatible when one is subordinate to the other,⁸ or when one has supervision over the other.⁹ And for

of treasurer, which is a subordinate and merely ministerial office held under the council, being in the hands of a member of the council which is to direct and control him."

In *Reg. v. Douglas* [1898] 1 Q. B. (Eng.) 560, 62 J. P. 277, 87 L. J. Q. B. N. S. 406, 78 L. T. N. S. 198, 14 Times L. R. 267, 46 Week. Rep. 377, it is held that, the justices' clerk being the servant of the justices, one cannot, at the same time, hold the offices of clerk to the justices and justice of the peace.

And see *State ex rel. Klick v. Wittmer* (1914) 50 Mont. 22, 144 Pac. 648, *infra*, footnote 10; *State ex rel. Young v. Hays* (1908) 105 Minn. 399, 117 N. W. 615, *supra*, footnote 6; *Kenney v. Goergen* (1886) 36 Minn. 190, 31 N. W. 210, *supra*, footnote 6.

⁹ In *Atty. Gen. ex rel. Moreland v. Detroit* (1897) 112 Mich. 145, 37 L.R.A. 211, 70 N. W. 450, an action involving the incompatibility of the offices of mayor and governor, the court says: "In every case the question must be determined from an ascertainment of the duties imposed by law upon the two officers. If one has supervision over the other, or if one has the removal of the other, the incongruity of one person holding both offices is apparent, and the incompatibility must be held to exist so that the acceptance of the latter vacates the former." The governor having, under the laws of the state, the right of removing the mayor for certain offenses, the offices are held incompatible.

Where, in *Kinyon v. Duchene* (1870) 21 Mich. 498, the county board of supervisors appointed certain of their number to be drain commissioners, the court, after reviewing the statute with respect to drain commissioners, says: "It is evident from these sections that the statute intended to give the board of supervisors the power, and to impose upon them the duty, as a wholly separate and independent board, to supervise the action of the drain commissioners, and to check or restrain any of their actions which they should deem extravagant or injudicious. It contemplated the unprejudiced separate action of two separate boards upon all matters on which the drain commissioners were authorized to act. This object would be defeated if the board of supervisors could appoint their own members as members of the other board. If these commissioners could sit in the board of supervisors, they might vote upon the approval of their own acts. The duties of the two offices were incompatible."

After holding the offices of deputy county auditor and trustee of a school town incompatible under a constitutional provision, the court, in *Wells v. State* (1911) 175 Ind. 380, 94 N. E. 321, Ann. Cas. 1913C, 86, says: "Whether the duties of deputy county auditor and trustee of the school of a town

these rules it follows that incompatibility must exist between offices one of which

has over the other the power of removal,¹⁰ the power of appointment,¹¹ the

are incompatible, and therefore forbidden by the policy of the common law, it is not necessary to determine, as the statutory prohibition is the same, in effect, as the common-law prohibition. There are, however, several particulars in which the duties are incompatible. Among the duties of the auditor and of his deputy is that of apportioning the school revenue . . . and approving the bonds of school trustees. . . . The school trustees make certain tax levies, the auditor makes certain assessments, and the auditor or his deputy computes the taxes and extends them on the duplicates. The auditor apportions to school corporations the funds arising from transfers of pupils. . . . The auditor or his deputy apportions and disburses certain of the school funds, and the trustees receive them through him. . . . There is such a connection between the two offices with respect to the school funds that leads to such incompatibility with respect to their management and the supervision of one office over the other, that the acceptance of one is the vacation of the other."

Richards v. Columbia (1874) 55 N. H. 96, involves the right of the selectmen of a town to appoint one of their own number agent for the purchase and sale of intoxicating liquors. The court says, speaking of the selectmen: "It is clearly their duty to watch the agents and see that they conform to the regulations prescribed and discharge their duties faithfully, and in particular keep a watchful supervision of the purchases and sales, and see that the agent is deriving no pecuniary emolument other than the stated compensation fixed by the selectmen. . . . Such being the duties of the selectmen, it seems plain that they cannot assume the agency themselves."

In holding, in *Gaw v. Ashley* (1907) 195 Mass. 173, 122 Am. St. Rep. 229, 80 N. E. 790, that the municipal board of health could not elect one of themselves to the office of quarantine physician, the court said: "The ordinance [creating the latter office] contemplates the existence of a relation between the physician and the board which requires that he shall not be a member of it. He is to make frequent reports to the board, and, from time to time, is to make recommendations. His charges to the sick are to be only such as the board approves. His personal interest in these charges is inconsistent with the proper performance of his duty as a member of the board of health, to fix their amount."

In *State ex rel. Moore v. Heddleston* (1880) 8 Ohio Dec. Reprint, 77, 5 Ohio L. J. 502, it is held that, in view of a statute providing that the treasurer of a school board cannot pay out any money except on an order signed by the president, the same person cannot hold both offices.

In *State ex rel. Rosenheim v. Hoyt* (1867) 2 Or. 246, the court says: "That the offices of councilman and marshal are incom-

patible, and cannot be held by the same person, we think, admits of no question. The marshal is the executive officer of the council, and has to settle his accounts for fees and services with that body; and it would not be competent for him to pass on his own accounts, and vote money out of the city treasury into his own pocket."

"Where the town clerk's accounts are allowed by the aldermen, or where a town clerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible." *Rex v. Pateman* (1788) 2 T. R. 777, 100 Eng. Reprint, 419.

See also *HOWARD v. HARRINGTON*, ante, 211; *State ex rel. Klick v. Wittmer* (1914) 50 Mont. 22, 144 Pac. 648, *infra*, footnote 10; *State ex rel. Metcalf v. Goff* (1887) 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226.

In connection with this footnote, attention is called to the limitation set out at the beginning of the note with respect to the exclusion of cases on the general question of the propriety of the appointment by an official body of one of its own members to a second office within that body's gift.

¹⁰ In holding the offices of alderman and purchasing agent incompatible, the court, in *State ex rel. Klick v. Wittmer* (1914) 50 Mont. 22, 144 Pac. 648, says: "Offices are 'incompatible' when one has power of removal over the other, . . . when one is in any way subordinate to the other, . . . when one has power of supervision over the other, . . . or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both. . . . The relations between the office of alderman of Great Falls and that of purchasing agent . . . are within all these specifications. . . . The city council may . . . abolish it [office of purchasing agent] at any time, and discharge the person appointed to fill it. . . . Thus, the incumbent of it, if he be an alderman, may, in certain circumstances, exercise absolute control over the existence and tenure of his office, or, in the desire to save his office, threatened by abrogation, he may be induced to assent to measures the virtue of which he does not perceive. Again, as to a portion of his duties, he is an agent of the council and subject to its supervision. It may disavow or curtail his general policy, reject his recommendations, or disallow the bills incurred by him; in any event, as member of the council he is placed in the position of supervising and affirming his own acts. Finally, if he be alderman as well as agent, he may pass upon, and possibly determine, the amount and sufficiency of his own bond. Further discussion is not necessary to establish that the holding of these offices by the same person is contrary to public policy."

And see *Rex v. Tizzard* (1829) 9 Barn. & C. 418, 109 Eng. Reprint, 155, 4 Marv. & R. 400, 7 L. J. K. R. 275, *supra*, footnote 8.

¹¹ In *Wescott v. Scull* (1915) 87 N. J. L.

power of audit,¹³ the power of punishment,¹⁴ or the power of regulating the fees.¹⁵ In an English case, however, it has been held that the power of the justices to fix the salary of the coroner does not render incompatible those two offices.¹⁶

The fact that one wrongfully expelled from one office accepts a second office

during the contest over the first seems to afford no ground for holding that he has abandoned the first office.¹⁷ In such a case, however, it must appear that the tenure of the second office is merely temporary. If it is permanent, it will outlast the contest and so result in incompatibility.¹⁷

Where the existence of the second office

410, 96 Atl. 407, it is said by the court: "We think that a chosen freeholder elected in a city, the common council of which has the power to appoint, under certain circumstances, members of the board of chosen freeholders, and who has accepted the office, holds an office incompatible with that of a member of the common council of that city."

In connection with this footnote, attention is called to the limitation set out at the beginning of the note with respect to the exclusion of cases on the general question of the propriety of the appointment by an official body of one of its own members to a second office within that body's gift.

¹² In *Cotton v. Phillips* (1875) 56 N. H. 220, in holding incompatible the offices of prudential committeeman and auditor of a school district, the court says: "The two offices are clearly incompatible. The prudential committee are charged with the administration of the affairs of the district. They are the sole custodians of the money apportioned to the district for schooling. They make contracts with teachers in their discretion, and disburse the funds. The duties of an auditor are to examine the accounts of the prudential committee, and their vouchers, and report whether they are properly cast and supported, and whether the money has been legally expended. If the same person could hold both offices, he would in fact sit in judgment on his own acts. If there should be any irregularity or misappropriation of the funds, of course the opportunity would be afforded for concealing it from the district. The object of electing auditors is that the district, through an independent tribunal, may have the additional assurance that its money has been properly accounted for and its affairs properly managed. When the two offices are held by the same person, this guaranty is, in a great measure, lacking." In this case the officeholder was elected to both offices at the same meeting. Through a misapprehension as to the number of votes needed to elect him to the prudential committee, it was thought that he had not been elected to that office, and he was subsequently elected auditor.

See also *People ex rel. Ryan v. Green* (1874) 58 N. Y. 295, affirming, as far as this question is concerned (1874) 5 Daly, 254, *supra*, footnote 6; *People ex rel. Earwicker v. Dillon* (1899) 48 App. Div. 539, 56 N. Y. Supp. 416, *supra*, footnote 7.

¹³ See *Howard v. Harrington*, *ante*, 211, where, after approving this definition of incompatibility, the court finds the offices of L.R.A.1917A.

mayor and police judge incompatible because, among other reasons, it is the duty of the police judge to try the mayor for failure to perform certain of his functions, and because it is the duty of the mayor to prosecute certain classes of offenses in the police court, where it is the duty of the judge to hear them.

¹⁴ *Gaw v. Ashley* (1907) 195 Mass. 173, 122 Am. St. Rep. 229, 80 N. E. 790, *supra*, footnote 9.

¹⁵ In *Davis v. Pembrokeshire Justices* (1881) L. R. 7 Q. B. Div. (Eng.) 513, where the incompatibility of the offices of justice of the peace and coroner was urged on the grounds that the salary of the coroner was fixed by the justices, and that the coroner might, in certain cases, be called upon to act as the sheriff's substitute in the service of writs, the court finds the arguments of no force, and holds the offices compatible.

¹⁶ Where, in *Gracey v. St. Louis* (1908) 213 Mo. 384, 111 S. W. 1159, a deputy city inspector of boilers and elevators had been unlawfully dismissed, it was held that the acceptance and tenure of the office of hoisting engineer during a portion of the time he was excluded from his office did not render him guilty of holding incompatible offices. "There is not an iota of testimony," says the court, "tending to show that, if defendant city had allowed him to perform his services as deputy inspector of boilers and elevators, he could not have taken up his work instantly, with an eye single to the service of his master. Plaintiff did not have to idle or starve in order to preserve his right of action." The charter of the defendant city provided that the term "officers" should "include all persons holding any situation under the city government or its departments."

And in *Houston v. Estes* (1904) 35 Tex. Civ. App. 99, 79 S. W. 848, where a policeman improperly discharged had been employed by the mayor for ten days as a special policeman, it was held that the acceptance of so brief an employment did not amount to an abandonment of the office in question.

¹⁷ A policeman who becomes, after his attempted discharge, a deputy constable, accepts an office incompatible with that of policeman. *Paris v. Cabiness* (1906) 44 Tex. Civ. App. 587, 98 S. W. 925. The decision in this case is rested upon the permanence of the office of deputy constable, the court saying: "It does not appear that the appointment was merely temporary, to meet some then existing emergency."

precludes the existence of the first, it has been held that no incompatibility exists.¹⁸ Cases of this kind arise where there is an attempted reorganization of a municipality, which turns out, after the election or appointment of the new officers, to be invalid. Where an officer has accepted, under the reorganized municipality, the office corresponding to the one he held before the reorganization, he is, according to this view, not guilty of holding incompatible offices. But where he abandons the office held under the old municipality, and accepts a wholly different office under the new municipality, the new office cannot be said to preclude the old one, and incompatibility exists.¹⁹ This view of the question seems equitable and entirely fair, but one court has taken the opposite position. In an Illinois case this matter of preclusion is ignored, and the office of

alderman of a city organized under a special charter is held incompatible with the office of alderman of the same city, reorganized under the general incorporation acts.²⁰

It has been held that neither the brevity of the period of incompatibility²¹ nor the remoteness of the contingency giving rise to the incompatibility²² is sufficient ground for holding offices compatible. On the latter point, however, there seems to be a difference of opinion.²³

III. Incompatible offices.

In accordance with the foregoing rules, the following offices have been held incompatible: Constable and justice of the peace;²⁴ member of the legislature and justice of the peace;²⁵ councilman under valid and invalid city governments;²⁶ deputy county auditor and school trus-

¹⁸ Where, by the act of the legislature, two new counties are made out of the territory comprising two old counties, and the probate judge of one of the old counties is appointed probate judge of the corresponding new county, the acceptance of the latter office does not affect the judge's right to the former office after the act is declared unconstitutional, no incompatibility between the two offices being possible inasmuch as the existence of the one precludes the existence of the other. *Hampton v. Dilley* (1892) 3 Idaho, 427, 31 Pac. 807.

¹⁹ Where a county is divided into two counties, and the clerk of the court in the original county accepts the clerkship of the court in the new county, he is held in *Beazely v. Stinson* (1843) Dallam, Dec. (Tex.) 537, to have accepted an incompatible office. In this case the fact that the act attempting to create the division had been held unconstitutional was not looked upon as having an effect on the matter of incompatibility.

²⁰ In *People ex rel. Stephen v. Hanifan* (1880) 96 Ill. 420, affirming (1880) 6 Ill. App. 158, where a city organized under a special charter attempted to incorporate under the general incorporation laws, an alderman elected under the special charter, who was afterward elected under the general incorporation laws, was held to have abandoned the office under the special charter, it having been decided in a prior decision that the city had not, in any legal mode, come under the general incorporation law. The court reasons as follows: "The city government of which he became a member was hostile to the regular city government. His position as a member of the council under the general law was incompatible with his duties as alderman of the city under the special charter."

²¹ In *State v. Buttz* (1877) 9 S. C. 156, an action involving the acceptance by a solicitor of the office of United States Representative, the court says: "The fact that in

this particular case the defendant accepted the office of Representative in Congress for an unexpired term, which happened to be of very short duration, and the fact that the public suffered no immediate detriment in this particular instance, cannot alter the principle applicable to the case."

²² "The remoteness of the necessity for the removal of a mayor by the governor is urged," according to the court in *Atty. Gen. ex rel. Moreland v. Detroit* (1899) 112 Mich. 145, 37 L.R.A. 211, 70 N. W. 450, "by counsel for the respondent, as a reason why a legal incompatibility does not exist at the common law [between the offices of mayor and governor]. The question, however," so the court says, "is one of the existence of the power, and not the remoteness of its exercise," and, without inquiring into the degree of the remoteness in the case, it holds the contention invalid.

²³ In *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636, after holding the offices of deputy sheriff and member of the board of school directors compatible, the court says: "We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility."

²⁴ See *Magie v. Stoddard* (1857) 25 Conn. 565, 68 Am. Dec. 375, in which the court seems to be of the opinion that the offices of justice of the peace and constable are incompatible.

²⁵ Membership in the legislature is said obiter, in *Green v. Wardwell* (1855) 17 Ill. 278, 63 Am. Dec. 366, to be incompatible with the office of justice of the peace.

²⁶ *People ex rel. Stephen v. Hanifan* (1880) 96 Ill. 420, affirming (1880) 6 Ill. App. 158, supra, footnote 20.

tee;²⁷ mayor and justice of the peace;²⁸ deputy sheriff and justice of the peace;²⁹ pay master in the United States Army and county clerk;³⁰ police judge and mayor;³¹ member of the board of health and quarantine officer;³² member of the county board of supervisors and drain commissioner;³³ mayor and governor;³⁴ water commissioner and overseer of streets;³⁵ water commissioner and chief of police;^{35a} selectman and public agent for the purchase of liquor;³⁶ prudential committeeman and auditor of school district;³⁷ United States Senator and clerk of courts;³⁸ attorney general and prosecutor of pleas;³⁹ chosen freeholder and county supervisor;⁴⁰

justice of the peace and town clerk;⁴¹ assistant engineer of fire department and fireman;⁴² superintendent and financial officer of institution for the feeble-minded;⁴³ president and trustee of school board;⁴⁴ director and superintendent of county infirmary;⁴⁵ trustee of school district and district school teacher;⁴⁶ city marshal and councilman;⁴⁷ major general of militia and colonel of militia;⁴⁸ deputy sheriff and justice of district court;⁴⁹ solicitor and United States Representative;⁵⁰ clerk of county court in old county and in new county comprising part of the same territory;⁵¹ policeman and deputy constable;⁵² policeman and special policeman;⁵³ justice of the peace and

²⁷ *Wells v. State* (1910) 175 Ind. 380, 94 N. E. 321, Ann. Cas. 1914C, 86, supra, footnote 9.

²⁸ *State ex rel. Crawford v. Anderson* (1912) 165 Iowa, 271, 136 N. W. 128, Ann. Cas. 1915A, 523, supra, footnote 7.

²⁹ It is said in *Wilson v. King* (1823) 3 Litt (Ky.) 457, 14 Am. Dec. 84, that the offices of deputy sheriff and justice of the peace are, at the common law, incompatible.

And it is held in *Com. v. State* (1831) 3 Leigh (Va.) 802, that in spite of the fact that by statute the office of high sheriff is not incompatible with the office of justice of the peace, the office of deputy sheriff is incompatible with that office. The court says: "A majority of the court is of opinion that the office of deputy sheriff stands, under our law, upon a different footing from that of high sheriff, and that none of the reasons which are urged in favor of the latter apply to the former office; that the statute alluded to embraces the case of high sheriff alone, and if, as they agree, it must be so construed as to allow him to resume his office of justice of the peace, it is a personal privilege which ought not to be extended; that the law casts the office of high sheriff upon a justice of the peace, but it is silent as to the deputy, and the high sheriff may select his deputy from any class of society."

³⁰ *Taylor v. Com.* (1830) 3 J. J. Marsh. (Ky.) 401.

³¹ *Howard v. Harrington*, ante, 211.

³² *Gaw v. Ashley* (1907) 195 Mass. 173, 122 Am. St. Rep. 229, 80 N. E. 790, supra, footnote 9.

³³ *Kinyon v. Duchene* (1870) 21 Mich. 498, supra, footnote 9.

³⁴ *Atty. Gen. ex rel. Moreland v. Detroit* (1897) 112 Mich. 145, 37 L.R.A. 211, 70 N. W. 450, supra, footnote 9.

³⁵ Where, in *Mead v. State* (1905) 73 Neb. 754, 103 N. W. 433, an ordinance consolidating the offices of water commissioner, overseer of streets, and chief of police, was under consideration, the court said: "There is no express provision and no indication of legislative intent that the office of water commissioner and any other office shall be held by the same person at one time, and L.R.A.1917A.

we think that, in the absence thereof, the consolidating ordinance, in so far, at least, as it assumes to unite that office with overseer of streets and chief of police, is inoperative."

^{35a} *Mead v. State* (Neb.) supra.

³⁶ *Richards v. Columbia* (1874) 55 N. H. 96, supra, footnote 9.

³⁷ *Cotton v. Phillips* (1875) 56 N. H. 220, supra, footnote 12.

³⁸ *State v. Parkhurst* (1802) 9 N. J. L. 427, supra, footnote 5.

³⁹ *State ex rel. Clawson v. Thompson* (1846) 20 N. J. L. 689, supra, footnote 8.

⁴⁰ On the ground that it was at least doubtful that the officers of chosen freeholder and county supervisor were not incompatible, leave was granted a taxpayer, in *State ex rel. Lofland v. Hilton* (1910) 80 N. J. L. 528, 78 Atl. 16, to file an information in the nature of a quo warranto to test the right to the office first held, which, in this case, was also the lesser.

⁴¹ *People ex rel. Earwicker v. Dillon* (1899) 38 App. Div. 539, 56 N. Y. Supp. 416, supra, footnote 7.

⁴² *People ex rel. Russell v. Fire Comrs.* (1894) 76 Hun, 146, 27 N. Y. Supp. 548, supra, footnote 7.

⁴³ *State ex rel. Doren v. Oglevee* (1881) 37 Ohio St. 142.

⁴⁴ *State ex rel. Moore v. Heddleston* (1880) 8 Ohio Dec. Reprint, 77, 5 Ohio L. J. 502, supra, footnote 9.

⁴⁵ See *State ex rel. Louthan v. Taylor* (1861) 12 Ohio St. 130.

⁴⁶ *Ferguson v. True* (1867) 3 Bush (Ky.) 255.

⁴⁷ *State ex rel. Rosenheim v. Hoyt* (1867) 2 Or. 246, supra, footnote 9.

⁴⁸ *State v. Brown* (1857) 5 R. I. 1, supra, footnote 8.

⁴⁹ *State ex rel. Metcalf v. Goff* (1887) 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226.

⁵⁰ *State v. Buttz* (1877) 9 S. C. 156, supra, footnotes 4 and 7.

⁵¹ *Beazely v. Stinson* (1843) Dallam Dec. (Tex.) 537, supra, footnote 19.

⁵² *Paris v. Cabiness* (1906) 44 Tex. Civ. App. 587, 98 S. W. 925, supra, footnote 17.

⁵³ *Houston v. Estes* (1904) 35 Tex. Civ. App. 99, 79 S. W. 848, supra, footnote 16.

contractor for carrying mail;⁵⁴ deputy clerk of the county court and justice of the peace;⁵⁵ paymaster and assistant engineer in Navy;⁵⁶ Navy engineer and draughtsman in hydrographic office;⁵⁷ jurat and town clerk;⁵⁸ jurat and mayor;⁵⁹ district councilor and district treasurer;⁶⁰ justice of B. R. and justice of C. B.;⁶¹ clerk to justices and justice of the peace;⁶² councilor of ward and alderman of borough;⁶³ alderman and capital burgess;⁶⁴ alderman and town clerk;⁶⁵ county treasurer and alderman;⁶⁶ and county Treasurer and justice of the peace.^{66a}

IV. Compatible offices.

The following offices have been held

⁵⁴ *Com. v. Israel* (1813) 1 Va. Cas. 317.
⁵⁵ *Amory v. Gloucester Justices* (1826) 2 Va. Cas. 523.

⁵⁶ *Webster v. United States* (1892) 28 Ct. Cl. (Fed.) 25.

⁵⁷ *Winchell v. United States* (1892) 28 Ct. Cl. (Fed.) 20.

⁵⁸ *Reg. v. Sandwich* (1666) 2 Keble, 93, 84 Eng. Reprint, 58; *Milward v. Thatcher* (1787) 2 T. R. 81, 100 Eng. Reprint, 45, 1 Revised Rep. 432, 7 Eng. Rul. Cas. 320.

⁵⁹ *Reg. v. Sandwich* (Eng.) supra.

⁶⁰ *Reg. v. Smith* (1848) 4 U. C. Q. B. 322, supra, footnote 8.

⁶¹ *Dyer's Case* (1557) 2 Dyer, 158b, 73 Eng. Reprint, 344, supra, footnote 8.

⁶² *Reg. v. Douglas* [1898] 1 Q. B. (Eng.) 560, 62 J. P. 277, 67 L. J. Q. B. N. S. 406, 78 L. T. N. S. 198, 14 Times L. R. 267, 46 Week. Rep. 377, supra, footnote 8.

⁶³ *Reg. v. Bangor* (1886) L. R. 18 Q. B. Div. (Eng.) 349, 56 L. J. Q. B. N. S. 326, 35 Week. Rep. 158, 51 J. P. 51.

⁶⁴ *Rex v. Hughes* (1826) 5 Barn. & C. 886, 108 Eng. Reprint, 329, 8 Dowl. & R. 708, 5 L. J. Mag. Cas. 20, 20 Revised Rep. 458.

⁶⁵ *Rex v. Tizzard* (1829) 9 Barn. & C. 418, 109 Eng. Reprint, 155, 4 Man. & R. 400, 7 L. J. K. B. 275, supra, footnote 8; *Rex v. Pateman* (1787) 2 T. R. 777, 100 Eng. Reprint, 419, 1 Revised Rep. 621, supra, footnote 9.

⁶⁶ *Rex v. Patteson* (1832) 4 Barn. & Ad. 9, 110 Eng. Reprint, 358, 2 L. J. K. B. N. S. 33, 1 Nev. & M. 612.

^{66a} *Rex v. Patterson* (Eng.) supra.

⁶⁷ A member of a city council is not disqualified, by reason of any incompatibility in the office, from being a commissioner of an improvement district in the city. *McDonnell v. Improvement Dist.* (1911) 97 Ark. 334, 133 S. W. 1128.

⁶⁸ In *Ellis v. State* (1889) 25 Fla. 702, 6 So. 768, it is said that a tax assessor is not disqualified for jury duty.

⁶⁹ It is held in *Lewis v. Wall* (1883) 70 Ga. 640, that a town marshal may also be bailiff of a justices' court, inasmuch as "there is nothing incompatible or inconsistent in the same person exercising the powers and duties of both offices." L.R.A.1917A.

to be compatible with each other: Councilman and commissioner of improvement district;⁶⁷ tax assessor and jurymen;⁶⁸ town marshal and bailiff of justices' court;⁶⁹ probate judge of old and of new counties;⁷⁰ county auditor and member of board of review;⁷¹ district attorney and captain of volunteers;⁷² city clerk and clerk of district court;⁷³ fish and game warden and professor of zoology in state university;⁷⁴ county superintendent and superintendent of county schools;⁷⁵ deputy sheriff and school director;⁷⁶ deputy city inspector of boilers and hoisting engineer;⁷⁷ secretary of state and adjutant general;⁷⁸ supreme court commissioner and lecturer in the state university law college;⁷⁹ selectman

⁷⁰ *Hampton v. Dilley* (1892) 3 Idaho, 427, 31 Pac. 807, supra, footnote 18.

⁷¹ See *Seiler v. State* (1902) 160 Ind. 605, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448, in which, without the point being raised specifically, it seems to be conceded that no incompatibility exists where a county auditor serves as a member of the board of review under a statute requiring him to do so.

⁷² *Bryan v. Cattell* (1864) 15 Iowa, 538, supra, footnote 7.

⁷³ After setting forth two definitions denying that incompatibility consists of a mere physical impossibility to perform the duties of two offices at one time, the court, in *Abry v. Gray*, 58 Kan. 148, 48 Pac. 577, finds that there is no incompatibility between the offices of clerk of a city of the first class and clerk of a district court.

⁷⁴ *Dyche v. Davis* (1914) 92 Kan. 971, 142 Pac. 264, supra, footnote 6.

⁷⁵ *State ex rel. Young v. Hays* (1908) 105 Minn. 399, 117 N. W. 615, supra, footnote 6.

⁷⁶ *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 33 L.R.A. 616, 30 S. W. 636, supra, footnote 23.

⁷⁷ *Gracey v. St. Louis* (1908) 213 Mo. 384, 111 S. W. 1159, supra, footnote 16.

⁷⁸ "Nor do we see any reason why the person who happens to hold the office of secretary of state may not, at the same time, hold that of adjutant general," says the court in *State ex rel. Tzschuck v. Weston* (1876) 4 Neb. 234. "It is true that the duties of the two offices are entirely dissimilar, but they are in no respect antagonistic, and, so long as the incumbent is willing to undertake the performance of both, in the absence of a law prohibiting it, we are of the opinion he may do so."

⁷⁹ The office of commissioner of the supreme court is not incompatible with the office of lecturer in the college of law at the state university, especially where the statute creating the office of commissioner forbids merely that he engage in the practice of law during his term. *Cornell v. Irvine* (1898) 56 Neb. 657, 77 N. W. 114.

and school committeeman;⁸⁰ clerk and collector of the same school district;⁸¹ notary public and messenger or librarian in district attorney's office;⁸² assistant clerk of district court and member of assembly;⁸³ assistant clerk of district court and clerk in mayor's office;⁸⁴ member of assembly and deputy clerk of court of special sessions of city and county of New York;⁸⁵ mayor and member of Congress;⁸⁶ deputy sheriff and court constable;⁸⁷ township's supervisor and township's treasurer;⁸⁸ deputy county clerk and notary public;⁸⁹ secretary of state and governor;⁹⁰ Navy agent and acting purser for Annapolis Naval academy;⁹¹ crier and messenger of United States district and circuit courts;⁹² clerk of Federal court and United States commissioner;⁹³ special assistant United

States district attorney and examiner;⁹⁴ Army officer on retired list and chief clerk in the Department of Agriculture;⁹⁵ clerk of United States circuit court and United States circuit court of appeals;⁹⁶ county clerk and justice of the peace;⁹⁷ clerk of the peace and justice of the peace;⁹⁸ justice of the peace and coroner;⁹⁹ councilman and town clerk;¹⁰⁰ capital Burgess and steward.¹⁰¹

V. Effect of incompatibility.

a. General rule.

It is the well-settled rule of the common law that the acceptance of a second office incompatible with one already held works an immediate vacation of the prior office.¹⁰¹ This rule seems to be based on the presumption of election as evidenced

⁸⁰ It is said in *School Dist. v. Carr* (1875) 55 N. H. 452: "It is possible that there might be such a state of things that it would be inconsistent in one holding the office of selectman to discharge at the same time the duties of school committee; but ordinarily this would not be so, and I do not think the two offices were incompatible in this case."

⁸¹ *Howland v. Luce* (1819) 16 Johns. (N. Y.) 135.

⁸² *Merzbach v. New York* (1900) 163 N. Y. 16. 57 N. E. 96, reversing (1897) 19 App. Div. 186, 45 N. Y. Supp. 1018.

⁸³ *People ex rel. Gilchrist v. Murray* (1878) 73 N. Y. 536.

⁸⁴ *People ex rel. Ryan v. Green* (1874) 58 N. Y. 295, affirming, as far as this point is concerned (1874) 5 Daly, 254, *supra*, footnote 6.

⁸⁵ *State ex rel. Atty. Gen. v. Gebert* (1909) 31 Ohio C. C. 355.

⁸⁶ *State ex rel. Wolf v. Shaffer* (1906) 18 Ohio Dec. 303.

⁸⁷ *Re Carbondale Twp.* (1873) 2 Luzerne Leg. Reg. (Pa.) 15.

⁸⁸ *Friedman v. Craig* (1915) — W. Va. —, 87 S. E. 361.

⁸⁹ And where the Constitution and statutes of a state expressly require the secretary of state to assume the office of governor upon the governor's death, upon the happening of that contingency no incompatibility exists in the holding of both offices by the secretary of state. *State ex rel. Chatterton v. Grant* (1903) 12 Wyo. 1, 73 Pac. 470, 2 Ann. Cas. 382.

⁹⁰ *United States v. White* (1851) Taney, 152. Fed. Cas. No. 16,684.

⁹¹ *Preston v. United States* (1888) 37 Fed. 417.

⁹² *Erwin v. United States* (1889) 2 L.R.A. 229, 37 Fed. 470 (district court); *United States v. McCandless* (1892) 147 U. S. 692, 37 L. ed. 334, 13 Sup. Ct. Rep. 465 (circuit court).

⁹³ *Crosthwaite v. United States* (1895) 30 Ct. Cl. (Fed.) 300.

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⁹⁴ *Geddes v. United States* (1903) 38 Ct. Cl. (Fed.) 428.

⁹⁵ *United States v. Harsha* (1893) 6 C. C. A. 178, 16 U. S. App. 13, 56 Fed. 953. Subsequently the act of Congress of July 31, 1894, was passed, declaring that no person who holds an office, the salary or annual compensation of which amounts to \$2,500, shall be appointed to or hold any other office to which compensation is attached, unless specially authorized by law. The Supreme Court on certified question ([1899] 172 U. S. 567, 43 L. ed. 556, 19 Sup. Ct. Rep. 294) held that this act did not create a vacancy in the office of clerk of the circuit court by reason of the fact that at the time of its taking effect the then lawful incumbent was also holding the office of clerk of the circuit court of appeals, to which he had presented his formal resignation before the passage of the act, notwithstanding he continued to claim the compensation attached to both offices.

⁹⁶ *Rex v. Plant* (1906) 37 N. B. 500.

⁹⁷ (N. B.) *Ibid*.

⁹⁸ *Davis v. Pembrokehire Justices* (1881) L. R. 7 Q. B. Div. (Eng.) 513, *supra*, footnote 15.

⁹⁹ *Rex v. Jones* (1831) 1 Barn. & Ad. 677, 109 Eng. Reprint, 938, 9 L. J. K. B. 103.

¹⁰⁰ *Rex v. Trelawney* (1765) 3 Burr. 1615, 97 Eng. Reprint, 1010.

¹⁰¹ *Magie v. Stoddard* (1857) 25 Conn. 565, 68 Am. Dec. 375, *supra*, footnote 24 (office of justice of peace vacated by acceptance of office of constable); *People ex rel. Stephen v. Hanifan* (1860) 96 Ill. 420, affirming (1880) 6 Ill. App. 158, *supra*, footnote 20 (office of councilman under special city charter vacated by acceptance of office of councilman under general incorporation laws, where organization under such general laws had been held illegal); *Wells v. State* (1910) 175 Ind. 380, 94 N. E. 121, Ann. Cas. 1913C, 86 *supra*, footnote 9 (office of trustee of school town vacated by acceptance of office of deputy county auditor); *State ex rel. Crawford v. Anderson* (1912)

by the acceptance and incumbency of the second office. This rule is, of course, subject to exceptions, but no clear case has been found directly denying it.

155 Iowa, 271, 156 N. W. 128, Ann. Cas. 1915A, 523, supra, footnote 7 (office of mayor vacated by acceptance of office of justice of the peace); Taylor v. Com. (1830) 3 J. Marsh. (Ky.) 401 (county clerkship vacated by acceptance of office of paymaster in United States Army); HOWARD v. HARRINGTON, ante, 211 (office of mayor vacated by acceptance of office of police judge); Northway v. Sheridan (1896) 111 Mich. 18, 69 N. W. 82 (holding that if offices of county and township supervisor are incompatible, the acceptance of latter vacates former); Atty. Gen. ex rel. Moreland v. Detroit (1897) 112 Mich. 145, 37 L.R.A. 211, 70 N. W. 450, supra, footnote 9 (office of mayor vacated by acceptance of office of governor); State ex rel. Moore v. Lusk (1871) 48 Mo. 242, supra, footnote 5 (holding, obiter, that if offices of county clerk and clerk of the circuit court were incompatible, the acceptance of the latter would vacate the former); Cotton v. Phillips (1875) 56 N. H. 220, supra, footnote 12 (office of prudential committeeman of school district vacated by acceptance of office of auditor of school district, both elections having been held at same meeting); State v. Parkhurst (1827) 9 N. J. L. 427; State ex rel. Clawson v. Thompson (1846) 20 N. J. L. 689, supra, footnote 8 (office of prosecutor of the pleas vacated by acceptance of office of attorney general); Wescott v. Scull (1915) 87 N. J. L. 410, 96 Atl. 407, supra, footnote 11 (membership in common council of city vacated by acceptance of office of chosen freeholder); People ex rel. Earwicker v. Dillon (1899) 38 App. Div. 539, 56 N. Y. Supp. 416, supra, footnote 7 (office of justice of peace vacated by acceptance of office of town clerk); People ex rel. Russell v. Fire Comrs. (1894) 76 Hun, 146, 27 N. Y. Supp. 548, supra, footnote 7 (office of assistant engineer of fire department vacated by acceptance of office of fireman); Ferguson v. True (1867) 3 Bush (Ky.) 255 (office of trustee of common school district vacated by acceptance of position as teacher in district school); State v. Brown (1857) 5 R. I. 1, supra, footnote 8 (acceptance of office of major general in militia vacated by acceptance of office of colonel of regiment inseparably attached to a brigade of the division commanded by him as major general); State ex rel. Metcalf v. Goff (1887) 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226 (office of justice of district court vacated by accepting office of deputy sheriff); State v. Buttz (1877) 9 S. C. 156, supra, footnotes 4 and 7 (office of solicitor vacated by acceptance of office of United States Representative); Beazely v. Stinson (1843) Dallam, Dec. (Tex.) 537, supra, footnote 19 (office of county clerk in an old county vacated by acceptance of office of county clerk in a new county comprising a part of the old); Paris L.R.A.1917A.

Attention is here called to the fact that, in a number of cases in which certain offices have been held to be within constitutional or statutory provisions

v. Cabiness (1906) 44 Tex. Civ. App. 587, 98 S. W. 925, supra, footnote 17 (office of policeman vacated by acceptance of office of deputy constable); Com. v. Tate (1831) 3 Leigh. (Va.) 802, supra, footnote 29 (office of justice of the peace vacated by acceptance of office of deputy sheriff); Com. v. Israel (1813) 1 Va. Cas. 317 (office of justice of the peace vacated by entering upon contract for carrying United States mail); State ex rel. Johnson v. Nye (1912) 148 Wis. 659, 135 N. W. 126 (holding that if offices of member of assembly and grain commissioner are incompatible, the acceptance of the latter vacates the former); Dyer's Case (1557) 2 Dyer, 158b, 73 Eng. Reprint, 344, supra, footnote 8 (office of justice of C. B. vacated by acceptance of office of justice of B. R.); Milward v. Thatcher (1787) 2 T. R. 81, 100 Eng. Reprint, 45 (office of town jurat vacated by acceptance of office of town clerk); Reg. v. Douglas [1898] 1 Q. B. (Eng.) 560, 62 J. P. 277, 67 L. J. Q. B. N. S. 406, 78 L. T. N. S. 198, 14 Times L. R. 267, 46 Week. Rep. 377, supra, footnote 8 (office of clerk to the justices vacated by the acceptance of an office (mayor) carrying with it the position of justice of the peace); Reg. v. Bangor Corp. (1886) L. R. 18 Q. B. Div. (Eng.) 349, 56 L. J. Q. B. N. S. 326, 35 Week. Rep. 158, 51 J. P. 51 (office of alderman of borough vacated by acceptance of office of councilor of ward of borough); Rex v. Hughes (1826) 5 Barn. & C. 886, 108 Eng. Reprint, 8 Dowl. & R. 708, 5 L. J. Mag. Cas. 20, 29 Revised Rep. 458 (office of capital Burgess vacated by acceptance of office of alderman); Rex v. Pateman (1787) 2 T. R. 777, 100 Eng. Reprint, 419, 1 Revised Rep. 621, supra, footnote 9 (after holding offices of alderman and town clerk incompatible, it is said that if the person appointed town clerk continues to exercise the office of alderman, as information in the nature of a quo warranto would be granted against him); Rex v. Tizzard (1829) 9 Barn. & C. 418, 109 Eng. Reprint, 155, 4 Man. & R. 400, 7 L. J. K. B. 275, supra, footnote 8 (office of alderman vacated by acceptance of office of town clerk).

It is said obiter in Bishop v. State (1898) 149 Ind. 223, 39 L.R.A. 278, 63 Am. St. Rep. 279, 48 N. E. 1038: "The settled rule of the common law prohibits an incumbent of a public office from holding a second one incompatible with the first, and the acceptance of the second office will ipso facto terminate his right or title to the first."

And it is said in Bryan v. Cattell (1864) 15 Iowa, 538, supra, footnote 7, that "if a party accepts another office, which, within the meaning of the law and the cases, is incompatible with that which he holds, we have no doubt but that the first would become vacant."

And granting in Gilbert v. Craddock

against holding two offices, the courts have used the term "incompatibility" as designating the inconsistency existing between the offices, and have said that the effect of such incompatibility is to render the first office vacant by reason of the acceptance of the second. Such cases are, of course, not within the scope of this note, the real question involved being one of the interpretation of the statute, and not at all of incompatibility.

b. Exceptions.

There are two exceptions to the general rule with respect to the effect of incompatibility. In the first place, it is generally admitted that where the office first held cannot be resigned by the officer, the second office, and not the first, is the one which he loses.¹⁰³ This is on the theory that the officer, not having the power to resign, should not be permitted to effect in one way that which he cannot accomplish in another. This rule has found its greatest application in England, where many of the public offices can neither be refused nor resigned.

There is a second exception to the rule

that the acceptance of the second incompatible office vacates the first one, but no cases have been found within the scope of this note which are authority therefor. All the cases laying down this exception arise under statutory or constitutional provisions against holding two offices.¹⁰⁴ This second exception is found where the two offices are held under different sovereignties, and the law of the sovereignty under which the second office has its existence is that which creates the incompatibility. In such a case the sovereignty creating the incompatibility is powerless to prevent the officer from exercising the office first held, and it must content itself with refusing to permit him to have the office which it does control. All the cases in which this exception is applied involve offices one of which is held under a state and the other under the Federal government. The mere fact that two offices are within the gift of two distinct persons or bodies does not make a case for the application of this rule, where both offices emanate from the same appointing power.¹⁰⁴

(1903) 67 Kan. 346, 72 Pac. 869, that the offices of mayor and councilman are incompatible, the court, in holding that the members of the council may not prevent one of their number from becoming mayor by refusing to accept his resignation, says: "There are ways plaintiff may lay down the office of councilman other than by resignation. One of these is by the acceptance of an incompatible office. . . . This would not require the concurrence of the mayor and council. When he shall be inducted into the office of mayor, he thereby vacates the office of councilman."

¹⁰³ It is said in *Rex v. Patteson* (1832) 4 Barn. & Ad. 9, 110 Eng. Reprint, 358, an action involving the compatibility of the offices of alderman and justices of the peace with that of county treasurer, that the acceptance of a second office "does not operate as an *absolute avoidance* in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or motion, unless that authority is privy and consenting to the second appointment." After stating that it is not necessary for it to decide more than that the appointment to the office of treasurer did not vacate that of alderman and justice of the peace, the court adds: "But, as it may be objected that, if so, the two offices may yet be held together, it may be as well to add that the acceptance of the treasurer'ship may perhaps be the ground of motion by the corporate body." And it is said later on that if the offices could not be held together, it follows as a necessary consequence, that the defendant was not eligible to that office [treasurer]. I.R.A.1917A.

And in *Worth v. Newton* (1854) 10 Exch. (Eng.) 247, 23 L. J. Exch. N. S. 338, 2 C. L. R. 1471, 2 Week. Rep. 628, it is held that, as the assistant overseer of a parish cannot determine his office by his own act, but the vestry only has that power, he cannot determine that office by the acceptance of an incompatible office.

Without deciding, in *Forbes v. Lloyd* (1876) Ir. Rep. 10 C. L. 552, whether or not the offices of justice of the peace and clerk of the peace are incompatible, the court held that, assuming them to be, the acceptance of the latter does not vacate the former, inasmuch as the acceptance of an office the appointment to which is not in the Crown does not vacate a prior incompatible office held under the appointment of the Crown.

¹⁰³ Such cases are set out, but this point is not taken up, in the note to *Groves v. Barden*, post, 228.

¹⁰⁴ In *State ex rel. Clawson v. Thompson* (1846) 20 N. J. L. 689, a case involving the offices of prosecutor of the pleas and attorney general, the court, after stating the general rule with respect to the acceptance of a second incompatible office amounting to a vacation of the first, says: "But counsel for the defendant, not denying the rule, insists that it is applicable only where the offices emanate from the same appointing power; and that it cannot apply in this case, for the one office was conferred by the legislature in joint meeting, and the other by the governor. . . . But in the case under consideration both appointments emanated from the state; the first [prosecutor] was conferred by the legislature, then in session; and the second by the governor.

It has sometimes been urged as a third exception to the general rule to the effect that the acceptance of the second incompatible office vacates the first, that the resignation of the second office subsequently to its acceptance will restore the officer's right to the office first held. This, of course, is not the case.¹⁰⁵ The acceptance of the second office has already vacated the first office, and nothing the officer can do can restore him thereto. And it has even been held, in this connection, that the loss of the second office because the election thereto is void does not restore the incumbent's right to the office previously held.¹⁰⁶

It is hinted in one case that in some

instances the relative dignity of the two offices is taken into consideration in determining which is vacated.¹⁰⁷ No other authority, however, has been discovered for such a view.

As stated in the beginning of this note, the discussion here goes no further than to point out which office is retained and which lost in the event of incompatibility. That matter having been settled, reference must be had to the general rules applicable to de facto officers and officers who wrongfully retain offices rightfully gotten possession of, in order to determine the validity of the acts performed by an officer who has lost the title to his office because of incompatibility.

Both were conferred and held under the authority of the state,—one and the same authority, differing only in the form of appointment."

¹⁰⁵ In *State ex rel. Metcalf v. Goff* (1887) 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226, in which it is held that the acceptance of the office of deputy sheriff vacated the office of justice of the district court, previously held by the same man, the court has this to say about the effect of resigning the second office: "The answer sets out that the respondent has recently resigned the office of deputy sheriff, but we do not see that this fact affects the case. If the office of justice became vacant, the respondent could not put himself back into it by his own act."

It is said obiter in *Bishop v. State* (1898) 149 Ind. 223, 39 L.R.A. 278, 63 Am. St. Rep. 279, 48 N. E. 1038: "The authorities affirm that the act of accepting . . . the second office operates as a surrender of the first; and when the officer has been once inducted, under his election or appointment, into the second office, his subsequent resignation of the latter can in no manner serve to restore his right or title to the first of-

fice, for it is evident that when a public office becomes vacant, a former incumbent cannot be restored to it by his own act."

¹⁰⁶ It is held in *Rex v. Hughes* (1826) 5 Barn. & C. 886, 108 Eng. Reprint, 329, 8 Dowl. & R. 708, 5 L. J. Mag. Cas. 20, 20 Revised Rep. 458, that, although the election of a capital Burgess to the office of alderman was void, and he was ousted therefrom, he was not thereby restored to the office of capital Burgess, his acceptance of the office of alderman having irrevocably vacated that office.

¹⁰⁷ In *State ex rel. Lofland v. Hilton* (1910) 80 N. J. L. 528, 78 Atl. 16, a case involving a county supervisor who afterward accepted the office of chosen freeholder, the court says: "The ordinary rule is that upon the acceptance of another office the first becomes vacant, if incompatible. . . . Sometimes the dignity of the two offices is regarded. In the present case the office to which the respondent was last elected was also the higher." That being an application for quo warranto, the application was granted against the officeholder as supervisor.

E. L. D.

NORTH CAROLINA SUPREME COURT.

J. H. GROVES, Appt.,
v.
FRANK BARDEN.

(169 N. C. 8, 84 S. E. 1042.)

Office — statutory prohibition of two — mail carrier.

A Federal rural mail carrier is a public officer within the operation of a statute imposing a penalty upon the holder of any office or place of trust or profit who shall undertake to hold any other office or place of trust or profit, and he therefore becomes

Note. — As to constitutional or statutory provisions against holding two offices, see annotation following this case, post, 231. L.R.A.1917A.

subject to such penalty if he undertakes to act as constable.

For other cases, see *Officers, I. a, 3, in Dig.* 1-52 N. S.

(April 14, 1915.)

APPEAL by plaintiff from a nonsuit granted by the Superior Court for Duplin County in an action brought to recover the penalty imposed by statute upon persons holding two offices. Reversed.

Statement by Allen, J.:

This is an action to recover a penalty of \$200, imposed by § 2365 of the Revisal upon any person who shall presume to hold any office or place of trust or profit contrary to article 14, § 7, of the Constitution of the

state. The statute confers the right of action to recover the penalty upon any one who shall sue for the same. The plaintiff offered evidence tending to prove that the defendant was an acting constable and was at the time a rural mail carrier. His Honor, being of opinion that the position of rural mail carrier was not a public office, entered a judgment of nonsuit, and the plaintiff accepted and appealed.

Messrs. George R. Ward and John A. Gavin, Jr., for appellant.

Messrs. Stevens & Beasley for appellee.

Allen, J., delivered the opinion of the court:

The Constitution, art. 14, § 7, declares that "no person, who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state, or government, shall hold or exercise any other office or place of trust or profit under the authority of this state, or be eligible to a seat in either house of the general assembly."

The line between "offices" and "places of trust or profit," within the meaning of the Constitution, has not been clearly marked, principally because they approach each other so closely, and are in all essential features identical.

In *Doyle v. Raleigh*, 80 N. C. 133, 45 Am. Rep. 677, the court, speaking of this question, says: "It is apparent from the association that 'places of trust or profit' are intended which approximate to, but are not, offices, and yet occupy the same general level in dignity and importance. The manifest intent is to prevent double officeholding—that offices and places of public trust should not accumulate in a single person; and the superadded words, of 'places of trust or profit,' were put there to avoid evasions in giving too technical a meaning to the preceding words."

And this was affirmed in *State ex rel. Wooten v. Smith*, 145 N. C. 476, 59 S. E. 649; the court adding in the latter case: "The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government. In this respect, the terms 'office' and 'place of trust,' as used in our Constitution, are synonymous. *Doyle v. Raleigh*, 80 N. C. 136, 45 Am. Rep. 677; *State ex rel. Barnhill v. Thompson*, 122 N. C. 495, 29 S. E. 720."

In determining whether a position is an office, place of trust or profit, or an employment, the authorities, which are collected L.R.A.1917A.

in the valuable note to *Atty. Gen. v. Tillinghast*, 17 Ann. Cas. 452, attach significance to the fact that an oath to support the Constitution is required, or that a bond for the faithful performance of duties must be executed, or that the duties are prescribed by law and not regulated by contract, or that the incumbent discharges independent duties and is not acting under the direction of others, or that the duties are continuing and permanent in their nature and are not occasional or intermittent, or that the term is fixed and continuing and not temporary, or that the position is named an office or an employment in the statute creating it; but, in the absence of a constitutional provision, these are only circumstances which are entitled to consideration, and are not determinative or conclusive. The editor of the note says: "It may be stated, as a general rule, fairly deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast upon the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; while a public employment, on the other hand, is a position which lacks one or more of the foregoing elements."

Our court is in line with the current of authority, having adopted and approved the definition of an office, that it is "a public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public;" and saying further: "The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government." *State ex rel. Wooten v. Smith*, 145 N. C. 477, 59 S. E. 650.

If, therefore, there is no constitutional classification of offices and employments, and a duty is imposed upon the incumbent of a position which requires him to perform a legislative, executive, or judicial act, he is a public officer, and otherwise an employee, and, in determining the nature of the duty, the fact that the lawmaking power may have declared the position an office or an employment, although not conclusive, is entitled to consideration. If these principles are properly applied, the position of rural mail carrier has all the indicia of a public office.

By reference to the postal laws and regulations of 1913, it will be seen (§ 718) that rural carriers are appointed by the postmaster general; that they are required to

take an oath to support the Constitution (§ 722), and to execute a bond to secure the faithful performance of their duties (§ 723); that the oath is referred to as an official oath (§ 722), his duties are designated as official duties (§ 752), and mention is made of the official character of the carrier (§ 740). His term and his duties are fixed by law and not by contract; and the duties are continuing, and not intermittent, and affect the public generally. They are defined to be: "The delivery into and collection from boxes on their routes of mail matter of all classes, serving of postoffices with mail whenever such service is authorized, sale of stamps and supplies, receiving and receipting for matter presented for registration, delivery of registered matter, the handling of registered matter in transit over their routes, taking of applications for money orders and the money therefor, the forwarding of mail addressed to their patrons, and the transfer of mail of former patrons whose addresses have been changed to other routes, the erection of United States collection boxes, and the performance of such other duties as may be required of them by law and the regulations of the department, to administer oaths required of pensioners and their witnesses in the execution of pension vouchers."

It is also provided in § 741 that a rural carrier shall not hold any state, county, municipal, or township office, which is a prohibition usually imposed upon officers, and not upon employees.

We have thus dealt with the question with reference to public offices generally, and not as applied particularly to positions held under the government of the United States; but as to the latter there seems to be a dividing line, marked by the Constitution itself, between offices and employments.

The Constitution of the United States, art. 2, § 2, says: The President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper in the President alone, in the courts of law, or in the heads of departments."

And, in construing this section of the Constitution, the court said, in *United States v. Germaine*, 99 U. S. 508, 25 L. ed. 482: "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that

when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

It was held in this case that a surgeon appointed by the Commissioner of Pensions was not a public officer, because he was not appointed by the head of a department.

The two cases of *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830, and *United States v. Smith*, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595, illustrate the application of this rule, making the character of the position to depend upon the source of the appointing power. In the first, it was held that a clerk in the office of the assistant treasurer of the United States, appointed with the approval of the Secretary of the Treasury, who was the head of the department, was a public officer; and in the second, that a clerk of a collector of customs, appointed by the collector, who was not the head of a department, was not an officer. In the latter case the court says: "A clerk of the collector is not an officer of the United States, within the provisions of this section; and it is only to persons of that rank that the term 'public officer,' as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the government who does not derive his position from one of these sources is not an officer of the United States, in the sense of the Constitution. This subject was considered and determined in *United States v. Germaine*, 99 U. S. 508, 25 L. ed. 482, and in the recent case of *United States v. Mouat*, 124 U. S. 303, 31 L. ed. 463, 8 Sup. Ct. Rep. 505. What we have here said is but a repetition of what was there authoritatively declared. . . . The case of *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830, does not militate against this view. The defendant there, it is true, was a clerk in the office of the assistant treasurer at Boston. but his appointment by that officer under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the department, within the con-

stitutional provision upon the subject of the appointing power."

The question was again considered in *United States v. Mouat*, supra, and the same conclusion reached, the court saying: "What is necessary to constitute a person an officer of the United States, in any of the various branches of its service has been very fully considered by this court in *United States v. Germaine*, supra. In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

The rural mail carrier is, as we have seen, appointed by the Postmaster General, a member of the Cabinet and the head of his department, and therefore comes within the classification of officers outlined in the Constitution, as construed by the Supreme Court of the United States; and this position is not in conflict with *State v. Boone*, 132 N. C. 1108, 44 S. E. 595, in which it was held that a carrier of mails operating upon a star route was not a public officer, because the mail carrier in that case was occupying his position under contract with a contractor of the government, and not by the appointment of the head of any department of government, as is the rural mail carrier.

It was held in *United States v. McCrory*, 33 C. C. A. 515, 63 U. S. App. 359, 91 Fed. 205, that a letter carrier appointed by the Postmaster General was an officer.

We are therefore of opinion that his Honor was in error in holding that a rural mail carrier is not an officer.

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1. Scope.

The discussion here goes no further than to point out what offices are offices within the meaning of the various statutory and constitutional provisions against holding two offices; and does not go into the question of the effect, in cases where it is found that the offices involved are such as come within the provisions of the statute or constitutional provision involved. That question will, doubtless, be practically de-

termined in most instances by the terms or setting of the statute; and if not, by the rule at common law, as shown in the note in this volume on "Incompatibility of offices at common law."¹

This note is limited to public offices, and cases involving private offices are not included, where either one or both of the offices involved are of a private nature.

Cases in which one of the offices in question is that of attorney, barrister, or counselor are omitted, inasmuch as it is not the holding of the office that is complained of in such cases, but the practice of the profession. For instance, there is no objection to a judge being an attorney,—rather the contrary,—but it is everywhere viewed as improper, for a judge to engage in the practice of his profession while holding his judicial office.

For the earlier cases on the right of person to hold two judicial positions at the same time, see the note on that subject in a former volume of this series.²

In a large number of the cases coming within the scope of this note, the courts speak of the inconsistency raised by the statutory or constitutional provision between the offices as incompatibility. This, of course, is a misnomer, the conflict or inconsistency being the creation solely of the statute or Constitution, and being governed entirely by the terms thereof.

II. Ex officio powers.

In several cases involving the imposition upon the holder of one office of an ex officio post or position, the ex officio position has been held not be an office, within the meaning of that term as used by the constitutional and statutory provisions against holding two offices.³ The reason for this seems to be that the

¹ Appended to *Howard v. Harrington*, ante, 211.

² Appended to *State v. Jones*, 8 L.R.A. (N.S.) 1107.

³ An act creating a sinking-fund commission, composed of the governor, the treasurer, the comptroller general, the attorney general, the chairman of the senate finance committee, and the chairman of the house ways and means committee, is held, in *State ex rel. Ray v. Blease* (1913) 25 S. C. 403, 79 S. E. 247, not to violate a constitutional provision against holding two offices of honor or profit at the same time, because "membership in the commission is not an office."

In *Houston v. Stewart* (1905) 99 Tex. 67, 87 S. W. 663, it is held that a provision in a city charter, creating a board of appraisement, and providing that two of the members thereof shall be aldermen, is not in conflict with the constitutional provision that no person shall hold at the same time more than one civil office of emolument. This is on the ground that the charter does not create a new office, but confers upon the aldermen selected to serve upon the board a power which might have been given to the entire council.

A statute providing that the clerk of the district court shall be ex officio a member of the jury commission is held, in *State v. Somnier* (1891) 33 La. Ann. 237, not to be in violation of the constitutional prohibition against holding more than one office of profit or trust at one time. "We cannot agree . . . that this legislation confers an additional office to the clerk," says

ex officio positions involved in these cases merely impose upon the original office duties properly within the scope of those offices, or of the same nature as the duties already belonging to them. In other cases, where the ex officio positions cannot be said merely to impose additional duties upon the holder of the first office, the ex officio post seems to be regarded as an office.⁴ It not being within the province of this note to define and discuss the meaning of the term "office," the question of the correctness or error of those decisions cannot be discussed.

the court. "It only imposes additional duties and functions to the clerk, who cannot be charged for that reason as holding more than one office. The duty of assisting the jury commissioners in the drawing of the jury is made part of his duties as clerk, and he receives no appointment or commission as jury commissioner from any source."

A statute making county commissioners ex officio road commissioners and superintendents is held, in *Bluitt v. State* (1909) 56 Tex. Crim. Rep. 525, 121 S. W. 168, not to create or impose on a county commissioner another civil office of emolument, within the constitutional provision prohibiting the holding at the same time of more than one civil office of emolument. "The commissioners' court and the commissioners themselves are charged by law with the duty, authority, and obligation of giving attention to all matters affecting public roads, in their respective counties; and the duties imposed on the commissioners . . . by this act came reasonably . . . within the general scope of their duties under the law."

And it is held in *State v. Potterfield* (1896) 47 S. C. 75, 25 S. E. 39, that membership by the governor ex officio on a state board of control is not an office, in the sense of the term used in a constitutional provision, that "no person while governor shall hold any other office or commission under this state."

And see *Pearce v. Stephens* (1897) 18 App. Div. 101, 45 N. Y. Supp. 422, affirmed without opinion in (1897) 153 N. Y. 673, 48 N. E. 1106, *infra*, footnote, 85.

⁴ *State v. Lord* (1907) 145 N. C. 479, 59 S. E. 656, *infra*, footnote 107; *Pacific Exp. Co. v. Cornell* (1899) 59 Neb. 364, 81 N. W. 377, *infra*, footnote 25; *Re Appointment of Revisor* (1910) 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176, 124 N. W. 670, *infra*, footnote 24; *Bouanchaud v. D'Hebert* (1869) 21 La. Ann. 138, *infra*, footnote 71; *Willis v. Owen* (1875) 43 Tex. 41, *infra*, footnote 110; *Callahan v. Marshall* (1914) 127 C. C. A. 48, 210 Fed. 230, *infra*, footnote 130.

⁵ Without expressing an opinion on the question whether or not the post of parish tax collector is an office, it is held in *Dorsey* L.R.A.1917A.

III. General constitutional provisions construed as referring to state offices.

Most courts which have expressed their views on the subject are of the opinion that general constitutional provisions, not specifying any particular offices, or purporting to be applicable to the offices of any particular governmental subdivision, apply only to state offices. Thus it has been held that, under constitutional provisions prohibiting the holding at the same time of more than one civil office of emolument,⁵ more than one office of trust or profit,⁶ or more than one lucrative office,⁷ only state

v. Vaughan (1850) 5 La. Ann. 155, that, if it is an office, it is a municipal office, and not within the provision of a constitutional clause which says that "no person shall hold or exercise at the same time more than one civil office of emolument;" and consequently that one may at the same time be tax collector and sheriff. "The incompatibility contemplated by the Constitution is," according to the court, "the holding of two state offices."

And upon similar facts, the same conclusion is reached in *Hood v. Dahlgreen* (1851) 6 La. Ann. 175.

⁶ It is held in *State v. Taylor* (1892) 44 La. Ann. 783, 11 So. 132, that membership in a city council is not a state office, and that the constitutional prohibition against exercising more than one office of trust or profit at the same time, consequently does not operate to make it improper to hold at the same time that office and that of jury commissioners, inasmuch as the constitutional provision "has reference only to holding at the same time two state offices." In the same case, "state office" is defined as one "created by the legislature, or . . . established in the first instance by the Constitution."

And this clause of the Constitution was again held to apply only to state offices, and not to include those of municipalities, in *State v. Phenix* (1914) 184 La. 329, 64 So. 129, where the officers of district attorney and city attorney are held to be consistent thereunder.

⁷ In *Chambers v. State* (1891) 127 Ind. 365, 11 L.R.A. 613, 26 N. E. 893, it is said: "It must, therefore, be regarded as the settled law of this state that if an office is purely municipal, the officer not being charged with any duties under the laws of the state, he is not an officer . . . but if the officer be charged with any duties under the laws of the state, and for which he is entitled to compensation, the office is a lucrative office within the meaning of the Constitution. This, although it may be a narrow construction of the Constitution, must be regarded as settled." The court then holds that, inasmuch as a school trustee has certain duties imposed upon him by state statute, although he is elected by the city or town council, his is a lucrative

offices are meant. Only one court has taken the opposite view.⁸ In that case, the Constitution prohibited the holding of two offices of honor or profit at the same time. For the cases in which these provisions have been applied without raising the point here under discussion, reference is made to subsequent sections of this note.⁹ The conclusions reached in some of those cases are hardly in accordance with the principle set out above.

A somewhat similar question arises under constitutional provisions dividing the government of the state into three departments and prohibiting the exercise of the functions of one department by an officer of either of the others. The general question of what offices are included under such provisions is treated later on in this note.¹⁰

office within the meaning of the Constitution, and that he cannot at the same time be trustee of the Institute for the Education of the Deaf and Dumb.

And this case is followed in *Wells v. State* (1910) 175 Ind. 380, 94 N. E. 321, Ann. Cas. 1913C, 86, in which the office of school trustee is held to be a lucrative office within the meaning of the Constitution, and not tenable at the same time with the office of deputy county auditor.

In *State ex rel. Platt v. Kirk* (1873) 44 Ind. 401, 15 Am. Rep. 239, it is held that, while the office of city councilman is a lucrative office, it does not come within the meaning of the constitutional prohibition against holding more than one lucrative office at the same time, inasmuch as it is strictly a municipal, and not a state, office; and it is held that the directorship of the state prison is tenable at the same time therewith.

And, on the ground that the office of mayor is a state office, by reason of certain state duties imposed thereupon by state law, it is held in *Howard v. Shoemaker* (1871) 35 Ind. 111, that it is a lucrative office within the meaning of the constitutional provision, and therefore not tenable at the same time with the office of prison director.

⁸ In construing a constitutional provision to the effect that "no person shall hold two offices of honor or profit at the same time," the South Carolina court, in *Darling v. Brunson* (1912) 94 S. C. 207, 77 S. E. 860, refuses for the following reason to make a distinction between state and municipal offices: "We are aware that a number of authorities may be cited, holding that constitutional provisions against holding two offices at the same time apply to state offices, and not to offices of a municipality. On examination of these cases, it will be found that in most of them the constitutional provisions construed use the words L.R.A.1917A.

IV. Specific statutory and constitutional provisions.

a. Dividing government of state into three departments.

1. In general.

It has been held, in several jurisdictions, that constitutional provisions dividing the government of the state into three departments, and prohibiting the exercise of the functions of one department by an officer of either of the others, apply only to the departments of the state government, and, consequently, only to such offices as come within the scope of the departments, as expressly defined and limited by the Constitution.¹¹ While no court has specifically denied the propriety of this rule, the conclusions reached in several of the

'state offices,' or by some similar expression give countenance to the distinction."

⁹ *Infra*, IV. b, IV. c. IV. d, and IV. e.

¹⁰ *Infra*, footnote 11, and the text to which it is appended.

¹¹ In *Santo v. State* (1855) 2 Iowa, 165, 63 Am. Dec. 487, it is held that a charter provision conferring upon the mayor of a city the jurisdiction of a justice of the peace is not in violation of the section of the Constitution which says that no person charged with the exercise of powers properly belonging to one of the governmental departments shall exercise any functions appertaining to either of the others. The court says that the departments referred to in the Constitution "are the departments of the government of the state of Iowa. The mayor of the city of Keokuk is not a part of the government of Iowa. He exercises none of the functions belonging to that department; whatever executive offices he may perform pertain to him only as an officer of that corporation."

Where the statute creating the commission form of government for certain cities provides that such boards of commissioners shall not possess any powers of the state, and that their offices shall not be state offices, the constitutional provision against the exercise of the powers of one branch of the government by the officers of another is not violated by the appointment of a judge of the circuit court as commissioner of a city having such form of government. *State ex rel. Wilkinson v. Lane* (1913) 181 Ala. 646, 62 So. 31.

In *People ex rel. Atty. Gen. v. Provines* (1868) 34 Cal. 520, the court adopts the view that the provision of the Constitution prohibiting the exercise of the functions of one department of the government by officers of another department applies only to the departments of the state government as expressly defined and limited in the Constitution. After overruling and criti-

cases are hardly in accordance therewith.¹²

For a discussion of the somewhat similar question, which arises in the case of general constitutional provisions not specifying any particular offices or purporting to be applicable to the offices of any particular governmental subdivision, reference is made to an earlier section of this note.¹³

cising a number of the earlier cases decided in the same jurisdiction, which took the view that the constitutional provision applied to municipal, county, and miscellaneous offices, as well as those belonging to the departments provided for in the Constitution, the court says: "The creation and regulation of local and subordinate governments, such as county, city, and town governments, is not attempted in the Constitution. . . . When, therefore, the Constitution is speaking of the 'powers of government,' and engaged in the work of distributing them to different departments, and securing absolute independence to each department by providing that each shall be worked and managed by a different set or class of individuals, of what government is it talking? Certainly not of town, city, village, or county governments, which it does not undertake to organize, which are not being established, but are to be established hereafter by a body which the Constitution is at the time creating and organizing. Obviously, it is talking about the government upon which it is at work, and it is the powers of that government alone which it is declaring, distributing, and guarding; that is to say, the state government, as contradistinguished from those which are to be hereafter created by legislative will, merely as the incidents and auxiliaries of the former. The departments, therefore, of which it speaks, and in respect to which it provides that no person employed in one shall be employed in either of the other two, are the departments of the state government, as expressly defined and limited in the Constitution; and its meaning is that no members of the legislative department, as there defined, shall at the same time be a member of the executive or judicial departments, as there defined, and vice versa." In this case it is specifically held that the office of police commissioner not being an office belonging to one of the departments of the state as defined in the Constitution, it is not incompatible with the office of police judge, which is an office belonging to the judicial department of the state.

The preceding overrules, among others of a long line of cases, *People ex rel. Simmons v. Sanderson* (1864) 30 Cal. 160, in which it had been held that the constitutional provision under discussion made improper the imposition upon the chief justice of the supreme court ex officio the office of trustee of the state law library. In overruling this case, the court, in the later L.R.A.1917A.

2. Offices within provisions.

Under constitutional provisions dividing the government of the state into three departments, and prohibiting the exercise of the functions of one department by an officer of either of the others, it has been held that one may not at the same time hold the following offices: County supervisor and levee commissioner;¹⁴

case, says: "As we now understand the question, there is no constitutional reason why the chief justice of this court cannot also hold the office of trustee of the state library and exercise its functions,—the latter office not pertaining . . . to either the legislative or executive departments, in the sense of the third article of the Constitution."

Uridias v. Morrill (1863) 22 Cal. 474, is another of the cases overruled by *People v. Provines*. In that case it was held that, where the constitutional provision excepts such cases as are thereafter expressly directed or permitted, and it is subsequently provided in the Constitution that the legislature may establish such municipal courts as may be deemed necessary, a statute conferring on the mayor the duties of a justice of the peace is not unconstitutional, the court thus resulting being a municipal court within the meaning of the constitutional provision. In *People v. Provines* (Cal.) supra, the court says, with respect to this case: "The judgment in *Uridias v. Morrill* is consistent with our views, but in the grounds upon which it was put the same error was committed which we have noticed. . . . In our judgment, there is nothing in the general rule declared in the third article [with respect to the division of the departments of government] which made it necessary to resort to the expediency of holding that the last clause of the first section of article VI. presents one of the cases referred to in the exception of the third article—a proposition manifestly untenable, for the first section of the sixth article does not confer upon the legislature other than legislative functions, and hence the power there conferred obviously cannot be within the exception to the third article."

And see *Com. v. Kirby* (1849) 3 Cush (Mass.) 577, *infra*, footnote 28.

¹² *Infra*, IV. a, 2.

¹³ *Supra*, III.

¹⁴ Under a Constitution dividing the powers of the state into three departments, and declaring that no person in one department shall exercise any power properly belonging to either of the others, and that the acceptance of an office in one department shall vacate all offices held in either of the other departments, where it is further declared by such Constitution that boards of county supervisors are part of the judicial department, and certain of the levee districts are referred to as a part of the state government in the same instrument, the board of levees com-

justice of the peace and mayor;¹⁵ police judge and mayor;¹⁶ justice of the peace and coroner;¹⁷ deputy sheriff and justice of the peace;¹⁸ sheriff and justice

of the peace;¹⁹ constable and justice of the peace;²⁰ state treasurer and justice of the peace;²¹ sheriff and member of general assembly;²² or chief justice of

missioners belongs to the executive department, and the acceptance by a county supervisor of membership on a board of levee commissioners at once vacates the office of supervisor. *Halley v. State* (1915) 108 Miss. 899, 67 So. 498.

¹⁵ And under a Constitution dividing the government into three departments, and providing that "no person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others," and that "the acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments," the offices of justice of the peace and mayor are not tenable at the same time; and the acceptance of the office of mayor by a justice of the peace is, of itself, a vacation of the first office. *State ex rel. Fletcher v. Armstrong* (1907) 91 Miss. 513, 44 So. 809.

¹⁶ See *Howard v. Harrington (Me.) ante*, 211, in which the court, while apparently of the opinion that the mayor of a city in that state, being charged with certain duties which concern the general public, belongs to the executive department of the state, refuses to rest its decision holding the offices of police judge and mayor incompatible upon that ground, but resorts to the common-law rule against incompatibility.

¹⁷ In *Godwin v. Gregg* (1848) 28 Me. 188, 48 Am. Dec. 489, it is held obiter that the offices of justice of the peace and coroner are not tenable at the same time, under the clause of the Constitution dividing the government into three departments.

It is said in *Opinion of Justices* (1825) 3 Me. 484, that, under the constitutional provision that no person belonging to one of the departments of the government shall exercise any of the powers properly belonging to either of the others, "no person can . . . of right hold and exercise, at the same time, the several offices of deputy sheriff and justice of the peace," or "the several offices of sheriff and justice of the peace," or "the several offices of coroner and justice of the peace."

¹⁸ *Opinion of Justices (Me.) supra*, footnote 17.

And under the same constitutional provision, it is held, in subsequent cases, that the offices of justice of the peace and deputy sheriff are not tenable at the same time. *Bamford v. Melvin* (1830) 7 Me. 14; *Stubbs v. Lee* (1874) 64 Me. 195, 18 Am. Rep. 251.

In *Wilson v. King* (1823) 3 Litt. (Ky.) 457, 14 Am. Dec. 84, it is held that under "the constitutional principle, which forbids the combination of executive and judicial powers in the same person," the offices of deputy sheriff and justice of the peace are not tenable at the same time.

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And under a similar constitutional provision, it is held in *State Bank v. Curran* (1849) 10 Ark. 142, that the officers of justice of the peace and deputy sheriff are not tenable at the same time, the former being a judicial office and the latter an executive office. Concerning a suggested distinction between sheriffs and deputy sheriffs with respect to this rule, the court says: "It is true that the deputy derives his authority to act by the appointment of the principal with the approval of the court, and that the principal is responsible for the faithful discharge of the duties of the office. But then the power which is conferred upon the deputy is co-extensive with that of sheriff, and it is the exercise of that power which is prohibited by the Constitution. . . . The duties and powers of the sheriff and his deputies are the same, and the inducements and temptations are alike held out to either, to depart from an impartial and faithful discharge of official duty."

¹⁹ *Opinion of Justices (Me.) supra*, footnote 17.

And it is held in *Richardson v. Justices* (1802) Sneed (Ky.) 172, that, under a constitutional provision dividing the government into three departments, and prohibiting the exercise of the power belonging to any one of such departments by any person holding an office under an other of such departments, the offices of sheriff and justice of the peace are not tenable at the same time, the former belonging to the executive department and the latter to the judicial department.

²⁰ While the court in *Pooler v. Reed* (1882) 73 Me. 129, fails specifically to designate any section of the Constitution as the basis of its decision, the case of *Stubbs v. Lee (Me.) supra*, footnote 18, is cited as authority for the statement that a constable's "acceptance of the office of justice of the peace, after his election and qualification as constable, must be held to be a surrender of the office of constable."

And see *Johnson v. McGinly* (1884) 76 Me. 432, in which, on the mere authority of the preceding case, it is held that a justice of the peace vacated his office by the acceptance of the office of constable.

²¹ It is held in *State v. Hutt* (1840) 2 Ark. 282, that, under a constitutional provision to the effect that "the powers of the government . . . shall be divided into three distinct departments, each of them to be confined to a separate body of magistracy," and that "no person, or collection of persons, being of one of those departments, shall exercise any power belonging to either of the others," the offices of justice of the peace and treasurer of the state are not tenable at the same time, the former being a judicial, and the latter an executive, officer.

²² Membership in the General Assembly is

the supreme court and trustee of the state law library.²³ This last case, however, has been specifically overruled.

3. Offices not within provisions.

Under constitutional provisions dividing the government of the state into three departments and prohibiting the exercise of the functions of one depart-

ment by an officer of either of the others, one may at the same time hold the following offices: Supreme court judge and trustee of state law library;²⁴ state executive officer and member of board of transportation;²⁵ sheriff and tax collector;²⁶ county attorney and notary public;²⁷ justice of the peace and constable;²⁸ deputy circuit clerk and county supervisor;²⁹ mayor and justice of

held in *Scott v. Strobach* (1873) 49 Ala. 477, not to be tenable at the same time with the office of sheriff, under a general constitutional provision which declares: "The powers of the government of the state of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive to another; and those which are judicial to another. No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to another except in the instances hereinafter expressly directed or provided."

²³ *People ex rel. Simmons v. Sanderson* (1866) 30 Cal. 160, supra, footnote 11.

²⁴ Neither a constitutional provision dividing the governmental powers into three parts, nor one providing that judges of the supreme court "shall hold no office of public trust, except a judicial office," during their terms, is violated by a statute making them ex officio trustees of the state law library. *Re Appointment of Revisor* (1910) 141 Wis. 592, 124 N. W. 670, 18 Ann. Cas. 1176. This is on the ground that the duties imposed are ministerial and administrative duties, which may properly be imposed upon the judiciary, because they are either helpful or necessary in the performance of the purely judicial duties of the court.

And see *People ex rel. Simmons v. Sanderson* (1866) 30 Cal. 160, supra, footnote 11.

²⁵ And under a constitutional prohibition against the officers of one department of the government exercising any power belonging to either of the others, it is held that a statute making certain of the executive officers of the state members of a board of transportation is not unconstitutional, the duties of the board being also executive. *Pacific Exp. Co. v. Cornell* (1899) 59 Neb. 364, 81 N. W. 377.

And see, in connection with the previous case, *Re Railroad Comrs.* (1884) 15 Neb. 679, 50 N. W. 276.

²⁶ It is held in *Merrill v. Gorham* (1856) 6 Cal. 41, that a sheriff is not a judicial but a ministerial officer, and that, consequently, a constitutional provision dividing the government into three departments, and prohibiting to one department the exercise of the functions of any other, does not make improper the consolidation of the officers of sheriff and tax collector. Speaking of the nature of the office of sheriff, the court says: "The fact that his election is provided for in that article of the Constitution, R.A. 1917A.

tution which treats of the judicial department of the government from exercising any character as a judicial officer. Anciently sheriffs exercised a variety of judicial functions; but their jurisdiction to hear and determine controversies was gradually taken away by acts of Parliament, until they were restricted almost entirely to the performance of ministerial duties. In this latter sense they are regarded in the United States, and particularly by the laws of this state, which have not assigned to them the performance of any judicial duties whatever."

²⁷ And under the constitutional prohibition prohibiting the officers of one department of the government from exercising any powers belonging to either of the other departments, it is held in *State v. Jackson* (1890) 9 Mont. 508, 24 Pac. 213, that the officers of county attorney and notary public are tenable at the same time.

²⁸ In Massachusetts the constitutional provision is as follows: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them." In holding the offices of justice of the peace and constable tenable at the same time thereunder, the court, in *Com. v. Kirby* (1849) 2 Cush. (Mass.) 577, says: "The provisions of this article are general in their terms, expressive only of a principle, and not intended to mark with precision the incompatibility of different offices. The article must have been so understood by the framers of the Constitution, as in other parts of that instrument certain officers are enumerated and their incompatibility directly declared. It has never been supposed that persons holding minor offices appertaining to the executive department of the government, such as deputy sheriffs, constables, or coroners, were thereby disqualified from holding seats in the legislature. The same was formerly true of the judges of the court of common pleas, who frequently held the office of senator or representative while in commission as judges, and were only disqualified by the statute" and constitutional amendment.

²⁹ The offices of deputy circuit clerk and county supervisor both belong to the judicial department of the government, and an acceptance of the former does not amount to a vacation of the latter, under the constitu-

the peace;³⁰ circuit judge and member of commission governing city;³¹ and police commissioner and police judge.³²

b. Prohibiting the holding of more than one lucrative office at the same time.

1. In general.

It has been held, in several cases falling under a constitutional provision of this kind, that it applies only to state offices.³³ That point is discussed, in connection with other constitutional provisions of a general nature, not specifying any particular offices, or purporting to be applicable to any particular governmental subdivision, in a previous section of this note.³⁴ While no court has specifically denied the propriety of this rule, in connection with the provision here under discussion, the conclusions reached in several of the cases are hardly in accordance therewith.³⁵

tional provision which prohibits any of the officers of one department of the government from exercising any power belonging to any of the other departments. *State v. Feibleman* (1873) 28 Ark. 424.

³⁰ *Santo v. State* (1855) 2 Iowa, 165, 63 Am. Dec. 487, supra, footnote 11; *Uridias v. Morrill* (1863) 22 Cal. 474, supra, footnote 11.

³¹ *State ex rel. Wilkinson v. Lane* (1913) 181 Ala. 646, 62 So. 31, supra, footnote 11.

³² *People ex rel. Atty. Gen. v. Provines* (1868) 34 Cal. 520, supra, footnote 11.

³³ *Chambers v. State* (1891) 127 Ind. 365, 11 L.R.A. 613, 26 N. E. 893, supra, footnote 7; *Wells v. State* (1910) 175 Ind. 380, 94 N. E. 121, Ann. Cas. 1913C, 86, supra, footnote 7; *State ex rel. Platt v. Kirk* (1873) 44 Ind. 401, 15 Am. Rep. 239, supra, footnote 7; *Howard v. Shoemaker* (1871) 35 Ind. 111, supra, footnote 7.

³⁴ *Supra*, III.

³⁵ *Infra*, IV. b, 2.

³⁶ *Howard v. Shoemaker* (1871) 35 Ind. 111, supra, footnote 7.

³⁷ *Wells v. State* (1910) 175 Ind. 380, 94 N. E. 121, Ann. Cas. 1913C, 86, supra, footnote 7.

³⁸ *Chambers v. State* (1891) 127 Ind. 365, 11 L.R.A. 613, 26 N. E. 893, supra, footnote 7.

³⁹ A general deputy sheriff is an officer, and holds a lucrative office, within the meaning of a constitutional prohibition against holding more than one lucrative office at the same time; and for that reason, that office may not be held at the same time with the office of constable. *State ex rel. Little v. Slagle* (1905) 115 Tenn. 336, 89 S. W. 326.

⁴⁰ The offices of state senator and assistant. L.R.A.1917A.

2. Offices within provisions.

Under constitutional provisions prohibiting the holding of more than one lucrative office at the same time, the following offices may not be held at once by the same person: Mayor and prison director;³⁶ school trustee and deputy county auditor;³⁷ school trustee and trustee of institution for education of the deaf and dumb;³⁸ deputy sheriff and constable;³⁹ state senator and assistant to the corporation commissioner;⁴⁰ postmaster and township trustee;⁴¹ postmaster and school trustee;⁴² supreme court reporter and colonel of volunteers;⁴³ county auditor and major of volunteers;⁴⁴ county recorder and county commissioner;⁴⁵ or township trustee and supervisor of a road district.⁴⁶

3. Offices not within provisions.

It has been held that, under constitutional provisions prohibiting the holding of more than one lucrative office at the same time, the following offices may be

held, in *Gibson v. Kay* (1914) 68 Or. 589, 137 Pac. 864, not to be tenable at the same time, under a constitutional provision prohibiting the holding of more than one lucrative office at the same time.

⁴¹ Under the prohibition against holding two lucrative offices at the same time, one cannot be a township trustee and a postmaster during the same period. *Foltz v. Kerlin* (1886) 105 Ind. 221, 55 Am. Rep. 197, 4 N. E. 439, rehearing denied (1886) 5 N. E. 672.

Assuming, in *Bishop v. State* (1897) 149 Ind. 223, 39 L.R.A. 278, 63 Am. St. Rep. 270, 48 N. E. 1038, that the compensation of the postmastership in question is great enough to exceed the amount stated in the clause excepting certain postmasters from the operation of the constitution prohibition against the holding of two lucrative offices at the same time, it is held that such office is not tenable at the same time with that of township trustee.

⁴² *Wood v. State* (1892) 130 Ind. 364, 30 N. E. 309.

⁴³ It is held in *Kerr v. Jones* (1862) 19 Ind. 351, that the offices of supreme court reporter and colonel of volunteers are both lucrative within the meaning of the constitutional prohibition against the holding of "more than one lucrative office at a time."

⁴⁴ *Mehring v. State* (1863) 20 Ind. 103 (on the authority of *Kerr v. Jones* (Ind.) supra).

⁴⁵ It is held in *Dailey v. State* (1846) 8 Blackf. (Ind.) 329, that the employments of county recorder and county commissioner are lucrative offices within the meaning of the constitutional provision against holding two lucrative offices at the same time.

⁴⁶ *Creighton v. Piper* (1860) 14 Ind. 182.

held at the same time by the same person: Director of state prison and councilman;⁴⁷ county surveyor and county highway superintendent;⁴⁸ and president of the boards of trustees for the hospital for the insane, the asylum for the blind, and the institution for the deaf and dumb.⁴⁹

c. Prohibiting the holding at the same time of more than one civil office of emolument.

1. In general.

In at least one case falling under a constitutional provision prohibiting the holding at the same time of more than one civil office of emolument, it has been held that the provision applies only to state offices.⁵⁰ That point is discussed, in connection with other constitutional provisions of a general nature, not specifying any particular offices, or purporting to be applicable to any particular governmental subdivision, in a previous section of this note.⁵¹ While no court has specifically denied the propriety of this rule in connection with the provision here under discussion, there may be some question whether the conclusions reached in all the cases are in accordance therewith.⁵²

2. Offices within provisions.

Under a constitutional provision prohibiting the holding at the same time of more than one civil office of emolument, it has been held that the offices of notary public and county clerk,⁵³ and of health inspector and health officer,⁵⁴ may not be held by the same person at the same time.

3. Offices not within provisions.

It has been held, under constitutional provisions prohibiting the holding at the same time of more than one civil office of emolument, that the following offices may be held by the same person at the same time: Road commissioner and road superintendent;⁵⁵ tax collector and sheriff;⁵⁶ alderman and member of board of appraisement;⁵⁷ county auditor and special county judge;⁵⁸ mayor and county commissioner;⁵⁹ and county attorney and notary public.⁶⁰

d. Prohibiting the holding of two offices of honor or profit at the same time.

1. In general.

While other constitutional provisions of a general nature, not specifying any particular offices, or purporting to be applicable to any particular governmental

⁴⁷ State ex rel. Platt v. Kirk (1873) 44 Ind. 401, 15 Am. Rep. 239, supra, footnote 7.

⁴⁸ It is held in State ex rel. Bateman v. Hart (1914) 181 Ind. 592, 105 N. E. 149, that a statute which permits the appointment of the county surveyor to the office of county highway superintendent is not in violation of the constitutional provision with respect to the holding of two lucrative offices at one time.

⁴⁹ In State ex rel. Michener v. Harrison (1888) 116 Ind. 300, 10 N. E. 146, it is held that one acting as president of the boards of trustees for the hospital for the insane, the asylum for the blind, and the institution for the deaf and dumb, under a statute providing for a common president for all three boards, does not hold two lucrative offices within the meaning of the Constitution.

⁵⁰ Dorsey v. Vaughan (1850) 5 La. Ann. 155, supra, footnote 5. And see Hood v. Dahlgreen (1851) 6 La. Ann. 175, supra, footnote 5.

⁵¹ Supra, III.

⁵² See infra, IV. c, 2.

⁵³ It is held in Biencourt v. Parker (1864) 27 Tex. 558, that the offices of notary public and county clerk are not tenable at the same time, under a constitutional provision against holding at the same time "more than one civil office of emolument."

⁵⁴ Under the constitutional provision against holding at the same time more than one civil office of emolument, it is held in Brumby v. Boyd (1902) 28 Tex. Civ. App. L.R.A.1917A.

164, 66 S. W. 874, that the offices of health inspector and health officer are not tenable at the same time.

⁵⁵ Bluit v. State (1909) 56 Tex. Crim. Rep. 525, 121 S. W. 168, supra, footnote 3.

⁵⁶ Dorsey v. Vaughan (1850) 5 La. Ann. 155, supra, footnote 5; Hood v. Dahlgreen (1851) 6 La. Ann. 175, supra, footnote 5.

⁵⁷ Houston v. Stewart (1905) 99 Tex. 67, 87 S. W. 663, supra, footnote 3.

⁵⁸ A duly elected, qualified, and acting county attorney does not come within the constitutional provision with respect to the holding of more than one civil office of emolument, by acting under the appointment of the governor as special county judge. McCannant v. Webb (1912) — Tex. Civ. App. —, 147 S. W. 693.

⁵⁹ Under a constitutional provision that "no person shall hold or exercise at the same time more than one civil office of emolument, except that of justice of the peace, county commissioner, notary public, and postmaster," one may hold the offices of county commissioner and mayor at the same time, the provision meaning that an incumbent can hold either of the offices named at the same time with any other office, and not that he can hold two offices only when both are amongst those specifically designated. Gaal v. Townsend (1890) 77 Tex. 464, 14 S. W. 365.

⁶⁰ Under the same reasoning as that applied in Gaal v. Townsend (Tex.) supra, it is held in Figures v. State (1907) — Tex.

subdivision, have been held to apply only to state offices,⁶¹ the only case involving the constitutional provision prohibiting the holding of two offices of honor or profit at the same time holds to the contrary view,⁶² and refuses to make any distinction between state and municipal offices. Inasmuch as all the cases which involve this particular provision arise in the same state, they must all be decided upon that theory.

2. Offices within provisions.

Under a constitutional provision prohibiting the holding of two offices of honor or profit at the same time, it has been held that one cannot at the same time hold the following offices: City health officer and secretary of the municipal board of health;⁶³ clerk of courts and intendant of a town;⁶⁴ supervisor of registration and commissioner of election;⁶⁵ or supervisor of registration and school trustee.⁶⁵

3. Offices not within provisions.

It has been held that, under a constitutional provision prohibiting the holding of two offices of honor or profit at the same time, the office of sinking fund commissioner may be held by one who holds at the same time the office of governor, treasurer, comptroller general, attorney general, or chairman of the house

ways and means committee.⁶⁶ And it has been held that the office of grand juror may be held by one who is at the same time either a magistrate or a rural free delivery mail carrier.⁶⁷

e. Prohibiting the holding of more than one office of trust or profit at the same time.

1. In general.

It has been held that a constitutional provision prohibiting the holding of more than one office of trust or profit at the same time applies only to state officers.⁶⁸ That point is discussed, in connection with other constitutional provisions of a general nature, not specifying any particular offices, or purporting to be applicable to any particular governmental subdivision, in a previous section of this note.⁶⁹ No case involving the provision here under consideration has either expressly or impliedly denied the correctness of this rule.

2. Offices within provisions.

Under the constitutional prohibition against holding more than one office of trust or profit at the same time, it has been held that it is improper for one to exercise at the same time the offices of police commissioner and jury commissioner,⁷⁰ or those of clerk of a district court and clerk of a parish court.⁷¹

Civ. App. —, 99 S. W. 412, that the offices of county attorney and notary public are tenable at the same time.

⁶¹ *Supra*, III.

⁶² *Darling v. Brunson* (1913) 94 S. C. 207, 77 S. E. 860, *supra*, footnote 8.

⁶³ Under a constitutional provision prohibiting a person from holding two offices of honor or profit at the same time, the same person cannot be at once secretary of a municipal board of health and city health officer. *Darling v. Brunson* (1913) 94 S. C. 207, 77 S. E. 860.

⁶⁴ The office of clerk of courts is an office of profit, and the office of intendant of a town is an office of honor, within the meaning of a constitutional provision that "no person shall hold two offices of honor or profit at the same time;" and the two are not tenable at the same time. *State v. Coleman* (1898) 54 S. C. 282, 32 S. E. 406.

⁶⁵ Without specifying the grounds therefor, it is held in *Mitchell v. Jones* (1913) 94 S. C. 487, 78 S. E. 528, that the office of supervisor of registration may not be held at the same time as either the office of commissioner of election or that of public school trustee. While the Constitution is not mentioned, it is probable that the constitutional provision against holding two offices of honor or profit at the same time is what the court had in mind.

⁶⁶ *State ex rel. Ray v. Blease* (1913) L.R.A.1917A.

95 S. C. 403, 79 S. E. 247, *supra*, footnote 3.

⁶⁷ The position of grand juror is not an office of honor or profit under the constitutional provision that "no person shall hold two offices of honor or profit at the same time;" and neither the office of rural free delivery mail carrier, nor that of magistrate, is untenable at the same time therewith. *State v. Graham* (1908) 79 S. C. 116, 60 S. E. 431; *State v. Todd* (1908) 79 S. C. 115, 60 S. E. 433; *State v. Lyles* (1908) 79 S. C. 114, 60 S. E. 433. And this is held to be true, even in view of a statute defining as public officers "all officers of the state that have heretofore been commissioned, and trustees of the various colleges of the state, members of various state boards, dispensary constables, and other persons whose duties are defined by law."

⁶⁸ *State v. Taylor* (1892) 44 La. Ann. 783, 11 So. 132, *supra*, footnote 6; *State v. Phenix* (1914) 134 La. 329, 64 So. 129, *supra*, footnote 6.

⁶⁹ See *supra*, III.

⁷⁰ It is held in *State v. Newhouse* (1877) 29 La. Ann. 824, that, under the constitutional prohibition against holding more than one office of trust or profit at the same time, the offices of police commissioner and jury commissioner are not tenable at the same time.

⁷¹ It is held in *Bouanchaud v. D'Hebert*

3. Offices not within provisions.

The following offices have been held not to be inconsistent, under the constitutional prohibition against holding more than one office of trust or profit at the same time: Clerk of district court and jury commissioner;⁷³ councilman and jury commissioner;⁷³ district attorney and city attorney;⁷⁴ clerk of district court and police juror;⁷⁵ and jury commissioner and delegate to constitutional convention.⁷⁶ And it has been held that a statute making the salaries of public service commissioners payable partly by the state and partly by the city does not create two incompatible offices within the meaning of the constitutional provision.⁷⁷

f. Prohibiting the holding of any other office.

1. In general.

As indicated by the heading, this section embraces only those cases which involve unqualified provisions against holding any other office. Cases involving statutory and constitutional provisions against holding another civil office, another office of profit, and the like, will

(1869) 21 La. Ann. 138, that, under a constitutional provision that "no person shall hold or exercise, at the same time, more than one office of trust or profit," a statute which provides that "the clerks of the several district courts shall be ex officio clerks of the parish courts" is unconstitutional, the court being of the opinion that the statute "clearly creates the office of parish clerk," and that it is an office of trust.

⁷³ State v. Somnier (1881) 33 La. Ann. 237, supra, footnote 3.

⁷⁴ State v. Taylor (1892) 44 La. Ann. 783, 11 So. 132, supra, footnote 6.

⁷⁵ State v. Phenix (1914) 134 La. 329, 64 So. 129, supra, footnote 6.

⁷⁶ The case of Voorhies v. Fownret (1860) 15 La. Ann. 598, as explained in State ex rel. Gorham v. Montgomery (1873) 25 La. Ann. 138, holds that the clerkship of the district court of a parish is tenable at the same time with the office of police juror of the same parish, on the ground that a police jurymen is not an officer, "in the intendment of that clause of the Constitution prohibiting a person from holding more than one office." "That decision," the court, in the later case, continues, "merely shows that the inhibition of the Constitution referred to only applied to constitutional officers."

⁷⁷ A member of a constitutional convention does not hold an office, within the meaning of the constitutional prohibition against holding two offices of trust or profit; and the office of jury commissioner is not vacated by acceptance of membership in L.R.A.1917A.

be found in the section dealing with miscellaneous statutory and constitutional provisions.⁷⁸

While other constitutional provisions of a general nature, not specifying any particular offices or purporting to be applicable to any particular governmental subdivision, have been held to apply only to state officers,⁷⁹ that question has not come up for consideration in any of the cases involving general provisions prohibiting the holding, by the incumbent of a specified office, of any other office. Without expressing an opinion as to the correctness of the rule indicated, attention is called to the fact that there is probably the same propriety in applying it to the provisions here under consideration, as to either of the provisions to which it has been applied.

2. Offices within provisions.

Under constitutional provisions prohibiting judges from holding any other office, a judge cannot be either a commissioner of appraisal⁸⁰ or a notary public⁸¹ while holding his judicial office. And under constitutional provisions prohibiting sheriffs from holding any other office, the offices of sheriff and tobacco

such a body. State v. Doyle (1915) 138 La. 350, 70 So. 322; State v. Rogers (1916) 138 La. 867, 70 So. 863.

⁷⁷ A statute fixing the salaries of public service commissioners at a certain amount, part of which is to be paid by the state and part by the city, is held, in Thrift v. Laird (1914) 125 Md. 55, 93 Atl. 449, not to offend against a constitutional provision that "no person shall hold, at the same time, more than one office of profit or trust created by the Constitution or laws of this state." The court says: The act creates one indivisible office, and whatever the legislature may have meant by the use of the words "an employee of said municipal corporation," when referring to the additional payment by the city to the commission and its general counsel, it is evident that it did not intend thereby to constitute them municipal officers of the city."

⁷⁸ Infra, IV. k.

⁷⁹ See supra, III.

⁸⁰ Under a constitutional provision prohibiting a justice of the supreme court from holding any other office or public trust, the offices of commissioner of appraisal and justice of the supreme court are not tenable at the same time. Re Gilroy (1896) 11 App. Div. 65, 42 N. Y. Supp. 640.

⁸¹ Under a constitutional provision that no judge during his term of office shall hold any other office, appointment, or public trust, the offices of notary public and judge of a criminal court are not tenable at the same time. Old Dominion Bldg. & L. Assn. 16 v. Sohn (1903) 54 W. Va. 101, 46 S. E. 222.

sampler⁸² and sheriff and highway commissioner⁸³ cannot be held by the same person at the same time.

3. Offices not within provisions.

The offices of town supervisor⁸⁴ and police commissioner⁸⁵ have been held not to be offices, within the meaning of constitutional provisions prohibiting a sheriff from holding any other office. And it has been held that an act creating a board of public works, and providing that the governor and other state officers shall compose it, "does not, in fact, operate as an appointment of the governor, and the other officers therein referred to, to another or different office," within the meaning of the constitutional provision that the governor shall not hold any other office during the term of his service.⁸⁶

g. Prohibiting the holding of more than one office of profit or trust under the state.

1. Offices within provisions.

Under a constitutional provision pro-

⁸² Under a constitutional provision that "sheriffs shall hold no other office," the offices of sheriff and sampler of tobacco are not tenable at the same time. *Shell v. Cousins* (1883) 77 Va. 328.

⁸³ The office of highway commissioner is an office within the meaning of a constitutional provision to the effect that sheriffs shall hold no other office, and a commissioner who accepts the office of sheriff comes within its meaning. *People ex rel. Henry v. Nostrand* (1871) 46 N. Y. 375.

⁸⁴ A constitutional provision that the sheriff shall hold no other office does not disqualify a township supervisor from holding the office of deputy sheriff. *People v. Gosh* (1890) 82 Mich. 22, 46 N. W. 101.

⁸⁵ A statute making a sheriff ex officio a member of the board of appointment of police commissioners is not in conflict with a constitutional provision that a sheriff shall hold no other office. *Pearce v. Stephens* (1897) 18 App. Div. 101, 45 N. Y. Supp. 422, affirmed without opinion in (1897) 153 N. Y. 673, 48 N. E. 1106. This case is put upon the grounds that the Constitution specifically provides that county officers whose election or appointment is not provided for by that instrument shall be appointed by such county authorities as the legislature may direct.

⁸⁶ *Bridges v. Shallcross* (1873) 6 W. Va. 562.

⁸⁷ The position of councilman is held in *Truitt v. Collins* (1914) 122 Md. 528, 89 Atl. 850, to be an office of profit within the meaning of the constitutional provision which says that "no person shall hold, at the same time, more than one office of profit, created by the Constitution and laws of L.R.A.1917A.

hibiting the holding, at the same time, of more than one office of profit under the state, the offices of councilman and supervisor of elections cannot be held by the same person.⁸⁷ And a similar provision, prohibiting circuit judges from holding any other offices of profit or trust under the state, has been held to apply to the office of colonel in the Confederate army,⁸⁸ so that one cannot at the same time be both judge and colonel.

2. Offices not within provisions.

A constitutional provision prohibiting a person from holding at the same time two offices of profit under the state is not violated by a statute imposing upon probate judges the powers and duties of judges of the county courts,⁸⁹ or by a statute imposing the powers of justices of the peace on judges of an inferior criminal court.⁹⁰ It having been decided in both of these cases that the statutes imposed additional duties, rather than a multiplicity of offices, no question is possible, as to whether the duties imposed constitute offices within the meaning of

this state;" and the offices of supervisor of elections and councilman are not tenable at the same time.

⁸⁸ It is held in *Chisholm v. Coleman* (1869) 43 Ala. 204, 94 Am. Dec. 677, that, under a constitutional provision to the effect that "judges of the supreme and circuit courts, and courts of chancery, shall receive no fees or perquisites of office, nor hold any other office of profit or trust under this state, the United States, or any other power," a judge of the circuit court forfeited and vacated his office by accepting a commission as colonel in the Confederate army.

⁸⁹ And it is held in *State ex rel. Vandiver v. Burke* (1911) 175 Ala. 561, 57 So. 870, that a statute investing probate judges with the powers and duties of judges of the county court is not in violation of the constitutional provision prohibiting a person from holding at the same time two offices of profit under the state, the court stating that there is involved "a multiplicity of duties and functions, but no multiplicity of offices."

⁹⁰ A statute establishing a court in lieu of all justices of the peace, by conferring the powers of such justices on the judges of an inferior criminal court already in existence, is held on rehearing in *State ex rel. Clarke v. Carter* (1911) 174 Ala. 266, 56 So. 974, not to violate a constitutional provision to the effect that no person shall hold two offices of profit at the same time under the state. It is said: "The Constitution does, in effect, inhibit multiplicity of offices, without multiplicity of officeholders; that is, it inhibits one person to hold two or more offices of profit and trust under the state government at the same time; but it does not forbid . . . the legislature from imposing

the constitutional provision. It having been decided that the duties do not constitute offices, it is, of course, impossible for any question to be raised with respect to their being offices within the meaning of the Constitution.

h. Prohibiting the holding of an office of honor or profit under the state by one holding office of honor or profit under the United States.

Under constitutional provisions prohibiting the holding of an office of honor or profit under the state by one holding an office of honor or profit under the United States, it has been held that one may not at the same time hold the following offices: Town collector and postmaster;⁹¹ city assessor and assistant postmaster;⁹² or United States marshal and director of state institution for the deaf and dumb.⁹³ And, although not called upon for a positive decision upon that point, one court has inclined to the opinion that, under a similar constitutional provision, the offices of postmaster and president of a village board cannot

additional duties upon, or clothing with added powers, existing officers, nor from withdrawing certain powers and duties from one office and transferring the same to another."

⁹¹ Under a constitutional provision prohibiting "any person holding any office of honor or profit . . . under the United States" from holding "any office of honor or profit under the authority of this state," one person may not hold both the office of town collector and that of postmaster. *Packingham v. Harper* (1896) 66 Ill. App. 96.

⁹² The office of assessor of a municipality is held in *State ex rel. Kierskey v. Kelly* (1902) 80 Miss. 803, 31 So. 901, to be an office of profit within the constitutional provision that no person holding any office of honor or profit under the United States shall hold any office of honor or profit under the laws of the state; and that office and that of assistant postmaster are not tenable at the same time.

⁹³ It is held in *Dickson v. People* (1855) 17 Ill. 191, that, under a constitutional provision that no person "holding any office of honor or profit under the government of the United States" shall "hold any office of honor or profit under the authority of this state," the acceptance of the office of United States marshal vacates a directorship of the Illinois institution for the education of the deaf and dumb, which latter office is not one of profit, but of honor merely.

⁹⁴ In *People ex rel. Johnson v. Blake* (1908) 144 Ill. App. 246, leave was granted for the filing of an information in quo warranto against the respondent, to compel him to show by what right he exercised the duties of president of the village board, when he was at the time of his election a postmaster L.R.A.1917A

be held by the same person at the same time.⁹⁴

Under a statute prohibiting one holding an office of profit under the United States from holding an office of profit under the state, it has been held that the offices of postmaster and probate judge may not be held by the same person at one time.⁹⁵

i. Prohibiting the holding of an office of trust or profit under the state by one holding office of trust or profit under the United States.

1. Offices within provisions.

Under constitutional provisions prohibiting the holding of an office of trust or profit under the state by one holding an office of trust or profit under the United States, it has been held that one cannot at the same time hold the following offices: Postmaster and county commissioner;⁹⁶ postmaster and county judge;⁹⁷ postmaster and justice of the peace;⁹⁸ or acting constable and rural mail carrier.⁹⁹ And in one case, in

whose annual compensation exceeded \$300, in view of the constitutional provision prohibiting "any person holding any office of honor or profit under any foreign government or under the government of the United States, except postmaster (whose annual compensation does not exceed the sum of \$300)" from holding "any office of honor or profit under the authority of this state."

⁹⁵ *Shepherd v. Sartain* (1913) 185 Ala. 439, 64 So. 57, *infra*, footnote 136.

⁹⁶ In *De Turk v. Com.* (1889) 129 Pa. 151, 5 L.R.A. 853, 15 Am. St. Rep. 705, 18 Atl. 757, under a constitutional provision that no "person holding or exercising any office or appointment of trust or profit under the United States shall, at the same time, hold or exercise any office in this state to which a salary, fees, or perquisites shall be attached," it is held that the offices of postmaster and county commissioner are not tenable at the same time.

⁹⁷ *Hoglan v. Carpenter* (1868) 4 Bush (Ky.) 89.

⁹⁸ It is said in *Rodman v. Harcourt* (1843) 4 B. Mon. (Ky.) 224, that the offices of postmaster and justice of the peace are not tenable at the same time, under a constitutional provision to the effect that "no person holding or exercising any office of trust or profit under the United States, or either of them, or under any foreign power shall . . . hold or exercise any office of trust or profit under the" commonwealth.

And see *Justices of Spencer County Ct. v. Harcourt* (1844) 4 B. Mon. (Ky.) 499, involving the same set of facts, in which the same conclusion with respect to the two offices is reached.

⁹⁹ See *GROVES v. BARDEN*, *ante*, 228, an action to recover a penalty for the violation

which it is probable that the court is thinking of this provision, but in which it neglects to state what statutory or constitutional provision it has in mind, it is held that one cannot at the same time be both postmaster and school trustee.¹⁰⁰

Under a statute prohibiting one holding an office of profit under the United States from holding an office of profit under the state, it has been held that one cannot at the same time hold the offices of postmaster and probate judge.¹⁰¹

2. Offices not within provisions.

However, under constitutional provisions prohibiting the holding of an office of trust or profit under the state by one holding an office of trust or profit under the United States, it has been held that one may at the same time hold the following offices: night watchman in postoffice and councilman;¹⁰² and United States pension agent and clerk of the penitentiary.¹⁰³

of the constitutional provision that "no person, who shall hold any office or place of trust or profit under the United States, or any department thereof, or under this state, or under any other state or government, shall hold or exercise any other office or place of trust or profit under the authority of this state," where it is held that the office of rural mail carrier comes within the meaning of the constitutional provision.

¹⁰⁰ In *Johnson v. Sanders* (1909) 131 Ky. 537, 115 S. W. 772, without specifically stating what provision of the statute or Constitution it has in mind, the court says, with respect to the offices of postmaster and school trustee: "It must be admitted that the offices were incompatible, for the law makes them so, and the courts have held that both cannot be held at the same time by one person."

¹⁰¹ *Shepherd v. Sartain* (1913) 185 Ala. 430, 64 So. 57, *infra*, footnote 130.

¹⁰² It is held in *Doyle v. Raleigh* (1883) 89 N. C. 133, 45 Am. Rep. 677, that the position of night watchman in a postoffice is not an "office or place of trust or profit," within the meaning of a statute to the effect that "no person who shall hold any office or place of trust or profit under the United States . . . shall hold or exercise any other office or place of trust or profit under the authority of this state;" and, accordingly, that thereunder the offices of alderman and night watchman may be held at the same time.

¹⁰³ In *Lindsey v. Atty. Gen.* (1857) 33 Miss. 508, it is held that a pension agent of the United States is not an officer under a constitutional provision which declares that no person holding an office of profit or trust under the United States shall hold any office of profit or trust under the state; L.R.A.1917A.

3. Prohibiting the holding of an office of trust or profit under the state by one holding another office of trust or profit under the state.

1. Offices within provisions.

Under the constitutional provision prohibiting the holding of an office of trust or profit under the state by one holding another office of trust or profit under the state, it has been held that one cannot at the same time hold the offices of county commissioner and member of board of education,¹⁰⁴ or town commissioner and county superintendent of public schools.¹⁰⁵

2. Offices not within provisions.

Under the constitutional provision prohibiting the holding of an office of trust or profit under the state by one holding another office of trust or profit under the state, it has been held that a city recorder cannot also hold either the office of public administrator,¹⁰⁶ or of justice of the peace.¹⁰⁷ And it has been

and that the offices of pension agent and clerk of the penitentiary are tenable at the same time thereunder.

¹⁰⁴ And under the constitutional provision prohibiting the holding of an office or place of trust and profit under the state by a holder of another office or place of trust and profit under the same state, it is held, in *State ex rel. Barnhill v. Thompson* (1898) 122 N. C. 493, 29 S. E. 720, that one person cannot at the same time be county commissioner and member of the county board of education.

¹⁰⁵ Under a constitutional provision that "no person who shall hold any office or place of trust or profit under the United States, . . . shall hold or exercise any other office or place of trust or profit under the authority of this state," it is held, in *Whitehead v. Pitman* (1914) 165 N. C. 89, 80 S. E. 976, that a town commissioner who accepts the position of county superintendent of public instruction eo instanti vacates the former office.

¹⁰⁶ A public administrator does not fill an "office or place of trust and profit" within the meaning of the constitutional provision which prohibits the holding of an office or place of trust and profit under the state by the holder of another office or place of trust and profit under the state; and such public administrator is not thereby prohibited from holding the office of city recorder. *State ex rel. Wooten v. Smith* (1907) 145 N. C. 476, 59 S. E. 649.

¹⁰⁷ In *State v. Lord* (1907) 145 N. C. 479, 59 S. E. 656, involving the right of a city recorder to exercise the functions of a justice of the peace, in accordance with a statute making the recorder a justice of the peace ex officio, the court, citing the constitutional provision that "no person who

held that a sheriff, during the period after the expiration of his term in which he is collecting the taxes for which he is accountable, is not an officer within the meaning of the constitutional provision, and that he may, accordingly, hold the clerkship of the superior court.¹⁰⁸

k. Under miscellaneous statutory and constitutional provisions.

1. Offices within provisions.

Under a variety of constitutional and statutory provisions, it has been held

shall hold any office or place of trust or profit under the United States . . . shall hold or exercise any other office or place of trust or profit under the authority of this state," says: "There is nothing in our fundamental law which forbids the appellant to hold the office of recorder and justice of the peace at one and the same time."

¹⁰⁸ The right given by statute to the sheriff to collect, after his term has expired, the taxes for which he is accountable, does not bring him within the meaning of a constitutional provision to the effect that "no person who shall hold any office or place of trust or profit under the United States . . . shall hold or exercise any other office or place of trust or profit under the authority of this state," so as to prevent him from accepting the clerkship of the superior court, during the period, after the expiration of his term, in which he is making such collections. *State ex rel. McNeill v. Somers* (1887) 96 N. C. 467, 2 S. E. 161. The court says: "The continued right to coerce payment of unpaid taxes, after, as before, the determination of the office, may be, and indeed is, the correlative of the obligation to account for what is on the tax list, that is, of an official duty; but it remains detached from the office to which it was incident, a separated function, but it is not itself an office or place of trust and profit. There can be but one incumbent of a single office, and the one term being ended, the other is filled by a successor."

¹⁰⁹ The office of mayor is held, in *Atty. Gen. ex rel. Moreland v. Detroit* (1897) 112 Mich. 145, 37 L.R.A. 211, 70 N. W. 450, to be a state officer, within the meaning of a constitutional provision prohibiting any one holding office under the state from executing the office of governor; and the offices of mayor and governor are held not to be tenable at the same time. This is on the ground that the mayor, in administering oaths, hearing complaints, and annulling or suspending licenses for violations of city ordinances or state law, is performing state duties.

¹¹⁰ A statute making the governor and attorney general members of the board of education violates constitutional provisions prohibiting the attorney general from holding or exercising at the same time any two L.R.A.1917A.

that one person cannot at the same time hold the following offices: Mayor and governor;¹⁰⁹ governor and member of board of education;¹¹⁰ attorney general and member of board of education;¹¹⁰ councilman and member of county board of health;¹¹¹ deputy sheriff and city collector;¹¹² justice of the peace and constable;¹¹³ state senator and clerk of the municipal court;¹¹⁴ jury commissioner and drainage commissioner;¹¹⁵ jury commissioner and village tax collector;¹¹⁶ jury commissioner and street commissioner;¹¹⁶ judge of municipal court and

offices, agencies, or appointments of trust or profit, and prohibiting the governor "from holding any other office or commission, civil or military." *Willis v. Owen* (1875) 43 Tex. 41.

¹¹¹ In *Vickers v. Sory* (1907) 31 Ky. L. Rep. 277, 102 S. W. 272, it is held that, under a statute providing that no person shall "at the same time fill a municipal office and a county office," membership on the county board of health is not tenable at the same time with the office of city councilman.

¹¹² The offices of deputy sheriff and city collector are held in *Keating v. Covington* (1896) 18 Ky. L. Rep. 245, 35 S. W. 1026, not to be tenable at the same time, under a statute which provides that no person shall "at the same time fill a municipal office and a county office."

¹¹³ It is held in *Magie v. Stoddard* (1857) 25 Conn. 565, 68 Am. Dec. 375, that, under a statute providing that no judge or justice of the peace shall hold the office of sheriff or constable, the acceptance of the office of constable by a justice of the peace vacates the latter office.

¹¹⁴ In *People ex rel. Myers v. Haas* (1900) 145 Ill. App. 283, it is held that, under a constitutional provision to the effect that "no judge or clerk of any court . . . shall have a seat in the general assembly," the offices of clerk of the municipal court and state senator are not tenable at the same time.

¹¹⁵ The officers of jury commissioner and drainage commissioner are not tenable at the same time, under a statute providing that no person holding any office under the state, or any parish or municipality therein, shall be competent to hold the office of jury commissioner, the office of drainage commissioner being an office under the parish, within the meaning thereof. *State v. Scott* (1903) 110 La. 369, 34 So. 479.

¹¹⁶ Under the statute providing that no person holding any office under the state, or any parish or municipality therein, shall be competent to hold the office of jury commissioner, the office of jury commissioner is held not to be tenable at the same time with the offices of village tax collector or street commissioner. *State v. Bain* (1914) 135 La. 776, 66 So. 196.

member of legislature;¹¹⁷ special judge of police court and state representative;¹¹⁸ circuit judge and member of the legislature;¹¹⁹ notary public and deputy county auditor;¹²⁰ associate justice of the United States district court and member of legislature;¹²¹ councilman and registrar of vital statistics;¹²² coun-

cilman and director of the poor;¹²³ deputy United States marshal and commissioner of a district;¹²⁴ school director and school treasurer;¹²⁵ councilman and water superintendent;¹²⁶ supreme judge of state and member of Congress;¹²⁷ county sheriff and deputy inspector and collector of customs;¹²⁸

¹¹⁷ Under a constitutional provision to the effect that "no person holding the office of justice of the supreme judicial court or of any inferior court . . . shall be a member of the legislature," the offices of judge of a municipal court and member of the legislature are not tenable at the same time. *Woodside v. Wagg* (1880) 71 Me. 207.

¹¹⁸ A special justice of a police court comes within the constitutional provision to the effect that "no judge of any court of this commonwealth shall at the same time have a seat in the senate or house of representatives" of the commonwealth; and a person holding the office of special justice of a police court may not, at the same time, hold a seat in the house of representatives. *Com. v. Hawkes* (1878) 123 Mass. 525.

¹¹⁹ *State ex rel. Owens v. Draper* (1870) 45 Mo. 355, involves a constitutional provision to the effect that no person holding a lucrative office under the state shall be eligible to either house of the general assembly, or shall remain a member thereof after having accepted any such office. The court says: "By the phrase, 'shall not be eligible,' I do not think it was intended to prohibit a person who occupied the position of judge from running for or being elected to the legislature. But if he should run and be elected, he would have to make his choice of which office he would retain, and his acceptance of one would necessarily operate as a vacation of the other. Therefore, it follows that when Owens qualified and took his seat in the legislature, he elected to vacate and abandon the office of circuit judge."

¹²⁰ The deputy auditorship of a county is held in *Sharp v. State* (1912) 54 Ind. App. 182, 90 N. E. 1072, to be a lucrative office within the meaning of a statute providing that "no person holding any lucrative office shall be a notary public," and that "his acceptance of any such office shall vacate his appointment as notary;" and the acceptance by a notary of a deputy auditorship is held to vacate his office of notary.

¹²¹ Under a constitutional provision to the effect that "no persons holding office under the authority of the United States . . . shall be eligible to, or have a seat in, the general assembly," a member of the general assembly who accepts an appointment as associate justice of the Federal district court thereby ceases to be a member of the assembly. *State ex rel. Leland v. Mason* (1899) 61 Ohio St. 513, 56 N. E. 468.

¹²² Under a statute to the effect that "no officers . . . of the state . . . nor any municipal or county officer or employee of the city or of any department thereof

shall serve as a member of councils during his continuance in such office or employment," one may not at the same time be a member of councils and registrar of vital statistics. *Com. ex rel. Sherwood v. Bennett* (1912) 233 Pa. 286, 82 Atl. 249.

¹²³ The office of director of the poor is held in *Com. ex rel. Martin v. Bohan* (1900) 10 Kulp (Pa.) 80, to be a municipal office within the meaning of a statute to the effect that no municipal officer shall serve as a member of councils; and the offices of director and councilman are held not to be tenable at the same time.

¹²⁴ Under a statute providing that no person holding an office under the United States shall be allowed to serve as a commissioner of a district, a deputy marshal of the United States is held in *Com. ex rel. Olwine v. Ford* (1846) 5 Pa. 67, to have no right to hold the office of commissioner of a district.

¹²⁵ Under an act which declares that "no one person shall be eligible to hold more than one . . . school district office at one time," the offices of school director and school treasurer are not tenable at the same time. *Com. ex rel. Ryan v. Haeseler* (1894) 161 Pa. 92, 28 Atl. 1014.

¹²⁶ Under a statute providing that "it shall not be lawful for any councilman, burgess, trustee, manager, or director of any . . . municipality . . . to be, at the same time, a treasurer, secretary, or other officer, subordinate to the president and directors, who shall receive a salary therefrom," one may not, at the same time, be borough councilman and water superintendent. *Com. v. Raudenbush* (1915) 249 Pa. 88, 94 Atl. 555.

¹²⁷ Under a constitutional provision that judges shall not be allowed to hold any office of trust or profit under the state or the United States, it is held in *Calloway v. Sturm* (1870) 1 Heisk. (Tenn.) 764, that the acceptance of the office of supreme judge vacates a seat held by the appointee in Congress.

¹²⁸ The offices of deputy inspector and collector of customs and county sheriff are not tenable at the same time, under a statute declaring that no person shall be capable of holding any post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the commonwealth, who holds any post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States. *Bunting v. Willie* (1876) 27 Gratt (Va.) 144, 21 Am. Rep. 338.

town councilor and clerk;¹²⁹ United States commissioner and tax collector;¹³⁰ postmaster and justice of the peace;¹³¹ city water commissioner and member of legislature;¹³² undersheriff and chosen freeholder;¹³³ water superintendent and lieutenant colonel in United States army;¹³⁴ alderman and member of United States House of Representatives;¹³⁵ postmaster and probate judge;¹³⁶ or justice of the peace and

clerk of courts of oyer and terminer and quarter sessions.¹³⁷

2. Offices not within provisions.

Under miscellaneous statutory and constitutional provisions, it has been held that one may at the same time hold the following offices: Jury commissioner and school commissioner;¹³⁸ county judge and commissioner of the county court;¹³⁹ jury commissioner and mem-

¹²⁹ Under an act of Parliament that no one can be town councilor during the time he holds an office of profit in the gift of the council, the offices of town councilor and clerk are not tenable at the same time, and the acceptance of the latter vacates the former. *Staniland v. Hopkins* (1841) 9 Mees. & W. 178, 152 Eng. Reprint, 75.

¹³⁰ An act of the legislative assembly of Alaska, making the United States commissioner tax collector for his precinct, creates a territorial office within the meaning of the act of Congress providing that "no person holding a commission or appointment under the United States shall . . . hold any office under the government of the said territory." *Callahan v. Marshall* (1914) 127 C. C. A. 48, 210 Fed. 230.

¹³¹ Under a constitutional provision that no person holding any office of profit or trust under the authority of Congress shall hold any executive or judiciary office under the state, the offices of postmaster and justice of the peace are not tenable at one time. *McGregor v. Balch* (1842) 14 Vt. 428, 39 Am. Dec. 231.

¹³² Under a statute providing that members of the municipal board of water commissioners shall not hold any other office of profit, a commissioner cannot at the same time be a member of the state legislature. *State ex rel. Wingate v. Valle* (1867) 41 Mo. 29.

¹³³ An undersheriff is held, in *Westcott v. Briant* (1909) 78 N. J. L. 226, 73 Atl. 66, to be a person "who holds and exercises the office of sheriff" within the meaning of the statute declaring that "no person shall exercise any other civil office during the time that he holds and exercises the office of a sheriff, and that by acceptance of the latter office, his commission for any other civil office shall be null and void;" and one holding the office of chosen freeholder comes within the prohibition of its terms when he accepts the office of undersheriff.

¹³⁴ Under a city charter providing that "no person elected to any salaried office under this act shall during his term of office hold any other public office," and that if any such person does "accept any other public office, he shall thereby cease to hold his office," a water superintendent who accepted a commission as lieutenant colonel in the United States Army was held to have vacated his municipal office. *People ex rel. Ward v. Drake* (1890) 43 App. Div. 325, 60 N. Y. Supp. 309, affirmed without opinion in (1900) 161 N. Y. 642, 57 N. E. 1122. L.R.A.1917A.

¹³⁵ A representative in Congress holds an office within the meaning of a city charter which provides that "no alderman shall during the term for which he is elected hold any other public office," and declares that "if any alderman . . . accepts such public office . . . his office as alderman shall immediately become vacant;" and an alderman who becomes a representative thereby vacates his office under the city. *People ex rel. Kelly v. Brooklyn* (1879) 77 N. Y. 503, 33 Am. Rep. 659.

¹³⁶ Under a statute to the effect that "no person holding an office of profit under the United States shall, during his continuance in office, hold any office of profit under this state," one man cannot hold both the offices of Federal postmaster and probate judge. *Shepherd v. Sartain* (1913) 185 Ala. 439, 64 So. 57.

¹³⁷ See *Adam v. Mengel* (1887) 5 Sadler (Pa.) 402, 8 Atl. 606, involving the situation of a justice of the peace accepting the clerkship of the courts of oyer and terminer and quarter sessions, where a statute prohibits a person from holding at the same time the offices of justice of the peace and of clerk of any court.

¹³⁸ In a statute providing that the board of jury commissioners shall be composed of persons who are not county officers, the term "county officers" is "used in the sense attached to it in the Constitution, and in that sense it does not include a school commissioner." *McLain v. State* (1883) 71 Ga. 279.

¹³⁹ Under a constitutional provision that "no person shall, at the same time, fill two municipal offices," the offices of county judge and commissioner of the county court, are held in *Vogt v. Beauchamp* (1913) 153 Ky. 64, 154 S. W. 373, not to be untenable at the same time. "Under the statute," the court says, "a county judge may make settlements with personal representatives . . . or he may, if he thinks proper, appoint a special commissioner to make such settlements. . . . The commissioner is simply an arm of the court to make such settlements because of the inability of the judge of the court to perform such duties. Manifestly, therefore, the two positions are not incompatible, when the law contemplates that in the absence of the appointment of a commissioner the county judge shall himself perform the duties of the commissioner."

ber of democratic parish executive committee;¹⁴⁰ trial justice and register of deeds;¹⁴¹ justice of the peace and register of deeds;¹⁴¹ councilman and assistant city engineer;¹⁴² aqueduct commissioner and brigadier general;¹⁴³ inter-

preter for district court and inspector of elections;¹⁴⁴ special deputy United States marshal and attendant of the court of general sessions;¹⁴⁵ clerk in mayor's office and assistant clerk of district court;¹⁴⁶ clerk in department of

¹⁴⁰ Membership in the Democratic parish executive committee is not an office within the meaning of the statute providing that "no person holding any office under the state, or any parish or municipality therein, shall be competent to hold the office of jury commissioner," and no incompatibility exists between that office and the office of jury commissioner. *State v. Ardoin* (1915) 136 La. 1085, 68 So. 133.

¹⁴¹ Under a constitutional prohibition against the holding of the offices of justice of an inferior court and register of deeds at the same time, it is held in *Opinion of Justices* (1878) 68 Me. 594, that a justice of the peace or a trial justice is not a justice of an inferior court, and that a register of deeds can properly be commissioned by the governor as a trial justice or a justice of the peace.

¹⁴² Where the city council has not created the office of assistant city engineer, nor appointed the incumbent to the office, and where it cannot remove him from the office, the office is not one under the city council, within the meaning of an ordinance to the effect that "no person, while a member of the city council, . . . shall . . . be allowed to hold any salaried office under the city council," and the offices of councilman and assistant city engineer are not untenable at the same time. *Ryan v. Lewiston* (1893) 86 Me. 125, 29 Atl. 955.

¹⁴³ Where the chief of engineers in the Army of the United States is retired and a new incumbent appointed to the office, the fact that the first incumbent retains his rank of brigadier general does not make him an officer within a statute providing that an aqueduct commissioner shall hold no other Federal, state, or municipal office, and he may be appointed to such position. *People v. Duane* (1890) 121 N. Y. 367, 24 N. E. 845, affirming (1889) 55 Hun, 315, 8 N. Y. Supp. 439. The court makes a distinction between a rank and an office, in the following terms: "The right to the rank, uniform, and pay of a brigadier general, specially retained to the defendant on retirement by the statute, is no test of the question whether he in fact holds a Federal office. The liability to trial by court-martial for offenses against the military code was assumed by the defendant when he joined the army; and as his name is still retained upon the roll, and as he is permitted to wear the uniform and receive a portion of the pay of the rank upon which he was retired, the government still retains some control over his conduct, and, while relieving him from office, has retained this liability. A person may, of course, be subject to the rules and articles of war and to L.R.A.1917A.

trial by court-martial without, necessarily, holding a Federal office. He is liable to be assigned to duty at the Soldiers' Home, if selected for that purpose by the commissioners of that institution, and this selection is approved by the Secretary of War. Such appointment and approval might, and probably would, confer upon the appointee the character of a Federal officer, but until that is done, it cannot be said that this liability is any proper test of the question under consideration; and this is also true in regard to the provision permitting a retired officer to be detailed, on his own application, to serve as professor in any college. It is suggested that, as defendant is still a member of the Army, as constituted by the Federal statutes, he is, for that reason, subject to be assigned to duty by the President and Congress. That may be so, and when such an assignment is made, he may then hold a Federal office not held by him when the mayor made the appointment in question."

¹⁴⁴ The office of interpreter of a district court, which is a part of the state, and not of the city, government, is a court office, and not a city government office; and it is not untenable at the same time with the office of inspector of elections, under a provision in the city charter providing that offices under the city shall be vacated by the acceptance of another civil office of honor, trust, or emolument. *Goettman v. New York* (1875) 6 Hun (N. Y.) 132.

¹⁴⁵ It is held in *O'Brien v. New York* (1895) 84 Hun, 50, 32 N. Y. Supp. 34, that an attendant of the court of general sessions is not an officer under the city government within the meaning of a statute providing that "any person holding office . . . who shall during his term of office accept . . . any other civil office of honor, trust, or emolument under the government of the United States . . . shall be deemed thereby to have vacated every office held by him under the city government;" and it is held, further, that the offices of special deputy United States marshal and attendant of such court are not untenable at the same time. The decision seems to rest on the ground that the court is not a part of the city government, *Goettman v. New York* (N. Y.) supra, being cited as authority therefor.

¹⁴⁶ An assistant clerk of a district court is not a city or county officer within the meaning of a charter provision that "any person holding office . . . who shall during his term of office . . . hold or accept any other office connected with the government of the city . . . shall be deemed thereby to have vacated every office held by him under the city government;" and the acceptance of either the office of

public works and assistant clerk of district court; ¹⁴⁶ member of legislature and assistant clerk of district court; ¹⁴⁷ chief burgess and justice of the peace; ¹⁴⁸ chief burgess and notary public; ¹⁴⁹ city recorder and United States district attorney; ¹⁵⁰ commissioner of state survey and landscape architect in department of public works; ¹⁵⁰ clerk of United States

circuit court and commissioner of the same court; ¹⁵¹ town trustee and town clerk; ¹⁵² town trustee and town treasurer; ¹⁵³ master commissioner of circuit court and city attorney; ¹⁵³ chief of police and sheriff; ¹⁵⁴ marshal and sheriff; ¹⁵⁵ deputy sheriff and school director; ¹⁵⁶ governor and member of state

clerk in the department of public works or of clerk in the mayor's office does not vacate his clerkship of the court. *People ex rel. Gilchrist v. Murray* (1878) 73 N. Y. 535.

¹⁴⁷ An assistant clerk of a district court is not a city or county officer within the meaning of a charter provision that "any person holding office . . . who shall during his term of office . . . accept a seat in the legislature shall be deemed thereby to have vacated every office held by him under the city government;" and the acceptance by him of membership in the assembly does not vacate his clerkship. (N. Y.) *Ibid.*

¹⁴⁸ Neither the office of justice of the peace nor that of notary public is a borough office within the meaning of a statute which provides that a chief burgess shall not hold any other borough office or appointment during his term; and a chief burgess may hold such offices during his term. *Com. v. Shindle* (1896) 19 Pa. Co. Ct. 258.

¹⁴⁹ Although a city recorder possesses some powers and performs some duties of a judicial nature, he is not a judge within the meaning of the constitutional provision that no person exercising any office of trust or profit under the United States shall, at the same time, hold or exercise the office of judge; and no inconsistency is created by the statute between the offices of city recorder and United States district attorney. *Com. v. Dallas* (1801) 4 Dall. (Pa.) 229, 1 L. ed. 812; *Respublica v. Dallas* (1801) 3 Yeates (Pa.) 300.

¹⁵⁰ A landscape architect in the department of public works is not an officer within the meaning of the city charter provision which says that "any person holding office . . . who shall, during his term of office, accept, hold, or retain any other civil office of honor, trust, or emolument under the government . . . of the state . . . shall be deemed thereby to have vacated every office held by him under the city government;" and, accordingly, that position is not untenable at the same time with the office of commissioner of the state survey. *Olmstead v. New York* (1877) 10 Jones & S. (N. Y.) 481.

¹⁵¹ A statute providing that "no person who holds an office the salary or annual compensation attached to which amounts to the sum of \$2,500 shall be appointed to or hold any other office to which compensation is attached" applies only to offices to which a fixed annual compensation is attached, and not to offices under the fee system, although the fees may, in some years, reach that sum; and a clerk of the circuit court,

whose compensation is dependent upon the fees received, may also be a commissioner of that court. *United States v. Durlacher* (1894) 63 Fed. 672.

¹⁵² It is held in *Santa Ana Water Co. v. San Buenaventura* (1896) 65 Fed. 323, that, where one statute provides for the vacation of the office of town trustee by removal from the town, and another declares what shall constitute a vacancy in offices in general, without enumerating incompatibility, this enumeration is exclusive, and no incompatibility exists between the office of trustee on the one hand, and those of clerk and treasurer on the other.

¹⁵³ The office of master commissioner of the circuit court is not a state office within the meaning of a constitutional provision to the effect that no person shall, at the same time, be a state officer and an officer of any city or town; and the offices of master commissioner and city attorney are not untenable at the same time thereunder. *Goodloe v. Fox* (1895) 96 Ky. 627, 29 S. W. 433.

¹⁵⁴ It is held in *Peterson v. Culpepper* (1904) 72 Ark. 230, 9 S. W. 783, 2 Ann. Cas. 378, that the office of chief of police of a city is, not a state office within the meaning of a constitutional provision to the effect that "no person shall hold or perform the duties of more than one office in the same department of the government at the same time;" and that that office is tenable at the same time with the office of chief of police and sheriff.

¹⁵⁵ Under a constitutional provision to the effect that "no person shall hold, or perform the functions of, more than one office under the government of this state at the same time," it is held in *Atty. Gen. ex rel. Wilkins v. Cannors* (1891) 27 Fla. 329, 9 So. 7, that a statute which imposes upon certain sheriffs the duties of the marshals of certain municipal corporations which the act dissolves is constitutional. This is on the ground that the office of marshal is a city, and not a state, office.

¹⁵⁶ In *State ex rel. Walker v. Bus* (1896) 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636, a case involving the offices of deputy sheriff of the city of St. Louis and a school director of the city, under a constitutional provision to the effect that "no person shall, at the same time, fill two municipal offices, either in the same or different municipalities," it is held that the office of deputy sheriff is not a municipal office, and that the two offices are tenable at the same time. The court says: "While the city of St. Louis is strictly a municipal corporation, it is

board of control;¹⁵⁷ special circuit judge and regular circuit judge;¹⁵⁸ and associate judge and county treasurer.¹⁵⁹ And it has been held that no inconsistency exists between a statute providing that no person shall hold the offices of police judge and justice of the

peace at the same time, and a statute providing that, in the absence of the police judge, a justice of the peace shall act in his place.¹⁶⁰ Accordingly, a justice of the peace, so acting in the place of an absent police judge, is held not to violate the former statute.

territory is also a subdivision of the state in which officers are elected to perform the functions of the state government, as distinguished from those pertaining to municipal government. These officers are in no sense municipal officers. Their designation as officers of the city of St. Louis refers to their territorial jurisdiction, rather than to the governmental duties they perform. They are officers under the laws of the state, and perform their duties within city limits. The sheriff of the city of St. Louis is an officer of the city in the same sense that a sheriff of a county is an officer of the county." Similar disposition is made of a statute to the effect that no person holding office under the city of St. Louis shall be a member of the board of school directors. And in the same case it is held that, under a constitutional provision to the effect that in certain cities and counties "no person shall, at the same time, be a state officer and an officer of any county, city, or other municipality," a deputy sheriff may at the same time be a public school director, the former office not being a state office within the meaning of the term as used in the constitutional provision.

¹⁵⁷ *State v. Potterfield* (1896) 47 S. C. 75, 25 S. E. 39, supra, footnote 3.

¹⁵⁸ It is held in *James v. Cammack* (1910) 139 Ky. 223, 129 S. W. 582, that the duties of a special circuit judge are not incompatible with those of a regular circuit judge, under a constitutional provision that "no person shall, at the same time, be a state officer or a deputy officer, . . . and an officer of any county, city, town, or other municipality, or an employee thereof; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities."

¹⁵⁹ One who holds by election the offices of associate judge and county treasurer does not violate a statute which prohibits the holding, by appointment, of those two offices at the same time, the statute applying strictly to tenure by appointment, and not being intended to include tenure by election. *State ex rel. Peters v. McCollister* (1841) 11 Ohio, 46.

¹⁶⁰ *Re Corum* (1900) 62 Kan. 271, 84 Am. St. Rep. 382, 62 Pac. 661. E. L. D.

NEW YORK COURT OF APPEALS.

RE CLAIM OF MINNIE A. DE VOE.

STATE INDUSTRIAL COMMISSION,
Appt.,
v.

NEW YORK STATE RAILWAYS, Resp't.

(218 N. Y. 318, 113 N. E. 256.)

Master and servant — workmen's compensation — injury out of working hours.

Injury to a motorman by collision with an automobile when he is attempting, out of working hours, to board a car to visit the official watch inspector, as he is required to do by the rules of his employer, does not arise out of or in the course of his employ-

ment within the meaning of the workmen's compensation act.

For other cases, see *Master and Servant, II. a, 1*, in *Dig. 1-52 N. S.*

(Willard Bartlett, Ch. J., dissents.)

(June 6, 1916.)

A PPEAL by the State Industrial Commission from an order of the Appellate Division of the Supreme Court, Third Department, reversing an award made by the Workmen's Compensation Commission to claimant in a proceeding by her under the workmen's compensation act to recover compensation for the death of her husband. Affirmed.

The facts are stated in the opinion.

Note.—Generally, for the American cases on injuries "arising out of and in the course of" the employment, see page 232 of the annotation in L.R.A.1916A, 23, on the general subject of workmen's compensation acts. The English cases will be found at page 40 of that annotation.

Specifically, as to the right to compensation for injuries to employee received while on the street, see annotation following *Hopkins v. Michigan Sugar Co.* L.R.A.1916A, L.R.A.1917A.

314; *Beaudry v. Watkins*, L.R.A.1916F, 576, and *Kunza v. Detroit Shade Tree Co.* post, 252. The analogous question as to the right to compensation for injuries received while going to and from work is discussed in the annotation following *De Constantin v. Public Service Commission*, L.R.A.1916A, 331.

For later cases dealing with the construction and effect of workmen's compensation acts, see L.R.A. Digest under the title, "Workmen's Compensation."

Mr. E. C. Aiken, with Mr. Egbert E. Woodbury, Attorney General, for appellant:

The accident which caused the death of the deceased arose out of and in the course of his employment.

Gane v. Norton Hill Colliery Co. [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42; Graham v. Barr, 50 Scot. L. R. 391, [1913] S. C. 538, 6 B. W. C. C. 412; Keyser v. Burdick, 4 B. W. C. C. 87; Helmke v. Thilmann, 107 Wis. 216, 83 N. W. 360, 8 Am. Neg. Rep. 172; Ewald v. Chicago & N. W. R. Co. 70 Wis. 420, 2 Am. St. Rep. 178, 36 N. W. 12, 591; Newark Paving Co. v. Klotz, 85 N. J. L. 432, 91 Atl. 91; Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549; Boyle v. Columbian Fire Proofing Co. 182 Mass. 93, 64 N. E. 726; Northwestern Union Packet Co. v. McCue, 17 Wall. 508, 21 L. ed. 705; Mole v. Wadworth, 6 B. W. C. C. 129; Walton v. Tredegar Oil & Coal Co. 6 B. W. C. C. 592; Mackenzie v. Coltness Iron Co. 41 Scot. L. R. 6, 6 Sc. Sess. Cas. 5th series 8, 11 Scot. L. T. 350; Keenan v. Flemington Coal Co. 40 Scot. L. R. 144, 5 Sc. Sess. Cas. 5th series, 164, 10 Scot. L. T. 409; Jarvis v. Hitch, — Ind. App. —, 65 N. E. 608; Riley v. W. Holland & Sons [1911] 1 K. B. 1029, 80 L. J. K. B. N. S. 814, 104 L. T. N. S. 371, 27 Times L. R. 327, 4 B. W. C. C. 155; Taylor v. Jones, 123 L. T. Jo. 553, 1 B. W. C. C. 3.

Messrs. Kernan & Kernan, for respondent:

There was no employment of deceased by the defendant corporation, within the meaning of the statute, at the time of injury.

1 Labatt, Mast. & S. pp. 9, 56; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Cunningham v. Syracuse Improv. Co. 20 App. Div. 171, 46 N. Y. Supp. 954; Bradbury, Workmen's Compensation Law, 2d ed. p. 404; Re Flaherty, (Opinions of the Solicitor for the Department of Commerce and Labor, p. 225); Benson v. Lancashire & Y. R. Co. [1904] 1 K. B. 242, 73 L. J. K. B. N. S. 122, 68 J. P. 149, 52 Week. Rep. 248, 89 L. T. N. S. 715, 20 Times L. R. 139; Walters v. Stavely Coal & I. Co. 105 L. T. N. S. 119, 55 Sol. Jo. 579, 4 B. W. C. C. 303; Gilbert v. The Nizam [1910] 2 K. B. 555, 79 L. J. K. B. N. S. 1172, 103 L. T. N. S. 163, 26 Times L. R. 604, 3 B. W. C. C. 455; Nolan v. Porter, 2 B. W. C. C. 106.

Assuming that there was an employment of deceased by defendant at the time of injury, the injury was not one "arising out of and in the course" of such employment. L.R.A.1917A.

Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Bradbury, Workmen's Compensation Law, 2d ed. p. 398; McNicol's Case, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Greene v. Shaw [1912] 2 I. R. 430, 46 Ir. Law Times 18, 5 B. W. C. C. 573; Kitchenham v. The Johannesburg [1911] A. C. 417, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. C. C. 311; Pierce v. Provident Clothing & Supply Co. [1911] 1 K. B. 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. C. C. 242; Warner v. Couchman [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51; Kelly v. Kerry County Council, 42 Ir. Law Times, 23, 1 B. W. C. C. 194.

The question as to whether or not a particular injury is one arising out of and in the course of the employment is a question of law for the court, and a specific finding by the Workmen's Compensation Commission upon such fact is not final.

De Voe v. New York State R. Co. 169 App. Div. 472, 155 N. Y. Supp. 12; Rheinwald v. Builders' Brick & Supply Co. 168 App. Div. 425, 153 N. Y. Supp. 598; Hotchkiss v. Mosher, 48 N. Y. 478; McKinley v. Hessen, 202 N. Y. 24, 95 N. E. 32.

Pound, J., delivered the opinion of the court:

At the time of receiving the injuries resulting in his death Edward De Voe resided at Mohawk, and was employed as a motorman by the New York State Railways a street railway corporation.

On September 12, 1914, at about 4:50 P. M. and after he had finished his work for the day, and as he was hurrying from the car barn at Mohawk to catch a car of the New York State Railways, which was just coming to a stop before the car barn, he was struck by an automobile running near the curb, receiving injuries from which he died three days later. The purpose of De Voe in taking, or attempting to take, a car was to proceed to Herkimer to have his watch tested. It was understood when employees were hired that they should have free transportation on the cars of the company. It was a rule of the company (employer) that the men should have their watches tested once in every two weeks, under penalty of loss of one day. The employees were not paid for the time which they consumed in the period of testing their watches, or of going to or from the place the test might be made. The person who

made the test was designated and paid by the employer.

The question is whether death resulted from "an accidental personal injury sustained by the employee arising out of and in the course of his employment." W. C. L. § 10, Consol. Laws, chap. 67. The employee is not insured generally against accident while working for the street railway corporation. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself, and goes to work, because of his employment; yet if he meets with an accident before coming to the employers' prem-

ises or his place of work, that is not a risk of his occupation, but of life generally. Deceased was not employed to have his watch regulated, and therefore was not injured while doing a duty that he was employed to perform. He was not injured while on duty, nor in his working hours, nor on his way to or from his duty within the precincts of the company.

The order appealed from should be affirmed, with costs against the Industrial Commission.

Hiscock, Chase, Cuddeback, Hogan, and Cardozo, JJ., concur.

Willard Bartlett, Ch. J., dissents.

MICHIGAN SUPREME COURT.

AUGUSTA KUNZE

v.

DETROIT SHADE TREE COMPANY, Plff.
in Certiorari.

(— Mich. —, 158 N. W. 851.)

Master and servant — workmen's compensation — injury by street traffic.

Injury to a tree trimmer whose duties require him to go about from place to place within the city to supervise the work, by being struck by an automobile when attempting to take a street car to go from one job to another, arises out of and in the course of his employment within the meaning of the workmen's compensation act. *For other cases, see Master and Servant, II, a, 1, in Dig. 1-52 N. S.*

(July 21, 1916.)

CERTIORARI to the State Industrial Accident Board to review its award in a proceeding under the workmen's compensation act to obtain compensation for the death of plaintiff's intestate. Affirmed.

The facts are stated in the opinion.

Mr. Thomas M. Cotter for plaintiff in certiorari.

Mr. E. D. Alexander, for defendant in certiorari:

Plaintiff's injury arose out of and in the course of the employment.

M'Laren v. Caledonia R. Co. [1911] S. C. 1075, 48 Scot. L. R. 885, 5 B. W. C. C. 492; *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90

Note. — As to right to compensation, under workmen's compensation acts, for injuries sustained by an employee while on the street, see footnote to *Re De Voe*, ante, 250.
L.R.A.1917A.

L. T. N. S. 611, 20 Times L. R. 429; *State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129.

Kuhn, J., delivered the opinion of the court:

This case is brought here by certiorari to review an award made by the State Industrial Accident Board.

Frederick Kunze, whose widow is the claimant herein, was employed by the Detroit Shade Tree Company, the defendant, as a tree trimmer and planter. Having been with the defendant company for about two years, on July 18, 1914, he was employed as a foreman, and in the course of this employment it was his duty to go from job to job about the city. On the day aforementioned, he had inspected a job on Virginia park, a street in the city of Detroit, and, having completed this inspection at about 9 o'clock in the morning, he left the work in charge of another employee, and started east on Virginia park to the intersection of Woodward avenue, where it is to be reasonably inferred from the evidence he was about to take a car to inspect another job north of Virginia park at the corner of Josephine avenue and Woodward avenue; and it also appears that there was another job for inspection at the corner of Mt. Vernon and John R. streets, which was also north of Virginia park. While at the intersection of Virginia park and Woodward avenue, he was knocked down by an automobile, seriously injured, and died the following day.

It is the contention of the appellant that there is no evidence in the record that the deceased was at the time of his death engaged in any business for his employer. Mr. Alfred Gibson, the president of the defendant company, was sworn and testified as

to the character of the employment. It appears from his testimony that the deceased was employed by the week, and he stated that in the summer time, "he went around trimming trees, doing tree surgery work, taking down trees, and so on, with other men in my employ that he had charge of." He also testified that at the time of his injury, the deceased had on his person a list of places to go, one after the other, and stated that he had finished his work on Virginia park. We think it is clear from the record that the employment of the deceased was to go from place to place to trim trees, and that in the discharge of these duties it was not only necessary for him to supervise the work, but it was necessary, in the course of his employment, to proceed from one job to the other, adopting such means of locomotion as he might desire.

It is strongly urged by counsel for appellant that the death of the deceased was not due to any accident "arising out of and in the course of his employment," and that there was no causal connection between the employment and the injury, and in support of this contention the recent decision of this court in *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325, is relied upon. In the opinion in that case, Mr. Justice Steere, speaking for the court, quoted from the rule announced by the Massachusetts court, in which it was stated: "If the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed, apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence."

Being clearly of the opinion that the record warrants the conclusion that at the time of the injury the deceased was within the ambit of his employment, we also think that it is a justifiable conclusion that the accident can be fairly traced to his employ-

ment as a contributing and proximate cause. It is true that in going from one place to another, as was his duty, he naturally was compelled to assume risks not in anywise connected with the trimming, planting, and treating of shade trees. But his employment extended further than this and necessarily obliged him, in the discharge of his duties, to go from place to place, and in so doing to assume the risks of traffic upon the streets. Where employees are compelled, during the course of their employment, to travel about the streets, it does not seem to us to be unreasonable to say that the danger of being struck by street cars, automobiles, and traffic of every description should be taken account of. We think it must be said that the very nature of the occupation of the deceased itself exposed him to the unusual risk and danger of an accident of this nature, and believe that the instant case is readily distinguishable from *Hopkins v. Michigan Sugar Co.* supra, where this court said that "no direct causal relation is claimed in the particular that the nature of the business of manufacturing sugar in itself exposes its employees to unusual risk of danger of accident of this nature."

It appears that in that case the deceased at the time of the accident had finished his duties of the day and had returned safely to his home city, Saginaw, and was injured because of slipping on the ice while passing on foot along a highway. In this case the deceased received his injury during the hours of employment, while actively engaged in performing work for his master in accordance with duties imposed upon him by his employment. See *Beaudry v. Watkins*, — Mich. —, L.R.A.1916F, 576, 158 N. W. 16.

We are of the opinion that the order and award of the Industrial Accident Board should be and is hereby affirmed.

TEXAS SUPREME COURT.

PAUL WAPLES et al., Composing the Democratic State Executive Committee, Appts.,

v.

E. K. MARRAST.

(— Tex. —, 184 S. W. 180.)

Elections — primary — constitutionality of law.

1. A primary election law is not unconstitutional because it is impracticable,

Note. — As to constitutionality of primary election laws, see annotation following this case, post, 259.

unworkable if literally construed, and defective because not providing for all candidates to be nominated.

For other cases, see Elections, IV. in Dig. 1-52 N. S.

Same — power to require primary.

2. The legislature may require political parties to hold primary elections to enable their members to designate their choice of candidates for office, whether state or national, and likewise their preference of delegates to party conventions.

For other cases, see Elections, IV. in Dig. 1-52 N. S.

Same — law applicable only to certain parties.

3. The legislature may make a primary election law applicable only to parties having certain numerical strength.

For other cases, see Elections, IV. in Dig. 1-52 N. S.

Same — limited application.

4. A primary election law is not invalid because, under the specified classification, it is applicable to only one party at the time of its adoption.

For other cases, see Elections, IV. in Dig. 1-52 N. S.

Tax — public purpose — primary election.

5. A primary election to select candidates of the various political parties for public office is not a public purpose for which taxes may be levied.

For other cases, see Taxes, I. & in Dig. 1-52 N. S.

(March 22, 1916.)

CERTIFICATION by the Court of Civil Appeals for the First Supreme Judicial District, for the determination by the Supreme Court, of questions arising upon appeal by respondents from the District Court for Galveston County in a mandamus proceeding to compel them to hold the primary election contemplated by the presidential primary act. Affirmative answer returned.

The facts are stated in the opinion.

Messrs. Cecil H. Smith, Walter Collins, and James B. Stubbs, for appellants:

Article 3175a, Rev. Stat., known as the presidential primary election law, is invalid, because it requires the expenses of such primary to be paid by the respective counties.

Castner v. Minneapolis, 92 Minn. 86, 99 N. W. 361, 1 Ann. Cas. 934; *Keller v. Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Glasgow v. Terrell*, 100 Tex. 584, 102 S. W. 98; *Borden v. Trespacios Rice & Irrig. Co.* 98 Tex. 509, 107 Am. St. Rep. 640, 86 S. W. 11; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Frank- L.R.A.1917A.*

fort v. Com. 26 Ky. L. Rep. 957, 82 S. W. 1008.

The law imposing on candidates fees for expenses of a primary, such fees bearing no relation to the services rendered in filing nomination papers, or expenses of an election, is an unconstitutional discrimination against candidates without means to pay for the privilege of becoming such.

People ex rel. Breckon v. Election Comrs. 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036.

The legislature cannot confer upon one class important privileges and partisan advantages, and deny them to another class, and hamper it with unfair and unnecessary burdens and restrictions in the selecting of its candidates.

State ex rel. Fitz v. Jensen, 86 Minn. 19, 89 N. W. 1128; *Middleton v. Texas Power & Light Co.* — Tex. Civ. App. —, 178 S. W. 956, 9 N. C. C. A. 847; *Ex parte Jones*, 38 Tex. Crim. Rep. 482, 43 S. W. 513; *Gustafson v. State*, 40 Tex. Crim. Rep. 67, 43 L.R.A. 615, 45 S. W. 717, 48 S. W. 518; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, 36 Sup. Ct. Rep. 7; *Jackson v. State*, 55 Tex. Crim. Rep. 557, 117 S. W. 818; *Owens v. State*, 53 Tex. Crim. Rep. 105, 126 Am. St. Rep. 772, 112 S. W. 1076; *San Antonio & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) 565, 19 S. W. 910; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 606, 17 Sup. Ct. Rep. 255; *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 648, 58 L. ed. 1138, 34 Sup. Ct. Rep. 678; *People ex rel. Phillips v. Strassheim*, 240 Ill. 279, 22 L.R.A.(N.S.) 1136, 88 N. E. 821; *State ex rel. Dorval v. Hamilton*, 20 N. D. 592, 129 N. W. 916.

The entire act must fail if unconstitutional in part.

Connolly v. Union Sewer Pipe Co. 184 U. S. 561, 46 L. ed. 690, 22 Sup. Ct. Rep. 431; *Western U. Teleg. Co. v. State*, 62 Tex. 634; *Kimbrough v. Barnett*, 93 Tex. 301, 55 S. W. 120; *Ex parte Towles*, 48 Tex. 442; *State ex rel. University of Utah v. Candland*, 36 Utah, 406, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834, 104 Pac. 285.

The law is impracticable and cannot be carried out.

Missouri, K. & T. R. Co. v. State, 100 Tex. 424, 100 S. W. 766; *State ex rel. Crow v. West Side Street R. Co.* 146 Mo. 155, 47 S. W. 959.

The legislature has no authority to delegate to the executive committees the right to legislate to supply deficiencies in the law.

Ex parte Mitchell. — Tex. —, 177 S. W. 953; *People ex rel. Breckon v. Election Comrs.* 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas.

562; *Rouse v. Thompson*, 228 Ill. 522, 81 N. E. 1109.

Messrs. John W. Campbell, Charles H. Theobald, Walter E. Cranford, and Marion J. Levy, for appellee:

The legislature has the right, under the police power of the state, to regulate the conduct of nominations of the political parties of the state, and to define a political party, and the provisions that only political parties casting over 50,000 votes at the last general election for governor and lieutenant-governor shall be required to hold preferential primary elections under the provisions of the law, the expense of which shall be borne by the counties, is not discriminatory, but it is a reasonable provision and regulation which the legislature had the power and right to make.

De Walt v. Bartley, 146 Pa. 529, 15 L.R.A. 771, 28 Am. St. Rep. 814, 24 Atl. 186; *State, Ransom, Prosecutor, v. Black*, 54 N. J. L. 446, 16 L.R.A. 769, 24 Atl. 489, 1021; *Ledgerwood v. Pitts*, 122 Tenn. 570, 125 S. W. 1036; *State ex rel. Fitz v. Jensen*, 86 Minn. 19, 89 N. W. 1126; *Kenneweg v. Allegany County*, 102 Md. 119, 62 Atl. 252; *Ladd v. Holmes*, 40 Or. 167, 91 Am. St. Rep. 457, 66 Pac. 714; *State ex rel. Adair v. Drexel*, 74 Neb. 776, 105 N. W. 174; *Riter v. Douglass*, 32 Nev. 400, 109 Pac. 444; *State ex rel. Labauve v. Michel*, 121 La. 374, 46 So. 430; *State ex rel. Webber v. Felton*, 77 Ohio St. 554, 84 N. E. 88, 12 Ann. Cas. 65; *State ex rel. Plimmer v. Poston*, 58 Ohio St. 620, 42 L.R.A. 237, 51 N. E. 150; *Gentsch v. State*, 71 Ohio St. 151, 72 N. E. 900; *Miner v. Olin*, 159 Mass. 487, 34 N. E. 721; *Corcoran v. Bennett*, 20 R. I. 6, 36 Atl. 1122; *State ex rel. McCarthy v. Moore*, 87 Minn. 308, 59 L.R.A. 447, 94 Am. St. Rep. 702, 92 N. W. 4; *People ex rel. Coffey v. Democratic General Committee*, 164 N. Y. 335, 51 L.R.A. 674, 58 N. E. 124; *Healey v. Wipf*, 22 S. D. 343, 117 N. W. 521; *Griffin v. Gesner*, 78 Kan. 669, 97 Pac. 796; *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728; *People ex rel. Breckon v. Election Comrs.* 221 Ill. 9, 77 N. E. 321, 5 Ann. Cas. 562; *Schafer v. Whipple*, 25 Colo. 400, 55 Pac. 180; *Hopper v. Stack*, 69 N. J. L. 562, 56 Atl. 1; *Herrera v. State*, — Tex. Crim. Rep. —, 180 S. W. 1097; *Auto Transit Co. v. Ft. Worth*, — Tex. Civ. App. —, P.U.R. 1916C, 565, 182 S. W. 685.

The primary elections are part of the political machinery of the state, so constituted by the act in question, and the payment of the expenses of the holding of the same is for a public purpose, and is not the granting of money to or in aid of any person or association of persons, within the meaning of the Constitution. L.R.A.1917A.

De Walt v. Bartley, 146 Pa. 529, 15 L.R.A. 771, 28 Am. St. Rep. 814, 24 Atl. 185; *State ex rel. Labauve v. Michel*, 121 La. 374, 46 So. 430.

The intention of the legislature, as expressed in the body of the act itself and in the caption and emergency clause thereof, and the general rule of construction of statutes in *pari materia*, require that this act be read together with the general primary law of this state, in so far as the provisions of the latter are applicable to the purpose and execution of the act under discussion; and, being so read, it is clearly practicable and capable of being carried out.

Ellis County v. Thompson, 95 Tex. 22, 64 S. W. 927, 66 S. W. 48; *Imperial Irrig. Co. v. Jayne*, 104 Tex. 395, 138 S. W. 575, Ann. Cas. 1914B, 322; *Bradford v. State*, — Tex. Crim. Rep. —, 180 S. W. 702; *Spence v. Fenchler*, — Tex. —, 180 S. W. 597; *Russell v. Farquhar*, 55 Tex. 359.

The statute makes it mandatory upon the state Democratic executive committee to conduct a direct preferential primary; and the committee, for the purpose of requiring orderly and prompt and efficient procedure in conducting this primary, may make reasonable regulations.

Ferris Press Brick Co. v. Hawkins, 53 Tex. Civ. App. 578, 116 S. W. 80; *Gomez v. Timon*, 60 Tex. Civ. App. 311, 128 S. W. 656; *Uvalde v. Burney*, — Tex. Civ. App. —, 145 S. W. 311.

Phillips, Ch. J., delivered the opinion of the court:

The case involves the constitutionality of what is familiarly known as the presidential primary act of the thirty-third legislature, chapter 46, General Laws of 1913. The terms of the act require the holding of precinct primary elections in the counties of the state on the fourth Tuesday in May in presidential election years by the respective political parties of the state polling as many as 50,000 votes for their respective candidates for governor at the last preceding general election,—obedience to it being optional with parties so polling a less number of votes,—for the expression by their qualified electors of their preference of candidates for the party nomination to the offices of President and Vice President of the United States and presidential electors, and likewise their choice of party candidates for the places of delegates to the national conventions of such parties.

The expense of such primary election of a party whose candidate for governor at the last preceding general election received as many as 50,000 votes, it is provided by the act, shall be paid out of the county treasury of each county, no provision being made

for the expense of the primary election of other parties, if held under the act.

It is further provided that the votes cast at the election shall be counted, canvassed, and returned as required by the general primary law of the state in relation to party nominations for the offices of governor and lieutenant governor.

In respect to the number of presidential electors to be nominated in the primary election, the act is deficient. It provides only for the nomination of one elector from each congressional district, whereas the state is required to elect at the general election a number equal to its whole number of Senators and Representatives in Congress.

Under the agreed facts of the case, the operation of the act at the present time is to require only the Democratic party to hold the primary election provided for, since it is, at present, the only party in the state whose candidate for governor at the last general election received as many as 50,000 votes. It is furthermore agreed that the cost of such a primary election as the act requires, will be not less than \$300,000, and will probably exceed that amount.

The requirement of the general primary law in respect to the time for the canvassing by the state executive committee of the votes cast for candidates for party nominations for governor and lieutenant governor is that it shall be at a meeting held on the second Tuesday in August of the election year. The Democratic National Convention, it appears from the statement of the agreed facts, has been appointed to meet on June 14, 1916. If the primary election should be held and the act literally observed, the votes cast for delegates could not be canvassed in time for that convention.

The suit was a mandamus proceeding by E. K. Marraat to require the appellants, who compose the Democratic State Executive Committee, to hold the primary election contemplated by the act. In the trial court the writ of mandamus was awarded, the learned trial judge in an able written opinion holding the act valid against the attack made upon it by the respondents. An appeal was prosecuted to the honorable court of civil appeals, which has certified to us the following questions:

1. Is the act, approved March 27, 1913, art. 3175a, Vernon's Sayles's Texas Civil Statutes, void upon the ground that it is in conflict with one or more of the provisions of the Constitution of this state or of the Union, as is claimed by appellants?

2. If not void, has the State Democratic Executive Committee authority to disregard its requirements in so far as they are im-L.R.A.1917A.

practicable, and to supply such regulations as they may deem proper and necessary?

We shall consider only the question of the constitutionality of the act. That it is impracticable, unworkable if literally observed, and is deficient because of the omission to provide for the nomination of the legal numbers of presidential electors, are not matters which, if true, affect the power of the legislature to enact the law.

The authority of the legislature to require the holding of a primary election by the political parties of the state for the purpose of enabling their members to vote their choice for party nominees for elective offices, whether state or national, and likewise express their preference in the selection of party delegates to party conventions, is undoubted. The legislative right in such an enactment to make, according to their numerical strength, a reasonable classification in respect to the political parties subject to the law, is equally clear. The act is not invalid under the classification adopted because it applies at the present time to only the Democratic party. It is not to be regarded as having been enacted for only the present day. It was within the province of the legislature to determine whether the numerically weaker parties should be relieved from its compulsory observance; and, if so, to provide a classification according to the voting strength of the parties. The selection of a voting strength of 50,000 votes as the test does not create an unreasonable classification, and the act is not, upon this account, to be overturned.

The only serious constitutional question involved by the act is its requirement that the expense of the primary election shall be borne out of the public treasury of the counties. This presents, nakedly, the question, whether it is within the power of the legislature to devote the public revenues of the state to the payment of the primary election expenses of political parties. The general primary law relating to the nomination of party candidates for state, district, and county offices imposes such expense upon the candidates. Rev. Stat. 1911, art. 3104. In the legislative history of the state, this is the first effort, so far as we are aware, to make the expense of a party election a charge upon the public revenue.

Section 3, article 8, of the Constitution, declares: "Taxes shall be levied and collected by general laws and for public purposes only."

By § 52, article 3, it is provided: "The legislature shall have no power to authorize any county, city, town or other political corporation . . . of the state, to lend its credit, or to grant public money

. . . in aid of, or to, any individual, association or corporation whatsoever," etc.

The funds possessed by the counties of the state, and available for the payment of the expense of the primary election provided for by this act, are only those which are derived by taxation. If the payment of such expense is, within the meaning of the Constitution, "a public purpose," the act is valid in its provision that it shall be borne out of the public treasury of the counties; otherwise it is not.

Taxes are burdens imposed for the support of the government. They are laid as a means of providing public revenues for public purposes. The sovereign power of the state may be exercised in their levy and collection only upon the condition that they shall be devoted to such purposes; and no lawful tax can be laid for a different purpose. Whenever they are imposed for private purposes, as was said in *Brodhead v. Milwaukee*, 19 Wis. 670, 88 Am. Dec. 711, it ceases to be taxation and becomes plunder.

It is not easy to state in exact terms what is "a public purpose" in the sense in which that term is employed as a limitation upon the state's power of taxation. The framers of the Constitution were doubtless sensible of this difficulty, for they did not attempt to define it. Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the state may be used to accomplish them. The powers of the state as a sovereignty exist only for governmental purposes. They may be freely exerted in the discharge of all the governmental functions of the state; but cannot be applied to uses, though public in aim and result, which are not governmental in their nature. As the means provided for the support of the government in its administrative duties, and existing alone for that end, the taxing power may be employed for no purpose save that which, in a true and just sense, is related to the performance by the state of its governmental office. The appropriation of the public revenue is a legislative power, and the legislature must necessarily be allowed a large discretion in determining to what uses public moneys may be put. Subject to the constitutional limitation that the public revenue shall be applied to only public purposes, to the prudent husbandry of the legislature as well as its provident foresight has been committed the public trust of making such use of it as will afford the economical administration of the government which both the spirit and the letter of the Constitution enjoin. The term "public pur-

pose" as used in this relation is not, therefore, to be construed narrowly, so as to deny authority to the legislature to make such provision for the administration and support of the government in its several branches and subdivisions as will faithfully subserve the present and future interests of the people. The limitation imposed by the Constitution upon the power is, however, imperative. And it is essentially true that it does not permit taxation for all purposes which, in a broad and general sense, may be regarded as public, but expressly confines its exercise to only those public purposes with which the state, as a government, invested with high and sovereign powers, but only as a grant from the people, and therefore to be solely used for the common benefit of all of them, and not as a paternal institution, may justly concern itself, and to which, for that reason, the public revenues may be rightfully devoted.

As to what is a public purpose within the meaning of § 3, article 8 of the Constitution, no better test can be presented than the inquiry: Is the thing to be furthered by the appropriation of the public revenue something which it is the duty of the state, as a government, to provide? *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *People ex rel. Detroit & H. R. Co. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400. Those things which it is the duty of the state to provide for the people, it is equally the right of the state, by means of the public revenue, to maintain. Within this category fall the general instrumentalities of the government, the public schools, and other institutions of like nature. But the state is wholly without any power to levy and appropriate taxes for the support of those things which, either by common usage or because they are in no proper sense the instruments of government, it is the duty of the people to provide for themselves. It is not all things which answer a public need or fill a public want that it is within the authority of the state to furnish for the people's use, or support at the public expense. Manufacturing industries, railroads, public enterprises of many kinds, private schools and private charitable institutions, all afford a service to the public, but the state is without any power to maintain them. Religion is generally esteemed a helpful influence for public morality. But the Constitution expressly declares that no public money shall be granted in aid of any religious organization.

General elections are essential to the public welfare, and are distinctly related to the discharge of an important governmental duty, because it is only by their means that

the organic law may be amended, and in the elective offices public officials be supplied for the various administrative agencies of the state. But is it any duty of the state to provide the people with nominees of political parties for the elective offices of the government? Is it in any just sense a concern of the state, that those offices be filled by only the nominees of political parties? And is there any right in the state to devote the public revenues of the state derived by taxation from the people at large in aid of the purposes of such parties?

A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalence of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for the government in accord with their political principles, and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental function. They constitute no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. In the interest of fair methods and a fair expression by their members of their preference in the selection of their nominees, the state may regulate such elections by proper laws, as it has done in our general primary law, and as it was competent for the legislature to do by a proper act of the character of the one here under review. But the payment of the expenses of purely party elections is a different matter. On principle, such expenses cannot be differentiated from any other character of expense incurred in carrying out a party object, since the attainment of a party purpose—the election of its nominees at the general elections through the unified vote of the party membership, is necessarily the prime object of a party primary.

The great powers of the state—and the taxing power is the one to be always the most carefully guarded—cannot be used, in our opinion, in aid of any political party or L.R.A.1917A.

to promote the purposes of all political parties. They are no more to be made the objects of governmental bounty or favor than any other class of public organizations into which groups of citizens may form themselves. Expenses incurred in the furtherance of their objects can no more be defrayed out of the public treasury than the expenses of other associations of individuals. If it is constitutional to use the public revenues to pay the cost of their primary elections, it would likewise be constitutional to pay the cost of their candidates' campaigns. If the constitutional barrier is removed in the one case, it cannot be restored in the other; but it will have to be admitted that any and all kinds of expense of political parties may be lawfully imposed as a part of the public burden of taxation.

For a stronger constitutional reason than would apply to other kinds of public organizations is it the clear duty of the state to withhold the use of its public revenues as an aid to political parties, and particularly as an aid in the holding of their party elections. The object of such parties is the political control of the government; and we regard it as a fundamentally sound proposition that no power of the government can be constitutionally used in furtherance or aid of the effort of any class or kind of organization, political or otherwise, to obtain the control of the government.

To provide nominees of political parties for the people to vote upon in the general elections is not the business of the state. It is not the business of the state because, in the conduct of the government, the state knows no parties and can know none. If it is not the business of the state to see that such nominations are made, as it clearly is not, the public revenues cannot be employed in that connection. To furnish their nominees as claimants for the popular favor in the general elections is a matter which concerns alone those parties that desire to make such nominations. It is alone their concern because they alone are interested in the success of their nominees. The state, as a government, cannot afford to concern itself in the success of the nominees of any political party, or in the elective offices of the people being filled only by those who are the nominees of some political party. Political parties are political instrumentalities. They are in no sense governmental instrumentalities. The responsible duties of the state to all the people are to be performed and its high objects effected without reference to parties, and they have no part or place in the exercise by the state of its great province in governing the people.

We have been pointed to but one authority holding that the public revenues may be used to pay the cost of the primary elections of political parties. (*State ex rel. Labauve v. Michel*, 121 La. 374, 46 So. 430), but in that case the question received only a casual consideration, and we do not feel at liberty to adopt the conclusion there announced.

Holding an act of the legislature to be unconstitutional is never a welcome duty, and this court has never performed it except with reluctance. It is a duty, however, plain and unmistakable, when, upon mature consideration, such is the conviction of the court. The Constitution is the supreme law of the state, and no consideration should be suffered to stand in the way of its enforcement. Tested by legal principles which are clear and established, the payment of the expenses of primary elections of political parties is not a public purpose for which public revenues may be used; and, in our opinion, the act in question is therefore unconstitutional and unenforceable.

Hawkins, J., concurring:

I concur in the conclusion and also in the general course of reasoning upon which it

has been reached, and in nearly all that our Chief Justice has said so well, above.

However, I consider it proper for me to say this:

Undoubtedly "common usage" is one very valuable test, or measure, by which the courts may determine whether a given expenditure of public funds is or is not for "a public purpose," and to that effect are the authorities; but I do not regard it as the only test, in any instance.

The distinction between the "maintenance" and the "regulation" of primary elections is drawn, and properly so, in said opinion, and that, indeed, is as far as it is necessary to go in answering the certified question; but, as this is a pioneer case of public importance, I wish, by way of making my own views clear, to emphasize, if possible, said distinction, and, in that connection, to say that said opinion, as I understand it, does not question the power and authority of the legislature to direct payment, out of public funds raised by taxation, of any and all reasonable expenses which may be incurred in the mere regulation—but not in the maintenance—of primary elections. *De Walt v. Bartley*, 146 Pa. 529, 15 L.R.A. 771, 28 Am. St. Rep. 814, 24 Atl. 185.

Annotation—Constitutionality of primary election laws.

The earlier cases on this question are discussed in the annotation to *People ex rel. Phillips v. Strassheim*, 22 L.R.A. (N.S.) 1135, and *State ex rel. Miller v. Flaherty*, 41 L.R.A. (N.S.) 132; and see also other notes there referred to.

As to constitutionality of preferential system of voting, see annotation to *Brown v. Smallwood*, L.R.A.1916B, 939.

As to validity of fee exacted for filing nomination, see annotation to *State ex rel. Riggle v. Brodigan*, L.R.A.1915B, 197.

As to constitutionality of provision limiting names of candidates on official ballot, see annotation to *Winston v. Moore*, L.R.A.1915A, 1190.

In general.

(Supplementing annotations in 22 L.R.A. (N.S.) p. 1136, and 41 L.R.A. (N.S.) p. 133.)

The objection which proved fatal to the act in *WAPLES v. MARRAST*, ante, 253, that a primary election is not "a public purpose" within the meaning of the Constitution, for which taxes might be levied, seems to be one that might have been advanced against most acts of this kind. With the exception, however, of the case of *State ex rel. Labauve v. Michel*, set out in the annotation in 22 L.R.A. (N.S.) L.R.A.1917A.

1136, where, contrary to the decision in the *WAPLES CASE*, the expenses of primary elections were held legitimate state expenses, the point does not appear to have been before decided.

It will be noticed that the contention in *WAPLES v. MARRAST*, that the act before the court was invalid because impracticable or unworkable if literally construed, and defective because not providing for all candidates to be nominated, was held not well taken; and that the court recognized the legislative right to require political parties to hold primary elections to enable their members to designate their choice of candidates for state or national offices and their preference of delegates to party conventions.

Where there is nothing in the Constitution prohibiting the legislature from enacting a law requiring party nominations to be made by means of primary elections, it has the power to provide that nominations of party candidates for office shall be made in no other way, to prescribe the time of holding and manner of conducting the primary elections by which such nominations are to be made, and also to impose such reason-

able conditions and tests as to party membership or affiliation as shall entitle those seeking party nominations to get their names upon their party ballots as candidates. This power need not be expressly conferred upon the legislature by the Constitution, but exists if its exercise is not prohibited by that instrument. *Hager v. Robinson* (1913) 154 Ky. 489, 157 S. W. 1138.

A primary election held merely to name the candidates of a political party or parties is not an election within the meaning of the provisions of the Constitution with respect to elections, such provisions referring to the election of officers, and not to the nomination of candidates. (Ky.) *Ibid.* (See, as to this question, note in 18 L.R.A.(N.S.) 412.)

Destruction of parties.

(Supplementing annotation in 22 L.R.A.(N.S.) p. 1137.)

In *People ex rel. McCormick v. Czarnecki* (1915) 266 Ill. 372, 107 N. E. 625, where the validity of the ballot law was in question, the court stated that when the provisions of the various primary election acts were considered, the purpose of the legislature to enforce and perpetuate an existing party system of government, and to maintain the integrity of political parties, was clearly manifest, and took the view that this purpose was a valid one.

Where there is no provision in the Constitution requiring a party nomination for the office of judge, an act providing for the abolition of party nominations for that office is not unconstitutional. *Winston v. Moore* (1914) 244 Pa. 447, L.R.A.1915A, 1190, 91 Atl. 520, Ann. Cas. 1915C, 498.

Sufficiency of title.

(Supplementing annotations in 22 L.R.A.(N.S.) p. 1137, and 41 L.R.A.(N.S.) p. 133.)

In *Thornhill v. Wear* (1912) 131 La. 479, 59 So. 909 (relying upon the decision in *State ex rel. Labauve v. Michel*, which is set out in the annotation in 22 L.R.A.(N.S.) 1137), the act of 1912, relative to primary elections, was held not unconstitutional on the ground that its title did not express its object. The exact title of the act does not appear.

The title of a statute reading, "An Act to Provide for Party Nominations by Direct Vote," which has a caption, "elections, primary," is sufficiently broad to cover provisions for punishment for violations of the act, and does not violate § 28 of art. 4 of the state Constitution. L.R.A.1917A.

State v. Peyton (1911) 234 Mo. 517, 137 S. W. 979, Ann. Cas. 1912D, 154.

And the provision of the Constitution that no law shall embrace more than one subject, which shall be expressed in its title, is not violated by an act the title of which states that it is an act to amend stated sections of the Revised Laws of a certain year, as the same were amended by subsequent Session Laws, and repealing certain Session Laws, the subject-matter of such laws being primary elections, although the act refers in its title to the sections amended by number only, without stating by descriptive words in connection therewith the general subject of the statutes amended, and without reciting in its own title the general subject of the legislation. *State ex rel. Olson v. Erickson* (1914) 125 Minn. 238, 146 N. W. 364.

In *Johnson v. Schmahl* (1912) 119 Minn. 179, 157 N. W. 741, the title to an act stating that it was to amend certain sections of the Revised Law of a certain year and acts amendatory thereto, relating to registration of voters and to primary and general elections, and to add certain provisions relating to registration of voters and primary and general elections, and to repeal any act or parts of acts inconsistent therewith, was held, by reference to the sections of the law of the year referred to, to indicate the legislature's intention to amend the existing primary statute, and to sufficiently suggest a purpose to repeal all statutory provisions as to the nomination of candidates for state office by party conventions.

Primary law as amendment to prior act.

(Supplementing annotation in 22 L.R.A.(N.S.) p. 1139.)

There is no violation of the constitutional provision that no law shall embrace more than one subject, although an act amending certain sections of the Revised Laws, whose subject is primary elections, refers to many different matters on subjects such as the filing by candidates for nomination, the preparation of ballots, the method of voting, registration, polling places, nomination by voters, and, in general, all the details from the filing for nomination to canvass for the votes and the declaration of the result, since all such subjects relate naturally and logically to the one general subject of primary elections. *State ex rel. Olson v. Erickson* (Minn.) *supra*.

And an act is not unconstitutional be-

cause the subject-matter of it is not germane to the statutes amended where the general subject of the statutes amended is primary elections, and the amendatory statute changes the date of primaries and changes the election of candidates for the legislature from the partisan to the nonpartisan ballot. (Minn.) Ibid.

Imposition of new restrictions or qualifications on voters and candidates—voters.

(Supplementing annotations in 22 L.R.A.(N.S.) p. 1140, and 41 L.R.A.(N.S.) p. 135.)

The right of suffrage is a constitutional right, and although the legislature may change the method of selecting candidates, it cannot pass a primary election law in any way infringing upon the right of voters to select as a candidate any person who is qualified to hold the office in question. *Re Paterson* (1913) — N. J. L. —, 88 Atl. 694.

The sections of the Indiana Constitution regulating the qualifications of voters, and other provisions regulating elections, are not violated by a primary law providing for second choice in voting at primary elections, since these are not the final elections which are contemplated by the Constitution. *Kelso v. Cook* (1916) — Ind. —, 110 N. E. 987.

And a section of the Constitution providing that, in all elections not otherwise provided for by the Constitution, every male citizen of the United States of the age of twenty-one, who has resided in the township sixty days and in the precinct thirty days immediately preceding such election, shall be entitled to vote in the precinct where he resides if he has duly registered, does not apply to primary elections, and a statute is not unconstitutional which provides for other qualifications for voting at primary elections. (Ind.) Ibid.

And a provision of the Constitution prohibiting the granting to a citizen or class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens, is not violated by a primary election law which gives voters at the last preceding general election a right to vote, but makes no provision for those who were duly registered at the preceding election, but did not vote thereat. The court stated that the purpose of the provision was to enable political parties to protect themselves from the perpetration of fraud by those not affiliated in good faith with them, and that they might waive their right to challenge those who were registered, but L.R.A.1917A.

did not vote at the preceding election, and that if such rights were not waived, they perceived nothing unreasonable in excluding persons from participating in a primary who so little regarded their primary adherence or their duties as citizens as to neglect their right to vote at the preceding election. (Ind.) Ibid.

And the constitutional provision that all elections by the people shall be by ballot, and all elections by the general assembly or by either branch thereof shall be viva voce, is not violated by a provision of a primary election law that each qualified voter of the precinct, who, at the last preceding general election, voted for a majority of the regularly nominated candidates of the party holding such election, shall be entitled to vote at such election, provided such elector was registered as a voter at such previous general election, and that, if he was not so registered, he should be entitled to vote by making a specified affidavit, and further providing that any qualified legal voter in the precinct might challenge any voter or person who should offer to vote, and that, when challenged, a person should be entitled to vote by making a specified affidavit. The contention in this case was that any qualified voter of the precinct, regardless of party, might challenge anyone demanding any party ballot, for lack of adherence to the party whose ballot he demanded, in which case the one challenged could not vote unless he made the prescribed oath of party allegiance; but it was held that one may waive any right conferred for his own benefit, whether contractual, statutory, or constitutional, unless the requirement is detrimental to the public, and that the fealty oath provided for by the act was a test intended solely for the benefit of the political parties interested, and that the performance of this condition might be waived by the particular political party whose right was involved, such waiver contravening no principle of public policy. (Ind.) Ibid.

And it was held in this case that the provision of the primary law set out in the preceding paragraph did not violate a constitutional provision that all elections shall be free and equal.

And a statute providing that when it shall be made to appear by affidavit that an error or omission has occurred or is about to occur in the placing of any name on an official primary ballot, or that an error or wrong has been committed or is about to be committed in printing such ballot or in the perform-

ance of any duty imposed by the act, the circuit court shall order the person charged with the error to correct it or show cause why he should not be compelled to do so, and providing that a failure to obey the court's orders shall constitute a contempt of court, and that the order shall not be appealable, and that only candidates can institute proceedings under such statute, is not invalid as a violation of §§ 59 and 60 of the Constitution, on the ground that it confers a remedy on candidates, and not on other classes of citizens, or because it expressly disallows an appeal. *Hager v. Robinson* (1913) 154 Ky. 489, 157 S. W. 1138.

Under provisions of a Constitution recognizing the existence of political parties, and empowering the legislature to pass a primary law and to prescribe tests controlling the right to vote at the primary election, the legislature has the right to require as a condition of voting that the voter state in his affidavit of registration the name of the political party or organization with which he intends to affiliate. *Don v. Pfister* (1916) — Cal. —, 155 Pac. 60.

— candidates.

(Supplementing annotations in 22 L.R.A.(N.S.) p. 1142, and 41 L.R.A.(N.S.) p. 136.)

The decision in *Johnson v. Grand Forks County*, set out in the annotation in 22 L.R.A.(N.S.) 1142, was followed in *Johnson v. Grand Forks County* (1912) 22 N. D. 613, 135 N. W. 179, where the court held a provision of the Primary Election Act of 1907, requiring candidates wishing to have their names placed on the primary ballot to pay a filing fee of 1 per cent of the salary of the office to which they sought nomination, invalid on the ground that it was unreasonable and placed additional qualifications on candidates and voters not included in the constitutional requirement. It will be noted that the act reduced the fee from 2 per cent, required by the Act of 1905, to 1 per cent.

And a provision in a Constitution prohibiting the granting to a citizen or class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens, is violated by a provision of a primary election law requiring candidates to pay into the state and county treasury a fee equal to 1 per cent of the annual salary of the offices which they aspire to hold, since this provision fixes a fee arbitrarily based on salary which can have no rea-

sonable application to the majority of candidates. *Kelso v. Cook* (1916) — Ind. —, 110 N. E. 987.

But a statute exacting a fee of \$100 from a candidate for a salaried state office for the filing of his nomination so that his name may appear on the official ballot has been held not unconstitutional on the ground that it adds a money qualification as a condition precedent to becoming a candidate for public office, or on the ground that the legislature is without power to impose more than a nominal filing fee, or that the fee prescribed is so unreasonable as to render the provision imposing it void. *State ex rel. Riggle v. Brodigan* (1914) 37 Nev. 492, L.R.A.1915B, 197, 143 Pac. 238.

A provision requiring a candidate to file with his petition an affidavit stating his residence, postoffice address, his election district, the name of the office for which he is a candidate, and other matters relating to his candidacy, makes no restrictions upon the rights of the elector, and does not violate the constitutional requirement that elections shall be free and equal. *Winston v. Moore* (1914) 244 Pa. 447, L.R.A.1915A, 1190, 91 Atl. 520, Ann. Cas. 1915C, 498.

In *People ex rel. McInerney v. Sweitzer* (1914) 266 Ill. 89, 107 N. E. 132, it was contended that the provisions of a primary law which were not specifically set out violated the constitutional guaranty that all elections should be free and equal, in that they required two conflicting residence qualifications for members of the board of assessors, one when the nomination was to be made by a political party, and the other when the nomination was to be by petition. It was held, however, that the primary election law fixed no qualification for office, but merely provided the method of nominating candidates to be voted for, and that no constitutional limitation was violated by providing a method of making party nominations applying equally to all persons seeking such nominations.

And a provision of a primary election law requiring candidates to state the name of the party with which they affiliated and which they supported at the last regular election is not invalid on the ground that it disregards the rights of independent voters, especially where another provision of the statute gives independent candidates a right by petition to get their names on the ballot at a regular election. *Hager v. Robinson* (1913) 154 Ky. 489, 157 S. W. 1138; *Francis v. Sturgill* (1915) 163 Ky. 650, 174 S. W. 753.

An act limiting the names of candidates on an official ballot for an office to the two who polled the highest vote at a primary election does not infringe the constitutional provision that elections shall be free and equal. *Winston v. Moore* (1914) 244 Pa. 447, L.R.A.1915A, 1190, 91 Atl. 520, Ann. Cas. 1915C, 498.

In *State ex rel. Dunn v. Coburn* (1914) 260 Mo. 177, 168 S. W. 956, it was held that a section of the primary election law providing that no person should file more than one written declaration indicating the party designation under which his name was to be printed on the official ballot should be read in connection with another statutory provision that the name of no candidate should appear in more than one group, and that underneath the name of each candidate a blank space sufficiently large to contain a written name should be left, and that when so read these provisions did not violate the provision of the Constitution that all elections should be free and open. And it was further held that these provisions did not violate the section of the Constitution prescribing the qualifications of a legal voter, and guarantying to the citizen so qualified the right to vote.

Where the Constitution directs the legislature to enact laws providing for direct nominations at primary elections, and to determine the test and conditions upon which electors, parties, or organizations of electors, shall participate, the legislature may prescribe tests and conditions for candidates as well as for electors, but is not bound to make membership in a party a condition of the right to seek the nomination of that party; and a provision in a primary election statute that nothing in the act shall be construed to limit the rights of any person to become the candidate of more than one political party for the same office, upon complying with the requirement of the act, is valid. *Hart v. Jordan* (1914) 168 Cal. 321, 143 Pac. 537; *Williams v. Jordan* (1914) 168 Cal. 793, 143 Pac. 538.

In *Shelton v. McMillan* (1914) 43 Okla. 486, 143 Pac. 196, a statute was held not invalid on the ground that it was indefinite, vague, and uncertain, or because it failed to provide for notice, which provided: "Any candidate in a primary election may challenge the correctness of the announced result thereof by filing with the county election board whose duty it is to canvass the returns in such race a verified statement setting forth a state of facts which, if true, would change the result in his favor; and there-

upon it shall be the duty of such board to inspect and count the ballots questioned by such candidate within ten days after he has filed his affidavit. Such board shall, upon the conclusion of such recount, proceed to certify the result."

A statute entitled, "An Act to Provide for the Holding of Primary Elections by Political Parties," and providing, "in the case of candidates for nomination for members of the board of assessors where five are to be elected, four of whom are to be elected from any one city and the city has the requisite number, then the candidate for nomination living outside of such city having the highest number of votes of his party shall be nominated and his name shall be placed on the official ballot at the following election," does not amend the revenue act by requiring a residence qualification for members of the board of assessors not required by the latter act, since the primary law fixes no qualification for office, but merely purports to provide for nomination of candidates for office by political parties, whatever their qualifications. *People ex rel. McInerney v. Sweitzer* (1914) 266 Ill. 89, 107 N. E. 132.

Discrimination—as to parties.

(Supplementing annotations in 22 L.R.A.(N.S.) p. 1144 and 41 L.R.A.(N.S.) p. 138.)

It will be noticed that in *WAPLES v. MARRAST* it was held that the legislature may make a primary election law applicable only to parties having a certain numerical strength.

And also that the primary law before the court was not invalid because, under the specified classification, it was applicable to only one party at the time of its adoption.

—as to candidates or voters.

(Supplementing annotations in 22 L.R.A.(N.S.) p. 1145, and 41 L.R.A.(N.S.) p. 138.)

A provision of an election law, limiting its operation to the election of judges, is not a violation of the constitutional provision that all laws regulating elections shall be uniform, since all persons in the same circumstances are treated alike by such act. *Winston v. Moore* (1914) 244 Pa. 447, L.R.A. 1915A, 1190, 91 Atl. 520, Ann. Cas. 1915C, 498.

An act limiting the names of the nominees for a particular office to be printed on the official ballot to one when a candidate at a primary receives more than one half the votes polled for the office, and more than one half the votes

polled in the political division, is not unreasonable or discriminatory. (Pa.) *Ibid.*

In *State ex rel. Olson v. Erickson* (1914) 125 Minn. 238, 146 N. W. 364, an amendatory act, the provisions of which do not appear, was held not unconstitutional on the ground that it was special or class legislation because of its classification of municipalities, some being made subject to it and others relieved from it; that there was an improper classification of candidates with respect to the time for filing for nominations, some being required to file within a designated period, and others within a different period; that there was an improper classification of candidates as nonpartisan and partisan, without a proper basis of distinction; that there was an improper classification by requiring partisan candidates to be put in classes upon the primary ballot, and prohibiting nonpartisan candidates from being so placed; and that there was an improper classification with regard to the nomination of candidates by petition.

Secrecy of ballot.

(Supplementing annotation in 22 L.R.A.(N.S.) p. 1145.)

A primary election is not an election within the meaning of the provisions of the Constitution regulating elections, and a provision of the Constitution that all elections shall be by secret official ballot is not violated by a provision of the primary election law requiring a candidate to state with what party he affiliated and voted at the last regular election. *Hager v. Robinson* (1913) 154 Ky. 489, 157 S. W. 1138. The court stated that the words "supported its nominees" did not necessarily mean that the candidate should have voted for such nominees, but that, without voting at all, he might have given actual and even active support by advocating their claims, although he did not vote, and that therefore, to require the candidate to say that he supported the nominees of his party did not necessarily compel the admission on his part that he voted for them, and for this reason it could not be said that the provision of the primary law invaded the secrecy of the ballot, even if the provisions of the Constitution with reference to secrecy were applicable.

And a provision of the Constitution that all elections by the people shall be by ballot, which contemplates that the ballot shall be a secret one, is not violated by a provision of a primary law L.R.A.1917A.

requiring a challenged voter at a primary election to make an affidavit that, at the last preceding general election, he affiliated with the party for whose candidate he proposed to vote in the primary, that he voted for a majority of the regular nominees of such party, and that he intends to support and vote for the regular nominees of that party at the coming election, since such act does not require the voter to specifically state for whom he previously voted, the test being the most liberal consistent with the exclusion of adversaries from party counsels. *Kelso v. Cook* (1916) — Ind. —, 110 N. E. 987.

Delegation of powers — legislative.

(Supplementing annotation in 22 L.R.A.(N.S.) p. 1146.)

A provision of the Constitution that each house of the legislature shall be the final judge of the election returns and qualifications of its members does not prevent the legislature from enacting a primary election law providing a method of nominating and electing candidates for legislative office. *State ex rel. McAvoy v. Gilliam* (1910) 60 Wash. 420, 111 Pac. 401.

A primary election is not an election within the meaning of a constitutional provision vesting in each house of the legislative assembly the power to judge of the election and qualifications of its own members, and this provision does not prevent the legislature from vesting jurisdiction in the courts to hear and decide contests involving nomination of candidates for such offices at a primary election. *Leu v. Montgomery* (1914) 31 N. D. 1, 148 N. W. 662.

— judicial.

(Supplementing annotation in 22 L.R.A.(N.S.) p. 1147.)

A provision of a primary election act giving a canvassing board the right to ascertain the number of votes cast for assessor of Cook county is not unconstitutional on the ground that it authorizes the canvassing board to exercise judicial power in determining the qualifications of candidates for office, since the act merely gives the board the power to determine from the votes cast whether the candidate has received the greater number of votes cast for the nomination for which he is a candidate. *People ex rel. McInerney v. Sweitzer* (1914) 266 Ill. 89, 107 N. E. 132.

In *D'Alemberte v. State* (1908) 56 Fla. 162, 47 So. 489, where the Constitution provided that no court other than those

specified in the Constitution should be established in the state, it was held that a canvassing board provided for by the primary election law could have no exclusive and ultimate power to pass upon the question whether a vote cast was legally cast, since that was a judicial question; but provisions of the primary law for the determination by a committee of a person's right to vote in case such right was questioned, and providing that a certain committee's decision should be final, were held not to violate the Constitution, as the act merely conferred a ministerial power on the committee, and the word "final" could be understood as meaning a final decision by the committee.

Popular election of United States senators.

(Supplementing annotations in 22 L.R.A.(N.S.) p. 1147, and 41 L.R.A.(N.S.) p. 140.)

A constitutional provision prohibiting the granting to a citizen or class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens, is not violated by a primary election law authorizing the nomination of governor and United States senator by a state-wide primary, while requiring nominations for other state officers to be made at state conventions, since this is a reasonable classification. *Kelso v. Cook* (1916) — Ind. —, 110 N. E. 987. J. T. W.

UNITED STATES SUPREME COURT.

CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY, Plff.
in Err.,

v.

D. F. RANKIN et al.

(241 U. S. 319, 60 L. ed. 1022, 36 Sup. Ct. Rep. 555.)

Carriers — Liability as insurers — effect of Carmack amendment.

1. The common-law liability of a carrier as an insurer was not changed with respect to a loss occurring on its own line by the provision of the Carmack amendment of June 29, 1906, to the act of February 4, 1887, § 20, making the initial carrier of an interstate shipment liable for any loss, damage, or injury "caused by it" or by any other carrier to which the shipment may be delivered.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

Note.—The decision in *CINCINNATI, N. O. & T. P. R. Co. v. RANKIN*, is, of course, conclusive as to the questions suggested in the headnotes so far as they involve interstate shipments. The principle declared in the opinion that, the shipment being interstate, the rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and "common-law rules as accepted and applied in Federal tribunals," is also exemplified in the case of *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 267, 38 Sup. Ct. Rep. 148, dealing with the validity of a stipulation limiting the carrier's liability. See also on that point the notes appended to that case in 44 L.R.A.(N.S.) 257, and the later note to *Louisville & N. R. Co. v. Miller*, 50 L.R.A.(N.S.) 819, and later case, *Boston & M. R. Co. v. Hooker*, L.R.A.1915B, 450. L.R.A.1917A.

Same — measure of rights and liability — interstate shipment.

2. The rights and liabilities of the parties to an interstate railway shipment depend upon Federal legislation, the bill of lading, and common-law rules as accepted and applied in Federal tribunals.

For other cases, see Carriers, III. a, in Dig. 1-52 N. S.

Evidence — presumption — carrier's compliance with law.

3. It cannot be assumed, merely because the contrary has not been established by proof, that an interstate railway carrier is conducting its affairs in violation of controlling Federal legislation.

For other cases, see Evidence, II. f, in Dig. 1-52 N. S.

Same — burden of proof — limitation of carriers' liability — choice of rates.

4. Recitals in a bill of lading for an interstate shipment, signed by both parties, that alternate rates, based upon specified values, are offered by the carrier's published freight rates, constitute admissions by the shipper and sufficient prima facie evidence of a choice of rates, and cast upon him the burden of proving, in case he wishes to contradict his admissions, that the carrier had not complied with the requirements of controlling Federal legislation respecting the filing and publishing of its rate schedules.

For other cases, see Evidence, II. f, in Dig. 1-52 N. S.

(May 22, 1916.)

ERROR to the Supreme Court of the State of Tennessee to review a judgment which affirmed a judgment of the Court of Civil Appeals affirming a judgment of the Circuit Court for Hamilton County, in plaintiffs' favor in an action brought to recover damages for injuries to an interstate shipment of live stock. Reversed.

The facts are stated in the opinion.

Messrs. James J. Lynch, Michael M. Allison, Edward Colston, and Isaac G. Phillips, for plaintiff in error:

If liable at all, the amount of the judgment complained of is erroneous. Defendants in error are entitled to recover only \$75 for each of the animals lost, as provided for in the contract of shipment.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Chicago, St. P. M. & O. R. Co. v. Latta, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 668, 57 L. ed. 690, 696, 33 Sup. Ct. Rep. 397; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; Bernard v. Adams Exp. Co. 205 Mass. 254, 28 L.R.A.(N.S.) 293, 91 N. E. 325, 18 Ann. Cas. 351.

If plaintiff in error had filed the schedule of rates containing the limited valuation set out in the bill of lading, with the Interstate Commerce Commission, their reasonableness could not be considered by the courts in this suit.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164.

The positive mandate of the law required the railway company to charge, and the shipper to pay, the rate which had been filed with the Interstate Commerce Commission, and the giving or accepting of any other rate would have been a violation of the law, and would have subjected both the railway company and the shipper to a heavy penalty.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 445, 51 L. ed. 561, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1012, 26 Sup. Ct. Rep. 628.

The court should presume that the schedule of rates providing for this limited valuation was properly filed with the Interstate Commerce Commission, as required by law.

Clement v. Louisville & N. R. Co. 153 Fed. 979; Meeker v. Lehigh Valley R. Co. 162 Fed. 359; Knox County v. Ninth Nat. Bank, 147 U. S. 94, 37 L. ed. 95, 13 Sup. Ct. Rep. 267; 1 Beach, Contr. § 717; Greenhood, Pub. Pol. Rule 130, p. 118; 2 Elliott, Contr. § 1061; 2 Chamberlayne, Ev. § 1056; Bradner, Ev. p. 362, § 25; Geraty v. Atlantic Coast Line R. Co. 211 Fed. 227.

Where the common-law liability of the carrier was waived by contract; such carrier was liable only for a breach of its duty L.R.A.1917A.

to exercise ordinary care to protect freight from loss in transportation.

Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; United States Exp. Co. v. Kountze Bros. 8 Wall. 342, 19 L. ed. 457; Holladay v. Kennard, 12 Wall. 254, 20 L. ed. 390; 1 Hutchinson, Carr. § 292; 2 Hutchinson, Carr. § 667.

Messrs. W. B. Miller and Charles C. Fox, for defendants in error:

A special plea, or one setting up an affirmative defense, imposes the burden of evidence on the party introducing such plea.

Gaugh v. Henderson, 2 Head, 629; Brown v. Phelon, 2 Swan, 629; Carter v. Turner, 5 Sneed, 179; Douglass v. Brandon, 6 Baxt. 58.

A plea bringing forward a substantive fact is not supported by one presumption based on another or other presumptions.

16 Cyc. 1050, 1051; United States v. Ross, 92 U. S. 218, 23 L. ed. 707; First Nat. Bank v. Stewart, 114 U. S. 224, 29 L. ed. 101, 5 Sup. Ct. Rep. 845; Manning v. John Hancock Mut. L. Ins. Co. 100 U. S. 693, 25 L. ed. 761; East Tennessee & W. N. C. R. Co. v. Lindamood, 111 Tenn. 458, 78 S. E. 99; De Glopper v. Nashville R. & Light Co. 123 Tenn. 633, 33 L.R.A.(N.S.) 913, 134 S. W. 609.

The dangerous condition made and maintained by the carrier, coupled with the reckless conduct of the engineer, assuredly made a clear case of loss caused by the carrier.

Louisville & N. R. Co. v. Warfield, 6 Ga. App. 553, 65 S. E. 308.

If for no other reason, the limitation of value should fail because utterly lacking in mutuality.

9 Cyc. 244, 245; 39 Cyc. 686; Clark v. Small, 6 Yerg. 423.

The carrier had better facilities and greater means of knowledge for proving the affirmative defense contained in its pleas than had the shipper to prove a negative. And the failure to prove its pleas or offer any evidence of the fact that the published freight rates and the tariff regulations referred to were legally authorized reacts with special force against it.

Brown v. Raisin Fertilizer Co. 124 Ala. 221, 26 So. 891; Cook v. Guirkin, 119 N. C. 13, 25 S. E. 715; see also N. H. Blitch Co. v. Atlantic Coast Line R. Co. 87 S. C. 115, 69 S. E. 16.

Mr. Justice McReynolds delivered the opinion of the court:

Defendants in error, experienced shippers, on November 6, 1911, delivered to plaintiff railway at Danville, Kentucky, a car of mules, nineteen of which they owned, for transportation to Atlanta, Georgia. They signed and accepted a through bill of lad-

ing, the pertinent portions of which follow:

Contract for limited liability in the transportation of live stock at reduced rates.

3. Limit of value.—That this agreement is subject to the following terms and conditions, which the said shipper accepts as just and reasonable, and which he admits having read and having had explained to him by the agent of the said carrier, viz.:

That the published freight rates on live stock of said carrier are, in all cases, based on the following maximum calculations, which are as high as the profit in the freight rates will admit of the carrier assuming responsibility for:

Horses or mules, not exceeding \$75 each

That the tariff regulations of said carrier provide that for every increase of 100 per cent, or fraction thereof, in the above valuations, there shall be an increase of 50 per cent in the freight rate; and that the said shipper, in order to avail himself of said published freight rates, agrees that said carrier shall not, in any case of loss or damage to said live stock, be liable for any sum in excess of the actual value of said stock at the place and date of shipment, nor for any amount in excess of the values stated above, which are hereby agreed to be not less than the just and true values of the animals, unless an additional amount is herein stated and paid for.

4. Guaranteed freight rate.—That the rate of freight guaranteed by said carrier, in view of the above stipulated valuations is \$ — per — from — to — and that said shipper accepts this rate of freight, and agrees to pay same at destination in connection with the charges advanced by said carrier, as indicated above, and any other legitimate charges which said carrier may advance for account of said shipper between point of shipment and destination for feed, water, etc.

A wreck occurred at Dayton, Tennessee; some of the animals were killed; others were injured and afterwards sold by plaintiff in error; and shippers brought this suit in the circuit court, Hamilton county, Tennessee, to recover \$4,750,—\$250 per head.

The declaration contains two counts. The first—a common-law count on a general contract of affreightment—alleges delivery with agreement to pay full freight charges and that the carrier accepted and agreed to transport safely, but failed so to do. The second sets up execution and delivery of the bill of lading annexed as an exhibit, L.R.A.1917A.

but declares shippers knew nothing of the limited-liability provision therein; and further "that the whole of said paper, and especially the \$75 limitation, is void and of no effect and is not operative or binding on them or either of them," because (1) executed in Kentucky, under whose laws it is void; (2) unreasonable and unjust; (3) no other contract of transportation was offered, and shippers were not aware that the transportation was to take place at reduced rates and under stipulations for limited liability; (4) there was no consideration; (5) the parties were not on equal terms. It also denounces as untrue statements in clause 3 of the bill concerning published freight rates and tariff regulations.

The railway filed nine pleas; two general—"not guilty" and "that it did not breach the contract of carriage" as alleged—and seven special ones. Among other things, the company avers in the latter: That it had duly filed with the Interstate Commerce Commission and had published and kept open for inspection schedules of joint rates between Danville, Kentucky, and Atlanta; they contained classifications of freight in force, and stated separately all terminal and other charges, and provided that carload rates upon horses and mules, where valued not above \$75 each, should be \$95 per car, and for every increase of 100 per cent or fraction thereof there should be an increase of 50 per cent in rate; plaintiffs knew the company's freight rates was based upon specified values and that it stood ready to transport at increased valuation and rate, and, knowing these facts, they declared the value specified, and thereby obtained the cheaper rate of \$95 per car. That the receipt or bill of lading duly signed by shippers fixes a maximum value; contains definite recitals (set out above) in respect of rates, etc., and "with all the provisions thereof, is valid and binding upon the plaintiffs and the defendant when applied to interstate shipments which are governed by the acts of Congress of February 4, 1887 (24 Stat. at L. 379, chap. 104), and June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563), and defendant pleads and relies upon the same as a complete bar to any recovery (in excess of \$75) for such mules as were actually killed and such ones as were actually damaged to the amount of \$75."

Issue being joined, the cause was tried to a jury. D. F. Rankin, testifying for himself, declared the mules were worth from \$230 to \$240 each; described the circumstances surrounding shipment, identified exhibited bill of lading as signed and accepted by him, but stated he did not read

it, and nothing was said about rates, and that he was not aware of the \$75 limitation; admitted he had shipped stock over same route before, paying \$95 per car; and asserted he had seen no printed tariff rates from Danville to Atlanta. The bill so identified was treated throughout the trial as properly in evidence; but no duly filed and applicable rate schedules were presented, nor did the railway introduce any evidence to support its special pleas.

The trial judge held:

"The one controlling point in this case is as to whether or not there is a presumption in favor of the defendant's compliance with the law whereby it seeks by its action to escape from liability."

"There is no doubt in the mind of the court but that if the railroad were charged with a violation of the provisions of the interstate commerce act, a presumption in favor of its compliance would arise; but where the railroad, as in this case, sets up, as a matter of defense, its compliance with the provisions of that act, the court is of the opinion that there is no presumption in its favor, and that the burden of proof is on the defendant to show a substantial compliance with the provisions of the act."

"It therefore follows that under the facts in this case, the undisputed facts and the decisions of our courts on this subject, that the court is of the opinion that the contract in this case is invalid, and the question goes to the jury as to the negligence of the defendant on this shipment of stock." And he charged the jury:

"If you find from the proof in this case that the plaintiff did deliver in good condition nineteen mules to the defendant to be transported to Atlanta, Georgia, and that there was an accident, a collision on the railroad, then the burden is upon the railway company to show that it has not been guilty of any negligence.

"If the defendant company shows you by the greater weight or the preponderance of the evidence its freedom from negligence, then the plaintiff is not entitled to recover.

"If you reach the conclusion that the plaintiff has made out his case and is entitled to recover for the value of the nineteen mules, then he would be entitled to recover the value of the mules at the place of their destination, in this case, Atlanta, Georgia, according to their value at the time they would have been delivered but for the negligence of the carrier, less whatever transportation charges there would have been on this car of stock.

"It is also in the discretion of the jury to award interest on any recovery from the time of the loss up to the present time."

... "Negligence is the want or lack
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of exercise of that degree of care which the particular circumstances demands. In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

Judgment upon a verdict for \$4,180—\$220 per head—and \$328.82 interest was affirmed by the court of civil appeals, and the supreme court approved this action without opinion.

The court of civil appeals *inter alia* declared:

"It hardly appears debatable to us, that it was incumbent upon the railroad company, in this case, in the present state of the pleadings, to show by proof that it had met the requirements of the interstate commerce act, and this burden it failed to carry, and having failed to do so, it cannot rely upon presumption.

"Having reached this conclusion, it remains to be determined what are the rights and liabilities of these parties, under the contract of carriage in this case. There being nothing in the record to show that the rate of freight charged by the company was approved and authorized by the Interstate Commerce Commission, we must determine the rights of these parties upon the theory that no such rate was ever filed with the Commission, or approved or authorized by it, and that the rate and contract made in this case was without the authority and outside of the act of Congress, invoked by this defendant; or, in other words, so far as the interstate commerce act is concerned, this railroad company has made the contract in violation of its provisions. . . .

"There is no proof that the railroad company had any other rate than the one charged plaintiffs for this shipment between Danville, Kentucky, and Atlanta, Georgia. There is no proof that it offered to plaintiffs, at the time it issued to them its bill of lading, a contract with unlimited liability, or, in other words, a common-law liability. . . .

"... If the company had any other rate than the one it agreed for the transportation of this freight, it did not disclose that fact to the shipper, nor did it have any rate whatever posted in or about its office. If it had a shipping contract with unlimited liability it did not choose between the two, and, from the undisputed facts developed in this record, it is clear to our minds this contract is void and the limited-liability clause therein cannot be relied upon by the company as a bar to the recovery of full value of each animal shipped. If, however, the defendant had shown, by proof, that the rate charged by it for this freight had been filed with and

approved by the Interstate Commerce Commission, and that it had posted the rate, as required by the act of Congress, then a rate of freight based upon the valuation fixed in the bill of lading would have limited plaintiffs' right to recover to the value fixed in the contract."

Plaintiff in error maintains, first, that not having been negligent, it is not liable for any sum; and, second, that in any event it is protected by a valid limitation in the bill of lading.

Counsel concede liability of a common carrier under the long-recognized common-law rule not only for negligence, but also as an insurer, and that unless the Carmack amendment (copied in margin¹) has changed this rule, the railway is responsible for damages not exceeding specified value. But they insist that in *Adams Exp. Co. v. Croninger*, 226 U. S. 401, 57 L. ed. 314, 44 L.R.A. (N.S.) 257, 33 Sup. Ct. Rep. 148, we held this amendment restricts a carrier's liability to loss "caused by it." And, consequently, they say, the trial court erred when it charged: "In this case the carrier is held to the highest degree of care for the safe transportation of the animals."

Construing the Carmack amendment, we said through Mr. Justice Lurton in the case cited (pp. 506, 507): "The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common-law duty as a common carrier." Properly understood, neither this nor any other of our opinions holds that this amendment has changed the common-law doctrine theretofore approved by us in respect of a carrier's liability for loss occurring on its own line.

The state courts, treating the bill of lading as properly in evidence, undertook

to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and common-law rules as accepted and applied in Federal tribunals. *Cleveland, C. C. & St. L. R. Co. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453, 36 Sup. Ct. Rep. 177; *Southern Exp. Co. v. Byers*, 240 U. S. 612, 60 L. ed. 825, 36 Sup. Ct. Rep. 410, and cases cited; *Southern R. Co. v. Prescott*, 240 U. S. 632, 60 L. ed. 836, 36 Sup. Ct. Rep. 469.

We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the interstate commerce act. It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and, in respect of transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law "presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*." *Bank of United States v. Dandridge*, 12 Wheat. 64, 69, 70, 6 L. ed. 552, 554, 555; *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 97, 37 L. ed. 93, 95, 13 Sup. Ct. Rep. 267; *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347, 351, 39 L. ed. 447, 449, 15 Sup. Ct. Rep. 391; *Sun Printing & Pub. Asso. v. Moore*, 183 U. S. 642, 649, 46 L. ed. 366, 372, 22 Sup. Ct. Rep. 240.

Under our former opinions the settled doctrine is that where alternate rates, fairly based upon valuation, are offered, a railroad may limit its liability by special contract. *George N. Pierce Co. v. Wells F. & Co.* 236 U. S. 278, 283, 59 L. ed. 576, 581, 35 Sup. Ct. Rep. 351.

The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability. And as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates

¹ "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. . . ." (Chap. 3591, 34 Stat. at L. 584, 595, Comp. Stat. 1913, §§ 8563, 8592.) L.R.A.1917A.

based on specified values were offered, such recitals constitute admissions by the shipper and sufficient prima facie evidence of choice. If, in such a case, the shipper wishes to contradict his own admissions, the burden of proof is upon him. *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 113, 18 L. ed. 170, 172; *The Delaware*, 14 Wall. 579, 601, 20 L. ed. 779, 783; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 337, 28 L. ed. 717, 719, 5 Sup. Ct. Rep. 151; *Cau v. Texas & P. R. Co.* 194 U. S. 427, 431, 48 L. ed. 1053, 1056, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; *Squire v. New York C. R. Co.* 98 Mass. 239, 248, 93 Am. Dec. 162; *Wabash R. Co. v. Curtis*, 134 Ill. App. 409, 412; *Hutchinson*, Carr. 3d ed. § 475.

The bill of lading in question is plainly entitled, "Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates," and contains the conspicuous provisions concerning published rates, tariff regulations, choice offered the shipper, and limit upon the carrier's liability, etc., above set out. In view of these recitals and admissions, the limitation of liability must be treated as prima facie valid, and, consequently, the trial court erred in holding it void as a matter of law, and permitting a recovery for full value of the animals.

The judgment below is reversed and the cause remanded to the Supreme Court of Tennessee for further proceedings not inconsistent with this opinion.

MARYLAND COURT OF APPEALS.

STATE OF MARYLAND TO USE OF
EMMA P. COX et al., Appts.,
v.

MARYLAND ELECTRIC RAILWAYS
COMPANY.

(126 Md. 300, 95 Atl. 43.)

Judgment — settlement of case — collateral attack.

1. The settlement by the attorneys, with the sanction of the court, of a suit against an employer for death of his employee, is not subject to collateral attack by showing that the amount paid was for insurance or wages payable from the relief fund. *For other cases, see Judgment, II. c, 1, in Dig. 1-52 N. S.*

Release — of claim for death — effect as to person not joint tort-feasor.

2. A settlement of an action against one person for an injury causing death will bar an action against another for the same death, although the defendants in the respective actions were not joint tort-feasors. *For other cases, see Release, II. b, in Dig. 1-52 N. S.*

(June 22, 1915.)

APPEAL by plaintiffs from a judgment of the Baltimore City Court in defendant's favor in a suit brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Note. — As to release of one of two or more persons severally, but not jointly, liable for a tort, as affecting liability of others, see annotation following this case, post, 273.

As to the character and kind of judgment or order within the rule precluding a collateral attack for fraud not affecting jurisdiction, including judgment entered by agreement, see note to *Clark v. Southern Can Co.* 36 L.R.A. (N.S.) 980. L.R.A.1917A.

Messrs. D. G. McIntosh and T. Tilden Kelbaugh, for appellants:

A tort-feasor is not released from liability by a settlement of the injured party with another, not shown to have been liable.

Thomas v. Central R. Co. 194 Pa. 511, 45 Atl. 344; 34 Cyc. 1088.

A release in full satisfaction for all damage claims, etc., given by an employee to his employer on receiving compensation from a relief fund maintained by the employer and employee, for injuries received through the negligence of a third party, but not through the joint negligence of the employer and said third party, is no discharge to the third party, and the injured employee is entitled to recover from said third party.

Chapman v. Pittsburg R. Co. 140 Fed. 784, 76 C. C. A. 418, 145 Fed. 886.

There can be no abatement of damages on the principle of partial compensation received for the injury when it comes from a collateral source, wholly independent of the defendant.

1 *Sutherland, Damages*, 2d ed. § 158; 13 Cyc. 70; *Dillon v. Hunt*, 105 Mo. 154, 24 Am. St. Rep. 374, 16 S. W. 516; *Baltimore City Pass. R. Co. v. Baer*, 90 Md. 108, 44 Atl. 992.

Messrs. Ritchie, Janney, & Griswold and Frank B. Ober, for appellee:

Where two or more suits are brought against different defendants for the same cause of action, or to recover for the same injury, the satisfaction of one discharges the cause of action, and is a bar to further proceedings in any other suit.

State use of Bashe v. Boyce, 72 Md. 140, 7 L.R.A. 272, 20 Am. St. Rep. 458, 19 Atl. 366; *Berkley v. Wilson*, 87 Md. 219, 39 Atl. 502.

The fact that the payment was made out of the so-called insurance fund maintained

by the telephone company does not alter the case.

Clark v. Southern Can Co. 116 Md. 85, 36 L.R.A. (N.S.) 980, 81 Atl. 271; Brown v. Cambridge, 3 Allen, 474; Morris v. Travelers' Ins. Co. 189 Fed. 211; Berkley v. Wilson, 87 Md. 222, 39 Atl. 502; Spitz v. Baltimore & O. R. Co. 75 Md. 162, 32 Am. St. Rep. 378, 23 Atl. 307; Fuller v. Baltimore & O. Employes' Relief Assn. 67 Md. 433, 10 Atl. 237; Otis v. Pennsylvania Co. 71 Fed. 136; Ringle v. Pennsylvania R. Co. 164 Pa. 529, 44 Am. St. Rep. 628, 30 Atl. 492; Atlantic Coast Line R. Co. v. Dunning, 94 C. C. A. 128, 166 Fed. 850; Hubbard v. St. Louis & M. River R. Co. 173 Mo. 249, 72 S. W. 1073; Leddy v. Barney, 139 Mass. 394, 2 N. E. 107; Tompkins v. Clay Street R. Co. 66 Cal. 163, 4 Pac. 1165, 11 Am. Neg. Cas. 181; Brewer v. Casey, 196 Mass. 384, 82 N. E. 45; Mooney v. Chicago, 239 Ill. 414, 88 N. E. 194.

Pattison, J., delivered the opinion of the court:

This suit was brought, under article 67 of the Code, by the appellants, the widow and infant children of George C. Cox, a lineman of the Chesapeake & Potomac Telephone Company, for damages resulting from the alleged negligence of the defendant, causing the death of the said George C. Cox while in the employment of the said Chesapeake & Potomac Telephone Company. In addition to the general issue plea, the defendant filed a further plea in which, briefly stated, it is alleged that the plaintiffs had previously instituted, in the court of common pleas of Baltimore city, a suit against the Chesapeake & Potomac Telephone Company to recover damages for the same tort which is the alleged cause of the present action, and that the said Chesapeake & Potomac Telephone Company appeared and pleaded to said suit, which was thereafter compromised and settled by the payment of the sum of \$2,527.20 to the plaintiffs by the said Chesapeake & Potomac Telephone Company, which was duly acknowledged in said proceedings and the entry made therein, "Agreed and settled and all claims therein satisfied." A copy of said proceedings, including the aforesaid declaration, a power of attorney from the plaintiffs to their attorney in that suit, and the docket entries, was filed with and made part of said plea. In reply to this second plea the plaintiffs filed their first and second replications, in which they do not deny the institution of the suit aforesaid, or that the declaration therein stated a different cause of action from that mentioned in the plea, or that the said suit was compromised and settled as stated in the plea. They admit

the payment to them by the defendant in that suit of the aforesaid sum, but deny that it was paid to or received by them for the tort aforesaid, and claim that it was paid to them as beneficiaries of George C. Cox from the relief fund of the employees' pensions, disability benefits, and insurance fund, of which association the said George C. Cox was a member, either as insurance or for three years' wages to said Cox, to which they were entitled from such fund, and that the suit against the Chesapeake & Potomac Telephone Company was instituted to recover such insurance or wages, and not to recover damages sustained by them by reason of the death of the said George C. Cox; and in their replication they allege that the death of the said George C. Cox was not caused by the negligence of the Chesapeake & Potomac Telephone Company. A demurrer was interposed to these replications, but it was overruled, and the defendant thereafter filed its rejoinders. Issues were thereafter joined, and the case proceeded to trial. At the conclusion of the plaintiff's testimony the defendant offered three prayers, each of which asked the court to direct the jury to render a verdict for the defendant; the first, because of a want of legally sufficient evidence entitling the plaintiffs to recover; the second, because of a want of legally sufficient evidence under the pleadings entitling the plaintiffs to recover; and the third, because of contributory negligence on the part of the deceased, George C. Cox. The first and second prayers were refused, the third prayer was granted, and a verdict was rendered for the defendant, upon which a judgment was entered. Exceptions were taken to the ruling of the court upon the granting of the defendant's third prayer, and to the rulings of the court upon the admission and rejection of certain testimony offered in the trial of the case, and from the judgment so entered an appeal was taken.

The main questions here presented are: First. Whether the prior settlement between the equitable plaintiffs and the Chesapeake & Potomac Telephone Company, as disclosed by the pleadings, is a bar to this action. Second. Whether Cox is shown to have been guilty of contributory negligence. If the first of these questions is decided in the affirmative, then it will be unnecessary for us to consider and pass upon the second, or upon the rulings on the admission and rejection of the testimony.

The aforesaid power of attorney executed by the appellant Emma P. Cox, as widow and as mother and next friend of the infant children of George C. Cox, deceased, not only appointed Carter Lee Bowie as attorney to institute said suit, but it authorized

him to prosecute it "to a verdict, or to compromise and settle the said suit for the sum of \$2,527.20, to be paid by the Chesapeake & Potomac Telephone Company, of Baltimore city, from its employees' benefit fund or otherwise, and to enter said suit and the cause of action 'Agreed and settled and all claims therein satisfied.'"

Pursuant to such authority, the suit was compromised by the defendant paying to the plaintiffs the aforesaid sum of \$2,527.20, and the case was marked: "Agreed and settled on terms, defendant to pay costs by order of the plaintiff's and defendant's attorneys filed."

The replication goes only to the extent of saying that the proceedings in the former suit, which are to be considered part of the plea, are not what they purport to be; that although their declaration therein discloses that the suit instituted by them, which resulted in the compromise and settlement aforesaid and the payment to them of the said sum of \$2,527.20, was to recover damages for the death of George C. Cox, "caused by the negligence of the defendant and its failure to perform the duty which it owed to him," yet the replication alleges that such suit was not instituted to recover such damages, and denies that the death of George C. Cox was the result of the negligence of said defendant, and that said sum paid to and received by them was not in settlement of damages suffered by them by the death of George C. Cox, but that it was the insurance to which they were entitled as his beneficiaries, or was for three years' wages, due and payable to them from said relief fund, as stated. And this is claimed by them notwithstanding the fact that Mr. Bowie was authorized "to compromise and settle the said suit for the sum of \$2,527.20, to be paid by the Chesapeake & Potomac Telephone Company, of Baltimore city, from its employees' benefit fund or otherwise, and to enter said suit and the cause of action, 'Agreed and settled and all claims therein satisfied.'"

The entering of the suit "settled" was done under the eye and with the sanction of the court, and should be considered as a judicial act not open to question or controversy in any collateral proceeding. *Clark v. Southern Can Co.* 116 Md. 95, 36 L.R.A. (N.S.) 980, 81 Atl. 271. And thus the effect of such settlement and entry cannot be changed or altered, as here attempted by the plaintiffs. The demurrer to the replication should have been sustained. *Morris v. Travelers' Ins. Co.* (C. C.) 189 Fed. 211.

But is the plea a good one, and is it a bar to the plaintiffs' right to recover? It is contended by the plaintiffs that it "fails to state that the defendant is a joint wrong-

doer with the Chesapeake & Potomac Telephone company, and for such reason it is bad."

The authorities are not altogether in accord upon this question. In some jurisdictions it has been held essential that the party to whom a release has been given, or with whom a settlement has been made, shall be one of two or more joint tort-feasors in order to discharge the others from liability. *Pittsburgh R. Co. v. Chapman*, 76 C. C. A. 418, 145 Fed. 886; *Kentucky Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219; *Thomas v. Central R. Co.* 194 Pa. 511, 45 Atl. 344; *Missouri, K. & T. R. Co. v. McWherter*, 59 Kan. 345, 53 Pac. 135. While in other states, including Maryland, it is not essential that the party with whom the settlement is made, or by whom the release is given, shall be a joint tort-feasor in order to release others from liability. *Gunther v. Lee*, 45 Md. 67, 24 Am. Rep. 504; *Berkley v. Wilson*, 87 Md. 222, 39 Atl. 502; *Cleveland v. Bangor*, 87 Me. 269, 47 Am. St. Rep. 326, 32 Atl. 892; *Brown v. Cambridge*, 3 Allen, 474; *Tompkins v. Clay Street R. Co.* 66 Cal. 163, 4 Pac. 1165, 11 Am. Neg. Cas. 181; *Brewer v. Casey*, 196 Mass. 384, 82 N. E. 45; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Hubbard v. St. Louis & M. River R. Co.* 173 Mo. 249, 72 S. W. 1073. This court said in *Gunther v. Lee*, 45 Md. 67, 24 Am. Rep. 504, quoting from *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 129: "When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages."

And in *Berkley v. Wilson*, 87 Md. 222, 39 Atl. 502, in which the court was discussing a plea similar to the one in this case, the court said, speaking through Judge Fowler: "Whether the wrongdoing complained of in the former case be the joint act of Bunnecke and the defendants, or the several tort of each, can make no difference in determining the validity of the plea or the admissibility of the record in evidence in this case. If the defendants and Bunnecke had both been sued in the first case for the injury there alleged, there could, of course, have been but one recovery. And it would seem to be very clear, upon reason and authority as well, that the same result must follow when the same injury is caused by the independent acts of several wrongdoers. The reason of this rule is apparent. It is neither just nor lawful that there should be more than one satisfaction for the same injury, whether that injury be done by one or more. *Cleveland v. Bangor*, 87 Me. 264, 47 Am. St. Rep. 326,

32 Atl. 802; *Brown v. Cambridge*, 3 Allen, 474; *Lovejoy v. Murray*, 3 Wall. 1, 18 L. ed. 120; *Gunther v. Lee*, 45 Md. 67, 24 Am. Rep. 504. In the case first cited *Whitehouse, J.*, speaking for the supreme judicial court of Maine, said 'No sound reason has been given, and it is believed none can be assigned, for such a distinction between the cases of wrongdoers who are jointly and severally liable, and those who are only severally liable for the same injury. In either case the sufferer is entitled to but

one compensation for the same injury, and full satisfaction from one will operate as a discharge of the others.'

The settlement of the aforesaid suit against the Chesapeake & Potomac Telephone Company, by the payment by it of the said sum of \$2,527.20, is a complete bar to the right of the plaintiffs to recover in this case. The judgment of the court below will therefore be affirmed.

Judgment affirmed, with costs to the appellee.

Annotation—Release of one of two or more persons severally, but not jointly, liable for a tort, as affecting liability of others.

It is a well-established general rule that, in the case of joint tort-feasors a release of one is a release of all. For a full discussion of this rule, see note to *Abb v. Northern P. R. Co.* 58 L.R.A. 293. Whether the rule as to joint tort-feasors applies where the parties are severally but not jointly liable is the subject of investigation in the present note.

In certain cases of release for torts the release is given to one who, although involved in some way, is in fact and law not liable for the tort. The effect of such a release is discussed in subd. VII. of the note to *Abb v. Northern P. R. Co.* 58 L.R.A. 293, and that to *Snyder v. Mutual Teleph. Co.* 14 L.R.A.(N.S.) 322. Other phases of the question as to joint tort-feasors are discussed in notes that may be found by consulting the Index to L.R.A. Notes, under the title, "Joint Creditors and Debtors."

The present note is not concerned with a discussion of what amounts to a joint liability. The conclusion of the various courts as to this question is accepted. If it is decided that there is a joint liability, the case is excluded; if, on the other hand, it is decided or clearly assumed that there is no joint liability, but a several one, the case is included. It doubtless is true that on at least some of the facts involved in the cases discussed in the note, other courts have come to the conclusion that a joint liability exists. The correctness of such conclusion is not challenged in this note.

The majority of the cases warrants the following conclusion: A release to one liable with another or others for the same injury releases the other or others where each of the tort-feasors is liable for the entire damages suffered by the injured party; it is immaterial whether they are jointly liable. But where a person liable with others for an injury

is liable only for the part contributed by him, a release to him does not release the others. The distinction is between a divisible and an indivisible cause of action. In the latter case, i. e., where a person liable with others for an injury is liable only for the part contributed by him, it may be shown as a matter of fact, that the release to the first of the tort-feasors was given upon a consideration which was intended to compensate the injured party for the entire injury; upon such a showing, the release does operate as a release of the others, since the injured party has been compensated for the entire injury, and it is the theory of the law to allow only one recovery for the same injury.

Thus, in *Chapin v. Chicago & E. I. R. Co.* (1885) 18 Ill. App. 47, a release of one railroad company for injuries suffered in a collision at a crossing is held a bar to an action against the other railroad company for the same injury. It is stated that the plaintiff in this case had a right of action against either company for the injury he received, whether he could have maintained a joint action or not. In either case, a release to one discharges both.

A judgment obtained by the owner of a building under construction, against the contractor, and the tender of the amount thereof, precludes a recovery by him for the same injuries against the architect. *Berkley v. Wilson* (1898) 87 Md. 219, 39 Atl. 502. See *Strabler v. Toledo Bridge Co.* (1900) 11 Ohio C. D. 87, *infra*.

A release given by the employee of a railroad company to the company, upon a settlement of his claim for injuries, operates to release his claim for the same injury against a foreman of the shop where the injury occurred. *Hartigan v. Dickson* (1900) 81 Minn. 284, 83 N. W. 1091.

There is obiter in *Cleveland v. Bangor*

(1895) 87 Mo. 259, 47 Am. St. Rep. 326, 32 Atl. 892, to the effect that satisfaction to one injured on the streets of a city, from a street railway company which maintained a post which contributed to the injury, would have been a bar to a suit against the municipality for the same injury.

In commenting upon the rule that a release to one joint tort-feasor releases all, the court, in *Chicago Herald Co. v. Bryan* (1906) 195 Mo. 574, 92 S. W. 902, states that the rule has been given a much more extended application than to cases of joint tort-feasors, and "applies to torts for which an injured party has an election to sue one or more parties severally." It was accordingly held in this case that one who had given notes to another for a certain specified purpose could not maintain an action against an agent of that other, who had misappropriated the proceeds thereof, after a settlement with the one to whom the notes were given.

A recovery and satisfaction against a water company for damages for an injury sustained by reason of falling into a trench in a city street was held, in *Brown v. Cambridge* (1862) 3 Allen (Mass.) 474, to preclude a subsequent recovery against the city. The court, after referring to the doctrine that a release of one joint tort-feasor discharges all, states that "the same doctrine applies to all joint torts and to torts for which the injured party has an election to sue one or more parties severally."

Without special attention to the question now under consideration, it is stated in *Merchants' Bank v. Curtiss* (1861) 37 Barb. (N. Y.) 317, that an accord and satisfaction by one of several obligors or wrongdoers is a satisfaction as to all.

It is stated in *McCoy v. Louisville & N. R. Co.* (1905) 146 Ala. 333, 40 So. 106, that where the acts of negligence of two or more persons unite in causing a single injury to a third, all of the wrongdoers are liable for the damages occasioned by the injury. The injury constitutes an indivisible cause of action. Although an action might be maintained by the injured person against a single tort-feasor, or separate actions against each thereof, when the cause of action is successfully prosecuted against one of the tort-feasors and satisfaction received therefor, the cause of action is extinguished and the other tort-feasors are released. It is immaterial whether or not they are joint tort-feasors. It L.R.A.1917A.

was accordingly held in this case that the personal representative of a decedent had no right to recover for the wrongful death of the decedent against one railroad company after recovery of a judgment for such wrongful death against another railroad company, and satisfaction thereof.

In other cases the discharge of one wrongdoer is held to preclude a recovery for the same injury against another wrongdoer where, as a matter of fact, the plaintiff has received from the first wrongdoer full compensation, on the theory that the law will not allow more than one recovery for the same wrong. Thus, in an action against a creditor, who, with another creditor, had wrongfully issued an attachment against their common debtor's goods, in which the defendant pleaded a recovery against the other creditor for the same attachment, it is stated: "Where, as in this case, the injury is an entirety, and the damages cannot be apportioned, and the injured party sues for the wrong done and recovers judgment which he accepts as compensation for the wrong, such recovery will be a bar to any further claim for damage for the plain reason that the law will not allow more than one satisfaction for a wrong done or injury inflicted." *Miller v. Beck* (1899) 108 Iowa, 575, 79 N. W. 344. In the earlier case the plaintiff asked for all the damage done his property, and the jury were instructed that he was entitled to all that was done. Having accepted the result of that suit, he is held to have received all that he is entitled to claim. In an opinion on a former trial (1897) 72 N. W. 553, after holding that the attaching creditors were not joint tort-feasors, it was held that a recovery of judgment against the one, and satisfaction thereof, did not operate to release the other.

See other cases of attaching creditors, *infra*.

A few cases cannot be reconciled with the foregoing. Thus, in *Pittsburgh R. Co. v. Chapman* (1906) 76 C. C. A. 418, 145 Fed. 886, a brakeman on a railway train was injured by coming in contact with a trolley wire or a guy wire used for its support, which a street railway company had negligently maintained at an insufficient height above the tracks of the railroad company. The brakeman was a member of a relief department of the railway company, and received from that department the sums so due him on account of his injury, and executed a release to the railroad com-

pany. The court states that no joint tort of the street railway company and the railroad company was averred or shown. The railroad company was therefore not a joint tort-feasor with the street railway company, and therefore the release did not operate to exonerate the street railway company. In the lower court (1905) 140 Fed. 784, it is stated that, by the terms of the release itself, it appears that nothing was paid the injured party except the indemnity due from the relief fund, and that nothing was paid for the release; consequently he never received any satisfaction from any source for the injury he sustained. It appears in this case that the release was given with the understanding that it was not to affect the rights of the injured brakeman against the street railway company. The court expresses a doubt as to whether the railroad company was negligent at all. In *Strabler v. Toledo Bridge Co.* (1900) 11 Ohio C. D. 87, where there was held to be no joint liability between the owner of a building under construction and the contractors, it is stated that a settlement with the owner for an injury to a workman would not have the effect of discharging the contractors. The decision in *Wagner v. Union Stock Yards & Transit Co.* (1891) 41 Ill. App. 408, is not clear. In this case suit was brought by the injured employee of a railroad company, after he had settled with the company, against a stock yards company which was alleged to have the control and management of the track where the injury occurred. An instruction with reference to a payment to the plaintiff by the railroad company, and release of such company, was held erroneous in leaving out the hypothesis that the railroad company was "jointly liable with appellee for the injury; that the company was a joint tort-feasor." The court then obscures the question by stating that "the rule is that a lease of, or receipt of full satisfaction from, one joint wrongdoer, discharges all. Release to, or the receipt of money from, one who is not in fact liable with another, will not discharge such other;" and two cases are cited to the proposition which hold that the release of one not liable at all does not discharge another. So that it is not clear whether the reason the instruction was held erroneous was that the party released was not jointly liable with the defendant, or that he was not liable at all. This case is taken as authority in *Western Tube Co. v. Zang* (1899) 85 Ill. App. 63, for the proposi-

tion that a release to, or the receipt of money from, one who is not in fact liable jointly with another, will not discharge such other. It cannot be said that the three last-discussed cases satisfactorily establish a rule contrary to the cases discussed in the earlier part of the note. Although language is used which indicates a contrary view, either the facts are such as to modify the meaning, or the question has not received due consideration.

Where the offenses are separate and distinct, and the parties committing them are in no way connected with each other, or acting together in any common purpose or intent, and where the act of neither tends to produce the injury done by the acts of the other, the receipt of satisfaction by one does not discharge the other.

Thus, in *Western Tube Co. v. Zang* (Ill.) supra, the receipt by the owner of an ice pond of a sum of money in full satisfaction of all damages sustained by him on account of the flow of the refuse from gas works into the ice pond is held not to discharge a manufacturing company which was also guilty of polluting the water in the pond.

Settlement with one coal company for pollution of a stream does not release another coal company for pollution of the same stream. *Gallagher v. Kemmerer* (1891) 144 Pa. 509, 27 Am. St. Rep. 673, 22 Atl. 970. The theory in this case is that each owner is liable only for the pollution which his mine worked. Whether this is the theory of *Western Tube Co. v. Zang* is not clear, but is apparently the fact.

The right of action which a wife has against saloon keepers who have sold liquor to her husband is held in Iowa not to be a joint action. Consequently the settlement by the wife with certain saloon keepers who were thus liable to her does not operate as a discharge of those not settled with. *Jewett v. Wanshura* (1876) 43 Iowa, 574. When the drunkenness complained of consists not of a mere simple state of intoxication contributed to by two or more, the action is stated not to be joint, but several, and each is liable only for the injury produced by his own act.

In *Townsend v. Hoppock* (1857) 6 Duer (N. Y.) 499, a release given to an attaching creditor for damages incurred in levying upon the debtor's goods was held not to operate to release a prior attaching creditor, where the act of the creditor released had no connection with

the act constituting the cause of action against the prior creditor.

And in *Carson v. Smith* (1895) 133 Mo. 606, 34 S. W. 855, a settlement by a debtor with a creditor who, with another creditor, attached the goods of the debtor, was held not to preclude the debtor from maintaining an action against the other creditor. In this case it is stated that the creditors were not joint tort-feasors, that one firm had no interest whatever in the suit of the other, and plaintiff could not, for that reason, have maintained his action for conversion against them jointly. They acted separately and independently of each other, and for the benefit of the respective firms. While one may have been guilty of a tort, the other may not have been; hence, any settlement that the plaintiff may have made with one of the creditors did not serve to extinguish his cause of action, if any he had, against the other.

Several attaching creditors were held

not tort-feasors in *Ceraline Mfg. Co. v. Anthracite Beer Co.* (1904) 25 Pa. Super. Ct. 94, as they were pursuing a remedy given by a statute, and their liability in case of the dissolution of the attachment was on their bond, and not in tort; consequently the settlement by the debtor with one of the attaching creditors for damages growing out of the issuing and service of the attachment did not operate as a release to another creditor from any further claim for damages. See *Miller v. Beck* (1899) 108 Iowa, 575, 79 N. W. 344.

In *Iddings v. Citizens' State Bank* (1902) 3 Neb. (Unof.) 750, 92 N. W. 578, a judgment in favor of a bank which held bills of lading for grain billed to a debtor of the bank, against one who converted the grain to his own use, was held not satisfied by a settlement made by the bank with the railroad company for delivering grain (including that converted) to the consignee without the bill of lading. *W. A. E.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

JAMES L. O'NEILL et al., Appts.,
v.

CENTRAL LEATHER COMPANY et al.,
Respts.

(87 N. J. L. 552, 94 Atl. 789.)

Evidence — war — proclamation.

1. The official communications by the President to Congress leave no doubt or room for a contrary inference that in November, 1913, and January, 1914, the Carranza and Villa forces in Mexico were recognized by our government as engaged in actual war.

For other cases, see War, in Dig. 1-52 N. S.

War — seizure of private property — right.

2. The right of the commander of an army in actual possession of a large territory, who observes the ordinary laws of war, to seize private property to meet his military necessities, does not depend on the existence of belligerency in the technical sense, but on the existence of belligerency in the sense of actual existing warfare.

For other cases, see War, in Dig. 1-52 N. S.

Same — levying contributions — legality.

3. The right of a military commander to levy contributions must be exercised in ac-

cordance with the laws of law. Contributions must be levied by the commander in chief or by the general of a corps acting independently.

For other cases, see War, in Dig. 1-52 N. S.
Same — sale of property — effect.

4. By agreement between General Villa, whose forces were in actual possession of the district in Mexico, and the citizens, a war contribution was assessed by commissions appointed by the taxpayers. One who was assessed failed to pay, and property belonging to him was seized by virtue of a general order and sold. Held, that the title passed by that sale is not open to inquiry in our courts.

For other cases, see Courts, I. c, 1, in Dig. 1-52 N. S.

(June 14, 1915.)

APPEAL by plaintiffs from a judgment of the Hudson County Circuit of the Supreme Court, in defendants' favor, in an action brought to recover possession of certain cattle hides. Affirmed.

The facts are stated in the opinion.

Mr. Oscar R. Houston, with Messrs. McDermott & Enright, for appellants:

A sale which violates the principles of international law does not give title even to a neutral purchasing bona fide beyond the territory of the belligerent.

The Ouachita Cotton (Withenburg v. United States) 6 Wall. 521, 18 L. ed. 935.

The matter of recognition or nonrecognition of belligerency or sovereignty *de jure* or *de facto* are matters exclusively for the political departments of the government.

Headnotes by SWAYZE, J.

Note. — As to litigation arising out of Mexican revolution, see annotation following this case, post, 280.
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Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80; Kennett v. Chambers, 14 How. 38, 14 L. ed. 316; The Three Friends, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; Rose v. Himely, 4 Cranch, 241, 272, 2 L. ed. 608, 618; United States v. Klintock, 5 Wheat. 144, 5 L. ed. 55; The Nueva Anna, 6 Wheat. 193, 5 L. ed. 239; Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; The Ambrose Light, 25 Fed. 408.

The courts take judicial notice of the acts of the political departments of the government in recognizing or not recognizing belligerency and sovereignty.

Jones v. United States, 137 U. S. 202, 214, 34 L. ed. 691, 696, 11 Sup. Ct. Rep. 80; Taylor v. Barclay, 2 Sim. 220, 57 Eng. Reprint, 771, 7 L. J. Ch. 65, 29 Week. Rep. 82.

In the present case the political departments of the United States government have not given such recognition to the so-called Constitutionalists either as a sovereign or de facto government or as belligerents.

Jones v. United States, 137 U. S. 202, 214, 217, 34 L. ed. 691, 696, 697, 11 Sup. Ct. Rep. 80; Woolsey v. Chapman, 101 U. S. 755-770, 25 L. ed. 915-920; Runkle v. United States, 122 U. S. 543-557, 30 L. ed. 1167-1171, 7 Sup. Ct. Rep. 1141; 1 Moore, Int. Law Dig. §§ 59-71, 74; The Conserva, 38 Fed. 431; The Three Friends, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495.

The court erred in admitting the evidence of internal political conditions in Mexico to show the existence of a government de facto.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Kennett v. Chambers, 14 How. 38, 14 L. ed. 316; Rose v. Himely, 4 Cranch, 241, 272, 2 L. ed. 608, 618; Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; The Ambrose Light, 25 Fed. 408; Louisiana v. Mississippi, 202 U. S. 153, 50 L. ed. 913, 932, 26 Sup. Ct. Rep. 408, 571; Gelston v. Hoyt, 3 Wheat. 246, 324, 4 L. ed. 381, 401.

The seizure under the circumstances proved was in violation of the modern law of nations, even though the captors be conceded the status of a belligerent sovereign.

United States v. Klein, 13 Wall. 128, 136, 20 L. ed. 519, 522; 40 Cyc. 336, notes 70 and 71; Planters' Bank v. Union Bank, 16 Wall. 488, 21 L. ed. 473; United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; Airhart v. Massieu, 98 U. S. 491, 25 L. ed. 213; Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163.

The seizure cannot be vindicated as an exercise of the taxing power.
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The so-called law of nations is part of the law of the land, and must be recognized and administered by our courts.

The Three Friends, 166 U. S. 53, 41 L. ed. 915, 17 Sup. Ct. Rep. 495; Respublica v. De Longchamps, 1 Dall. 111, 1 L. ed. 59.

The courts of this country have jurisdiction to inquire, to an extent, into the legality of the acts of foreign powers or courts, even of recognized sovereignty, when necessary for the determination of the title to property brought within the jurisdiction of our courts.

Rose v. Himely, 4 Cranch, 241, 271, 2 L. ed. 608, 617; Sabariego v. Maverick, 124 U. S. 261, 31 L. ed. 430, 8 Sup. Ct. Rep. 461; The Santissima Trinidad, 7 Wheat. 284, 5 L. ed. 454; Miller v. The Resolution, 2 Dall. 1, 1 L. ed. 263; Hilton v. Guyot, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139.

The seizure in question was without any sanction under the Mexican law.

Planters' Bank v. Union Bank, 16 Wall. 488, 21 L. ed. 473; Eastern Lunatic Asylum v. Garrett, 27 Gratt. 163.

Messrs. Morgan J. O'Brien and William D. Edwards for respondents.

Swayze, J., delivered the opinion of the court:

The question to be decided is the title to certain hides claimed by the plaintiff under Martinez, the former owner, and by the defendant Central Leather Company under a title based on a seizure in Mexico by military forces under the authority of General Villa.

1. In cases of this kind the courts are bound to follow the action of the political branches of the Federal government where there has been such action. Jones v. United States, 137 U. S. 202, 34 L. ed. 691, 11 Sup. Ct. Rep. 80. Our first question is, therefore, What action has been taken by the Federal government? We are informed of this by various documents submitted in evidence. The letter from Mr. Lansing, counselor to the Department of State, written for the Secretary of State under date of August 20, 1914, makes it clear that our government has never recognized any government in Mexico headed by Carranza or Villa, and has never recognized as belligerents, within the intent and meaning of the law of nations, any forces operating in Mexico under their command. This explicit declaration of Mr. Lansing, acting officially, settles that question as far as this court is concerned, and leaves nothing to inference.

When we examine further to determine what is the exact position taken by our government with reference to the forces un-

der the command of Carranza as chief, and the immediate command of Villa, we find no such explicit declaration; but the official communications by the President to Congress leave no doubt or room for a contrary inference that at the time the hides in question were seized in November, 1913, and sold in January, 1914, the Carranza and Villa forces were recognized by our government as engaged in actual war. In a message to Congress on August 27, 1913, the President stated his efforts to secure the abdication of the Huerta government, and said that the territory "in some sort controlled by the provisional authorities at Mexico City (the Huerta government) has grown smaller, not larger;" that "difficulties more and more entangle those who claim to constitute the legitimate government,"—a "claim they have not made good in fact." He states that he has suggested a settlement conditioned on immediate cessation of fighting throughout Mexico, a definite armistice solemnly entered into and scrupulously observed, security for an early and free election in which all will agree to take part, the agreement of all parties to abide the result of the election and to co-operate in organizing and supporting the new administration. These references to a cessation of fighting and definite armistice obviously recognize that fighting is going on, and that it is of such a character that it may be stopped by an armistice, a word appropriate only to a condition of warfare. "An armistice suspends military operations by mutual agreement of the belligerent parties." Article 36 of The Hague Convention of 1907 as to Regulations Concerning the Laws and Customs of Land Warfare. It is a word that cannot properly be applied to agreements between a government on the one side and rioters, brigands, or banditti on the other. The message of the President, moreover, contemplated an agreement between parties who had the power to secure the scrupulous observance of agreements solemnly entered into and of an agreement to abide the result of an election. If there could be any doubt that the President thereby recognized that the armed forces in Mexico were divided into parties who could command the obedience of their members and that their armed struggle was war, that doubt would be removed by his further declaration that it is our duty to show what true neutrality will do to enable the people of Mexico to set their affairs in order again. Neutrality is a word not properly applicable, except as between armed forces engaged in war which our government desires to treat on a plane of absolute equality. The necessary inference to be drawn from the use of the word "neutrality" is confirmed by L.R.A.1017A.

subsequent language in the message. The President speaks of increased danger to noncombatants in Mexico, as well as to those actually in the field of battle, and says that he deems it his duty "to see to it that neither side to the struggle now going on in Mexico receive any assistance from this side of the border." He refers to the "best practice of nations in the matter of neutrality." The evidence proves that this recognition by the President of a state of war between the Huerta government and the Carranza government was merely a recognition of existing facts. Professor Beale defines war as follows (9 Harvard Law Review, 407): "War, in law, is not a mere contest of physical force, on however large a scale. It must be an armed struggle, carried on between two political bodies, each of which exercises de facto authority over persons within a determinate territory, and commands an army which is prepared to observe the ordinary laws of war."

That the struggle in Mexico in 1913-1914 was an armed struggle is well known; that it was carried on between two political bodies,—one the Huerta government, claiming to be the legitimate successor of the formerly existing Mexican government; and the other the Carranza government, organized under the so-called "plan of Guadalupe," is proved; that each exercised de facto authority over persons within a determinate territory and commanded an army is proved; that the Carranza forces, at least, were prepared to observe the ordinary laws of war, is shown by their adoption of our own regulations.

Our government has, however, gone further than merely to recognize that the two contending parties were at war. On December 2, 1913, the President in his annual message spoke of Huerta's authority as usurped and said there could be no lasting peace until he surrendered it. If Huerta's authority was usurped, if peace was impossible until he surrendered, armed resistance to that authority was justified. The President added the most important declaration: "Mexico has no government." In that situation the only control resembling governmental authority must have been in the commanders of the armed forces in possession of the particular district or in the governments of the separate states of the Mexican Republic. In fact, the state of Chihuahua, having twice the area of the state of New York, and a large part of the state of Coahuila, were under the control of Carranza and Villa at the time the hides in question were there seized and sold. The municipal government of Torreon, favorable to them, had been restored after Villa's capture of the city, and Martinez, a Huerta

supporter, was in hiding and subsequently fled.

2. The next question is whether the commander of an army in actual possession of a large territory, who observes the ordinary laws of war, has the right, according to those laws, to seize private property to meet his military necessities. We need not go so far as to consider whether, in the absence of government in Mexico as the President has decided, a military government under such circumstances would be entitled to be considered a *de facto* government, so as to deprive us of any right to question its acts as to the property of Mexicans within the Mexican territory controlled by it. *American Banana Co. v. United Fruit Co.* 213 U. S. 347, 53 L. ed. 826, 29 Sup. Ct. Rep. 511, 16 Ann. Cas. 1047. We need only inquire into the rights of parties to a war under the laws that govern that situation. These rights do not depend on the existence of belligerency in the technical sense, but on the existence of belligerency in the sense of actually existing warfare. The distinction was pointed out by President Cleveland in his first and seventh annual messages, 9 Harvard L. Rev. 406, and by the United States Supreme Court in *The Three Friends*, 166 U. S. 1, 63, 64, 41 L. ed. 897, 918, 919, 17 Sup. Ct. Rep. 495. Belligerency in the strict technical sense—that is, belligerency recognized by another power—involves such serious disadvantages to the recognizing power, such as the right of blockade by either belligerent, the right of visitation, search, and seizure of contraband on the high seas, abandonment of claims for reparation on account of damages suffered by citizens of the recognizing power, that recognition depends not merely on the actual fact of existing war, but on the policy of other powers and the necessity of recognition of belligerency by them. But there may be a recognition of a condition of political revolt, a situation between recognition of the existence of war in a material sense and of war in a legal sense. Such was the case of *The Three Friends* above cited, in which our neutrality act was held applicable at the time of the insurrection in Cuba. The court held that, although never recognized even as belligerents, the insurgents were “a people” within the meaning of the neutrality act, as the Attorney General put it in his brief, because they were a political organization, engaged in a political enterprise. It was those facts that saved the owners of *The Three Friends* from being pirates, and subjected them only to the penalties of the neutrality act. A similar recognition, if not more, has been accorded by the President to the Carranza-Villa forces. We are in duty bound, under the declaration in his L.R.A.1917A.

messages to Congress, to preserve neutrality. This cannot be done, unless we accord to both parties alike all the rights permitted by the rules of war; and even if the Carranza-Villa forces were no more than insurgents, we should have to treat them like any other belligerent, as to whom we desired to be entirely fair, without subjecting ourselves to the inconveniences that would arise from a formal recognition of belligerency. No such troubles can arise from acts done on Mexican soil and affecting Mexican property only. The courts of one country, says Chief Justice Fuller in *Underhill v. Hernandez*, 168 U. S. 250, at page 252, 42 L. ed. 456, 457, 18 Sup. Ct. Rep. 83, at page 84, will not sit in judgment on the acts of the government of another done within its own territory, and this principle is not confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. “The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.”

In the absence of any government in Mexico, a fact as to which the President's statement is conclusive upon us, the rule by paramount force in any particular district is provable as matter of fact by evidence, which in this case is neither left in doubt nor subject to possible inference to the contrary. Warfare has been recognized by the President as existing, and although he has not officially determined in what particular territory or at what particular time Carranza and Villa were in control, he has said in public messages to Congress that only part of Mexico was under Huerta's control, and that has grown smaller, not larger. He has thus left it open—in fact, made it necessary—for the courts in a proper case to determine whether a particular territory was in control of one party or the other. The action in *Underhill v. Hernandez* was an action for personal torts; but we are equally bound by the same legal principle in an action involving the title to personal property, if title thereto can ever be passed by a military commander exercising paramount force. That title can be so passed is well settled, since the right to confiscate property or levy military contributions is one of the rights of the military occupant of a territory. The reason for permitting an armed force to levy contributions or even to confiscate property in territory occupied by them apply as well to insurgents conducting war in a material

sense as to recognized belligerents conducting war in a legal sense. The reason is the necessity of carrying on the usual operations of government and of supporting the Army. As the old practice of private pillage was frowned on and discontinued, the milder and more effective system of requisitions (a term sometimes attributed to Washington), contributions, and confiscations took its place. The advantage was that the latter were under the control of the military authorities, and the burden was not only better distributed, but the evils attending private pillage ceased. The inhabitants of the conquered territory suffered less, and the conquerors gained more. Whether the practice is to be justified on ethical grounds is disputed by Bonfils (*Droit, International Public*, §§ 1218-1225), but is recognized by him as existing usage (§ 1226), as it is by other text writers. Hall 5th ed. 427 ff.; Wheaton, *Atlay's ed.* 482, quoting Halleck; 7 Moore, *International Law Dig.* 280. The rule had the approval of The Hague Conference of 1907 in its effort to codify the rules of war. Articles 48 and 49. It has had the approval of our government and of our acts in accordance therewith (7 Moore, *International Law Dig.* 285, 286), and of the United States Supreme Court (*Miller v. United States* [Page v. United States] 11 Wall. 268, 304, 20 L. ed. 135, 145). The question was directly involved in that case, since unless the confiscation acts could be justified under the war power of the Constitution, they would be void because in violation of the 5th Amendment. After pointing out the right of confiscation under the rules of war as between independent nations, the court said that every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil, and referred to the Prize Cases, 2 Black, 635, 17 L. ed. 459. The latter are interesting,

because the right to condemn was asserted in favor of our government, although it had not recognized the Confederate States as belligerents. An excellent statement of the rule, and the reason by which it is justified, is to be found in 15 Harvard L. Rev. 140, 141.

The right to levy contributions is distinctly a conqueror's right, and rests upon paramount force. It does not depend upon the recognition of belligerency, with all that accompanies it, nor is its exercise limited to recognized belligerents. Existing warfare and actual occupancy of the territory are the conditions necessary. Since the right exists under the laws of war, it must be exercised in accordance with those laws. It must not be confused with mere brigandage or looting. Contributions must be levied either by the commander in chief, or by the general of a corps acting independently. Hall, 428, 429, adopted by Moore, 7 Moore, *International Law Dig.* 281. The rule is implied in the instructions for our Army during the Civil War. 7 Moore, 286. In the present case the rules of war were complied with. General Villa's forces were in actual possession of Torreon and the Laguna district. By agreement between him and the citizens, a war contribution was assessed in the district by commissions appointed by the taxpayers. An assessment was made against Martinez, who as a partisan of Huerta was then in hiding. He failed to pay, and his name was included in a general order to seize the property of those who refused to pay their share of the contribution. In pursuance of that order these hides were seized, and sold by General Villa. The proceedings subsequently had the approval of Carranza. We think that sale passed a title not open to inquiry in our courts.

The judgment is therefore affirmed, with costs.

Annotation—Litigation arising out of Mexican revolution.

The armed struggle of recent years in Mexico has presented some judicial as well as diplomatic problems.

The question as to which faction constitutes the *de facto* government has been settled for the courts by the Executive recognition of General Carranza as the central authority of Mexico.

The recognition officially extended by the President of the United States to General Carranza as the central authority of Mexico, whether right or wrong, is conclusive on the courts, and must be deemed to involve a recognition as well L.R.A.1917A.

of General Carranza's governor in Yucatan,—especially since the President of the United States, when placing an embargo on the shipment of arms and munitions to Mexico, excepted from such embargo "all ports of entry in Mexico except those along the international boundary in the states of Chihuahua and Sonora and all the ports in Lower California," basing this action upon the report of the Department of State that in all such excepted ports of entry the recognized *de facto* government of Mexico was in effective control, the courts tak-

ing judicial notice that the port of Progreso, Yucatan, is among the ports of entry so excepted. *Yucatan v. Argumedo* (1915) 92 Misc. 547, 157 N. Y. Supp. 219.

This recognition of the Carranza government relates back to the inception of that government, and the government in Yucatan, which acknowledges the superior authority of General Carranza, is vested with all state property, including title to all state funds accumulated during previous *de facto* régimes, and to a cause of action which accrued to the state when its funds were misappropriated by a former acting governor. (N. Y.) *Ibid*.

The fact that the government of the United States had not then accorded official recognition to either party to the civil war in Mexico did not impair the authority of the President to execute, with respect to troops of either party who seek in the United States refuge and asylum from the enemy, the provisions of The Hague Convention of October 18, 1907, chap. 2, art. 11, ratified by both the United States and Mexico, that "a neutral power which receives in its territory troops belonging to the belligerent army shall intern them as far as possible from the theater of war." *Ex parte Toscano* (1913) 208 Fed. 938.

Such interment does not violate the Federal Constitution. (Fed.) *Ibid*.

Authority to use the military power in time of peace, to arrest without warrant and imprison without trial, a citizen of Mexico merely suspected of organizing in the United States a military expedition against Mexico, was not conferred upon the President of the United States by the provision of U. S. Penal Code, § 14, which makes it lawful for the President or such other person as he shall have empowered for that purpose to employ the land and naval forces for the purpose of preventing the carrying on of any military expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace. On the contrary, his arrest, upon the mere order of the President, was in contravention of U. S. Const. 14th Amend. and his continued detention was repugnant not only to the due process of law clause of U. S. Const. 5th Amend., but also to U. S. Const. 6th Amend., which guarantees to the accused the right to speedy and public trial by a jury of the district where the crime shall L.R.A.1917A.

have been committed. *Ex parte Orozco* (1912) 201 Fed. 106.

By the 1st section of a joint resolution of Congress of March 14, 1912, it was made unlawful to export any arms or munitions of war from any place in the United States to an American country brought within the terms of the resolution by the proclamation of the President that he finds conditions of domestic violence to exist there which are promoted by the use of arms or munitions of war procured from the United States, and by the 2d section the prohibitions of the first section were made operative by punishing "any shipment of material hereby declared unlawful."

The validity of this joint resolution was assumed in *United States v. Chavez* (1912) 228 U. S. 525, 57 L. ed. 950, 33 Sup. Ct. Rep. 595, and was directly upheld in *Talbott v. United States* (1913) 125 C. C. A. 360, 208 Fed. 144, writ of certiorari denied in (1914) 232 U. S. 722, 58 L. ed. 815, 34 Sup. Ct. Rep. 331.

The President's proclamation of April 14, 1912, having brought Mexico within the terms of the resolution, one Chavez was indicted for making a shipment of munitions destined for a specified point in Mexico by transporting the same on his person between two points in the city of El Paso, Texas. The Federal district court quashed the indictment on the ground that the charge of a shipment without an averment of landing in the foreign country stated no offense. But the Supreme Court of the United States, reversing the district court, held in *United States v. Chavez* (U. S.) *supra*, that the act of sending the prohibited merchandise from the United States to the foreign and prohibited country, without reference to the completion of such act by landing or delivery at its destination, must be deemed to be condemned by the resolution in question; and further held that resort to personal carriage as a means of moving the prohibited articles from the United States to the foreign and prohibited country would not render inapplicable the prohibitions of such joint resolution.

But the mere intent to ship the goods into the forbidden territory is not an offense under this resolution, unless that intent be coupled with an actual shipment made from a definite point in the United States to a definite point in Mexico. *United States v. Albert Steinfeld & Co.* (1913) 209 Fed. 904; *United States v. Phelps-Dodge Mercantile Co.* (1913) 209 Fed. 910.

In the first of these cases an indictment charging a violation of the joint resolution by shipping munitions of war from New Haven, Connecticut, to Tucson, Arizona, with intent to export them from the United States to Mexico, naming the state of Sonora, Mexico, as the ultimate destination of said shipment, was held to be fatally defective because at most it charged a mere intent to ship the munitions of war into Mexico, and because it failed to specify any point of destination within the forbidden territory to which the alleged shipment was made.

The court, while admitting that, under the law laid down in *United States v. Chavez* (U. S.) *supra*, the act forbidden by Congress becomes an offense from the very moment when a shipment is started from any point in the United States to any point within the forbidden territory, said that so long as the mere intent is not coined into an act of actual shipment made from a point in the United States to a point within the forbidden territory no offense has been committed. "In the *Chavez Case*," said the court, "the defendant started with the munitions of war on his person, intending to deliver them at a definite point within the forbidden territory, to wit, the city of Juarez, Mexico, and was stopped on the way at a point in the city of El Paso somewhere between the initial and terminal points of the shipment; but, as a matter of fact, it ap-

pears in that case that the munitions of war were put on their final shipment, and were actually in transit to and into the city of Juarez, in the United States of Mexico, when the defendant in that case was arrested. In the case at bar it nowhere appears that the intent to ship the munitions of war into the United States of Mexico was ever coined into an act of actual shipment; but, on the contrary, it is manifest from the indictment that the munitions of war were shipped from New Haven, Connecticut, to Tucson, Arizona, and there the shipment stopped; and it does not appear from the indictment that the munitions of war were ever shipped from Tucson, Arizona, or from any other point, into the forbidden territory; consequently it is manifest that the indictment charges only the mere intent to reship the forbidden goods from Tucson, Arizona, into the forbidden territory, and nothing more, and, as this mere intent is not an offense under the joint resolution, the indictment is bad in this particular, and cannot be sustained."

In the second of these cases the indictment charged a shipment of munitions between two points in Arizona, with an unidentified point in Sonora, Mexico, as the ultimate destination, and a demurrer was sustained on the same grounds set forth in *United States v. Albert Steinfeld & Co. (Fed.) supra*.

W. W. N.

TENNESSEE SUPREME COURT.

I. J. COOPER RUBBER COMPANY, Appt.,
v.

J. T. JOHNSON et al.

(138 Tenn. 562, 182 S. W. 593.)

Corporation — foreign — doing business in state — consignee of goods for sale.

1. A foreign corporation is not, by consigning its product to a local merchant for sale, doing business within the state so as to be required to comply with its laws to be entitled to sue in its courts, although the contract requires the goods to be insured in

the name of the consignor and permits the consignee to adjust claims under guaranties under which the goods are sold.

For other cases, see Corporations, VII. b, in Dig. 1-52 N. S.

Principal and surety — release of surety — extension of time for payment of instalment.

2. A surety upon a contract requiring a consignee to make monthly payments for the goods consigned to him for sale is not released, by the acceptance by the consignor of a note for one instalment, from liability for other instalments.

For other cases, see Principal and Surety, I. b, in Dig. 1-52 N. S.

(February 5, 1916.)

Note. — For annotation of the question as to when a foreign corporation which has entered into a contract for the local handling of its product may be considered as doing business within the state within the meaning of a statute prescribing the conditions upon which foreign corporations may transact business therein, see annotation to *Standard Fashion Co. v. Cummings*, L.R.A. 1916F, 329. L.R.A.1917A.

APPEAL by complainant from a decree of the Chancery Court for Davidson County dismissing a suit on a bond executed by defendants to secure the performance of a contract for the sale of certain goods. Reversed.

The facts are stated in the opinion.

Messrs. E. J. Walsh, F. M. Bass, and Gordon, Morrill, & Ginter, for appellant:

The regulation of all acts of interstate commerce belongs exclusively to the domain of the Congress of the United States, under the provisions of the Federal Constitution, and a state statute which undertakes to regulate such business contravenes the interstate commerce clause of the Constitution, and is, therefore, void.

Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Pennsylvania Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

The transactions between the complainant and the Standard Vulcanizing & Tire Company were acts of interstate commerce, and, therefore, complainant was not engaged in such business in Tennessee as is contemplated by the laws of Tennessee, requiring foreign corporations to register their charters with the secretary of state, etc.

Milan Mill. & Mfg. Co. v. Gorten, 93 Tenn. 594, 26 L.R.A. 135, 4 Inters. Com. Rep. 851, 27 S. W. 971; Advance Lumber Co. v. Moore, 126 Tenn. 314, 148 S. W. 212; Western Oil Ref. Co. v. Dalton, 131 Tenn. 329, 174 S. W. 1138; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Pennsylvania Sales Corp. v. Willock, — Tenn. C. C. A. —, 1914; Stein Double Cushion Tire Co. v. Wm. T. Fulton Co. — Tex. Civ. App. —, 159 S. W. 1013; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Keating Implement & Mach. Co. v. Favorite Carriage Co. 12 Tex. Civ. App. 666, 35 S. W. 417; Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844; Atlas Engine Works v. Parkinson, 161 Fed. 223; Re Monongahela Distillery Co. 186 Fed. 220; Sioux Remedy Co. v. Lindgren, 27 S. D. 123, 130 N. W. 49; Sioux Remedy Co. v. Cope, 28 S. D. 397, 133 N. W. 683; Sanitas Co. v. Nieziorawski, 138 Wis. 374, 120 N. W. 292.

The vulcanizing company is estopped to invoke as a defense the fact that the complainant is doing business in this state in violation of the law, and defendants, having also signed said bond as sureties, to secure the faithful performance of said contract, are likewise estopped.

Memphis & A. River Packet Co. v. Agnew, 132 Tenn. 265, L.R.A.1916A, 640, 177 S. W. 949.

Mere delay by the creditor to proceed L.R.A.1917A.

against the debtor, or failure to notify the surety of his default, will not, in the absence of fraud, discharge the surety. It is the business of the surety to see that his principal performs the duty which he has guaranteed, and not that of the creditor.

Hebert v. Lee, 118 Tenn. 137, 12 L.R.A.(N.S.) 247, 121 Am. St. Rep. 989, 101 S. W. 175, 11 Ann. Cas. 1029; Watauga Bank v. Matson, 99 Tenn. 390, 41 S. W. 1062; Pingrey, Suretyship, §§ 141-a, 293; Brandt, Suretyship, § 2; Boyd v. Agricultural Ins. Co. 20 Colo. App. 28, 76 Pac. 986; Pacific F. Ins. Co. v. Pacific Surety Co. 93 Cal. 7, 28 Pac. 842; Gilbert v. State Ins. Co. 3 Kan. 1, 44 Pac. 442; Wilkerson v. Crescent Ins. Co. 64 Ark. 80, 62 Am. St. Rep. 152, 40 S. W. 465; Atlantic & P. Teleg. Co. v. Barnea, 64 N. Y. 385, 21 Am. Rep. 622.

An agreement for delay, in order to release a surety, must be for a definite or fixed time.

Watauga Bank v. Matson, 99 Tenn. 390, 41 S. W. 1062; Johnson v. Hacker, 8 Heisk. 408; Cherry v. Miller, 7 Lea, 305; White v. Summers, 1 Baxt. 154; Sully v. Childress, 106 Tenn. 111, 82 Am. St. Rep. 875, 60 S. W. 499.

Where an extension of time is given to the principal, but given with the express reservation of the right of recourse against the surety, such extension will not release the surety, although no notice is given the surety of such extension.

Meredith v. Dibrell, Ann. Cas. 1914B, 1081, and note, 127 Tenn. 388, 46 L.R.A.(N.S.) 92, 155 S. W. 163; Webb v. Hewitt, 3 Kay & J. 438, 69 Eng. Reprint, 1181.

A release of or an extension of time as to one or more of the monthly instalments that had become past due will not relieve the defendant sureties from liability as to those instalments thereafter accruing.

32 Cyc. 196; Coe v. Cassidy, 72 N. Y. 133; Ducker v. Rapp, 67 N. Y. 464; Ellis v. McCormick, 1 Hilt. 313; Haynes v. Synnott, 160 Pa. 180, 28 Atl. 832.

Mr. Clarence T. Boyd for appellees.

Williams, J., delivered the opinion of the court:

This suit was instituted by the Cooper Rubber Company, an Ohio corporation, to recover of Johnson and Tinsley, as sureties on a bond executed by the Standard Vulcanizing & Tire Company (called the tire company in this opinion), as principal.

The tire company was engaged in handling automobile accessories in Nashville, and entered into a contract with the rubber company by the terms of which the latter agreed to consign to the former tires, etc., for a designated period. On account of its lack of financial ability or standing, the

tire company was required to execute a bond to save harmless the rubber company in respect of a breach of the contract by the tire company.

The first and main defense of the sureties is that the complainant rubber company had not complied with our foreign corporation acts, and was doing business in this state through the agency of the tire company; therefore that it may not maintain the suit because of the failure to so comply. This defense was sustained by the chancellor.

The contract between the two companies is in character one of consignment of merchandise for sale, unless one or more of its provisions later to be set out, relied on by appellee as so doing, mark it as one governing the parties as principal and agent,—the tire company as agent through which the rubber company did business in this state.

A contract quite similar as to the main provisions was involved in the case of *Butler Bros. Shoe Co. v. United States Rubber Co.* 84 C. C. A. 167, 156 Fed. 1, writ denied in 212 U. S. 577, 53 L. ed. 658, 29 Sup. Ct. Rep. 686, in the court of appeals of the eighth circuit. In reply to the same defense that is here interposed—that the plaintiff rubber company had never qualified to do business in the state of Colorado, and that it could not therefore maintain suit in that state—the court said: “It [the foreign corporation] agreed to ship the goods from its warehouse, or its mill, upon the orders of the appellee, to that company in Denver; and it did so. It contracted to do, and it did, nothing more. It never had any office or place of business in Colorado. It never received, stored, handled, or sold any goods, or collected any money for the sales of any goods, in that state under this contract. It never incurred, assumed, or paid any expenses of doing all these things, or of conducting any of the business. The shoe company had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it agreed to bear all the expenses and losses of receiving, storing, and selling the goods, and it did so. The purchasers of the goods were purchasers from it, solicited and secured by it. They were its customers, and liable to it for the purchase price of the goods. . . . The rubber company did not agree to do, and did not actually do, any of the business of receiving, storing, and selling the goods in Colorado. The shoe company did agree to do, and did do, that business. These facts have driven our minds with compelling force to the conclusion that, within the true intent and meaning of the Constitution and statutes of Colorado, the rubber company was not doing business in L.R.A.1917A.

that state, and the contracts between these litigants are valid and enforceable.”

Among other cases cited on the point in the opinion just quoted from are *Allen v. Tyson-Jones Buggy Co.* 91 Tex. 22, 40 S. W. 393, 714, and *Gunn v. White Sewing Mach. Co.* 57 Ark. 24, 18 L.R.A. 206, 4 Inters. Com. Rep. 309, 38 Am. St. Rep. 223, 20 S. W. 591, and cited for disapproval is the contrary ruling in *Com. v. Parlin & O. Co.* 118 Ky. 168, 80 S. W. 791. See also the later cases of *Hessig-Ellis Drug Co. v. Sly*, 83 Kan. 60, 109 Pac. 770, Ann. Cas. 1912A, 551; *Stein Double Cushion Tire Co. v. Wm. T. Fulton Co.* — Tex. Civ. App. —, 159 S. W. 1013; *Sucker State Drill Co. v. Wirtz*, 18 L.R.A. (N.S.) 135, and note (17 N. D. 313, 115 N. W. 844); and note to *Harrell v. Peters Cart-ridge Co.* 44 L.R.A.(N.S.) 1094.

In *Allen v. Tyson-Jones Buggy Co.* supra, in speaking of such a foreign corporation's status to maintain suit, it was said: “The business which it transacted, as shown by the allegations, was to enter into a contract with the commission merchants to sell its buggies and phaetons on commission. . . . The selling of the buggies and phaetons, which was to be done by the commission merchants, was not a business done or carried on by the corporation. It was the business of the commission merchants themselves.”

The terms “factor” and “commission merchants” are said to be nearly or quite synonymous; the former expression being more common in the language of the law, and the latter in the language of commerce. A “factor” is one whose business it is to receive and sell goods for a commission, being intrusted with the possession of the goods to be sold, and usually selling in his own name. 1 *Mechem Agency*, §§ 74, 2497, et seq.

While in one sense a factor or commission merchant is the agent of the consigning dealer or manufacturer, he does not conduct an agency or business for the latter at the place of business of the former, where the sales of the consigned merchandise are made to customers chosen by the local dealer, at his own risk, and the proceeds of the sale do not become the exclusive property of the consigning company. A business so conducted is truly said to be that of the factor or commission merchant.

A provision of the contract pointed to by appellee sureties as showing a doing of business in the state is one which makes it the duty of the tire company to insure the goods in its hands, as follows: “Third. It is mutually agreed that the second party shall at all times cause the said merchandise in its possession to be, to the satisfaction of the first party, insured against fire in the

name of the first party, to an amount not less than 80 per cent of the value of said merchandise. It is further understood that the policies covering such insurance shall be made payable to, and deposited with, the first party, and that the cost of this insurance shall be borne by the second party."

The incorporation of similar clauses in contracts of consignment is not unusual, and it has been held that it does not have the effect claimed by appellee, to constitute the local dealer a business agency of the foreign corporation; the latter therefore to be treated as doing business in the state. *Wasey v. Whitcomb*, 167 Mich. 58, 132 N. W. 572; *Three States Buggy & Implement Co. v. Com.* 32 Ky. L. Rep. 385, 105 S. W. 971; *Sturm v. Boker*, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99.

The power to insure the goods placed in his hands is one of the ordinary powers of a factor or of one selling on commission, impossible by contract or usage on the factor as such. 1 *Mechem, Agency*, 2d. ed. § 2521; 12 *Am. & Eng. Enc. Law*, 2d ed. 656; *Wasey v. Whitcomb*, supra. Manifestly the provision had relation to and was in furtherance of the duty to care for, and in certain circumstances to return, the goods. The cost of the insurance was to be paid by the local dealer, not by the rubber company through it.

It is next said that the following contract provision works the result contended for: "Eleventh. The second party agrees to, in behalf of the first party, make all adjustments with reference to sale of merchandise covered by this contract that may be necessary under the guaranty under which said merchandise was sold, in accordance with written instructions given to the second party by the first party from time to time; said adjustments to be made out of stock of tires, casings, and tubes belonging to the first party, and in possession of the second party, when necessary."

These adjustments we understand, are those required to be made to satisfy the ultimate consumer in respect of and under the guaranty of the quality of the merchandise. The guaranty aided the local dealer

in selling the goods, and this provision but enabled the latter to keep faith with his customer. Anything so done may be treated as an incident of the local dealer's business. We fail to see how it brought the rubber company within the purview of the statute as the possessor of goods within this state for the purpose of barter or sale, or constituted the tire company an agency for that purpose.

Another and distinct defense of appellees, sustained by the chancellor, was: That the rubber company had agreed with the tire company on a material change in the contract without their consent, with the result that as guarantors, or sureties on the bond, they were released from liability. It is insisted that, while the contract provided that monthly remittances should be made in cash, the tire company was permitted to fall behind in its payments, and that the rubber company accepted a note for one month's sales from the tire company, payable in thirty days, thus extending the time and operating a release of the sureties. This defense cannot be sustained. "If a surety is liable for different payments, such as instalments of rent, an extension of time as to one or more will not affect the liability of the surety for others." 32 *Cyc.* 196.

When successive payments are to be made, at fixed periods, if the creditor gives time as to one of such payments he will release the surety as to it, but not with regard to subsequent payments. The receipt of the note could have no greater effect than a payment of the money, especially when received as here as cash, and the surety is not sought to be held liable thereon. *Klein v. Long*, 27 App. Div. 158, 50 N. Y. Supp. 419; *Cohn v. Spitzer*, 145 App. Div. 104, 129 N. Y. Supp. 104; *Shepard Land Co. v. Banigan*, 36 R. I. 25, 87 Atl. 531; 2 *White & T. Lead. Cas.* in Eq. 8th ed. 590.

We are of opinion that the several defenses urged by the appellee are not maintainable, and that the chancellor erred in not decreeing in favor of the rubber company.

Reversed, with decree here.

TENNESSEE SUPREME COURT.

W. R. DENNY, Appt.,
v.

BOARD OF EQUALIZATION OF SUMNER
COUNTY et al.

(134 Tenn. 468, 184 S. W. 14.)

Domicil — change — moving to secure school advantages.

One does not change his domicil for purpose. L.R.A.1917A.

poses of taxation who, for the purpose of securing educational facilities for his children, moves into a particular county with the intention of retaining his former domicil and returning to it when the education is finished, unless a farm for permanent residence is purchased elsewhere, although

Note. — As to domicil or residence for taxation as affected by purpose to obtain school facilities, see annotation following this case, post, 290.

he sells his property in the county from which he moves and purchases a residence in the other.

For other cases, see Domicil, in Dig. 1-52 N. S.

(March 11, 1916.)

APPEAL by complainant from a decree of the Chancery Court for Sumner County in favor of defendants in a suit to enjoin them from making an assessment against complainant's personal estate and to prevent the collection of taxes based on such assessment. Reversed.

The facts are stated in the opinion.

Mr. Ed. T. Seay, for appellant:

In the absence of a statute upon the subject, the situs of personal property, for the purpose of taxation, is at the place of the domicile of the owner, and cannot be legally assessed anywhere else.

37 Cyc. 947, 948.

Since for the purpose of taxation, one must have a residence or domicile somewhere, he cannot abandon a domicile once acquired, until he has actually acquired another; and a domicile once established will be presumed to continue where it has been until a change is affirmatively shown.

37 Cyc. 949; South Nashville Street R. Co. v. Morrow, 87 Tenn. 406, 2 L.R.A. 853, 11 S. W. 348; State ex rel. Kelly v. Shepherd 218 Mo. 656, 131 Am. St. Rep. 563, 117 S. W. 1169; Berry v. Wilcox, 48 Am. St. Rep. 706, and note, 44 Neb. 82, 62 N. W. 249; Walton County v. Morgan County, 120 Ga. 548, 48 S. E. 243; Fisher v. Rush County, 19 Kan. 414; Trimble v. Mt. Sterling, 11 Ky. L. Rep. 727, 12 S. W. 1066; Ayer & L. Tie Co. v. Keown, 122 Ky. 580, 93 S. W. 588; Com. v. Northwestern Mut. L. Ins. Co. 32 Ky. L. Rep. 796, 107 S. W. 233; Schmoll v. Schenck, 40 Ind. App. 581, 82 N. E. 805; Johnson County v. Hewitt, 76 Kan. 816, 14 L.R.A. (N.S.) 493, 93 Pac. 181; Helm v. Com. 135 Ky. 392, 122 S. W. 196; Winchester v. Van Meter, 158 Ky. 31, 164 S. W. 323; Loyd v. Lynchburg, 113 Va. 627, 75 S. E. 233; Cooley, Taxn. 3d ed. p. 641.

Where a person acquires a domicile, he is presumed to hold it until another is obtained, and to constitute a change of domicile, the fact must concur with the intention. By "domicil" two things are implied—residence of a person and the intention to make it his home.

Williams v. Saunders, 5 Coldw. 60; Kellar v. Baird, 5 Heisk. 39; Whitley v. Steakly, 3 Baxt. 393; Allen v. Thomason, 11 Humph. 537, 54 Am. Dec. 55; Foster v. Hall, 4 Humph. 348; Pearce v. State, 1 Sneed, 63, 60 Am. Dec. 135; White v. White, 3 Head, 404; Sparks v. Sparks, 114 L.R.A. 1917A.

Tenn. 666, 88 S. W. 173; Layne v. Pardee, 2 Swan, 235; Stratton v. Brigham, 2 Sneed, 423; Viles v. Waltham, 157 Mass. 542, 34 Am. St. Rep. 311, 32 N. E. 901; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Gravillon v. Richard, 13 La. 293, 33 Am. Dec. 563; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Allgood v. Williams, 92 Ala. 551, 8 So. 722; Barhydt v. Cross, 156 Iowa, 271, 40 L.R.A. (N.S.) 986, 136 N. W. 525, Ann. Cas. 1915C, 792; Cooper v. Beers, 143 Ill. 25, 33 N. E. 61; Ayer v. Weeks, 65 N. H. 248, 6 L.R.A. 716, 23 Am. St. Rep. 37, 18 Atl. 1108; Shaw v. Shaw, 98 Mass. 158; State ex rel. White v. Scott, 171 Ind. 349, 86 N. E. 409; Woodworth v. St. Paul, M. & M. R. Co. 5 McCrary, 574, 18 Fed. 282; Kemna v. Brockhaus, 10 Biss. 128, 5 Fed. 762; Chambers v. Prince, 75 Fed. 176; Denver v. Sherret, 31 C. C. A. 499, 60 U. S. App. 104, 88 Fed. 226, 5 Am. Neg. Rep. 520; Mitchell v. United States, 21 Wall. 350, 22 L. ed. 584; Anderson v. Watt, 138 U. S. 695, 34 L. ed. 1078, 11 Sup. Ct. Rep. 449; Desmare v. United States, 93 U. S. 605, 23 L. ed. 959; Somerville v. Somerville, 5 Ves. Jr. 750, 31 Eng. Reprint, 839, 5 Revised Rep. 155, 9 Eng. Rul. Cas. 730.

Mr. George W. Boddie for appellees.

Williams, J., delivered the opinion of the court:

The bill of complaint was filed by Denny to enjoin the county of Sumner and the board of equalization of that county from making an assessment of complainant's personal estate, and to prevent collection of taxes based on any such assessment. The preliminary steps had been taken to assess complainant's holdings of personal property in that county at \$40,000 for the year 1915, and the tax authorities of Trousdale county also made an assessment of the property for that year in the same amount, claiming that situs for taxation was in the latter county.

Denny was born in Smith county, Tennessee, in 1867, and had his domicile there until 1902, when he removed to Trousdale county, in this state.

In 1913 he sold his farms in Trousdale and Smith counties, and also his personal property, with only a few exceptions. He was at that time, and has since remained, a widower; he and a son fifteen years of age constituting his family.

Not finding the school advantages of Trousdale county adequate, as he thought, he considered going to Lebanon, Wilson county, or to Gallatin, Sumner county, for the purpose of placing his son in school. He was persuaded by a close personal

friend who lived in Gallatin to choose the latter place, and he went there early in 1914 and placed his son at once in a boys' training school. At first he rented a house and 21 acres of land that surrounded it. Later, finding that this place was on the market at \$10,000, he purchased it at about \$8,000, but as an investment. The acreage was located in the suburbs of Gallatin, and he was persuaded by his friend that it was or would become valuable for subdivision purposes.

Before going to Gallatin, Denny had this friend to ascertain from a leading attorney of the Gallatin bar whether his going to that place for the purpose of educating his son would operate to change his domicile; his desire being to retain his legal residence in Trousdale county. He was assured that it would not. He took up his abode, along with his son, in Gallatin for the purpose indicated, and, as he testifies, with the intent not to make it his permanent home. The proof discloses his intention to be: To purchase a farm in some county of this state when one could be found that was satisfactory, and to make his permanent residence at the place where it was purchased; to place his son later on in Vanderbilt University, at Nashville, and to go there and abide (if a farm had not been purchased at the time), while his son was going through a college course; and, if a farm had not been found elsewhere, to go back to Trousdale county and purchase one there when his son was through school. He was a farmer, and purposed bringing up his son as a farmer after the education of the latter was completed.

Complainant made unsuccessful efforts to buy farms in Sumner, Williamson and Maury counties; and, as stated, he testifies that he had no intention of residing permanently in Gallatin, or in Sumner county, unless he should succeed in making the purchase of a farm there. The other proofs as to his contemporaneous declarations are to the effect that his intention was to retain domicile in Trousdale county; that he had no purpose to remain in Gallatin permanently, but to use it as a base for educating his son and for finding a farm in some Tennessee county; no particular county being in mind.

Denny has continued all along to vote in Trousdale county and to pay taxes on personalty there.

In this state we seem to have no reported case dealing with the subject of domicile in respect of the place of taxation of personal effects. However, we have cases in which domicile has been defined when the same had relation to other subject-matters. Some of these cases are pertinent L.R.A.1917A.

to the one in hand. Thus *Allen v. Thomson*, 11 Humph. 536, 54 Am. Dec. 55, and *Kellar v. Baird*, 5 Heisk. 39 (relating to succession); *Layne v. Pardee*, 2 Swan, 232 (marital rights); *Pearce v. State*, 1 Sneed, 66, 60 Am. Dec. 135 (elective franchise); *White v. White*, 3 Head, 405; *Williams v. Saunders*, 5 Coldw. 60 (forum for probate of will), and *Keelin v. Graves*, 129 Tenn. 103, L.R.A.1915A, 421, 165 S. W. 232, and *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423 (exemptions). See also other cases discussing domicile in relations that do not furnish so close an analogy. *Foster v. Hall*, 4 Humph. 346, and *Stratton v. Brigham*, 2 Sneed, 420 (residence for attachment purposes); *Sparks v. Sparks*, 114 Tenn. 666, 88 S. W. 173 (residence for divorce); and *Laue v. Grand Fraternity*, 132 Tenn. 235, L.R.A. 1915F, 1056, 177 S. W. 941 (forfeiture of life insurance).

For purposes of taxation of personal property one must, of course, have a domicile fixed in some particular county and municipal corporation or civil district of the state.

"Domicil" and "residence" are not synonymous in the law relating to situs for taxation, "domicil" importing a legal relation existing between a person and a particular place based on actual residence, plus a concurrent intention there to remain, as at a fixed abiding place.

A man may have two or more residences, but only one domicile or legal residence. He must have a domicile somewhere; he can have only one; therefore, "in order to lose one, he must acquire another."

The law will, from facts and circumstances, fix a legal residence for him, unless he voluntarily fixes it himself, and, when his legal residence is once fixed, it requires both fact and intention to change it. As contra-distinguished from his legal residence, he may have an actual residence in another state or county. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purpose indicated, may be merely ideal, but his actual residence must be substantive. He may not actually abide at his legal residence at all, but his actual residence must be his abiding place. *Tipton v. Tipton*, 87 Ky. 245, 8 S. W. 440; *Long v. Ryan*, 30 Gratt. 718.

To constitute a change from a domicile to another domicile of choice, as is claimed in the instant case, three things are essential; (a) Actual residence in the other or new place; (b) an intention to abandon the old domicile; and (c) an intention of acquiring a new one at the other place. *Sparks*

v. Sparks, 114 Tenn. 666, 88 S. W. 173; Foster v. Hall, 4 Humph. 346.

The definition of "domicil" approved by the Supreme Court of the United States in the recent cases of *Williamson v. Osenton*, 232 U. S. 619, 624, 58 L. ed. 758, 761, 34 Sup. Ct. Rep. 442 (domicil for divorce), and *Gilbert v. David*, 235 U. S. 561, 59 L. ed. 360, 35 Sup. Ct. Rep. 164 (domicil for Federal jurisdiction), is that given by Dicey in his *Conflict of Laws* 2d ed. p. 111. This definition is in negative form, and a change of domicil is said to be effected where there is a change of abode and "the absence of any present intention to not reside permanently or indefinitely in the new abode." The same essential factors, as we conceive, appear in the definition when thus phrased: "As some writers express it, there must be an *animus non revertendi* and an *animus manendi* or *animus et factum*. *Berry v. Wilcox*, 44 Neb. 82, 48 Am. St. Rep. 706, 62 N. W. 249; *Hayes v. Hayes*, 74 Ill. 312, 316; *Jopp v. Wood*, 34 L. J. Ch. N. S. 212; 4 De G. J. & S. 616, 46 Eng. Reprint, 1057, 5 New Reports, 422, 11 Jur. N. S. 212, 12 L. T. N. S. 41, 13 Week. Rep. 481; *Moorhouse v. Lord*, 10 H. L. Cas. 272, 11 Eng. Reprint, 1030, 1 New Reports, 555, 32 L. J. Ch. N. S. 295, 9 Jur. N. S. 677, 8 L. T. N. S. 212, 11 Week. Rep. 637. The factum is the transfer of the bodily presence, and the animus is the intention of residing permanently, or for an indefinite period. A change of domicil therefore involves a question of fact and intent. The fact is easily proved because it is shown by the mere transfer of the bodily presence from the old to the new place of abode, but the intent with which the change is made is to be determined from the character of the residence, its object and purpose, in connection with the other evidence in the case. Residence in a particular place is a fact obvious to the senses, and cannot be easily mistaken, but its value in fixing domicil is unimportant unless accompanied with an intent of remaining permanently or indefinitely or, as it is sometimes said, with no present intent of removing therefrom. Residence alone, however long continued, will not effect a change of domicil. On this point the authorities speak with practically one voice." *Pickering v. Winch*, 9 L.R.A. (N.S.) 1159, and note, 48 Or. 500, 87 Pac. 763.

Reference may be made parenthetically to an exception recognized in this state to the rule that a domicil once fixed remains until another is actually acquired, arising in event of a change from a domicil of choice to that of origin. Then, if the removal be with the intention to resume his L.R.A.1917A.

domicil of origin, the latter is reacquired before it is reached, or even while the person is in itinere, "for it reverts from the moment the other is given up." *Allen v. Thomason*, 11 Humph. 536, 54 Am. Dec. 55, citing *Story*, *Conf. L.* The doctrine touching this exception is confined, however, to changes from one country to another, or from one state of the Union to another. *Kellar v. Baird*, 5 Heisk. 39; *Story, J.*, in *Catlin v. Gladding*, 4 Mason, 308, Fed. Cas. No. 2520; *Udny v. Udny*, L. R. 4 H. L. Sc. App. Cas. 441, 9 Eng. Rul. Cas. 782. The exception thus recognized in this state should be held in mind to prevent confusion in the attempted application of the language used in opinions enforcing the doctrine to instances where it has no relevancy.

In the case of *Bulkley v. Williamstown*, 3 Gray, 493, it appeared that prior to the tax test date of May 1, 1853, Bulkley, an inhabitant of Williamstown, had made preparations for removing from that town to Rock Island, Illinois, and the last week of April he left Williamstown. He and his family went first to Adams, Massachusetts, there taking rooms with board, and they were in Adams on the test date. The trial judge instructed the jury that, if plaintiff had removed from Williamstown with a bona fide intention of abandoning residence in that town from that time, and with no present intention of ever making it his home, still he had domicil there for purpose of taxation until he actually acquired one elsewhere. On appeal a verdict based on the instruction was sustained, and it was said: "The question of domicil is often a difficult one; and it is a matter of surprise, considering the number of cases, that questions do not arise more frequently. The difficulty is intrinsic in determining, under the various combinations of circumstances, what constitutes habitancy or domicil, which, for most purposes at least, are the same. . . . The question in this case is: Where was the plaintiff's domicil on 1st day of May, 1853? Clearly not in Rock Island, Illinois, for he had not taken up his abode there. But he was an inhabitant of Massachusetts for the purposes of taxation, and of some town, city, or district. . . . Whether he had left Williamstown with an intent to make Adams his place of abode was a question of fact, which was left to the jury, who decided that he had not, which appears to us to be right, according to the evidence as reported."

See also *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424, and cases there cited.

In the case last named it appeared that a person domiciled in Boston left for an indefinite term of absence, and on leaving

he had determined never to return to reside in Boston; and before May 1, 1877, he had decided to take up his residence on his return from his travels in Connecticut, and on his return in 1879 he went to Connecticut to reside. It was held that his ~~domicil for taxation purposes on May 1, 1877, was in Boston; the court assigning as reasons for the judgment:~~ "Although he might have left the commonwealth with the fixed purpose to abandon it as a residence, he did not leave it on his way to a place certain which he had determined upon as his future residence, and was proceeding to with due despatch; and upon the general rule that, having had a domicil in this commonwealth, he remains an inhabitant for the purpose of taxation until he has acquired a new domicil, the intention and fact had not concurred at the time when this tax was assessed."

See also *Ayer v. Weeks*, 65 N. H. 248, 6 L.R.A. 716, 23 Am. St. Rep. 37, 18 Atl. 1108.

The mere intention to acquire a new domicil without the fact of an actual removal and residence avails nothing; neither does the fact of an actual removal without such intention. This intent is as essential as the fact of actual residence. A mere change in the place of abode, though more than temporary, is not sufficient, unless the intent concur.

"This intention, it is true, may be inferred from circumstances, and the residence may be of such a character and accompanied by such indices of a permanent home that the law will apply to the facts a result contrary to the actual intention of the party. Thus one cannot make a permanent, fixed commercial residence with all the surroundings of a permanent home in one place and a domicil in another by a mere mental act. But a residence for mere pleasure or health is not regarded as of any great weight in determining the question of a change of domicil." *Pickering v. Winch*, supra; *Still v. Woodville*, 38 Miss. 646; *Ayer v. Weeks*, supra.

In such case he does not lose his former domicil so long as his intention remains conditional; as, for example, where he may seek employment, intending to change his permanent home only if he finds it. 9 R. C. L. 553-555; *Berry v. Wilcox*, 48 Am. St. Rep. 716, note.

In *State ex rel. White v. Scott*, 171 Ind. 349, 86 N. E. 409, it was said: "So it may be . . . said that a journey into another state or territory for inspection, accompanied with an intent permanently to remove to such other state if a satisfactory place is found, does not amount to a change L.R.A.1917A.

of residence until an approved location has been . . . discovered and chosen," etc.

We are of opinion that the chancellor held an erroneous view as to the effect of the proof. Denny's domicil remained in Trousdale county. Clearly he acquired no ~~domicil in the town of Collatin; his intention to remain there was not even conditional.~~ His intention to make a legal residence in the county of Sumner may be said to have been conditional; that is, on his finding a farm there that was satisfactory. And as clearly his purpose was not to remain permanently or for an indefinite time. The limit of his purposed stay was until the preparatory school course of his son was concluded. Such a purpose falls within the spirit of the rulings above outlined. There was therefore lacking the intent that is necessary to change one's domicil.

The counsel of the county places much emphasis on his contention that the domicil in Trousdale county was abandoned, in that it is claimed that Denny left there with no fixed, absolute, and unconditional intent to return to it as his home. As we have seen, however, the case turns upon the ruling that Trousdale county was to force his domicil until another was acquired, and such other was not acquired by a voluntary fixing of a habitation at the new place to remain conditionally or for a temporary and special purpose. 9 R. C. L. 555, § 20. Reversed with decree here.

A petition for rehearing having been filed, the following response was handed down:

A petition to rehear has been filed and considered, but a re-examination of the case serves only to confirm the soundness of the views already expressed:

It so happens that the supreme court of Georgia had under consideration the question of domicil, in a case involving succession to property by will of a testator at the time we had the pending case under review. A few days before the above opinion was handed down by us, that court filed (February 26, 1916) its opinion, in which it was ruled: "If a person actually removes to another place, with the intention of remaining there for an indefinite time as a place of fixed domicil, such a place becomes his domicil. If a person leaves the place of his domicil temporarily, or for a particular purpose, and does not take up an actual residence elsewhere with the avowed intention of making a change in his domicil, he will not be considered as having changed his domicil. *Crawford v.*

Wilson, 4 Barb. 505; Ross v. Ross, 103 Mass. 575. . . . "If there be both actual residence and an intention of remaining,—the animus manendi,—then a domicil

is established." Worsham v. Ligon, 144 Ga. 707, 87 S. E. 1025.

A rehearing is denied.

Annotation—Domicil or residence for taxation as affected by purpose to obtain school facilities.

The question whether a change of domicil or residence is effected by going to another state, county, or district to teach school is discussed in the annotation following Klutts v. Jones, post, 291, and earlier notes there referred to.

There seems to be little authority except DENNY v. BOARD OF EQUALIZATION, ante, 285, directly on the question of domicil or residence for taxation as affected by the purpose to obtain school facilities. That case illustrates well the prominence in determining any question of domicil of the question of intent. It is said in 14 Cyc. 838, that domicil of choice is entirely a question of residence and intent, and that both must concur in order that the domicil may be deemed established. It is because of the lack usually of intent to establish a domicil in the new location that one going to a particular town or school, either as a teacher, student, or parent, for educational purposes, cannot be considered as having thereby effected a change of domicil.

It has been said that, in general, "an intent to change one's domicil and place of abode is not so readily presumed from a residence at a public institution for the purposes of education, for a given length of time, as it would be from a like removal from one town to another and residing there for the ordinary purposes of life; and therefore stronger facts and circumstances must concur to establish the proof of change of domicil in the one case than in the other." Opinion of Justices (1843) 5 Met. (Mass.) 587.

And it was held in Opinion of Justices (Mass.) supra, that the mere fact that one goes to a public institution, and there resides for the purpose of education, will not of itself necessarily change his domicil for the purpose of voting and taxation; but the question of domicil for these purposes is one of fact; depending on all the circumstances connected with such residence.

So, the fact that a student at college has his means of support from another place is a circumstance which, with other evidence, may bear on the question of domicil for purposes of taxation and voting, but is not determinative of L.R.A.1917A.

the domicil, and may in some instances be immaterial. (Mass.) Ibid.

Where, on the death of his parents, a minor, nine years old, went to live with a relative in another school district and continued to live there until attaining his majority, being enrolled in the latter district and enjoying the privileges of other school children therein, it was held that, for the purpose of determining the district entitled to the school taxes on his estate, there had been a change of domicil, and that the fact that the minor was regularly returned as a taxpayer in the district of his parents' former domicil was insufficient to establish a residence or domicil in that district, or to prevent a change of residence or domicil on the part of the minor after the parents' death. State ex rel. Brown v. Hamilton (1907) 202 Mo. 377, 100 S. W. 609.

As somewhat analogous to cases dealing with the question of domicil or residence for taxation, as affected by a purpose to obtain school facilities, attention is called to the case of Granby v. Amherst (1810) 7 Mass. 1, where the question was whether a pauper had acquired a settlement in a town so as to render it liable for his support; and it was held that, within the meaning of a statute requiring two years' residence in a town in order to acquire a settlement therein, the residence of one who owned a freehold of the requisite value in a certain town and resided therein for more than a year, when he became a student in college in another place for four years, spending his vacations in the town where his property was located and continuing his residence therein on completing his college course, was in the town during the time he was at the college.

The question as to what constitutes residence entitling a child to the privileges of the public schools is considered in notes in 26 L.R.A. 581; 36 L.R.A. (N.S.) 341; and 51 L.R.A.(N.S.) 234.

And as to change of domicil as affected by removal for benefit of health, see note to Pickering v. Winch (1906) 48 Or. 500, 9 L.R.A.(N.S.) 1159, 87 Pac. 763.

R. E. H.

NEW MEXICO SUPREME COURT.

WILLIAM D. KLUTTS et al., Appts.,

v.

MOSES B. JONES, Treasurer, et al.

(— N. M. —, 158 Pac. 490.)

Domicil — unmarried woman.

"Residence" is largely a question of intention. Hence, where an unmarried woman, over twenty-one years of age, who is dependent upon her own earnings for her support, accepts employment in the public schools of a given town and takes up her residence therein, with the intention of remaining there and making such town her home so long as she receives employment there, or until she has an opportunity to better her condition in life by accepting a more lucrative position in some other place, she is a resident of such town or voting precinct in which she lives, and, other requirements of the law not prohibiting, she is entitled to vote at an election in such district to determine whether bonds shall be voted for a school building.

For other cases, see *Bonds*, III. b, 3, in *Dig.* 1-52 N. 8.

(June 13, 1916.)

APPEAL by plaintiffs from a judgment of the District Court for Roosevelt County in defendants' favor in an action brought to enjoin the defendant treasurer from negotiating and selling certain bonds issued by the directors upon an alleged illegal election, and to declare the bonds void and canceled. Affirmed.

The facts are stated in the opinion.

Mr. George L. Reese for appellants.

Mr. James A. Hall, for appellees:

The place where a person lives is presumed to be the place of domicil until facts establish the contrary.

2 Kent, Com. 535; *Shepard v. Wright*, 113 N. Y. 582, 21 N. E. 724.

Residence is a fact depending upon outward acts and intention upon the part of the voter.

McCrary, Elections, § 62.

The casting of a ballot creates the presumption that the person voting is a legal voter, and the mere fact of voting in a particular precinct goes to show the intentions of a voter as to his place of residence.

Berry v. Hull, 6 N. M. 678, 30 Pac. 946.

A permanent residence, to entitle one to

Headnote by ROBERTS, Ch. J.

Note. — For going to another state, country, or district to teach school or preach, as effecting a change of domicil or residence, see annotation following this case, post, 294.
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vote, is where the intended voter means to abide and become a citizen until duty, business, moral obligation, contract, resolution, or convenience may compel him to elect a new home as place of domicil.

15 Cyc. 291; *Price v. Price*, 156 Pa. 617, 27 Atl. 291.

When the circumstances are such that a man may claim his domicil at either one of two places, the place he regards as his home or domicil will be his residence for the purpose of voting.

Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; *Hood's Estate*, 21 Pa. 106; *Carey's Appeal*, 75 Pa. 201.

Roberts, Ch. J., delivered the opinion of the court:

On April 6, 1914, an election was held in school district No. 30, Roosevelt county, New Mexico, to determine whether the bonds of said district in the sum of \$5,000 should be issued for the purpose of building a schoolhouse in said district. In the election fifty-nine votes were cast and counted for the issuance of the bonds, and fifty-eight votes were cast and counted against the issuance of the bonds. The appellants, among other things, in their second amended complaint, alleged that one vote cast and counted in said election for the issuance of the bonds, to wit, the vote of Willie Mae Culberson, now Elliott, was illegal, in that the said Willie Mae Culberson was not a resident of the said school district, and was not a qualified voter at said election; that on account of said illegal vote the majority of the qualified electors and voters of said district did not vote for the issuance of the bonds in said district; that the result of the election as declared by the directors of said district was erroneous and illegal; and prayed that the defendant treasurer of Roosevelt county be enjoined from negotiating and selling the bonds issued by the directors upon said election, and that the bonds be declared void and canceled. The appellees denied that the vote of said Willie Mae Culberson was illegal, and contended that she was a resident of said district at the time of said election, and entitled to vote therein. This issue was tried before Hon. John T. McClure, District Judge, sitting within and for Roosevelt county, on the 23d day of June, 1915, and resulted in a finding and judgment for the defendants. From the judgment of the district court the appellants have prosecuted this appeal.

The only question of inquiry on the appeal is whether or not the vote of Willie Mae Culberson was illegal. The sole question to be determined by this appeal is as to whether there is substantial evidence to sup-

port the finding of the trial court that Willie Mae Culberson, now Elliott, was, at the time of such election, a qualified elector of the Taiban voting precinct. In the case of *Klutts v. Jones*, 20 N. M. 230, 148 Pac. 494, the question of the right of women possessing the qualifications required by § 1, art. 7, of the Constitution, to vote at elections held for the purpose of voting bonds for the construction of a school building, was resolved in the affirmative. The question here for determination is, Had Willie Mae Culberson "resided" within the Taiban voting precinct thirty days prior to this election, for it is conceded that she had resided within the state for one year and within the county of Roosevelt ninety days, as required by said § 1, art. 7, of the Constitution. The evidence shows that she was more than twenty-one years of age in September, 1913, at which time she signed a contract with the directors of such school district to teach the Taiban school for the term beginning in September, 1913; that she had, for four years prior thereto, attended the Normal University at Las Vegas, New Mexico, her tuition and board having been provided for by her parents. She says that when she contracted to teach at the Taiban school, she took up her residence at Taiban, intending to make that place her permanent home, so long as she was there employed. When she went to Taiban she took all of her personal belongings with her, and says that she did not expect to call upon her parents for further financial assistance. In other words, she intended to make her own living, and did not expect to contribute toward the support of her father's family or to receive aid from them. She became ill with typhoid fever shortly after she went to Taiban, and was taken to Portales by her mother while unconscious, and was there cared for until she recovered, which was apparently sometime in November. While she was in Portales an election was held for the purpose of locating a county high school, in which both Portales and Taiban were seeking to secure such school. She worked at the polls during the day for the location of said school at Taiban, but did not vote, although asked to do so, because, she stated, that her residence was in Taiban, and she had no right to vote in Portales. In the summer of 1914 she visited her parents in Portales for a week or so, and then went to Las Vegas to attend the summer normal, returning to Taiban in August or September, and teaching school there the following term. She was married in Taiban, at her home there, to a Mr. Elliott, and after her marriage she went with her husband to his home in L.R.A.1917A.

Chaves county. The above afforded substantial evidence of the fact that the voter in question was legally entitled to vote at such election, and the finding of the trial court in this regard will not be disturbed here.

Appellants argue that because the witness testified that she did not intend to remain in Taiban should she find a situation in some other place that suited her better, or should she fail to secure employment in the schools at that place, she was not a resident of such voting precinct within the meaning of the Constitution. This is the extreme view, which finds some support in the earlier cases. In the case of *Berry v. Wilcox*, 44 Neb. 82, 48 Am. St. Rep. 700, 62 N. W. 249, the court says: "The older cases and some of the modern ones require as an essential element the animus manendi, and construe this term as meaning an intention of always remaining."

In this case, the question was as to whether or not a student at an institution of learning was a resident of the town in which such institution was located, and entitled to vote at elections held there. The opinion is so instructive upon the point here raised that we quote at length therefrom:

"That what place is any one's domicile is a question of fact; that if a student have a father living; if he remain a member of his father's family; if he return to pass his vacations; if he be maintained by his father,—these are strong circumstances repelling a presumption of a change of domicile. But if he be separated from his father's family, not maintained by him; if he remove to a college town and take up his abode there without intending to return to his former domicile,—these are circumstances more or less conclusive to show the acquisition of a domicile in the town where the college is situated. The same view was taken in *Sanders v. Getchell*, 76 Me. 158, 49 Am. Rep. 606. The supreme court of Ohio, quoting Story's definition of domicile, adds: 'It is not, however, necessary that he should intend to remain there for all time. If he lives in a place with the intention of remaining for an indefinite period of time as a place of fixed present domicile, and not as a place of temporary establishment, or for mere transient purposes, it is, to all intents and for all purposes, his residence.' *Sturgeon v. Korte*, 34 Ohio St. 525.

"In *Dale v. Irwin*, 78 Ill. 170, the court said: 'What is "a permanent abode?" Must it be held to be an abode which the party does not intend to abandon at any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever

on the change. No man in active life in this state can say, wherever he may be placed, This is and ever shall be my permanent abode. It would be safe to say a permanent abode, in the sense of the statute, means nothing more than a domicile, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it.'

"These authorities, we think, present the law in its true aspect. The fact that one is a student in a university does not of itself entitle him to vote where the university is situated, nor does it prevent his voting there. He resides where he has his established home, the place where he is habitually present, and to which, when he departs, he intends to return. The fact that he may, at a future time, intend to remove, will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must coexist the fact and the intention of making it his present abiding place, and there must be no intention of presently removing."

The case of *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700, in which Judge Elliott wrote the opinion of the court, is also very instructive. The court says:

"It is said by appellant's counsel that, 'to effect a change of domicile, there must be intention and act united,—the fact of residence and the intention of remaining.' In support of this proposition, counsel cite *McCrary, Elections*, 30, 40; *Cooley, Const. Lim.* 604; 2 *Kent, Com.* 431; *Astley v. Capron*, 89 Ind. 167; *Culvertson v. Floyd County*, 52 Ind. 361; *McCollem v. White*, 23 Ind. 43; *Maddox v. State*, 32 Ind. 111. The counsel's statement is doubtless an accurate one, but here the intention and the act, as the trial court found, did unite, and we think this finding is fully sustained by the testimony before the court. It is not necessary, however, that there should be an intention to remain permanently at the chosen domicile; it is enough if it is for the time the home of the voter to the exclusion of other places. Judge Cooley says: 'A person's residence is the place of his domicile, or the place where his residence is fixed, without any present intention of removing therefrom.' *Cooley, Const. Lim.* 5th ed. 754. Judge Story makes substantially the same statement of the rule. *Story, Conf. L.* § 43.

'In the case of *Cessna v. Meyers, Smith, Elect. Cas.* 60, reported and strongly approved by Judge *McCrary*, it was said: 'A man may acquire a domicile, if he be personally present in a place and elect that as his home, even if he never design to

remain there always, but design at the end of some short time to remove and acquire another. A clergyman of the Methodist Church who is settled for two years may surely make his home for two years with his flock, although he means, at the end of that period, to remove and gain another.' *McCrary, Elections*, p. 496; *Id.* § 38. This principle was applied to the case of a student of Andover College, in *Putnam v. Johnson*, 10 Mass. 488, where it was said: 'A residence at a college or other seminary, for the purpose of instruction, would not confer a right to vote in the town where such an institution exists, if the student had not severed himself from his father's control, but resorted to his house as a home, and continued under his direction and management. But such residence will give a right to vote to a citizen not under pupilage, notwithstanding it may not be his expectation to remain there forever.' In this instance, the citizens, having taken up a residence in Bloomington and having no other home, were entitled to vote there, although they may not have intended to remain there always. It is frequently said in the books that a man must have a home somewhere, and it is agreed that this home is at the place where he is bodily present with the intention of making it his domicile, although he may have in view a change of residence at some future time. *Cooley, Const. Lim.* 754; *McCrary, Elections*, § 30."

These authorities dispose of appellants' contention in this case. Were this not the true rule, many people in this state would be deprived of the right to vote. Take, for example, a railroad employee who is sent by the company from place to place as his services are required, could it be said that he was not entitled to vote in a given place where he was employed, and where he lived, and had resided for the requisite time, because, perchance, he expected at some future time to be assigned to some other place? Another example is afforded by Methodist ministers, referred to in the excerpt from *McCrary on Elections*. It is commonly known that they are only assigned to a given charge for a period of one year, at the end of which period they may be reassigned to some other charge or returned to the same one. Certainly they can have no present intention of making the place of their assignment their permanent home, but they do intend, as did the witness in this case, to make the place of their work their home until some event transpires which works a change of residence.

The question of whether a person is a resident of one place or another is largely a question of intention, and, where the in-

tention and the acts of the party are in accord with the fact of residence in a given place, there can be no doubt of the fact that such party is a bona fide resident of the place where he intends to and does reside, and that he has the right to exercise all the rights and privileges accorded actual residents of such place, provided he comes within the provisions of the law regulating such rights. Here the voter's intention was to make Taiban her home. She was over twenty-one years of age, and was making her own way in the world. She had the right to select the place of her choice as her home. Under the law she owed no further duty to her parents, nor they to her. She was free to make her home where she chose, and, having elected to live in Taiban as her home, and claiming none other, she had the right to vote in the election held, because she came within all the other provisions of the law regulating the right to vote.

Counsel for appellant argues that the voter's testimony was overcome by the evidence of the witness Wheeler, who was the railroad ticket agent at Taiban, who testified that upon one occasion, when Miss

Culberson had completed a school term at Taiban, she asked for a ticket to Portales, and, in reply to an inquiry as to where she was going, replied, "I am going home." But this proves nothing, for it is very common for men and women who have families, and have long had an established residence at some other place, to say they are "going home" when speaking of an intended visit to father and mother, or to the "old home place." Upon the occasion referred to the daughter went to Portales and visited her father and mother for three or four days, and then went on to Las Vegas, where she attended the normal school during the summer term. After the school term there was completed she again spent a week or so with her parents, and then returned to Taiban, where she resumed her work of teaching.

The evidence in this case amply justified the finding by the trial court that Miss Culberson, now Mrs. Elliott, was a duly qualified voter at such election, and the judgment must be affirmed; and it is so ordered.

Hanna and Parker, JJ., concur.

Annotation—Going to another state, county, or district to teach school or preach, as effecting a change of domicile or residence.

Earlier cases on this question are collected in a note to *Dignam v. Shaff*, 22 L.R.A.(N.S.) 996. In general, it is stated therein that the question whether, by going into another state, county, or district for the purpose of teaching or preaching, one loses his domicile or residence, or in other words gains a new one, is largely a question of fact, with the element of intention prominently entering therein.

KLUTTS v. JONES, ante, 291, lays down a logical rule that a residence for purposes of voting may be acquired by an unmarried teacher in the town in which she accepts employment, where she is dependent upon her own earnings for support, and intends to make that town her home so long as she receives employment there or until she has an opportunity to accept a better position; in other words that the acquisition of a domicile for voting purposes is not prevented by the fact that the teacher's intention to make the place of pursuing her vocation her home is subject to the possibility that at some future time she may find a better position in another place or fail to secure employment in the place in question, in either of which events her intention is not to remain in L.R.A.1917A.

the town in which she is at present employed. This rule appears to be fully supported by the authorities cited in the opinion dealing with the question of residence of students for purposes of voting.

Under a statute providing that a person shall be deemed to have a domicile for voting purposes where he has his principal establishment, it was held in *Jodoin v. St. Hyacinthe* (1912) Rap. Jud. Quebec, 43 C. S. 123, that the domicile of members of a Catholic Brotherhood engaged in teaching in a school should be deemed to be the place where the Brotherhood, and not the school, is located.

And under the same statute, it was held in *Demers v. St. Nicolas* (1913) Rap. Jud. Quebec, 43 C. S. 321, that an unmarried teacher who occupies rooms in a town in order to be near the school, but who passes his vacations with his parents in another municipality, in which he formerly had his domicile, who keeps there a room at his disposal, and declares that he never intended to change his domicile, is legally enrolled upon the electoral list of the latter municipality.

The question arose in *Re Riley* (1914)

86 Misc. 628, 148 N. Y. Supp. 623, in a proceeding to determine whether an estate of a decedent was exempt from taxation in New York, whether the domicile of the decedent, who was a bishop of the Episcopal Church, in charge of the American branch of that church in Mexico, was in the latter country or in New York. In his will the decedent described himself as "now of the city of New York, but for many years a resident of the city of Mexico," and in a codicil thereto, executed two years after the will, as "of New York, bishop in the Mexican branch of that church." It was found that notwithstanding the recitals in the will, "now of the city of New York," and in the codicil, "of New York," the domicile of the decedent was

in Mexico, in view of the facts that for many years prior to the making of the will he was a resident of that country, that his life work was there, and he spent but little time elsewhere, and that after making the codicil he returned to Mexico, where he died thirteen years later.

As to acquiring residence as a voter while attending school or public institution, see notes to *Wolcott v. Holcomb*, 23 L.R.A. 215, and *People v. Osborne*, 40 L.R.A.(N.S.) 168.

And as to domicile or residence for taxation as affected by purpose to obtain school facilities, see note to *Denny v. Board of Equalization*, ante, 285. See also other annotation therein referred to.

R. E. H.

UNITED STATES SUPREME COURT.

WALTER J. CAREY, Appt.,
v.

E. REEDER DONOHUE, Trustee in Bankruptcy of John E. Humphreys, et al.

(240 U. S. 430, 60 L. ed. 726, 36 Sup. Ct. Rep. 386.)

Bankruptcy — preferential transfers — computing four months' period — when is recording "required."

The recording of a conveyance by an insolvent is not "required" by law, within the meaning of the provisions of the bankruptcy act of July 1, 1898, § 60a, as amended by the act of February 5, 1903, and § 60b, as amended by the act of June 25, 1910, avoiding preferential transfers by an insolvent recorded or registered within four months before the bankruptcy proceedings are begun, if by law recording or registering is required, where, under the applicable local law, the failure to record a deed does not render it invalid as to the grantor's creditors, but only as to subsequent bona fide purchasers without notice.

For other cases, see *Bankruptcy*, II. b, 2, b, in *Dig. 1-52 N. S.*

(March 13, 1916.)

A PPEAL by defendant from a decree of the United States Circuit Court of Appeals for the Sixth Circuit, affirming on a second appeal a decree of the District Court for the Southern District of Ohio, setting

Note.—The decision in *CAREY v. DONOHUE* settles the question discussed in the notes to *First Nat. Bank v. Connett*, 5 L.R.A.(N.S.) 148, and *Loeser v. Savings Deposit Bank & T. Co.* 18 L.R.A.(N.S.) 1233. It is therefore not necessary to cite the intervening cases on this question. They are referred to in the above opinion. L.R.A.1917A.

aside in favor of plaintiff a conveyance made by John E. Humphreys, bankrupt. Reversed.

The facts are stated in the opinion.

Messrs. Morison R. Waite and John Randolph Schindel, for appellant:

In Ohio a deed is good, although unrecorded, against all except bona fide purchasers without notice.

Irvin v. Smith, 17 Ohio, 226; *Wright v. Franklin Bank*, 59 Ohio St. 80, 51 N. E. 876; *Kemper v. Campbell*, 44 Ohio St. 210, 6 N. E. 586; *Blackburn v. Blackburn*, 8 Ohio, 81.

Congress, in enacting §§ 60a and 60b of the bankruptcy act must have had in mind the status given to a trustee in bankruptcy by § 47a, cl. 2, and meant that those instruments were by law required to be recorded or registered which would otherwise be unavailing against the trustee in bankruptcy having that status.

Re *Hunt*, 139 Fed. 283; *Little v. Holley-Brooks Hardware Co.* 67 C. C. A. 46, 133 Fed. 874; *Meyer Bros. Drug Co. v. Pipkin Drug Co.* 69 C. C. A. 240, 136 Fed. 396; Re *McIntosh*, 80 C. C. A. 250, 150 Fed. 546; Re *Boyd*, 130 C. C. A. 288, 213 Fed. 774; *Rydberg v. Smith*, 110 C. C. A. 68, 188 Fed. 196; Re *Klein*, 116 C. C. A. 603, 197 Fed. 241; Re *Mosher*, 224 Fed. 739.

Messrs. E. R. Donohue, David Davis, and W. G. Durrell, for appellees:

Failure by Carey from August 6, 1910, to November 15, 1910, to record the deed, was, of itself, so far as the creditors of the bankrupt are concerned, fraudulent.

Clayton v. Exchange Bank, 57 C. C. A. 656, 121 Fed. 630, 191 U. S. 567, 48 L. ed. 306, 24 Sup. Ct. Rep. 840; Re *Beckhaus*, 100 C. C. A. 561, 177 Fed. 141; *Loeser v. Savings Deposit Bank & T. Co.* 18 L.R.A.

(N.S.) 1233, 78 C. C. A. 597, 148 Fed. 975; *English v. Ross*, 140 Fed. 630; *Ragan v. Donovan*, 189 Fed. 138; *Mattley v. Giesler*, 110 C. C. A. 90, 187 Fed. 970; *Dulany v. Morse*, 39 App. D. C. 523; *First Nat. Bank v. Connett*, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 33; *Carey v. Donohue*, 126 C. C. A. 254, 209 Fed. 328.

Mr. Justice Hughes delivered the opinion of the court:

This suit was brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt of certain real estate. Upon appeal from a decree in favor of the trustee, it was held by the circuit court of appeals that the case had been tried, and the decree was based, upon the theory of preference voidable under the bankruptcy act, and for the purpose of appropriate amendment to conform the bill to the proof, the decree was reversed and the cause was remanded. 126 C. C. A. 254, 209 Fed. 328. The amendment was made accordingly, and the decree was re-entered and affirmed. 129 C. C. A. 664, 213 Fed. 1021.

The petition in involuntary bankruptcy was filed on January 3, 1911, and the adjudication was had on January 24, 1911. The following facts appear from the findings: On August 6, 1910, John E. Humphreys (the bankrupt) executed and delivered to Walter J. Carey (the appellant) the deed in question. It was left for record on November 15, 1910, with the recording officer of the proper county, and was recorded. Humphreys was insolvent at the time of the execution of the deed, and Carey at that time had reasonable cause to believe that such transfer to him, if made, would effect a preference, being given in payment of an antecedent debt. On December 31, 1910, Carey conveyed the property to innocent purchasers, this deed being left for record on January 3, 1911. It was held that the latter conveyance placed the property itself beyond the reach of the court; and judgment was given in favor of the trustee and against Carey for the value of the property as found by a jury, with provision for the payment by the trustee to the wife of the bankrupt of the estimated value of her inchoate right of dower.

We are not concerned with the provisions of the Ohio statute relating to preferences (General Code, §§ 11,104, 11,105),—a statute which provides a different test of liability from that of § 60¹ of the Federal

act pursuant to which the recovery was had. (126 C. C. A. 254, 209 Fed. pp. 331, 332.) The sole question presented for the consideration of this court is whether the deed executed by the bankrupt was one which was "required" to be recorded within the meaning of this section. If it was not, there could be no recovery of the property under § 60, as the deed was executed and delivered more than four months before the petition in bankruptcy was filed. If the deed was required to be recorded in the sense of the statute, it is clear that the trustee was entitled to recover, as the recording was within the four months' period and the other conditions of recovery were satisfied.

The provision for the recording of the deed is found in § 8543 of the General Code of Ohio, which follows the requirement for the recording of mortgages and powers of attorney. The section reads:

"Section 8543. All other deeds and instruments of writing for the conveyance or encumbrance of lands, tenements, or hereditaments executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument."

Referring to this section, the supreme court of Ohio said in *Dow v. Union Nat. Bank*, 87 Ohio St. 173, 181, 100 N. E. 328: "This provision of the statute must be accepted as exclusively defining the consequences which follow a failure to file a deed for record, and there being mere neglect, unaccompanied by any fraudulent conduct or representation on the part of the grantee, no right can accrue to anyone other than such bona fide purchaser." Accordingly, it was held that the mere failure to record a deed did not render it invalid as to creditors of the grantor although they became such on the faith of his representation that he was still the owner of the property conveyed. This decision applied the ruling in *Wright v. Franklin Bank*, 59 Ohio St. 80, 92, 93, 51 N. E. 876, where it was said: "Lands held by a properly executed but unrecorded deed are also free from the debts of the grantor, whether attempted to be reached in an

¹ The applicable provisions of § 60 are as follows:

"Sec. 60. Preferred Creditors—*a*. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or L.R.A.1917A.

after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer

assignment for the benefit of creditors made by him, or upon an attachment, judgment, or execution against him. The title under such a deed is good as against everything except a subsequent bona fide purchaser without notice. . . . Mortgages so executed, whether on an estate in real property or on only an interest therein, take effect from the time of the delivery to the recorder, and deeds so executed, conveying the estate or only an interest therein, that is, an equity, take effect from delivery, except as against subsequent bona fide purchasers without notice, and as against such the deed must be also recorded." In the present case, the court of appeals was satisfied that in equity the instrument (which was absolute in form) should be treated as a mortgage, but the court did not think this to be important because of the holding of the Ohio court that an instrument in this form, "unlike a legal mortgage, operates upon delivery to transfer title and so is required to be recorded as a deed." 126 C. C. A. 260, 261, 209 Fed. pp. 334, 335; *Kemper v. Campbell*, 44 Ohio St. 210, 218, 6 N. E. 586; *Wright v. Franklin Bank*, 50 Ohio St. p. 95, 51 N. E. 876; *Cole v. Merchants Nat. Bank*, 15 Ohio C. C. (N. S.) 315, 347.

Under these decisions, then, we assume that there was no requirement that this conveyance should be recorded in order to give it validity as against any creditor of the bankrupt, whether a general creditor, or a lien creditor, or a judgment creditor with execution returned unsatisfied; that is, as against any class of persons represented by the trustee or with whose "rights, remedies, and powers" he was to be deemed to be vested. Bankruptcy act, § 47a. This fact, the appellant contends, makes recovery impossible under § 60; while the appellees insist that the provision in the interest of subsequent bona fide purchasers constitutes a requirement of recording which entitles a trustee to recover for the benefit of creditors. With respect to the construction of the clause in question, there has been di-

versity of opinion in the circuit courts of appeals. In the sixth, seventh, and eighth circuits, the view has been taken that the word "required" refers "to the character of the instrument giving the preference" without regard to the persons in whose favor the requirement is imposed; that is, if the transfer is required to be recorded as to anyone, the trustee may recover if it has not been recorded more than four months before the filing of the petition in bankruptcy. See *Loeser v. Savings Deposit Bank & T. Co.* (C. C. A. Sixth) 18 L.R.A. (N.S.) 1233, 78 C. C. A. 597, 148 Fed. 975, 979, (followed by the decision in the present case); *Re Beckhaus* (C. C. A. Seventh) 100 C. C. A. 561, 177 Fed. 141 (see *Re Sturtevant* [C. C. A. Seventh] 110 C. C. A. 68, 188 Fed. 196); *First Nat. Bank v. Connett* (C. C. A. Eighth) 5 L.R.A. (N.S.) 148, 73 C. C. A. 219, 142 Fed. 33, 36; *Mattley v. Giesler* (C. C. A. Eighth) 110 C. C. A. 90, 187 Fed. 970, 971. A different conclusion has been reached in the second, fifth, and ninth circuits. See *Re Boyd* (C. C. A. Second) 130 C. C. A. 288, 213 Fed. 774; *Meyer Bros. Drug Co. v. Pipkin Drug Co.* (C. C. A. Fifth) 69 C. C. A. 240, 136 Fed. 396; *Re McIntosh* (C. C. A. Ninth) 80 C. C. A. 250, 150 Fed. 546; also *Re Hunt* (D. C. N. Y.) 139 Fed. 283.

In its original form, § 60 made no reference to record. 30 Stat. at L. 562, chap. 541, Comp. Stat. 1913, § 9644. The four months ran from the time of the giving of the preference, and if this period had elapsed when the bankruptcy proceeding was instituted, there could be no recovery under § 60, whether the transfer had, or had not, been recorded. See *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; *Rogers v. Page*, 72 C. C. A. 164, 140 Fed. 590, 599. But a different rule was established for computing the time within which a petition in bankruptcy might be filed. In § 3b, it was provided that the four months' period should not expire "until four months after (1) the date of the recording or registering of the trans-

will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required. [32 Stat. at L. 799, 800, chap. 487, § 13, Comp. Stat. 1913, § 9644.]

"b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registra-

tion of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." [36 Stat. at L. 842, chap. 412, § 11, Comp. Stat. 1913, § 9644.]

fer . . . when the act consists in having made a transfer . . . for the purpose of giving a preference . . . if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer." 30 Stat. at L. 546, 547, chap. 541, Comp. Stat. 1913, § 9587. This distinction between the test of the right to institute bankruptcy proceedings and the test of the right to recover from one who had received a transfer alleged to be a preference lay in the terms of the act and could not rightly be ignored. It was urged that the result was to encourage secret preferential transactions; but the wisdom of the prescribed condition of recovery from the preferred creditor, and the advisability of conforming the provision of § 60 to that of § 3b was a matter for legislative, not judicial consideration. To secure this conformity, an amendment to § 60 was proposed in Congress in the year 1903. As passed by the House of Representatives, it added to § 60a the following clause: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required or permitted, or if not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property transferred." Cong. Rec. 57th Cong. 1st Sess. vol. 35, pt. 7, pp. 6938, 6943. The Senate struck from this proposed amendment all that follows the words, "if by law such recording or registering is required," and as thus limited the amendment was adopted by Congress. Cong. Rec. 57th Cong. 2d Sess. vol. 36, pt. 1, p. 1036; act of Feb. 5, 1903, chap. 487, 32 Stat. at L. 797, 799, 800, Comp. Stat. 1913, § 9644; Re Hunt, 139 Fed. p. 286. There is no basis for the assumption that the words which the House of Representatives had desired to add were ultimately deemed to be surplusage, for these words had an obviously distinct significance and they had been included in § 3b, which in this respect remained unchanged.

We cannot but regard the action of Congress as a deliberate refusal to conform the requirements of § 60 to those of § 3b, and we are not at liberty to supply by construction what Congress has clearly shown its intention to omit. It should also be observed that § 60 was again under consideration by Congress in the year 1910, and it was again amended [36 Stat. at L. 842, chap. 412, § 11, Comp. Stat. 1913, § 9644]; L.R.A.1917A.

but the last sentence of § 60a, as inserted in 1903, was left unaltered. And the same conditional clause—"if by law recording or registering thereof is required"—was used in the amended subdivision b (ante, 296, note). Whatever argument is made for an extension of the clause, in order more completely to conform it to the language of § 3b, we must disregard as addressed to a matter solely of legislative policy.

As Congress did not undertake in § 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred. The character of the transfer itself, both with respect to what should constitute a transfer and its preferential effect, had been carefully defined. It is plain that the words are not limited to cases where recording is required for the purpose of giving validity to the transaction as between the parties. For that purpose, no amendment of the original act was needed, as in such a case there could be no giving of a preference without recording. But in dealing with a transfer, as defined, which, though valid as between the parties, was one which was "required" to be recorded, the reference was necessarily to a requirement in the interest of others who were in the contemplation of Congress in enacting the provision. The natural, and, we think, the intended, meaning, was to embrace those cases in which recording was necessary in order to make the transfer valid as against those concerned in the distribution of the insolvent estate; that is, as against creditors, including those whose position the trustee was entitled to take. This gives effect to the amendment and interprets it in consonance with the spirit and purpose of the bankruptcy act. See Senate Report, No. 691, Sixty-first Cong. 2d Sess., p. 8. In the present case, there was no requirement of recording in favor of creditors, either general creditors or lien creditors. The requirement of the applicable law was solely in favor of subsequent bona fide purchasers without notice. These subsequent purchasers are entirely outside of the purview of the bankruptcy act. The proceeding in bankruptcy is not, in any sense, in their interest, and the trustee does not represent them. We can find no ground for the conclusion that the clause "if by law recording or registering thereof is required" had any reference to requirements in the interest of persons of this description. The limitation of the provision to those transfers which are "required" to be recorded under the applicable law is not to

be taken to be an artificial one by which the rights of creditors are made to depend upon the presence or absence of local restrictions adopted, alio intuitu, in the interest of others. Rather, as we have said, we deem the reference to be to requirements of registry or record which have been established for the protection of creditors,—the persons interested in the bankrupt estate, and in whose behalf, or in whose place,

the trustee is entitled to act. And where, as in this case, there is no such requirement, and the transfer was made more than four months before the filing of the petition in bankruptcy, there can be no recovery under § 60.

In this view, the decree must be reversed and the cause remanded for further proceedings in conformity with this opinion.

It is so ordered.

WEST VIRGINIA SUPREME COURT OF APPEALS.

GEORGE C. HOUSEMAN, by Next Friend,
v.

HOME INSURANCE COMPANY, Plff. in
Err.

(— W. Va. —, 88 S. E. 1048.)

Incompetent person — right to prosecute action.

1. An insane person may prosecute an action in his own name by a next friend, when no committee has been appointed for him, or, if appointed, has failed to accept or qualify, or is otherwise disqualified to act in that capacity.

For other cases, see Incompetent Persons, V. in Dig. 1-52 N. S.

Trial — right to sue — time to question.

2. If contested, the question whether an insane plaintiff may sue by a next friend must be raised and determined before joinder and trial on other issues. Otherwise, the objection comes too late.

For other cases, see Trial, I. f, in Dig. 1-52 N. S.

Insurance — denial of liability — waiver.

3. Denial of liability on an insurance policy, based solely on an alleged want of unconditional ownership of the property destroyed, operates as a waiver of a provision thereof, requiring proofs of the quantum of loss as a prerequisite to an action on the policy.

For other cases, see Insurance, V. b, 5, f, in Dig. 1-52 N. S.

Headnotes by LYNCH, J.

Note. — For insanity or sickness of insured as excuse for failure to give notice or furnish proofs of loss as required by policy of fire insurance, see annotation following this case, post, 305.

The right of an insane person to institute proceedings by next friend is discussed in the note to *Isle v. Cranby*, 64 L.R.A. 513. See also in this connection the note to *Wiesmann v. Donald*, 2 L.R.A. (N.S.) 961.

The effect of an outstanding contract for the sale of property to defeat sole and unconditional ownership by vendor is treated in the note to *Sharman v. Continental Ins. Co.* 52 L.R.A. (N.S.) 670, and other notes there referred to.
L.R.A.1917A.

Same — insanity — effect.

4. The insanity of an insured at the time of the loss, continued thereafter during the limitation period prescribed by the policy for commencement of an action thereon, exempts compliance with the condition regarding proofs of loss.

For other cases, see Insurance, VI. a, in Dig. 1-52 N. S.

Evidence — burden of proof — insurance — breach of condition.

5. On the insurer against loss by fire rests the burden of proving, when averred in defense of an action on the policy, breach of the condition against misrepresentation or concealment by the insured of the true ownership of the property damaged, or that the ownership thereof then was, or since has become, other than sole and unconditional.

For other cases, see Evidence, II. c, in Dig. 1-52 N. S.

Same — ownership — option.

6. Neither an option nor an invalid or conditional contract of sale of personal property by an insured, with reservation of title until payment of the purchase money, although possession is transferred to the vendee, will constitute a breach of the condition of the policy requiring "sole and unconditional ownership."

For other cases, see Insurance, III. e, 1, b, in Dig. 1-52 N. S.

(April 18, 1916.)

ERROR to the Circuit Court for Mercer County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. **Sexton & Roberts and Sanders, Crockett, & Kee**, for plaintiff in error:

Plaintiff cannot recover, by reason of his failure to furnish to the defendant proper proof of loss, which is required by the policy sued on as a condition precedent to the right of recovery.

Munson v. German Ins. Co. 55 W. Va. 423, 47 S. E. 160; *L. Rosenthal Clothing & Dry Goods Co. v. Scottish Ins. Co.* 55 W. Va. 238, 46 S. E. 1021; *Adkins v. Globe F. Ins. Co.* 45 W. Va. 384, 32 S. E. 194.

Defendant did not waive the furnishing

of proof of loss, for the reason that such investigation of the loss and damage, and the origin of the fire, as was made by the defendant's adjuster, was made under and by virtue of a nonwaiver agreement, that none of the rights of either party should be waived or invalidated by such investigation. And even in the absence of such agreement, neither the local agent nor the adjuster had authority under the law to waive the furnishing of proofs of loss.

Morris v. Dutchess Ins. Co. 67 W. Va. 368, 68 S. E. 22; *Slater v. Williamsburg City F. Ins. Co.* 68 W. Va. 779, 71 S. E. 197.

The policy sued on is void for the further reason that, in making application therefor, W. H. Houseman concealed and misrepresented certain material facts, representing to the defendant, among other things, that George C. Houseman was the owner of the property intended to be insured, whereas in fact he had no interest whatever in the said property.

Tyree v. Virginia Ins. Co. 55 W. Va. 63, 66 L.R.A. 657, 104 Am. St. Rep. 983, 40 S. E. 706, 2 Ann. Cas. 30.

Under the modern rule that a demurrer to the evidence should be treated as a verdict of the jury, the court below should have sustained the defendant's demurrer to the evidence.

Barrett v. Raleigh Coal & Coke Co. 55 W. Va. 395, 47 S. E. 154; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686; *McDermitt v. Forbes*, 73 W. Va. 240, 80 S. E. 356.

Messrs. Stokes & Sale, for defendant in error:

Proof of loss was furnished as required by policy. A substantial compliance with this provision is all that is necessary.

Vance, Ins. p. 500; 19 Cyc. 849; *Schilansky v. Merchants' & M. F. Ins. Co.* 4 Penn. (Del.) 293, 55 Atl. 1014; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Wicking v. Citizens' Mut. F. Ins. Co.* 118 Mich. 640, 77 N. W. 275; *DeRaiche v. Liverpool & L. & G. Ins. Co.* 83 Minn. 398, 86 N. W. 425; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366; *Home Ins. Co. v. Cohen*, 20 Gratt. 312; *Bryan v. Peabody Ins. Co.* 8 W. Va. 605; *Tucker v. Colonial F. Ins. Co.* 58 W. Va. 30, 51 S. E. 86.

No proof of loss was necessary, because the insured at the time of the fire was a lunatic, and unable to make the same.

Vance, Ins. p. 503; *Insurance Cos. v. Boykin*, 12 Wall. 433, 20 L. ed. 442; *Woodmen Acci. Asso. v. Pratt*, 62 Neb. 673, 55 L.R.A. 291, 89 Am. St. Rep. 777, 87 N. W. 546; *Hayes v. Continental Casualty Co.* 98 Mo. App. 410, 72 S. W. 135; *Wheeler v. L.R.A.* 1917A.

Connecticut Mut. L. Ins. Co. 82 N. Y. 543, 37 Am. Rep. 594.

No proof of loss was necessary because the defendant declined to pay the claim.

19 Cyc. 867; *Deitz v. Providence Washington Ins. Co.* 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50.

By failing to point out objections to the proof of loss furnished, the defendant waived whatever defects there might have been therein.

19 Cyc. 862 et seq.; 19 Cyc. 857; *American F. Ins. Co. v. Bland*, 19 Ky. L. Rep. 287, 40 S. W. 670; *American F. Ins. Co. v. Sisk*, 9 Ind. App. 305, 36 N. E. 659; *Eggleston v. Council Bluffs Ins. Co.* 65 Iowa, 308, 21 N. W. 652; *Georgia Home Ins. Co. v. Goode*, 95 Va. 751, 30 S. E. 366.

Defendant, by proceeding with the adjustment and giving plaintiff to understand that the loss would be adjusted, waived a proof of loss.

19 Cyc. 859, note 16; *Cook v. North British & M. Ins. Co.* 181 Mass. 101, 62 N. E. 1049.

A nonwaiver agreement, though executed, is itself waived if the claimant is given to understand that his claim will be adjusted without a proof of loss.

19 Cyc. 871.

The ownership was such as complied with the terms of the policy.

Haider v. St. Paul F. & M. Ins. Co. 67 Minn. 514, 70 N. W. 805; *Vance, Ins. 444*; *Dupreau v. Hibernia Ins. Co.* 76 Mich. 615, 5 L.R.A. 671, 43 N. W. 585; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8; *Loventhal v. Home Ins. Co.* 112 Ala. 108, 33 L.R.A. 258, 57 Am. St. Rep. 17, 20 So. 419; *Southern Ins. Co. v. Estes*, 106 Tenn. 472, 52 L.R.A. 915, 82 Am. St. Rep. 892, 62 S. W. 149; *Stowell v. Clark*, 171 N. Y. 673, 64 N. E. 1125; *Scottish Union & Nat. Ins. Co. v. Strain*, 24 Ky. L. Rep. 958, 70 S. W. 274; *Union Assur. Soc. v. Nalls*, 101 Va. 613, 99 Am. St. Rep. 923, 44 S. E. 896; 19 Cyc. 94; *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687; *Burson v. Fire Asso. of Philadelphia*, 136 Pa. 267, 20 Am. St. Rep. 919, 20 Atl. 401; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507, 27 Am. Rep. 582; *Erb v. Fidelity Ins. Co.* 99 Iowa, 727, 69 N. W. 261.

The nature of the ownership of this property having been explained to the defendant's representative, and the property insured in accordance with his advice, the defendant cannot now set up as a defense the fact that the insured did not own the property.

Burson v. Fire Asso. of Philadelphia, 136 Pa. 267, 20 Am. St. Rep. 919, 20 Atl. 401.

Lynch, J., delivered the opinion of the court:

On this writ to the judgment for plaintiff rendered upon defendant's demurrer to the evidence, on the trial of an action of *assumpsit* based on a contract of insurance against damage or destruction by fire of a stock of merchandise and household goods, the meritorious questions concern the right of an insane plaintiff to sue by his next friend, the proof of loss, and, as an element thereof, of the ownership of the property insured.

In Virginia, it has been held that equity has jurisdiction of a suit by an insane person by a next friend, either where no committee has been appointed, or, if appointed, his interests are hostile or inimical to the property rights of the lunatic. *Bird v. Bird*, 21 Gratt. 712; *Hinton v. Bland*, 81 Va. 588. And, according to 22 Cyc. 1231, the general rule seems to be: Where no committee has been appointed, or, if appointed, refuses to qualify, or has been removed, the action may be prosecuted in the name of the insane by any competent person as next friend, with the sanction of the court, though the lunatic has not been judicially declared insane, if it otherwise appears he is insane. This rule was laid down or approved in *Newcomb v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222; *Isle v. Cranby*, 199 Ill. 39, 64 L.R.A. 513, 64 N. E. 1065; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937; *Kroehl v. Taylor*, 69 N. J. Eq. 525, 61 Atl. 257; *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 268; *Gray v. Parke*, 155 Mass. 433, 29 N. E. 641; *Stanley v. Stanley*, 123 Ga. 122, 61 S. E. 287. In the *Isle Case*, it was held, upon a motion to dismiss an action so brought, the court may inquire into and determine the question of sanity, and where necessary appoint a proper person as next friend to prosecute the action for and in behalf of the actual plaintiff.

Whether because of his mental unsoundness a plaintiff can sue by his next friend is a question which should be raised and determined before trial. *Worthington v. Mencer*, 96 Ala. 310, 17 L.R.A. 407, 11 So. 72; *Lamb v. Lamb*, — N. J. Eq. —, 23 Atl. 1009; *Bird v. Bird*, *supra*. But by no plea tendered or motion made before joinder on the issues raised did defendant question the right to maintain this action as brought. Nor did it offer any evidence under the general issue to show the appointment and qualification of a committee for the plaintiff, or any proceedings instituted for that purpose, either in this state or in Virginia, the latter being the state of plaintiff's residence. On the contrary, it is proved that

no such appointment has been made or attempted in either state. As the case proceeded virtually without protest or objection, and without the pretense of any disqualification or impropriety on the part of the next friend, to dismiss the action now, upon the mere suggestion of an irregularity, may operate to absolve defendant from any liability under its contract of indemnity. Nor does defendant seem to rely, and it may be said with confidence it does not rely, on this defense to the right to a recovery on the policy. Besides, we see no merit in the proposition.

On the other questions, the case was tried on the general issue and specifications of defensive matters and replies thereto, as permitted by § 65, chap. 125, Code (§ 4819). The replies alleged certain grounds which, if proved, operated as waivers or estoppels.

The fire occurred November 25, 1913. It destroyed or damaged the greater part, but not all, of the property insured. The loss was partial, not total. Plaintiff, George C. Houseman, although competent to contract when the insurance was purchased, was, at the date of the fire and thereafter remained, and now is, insane. What has since occurred in his behalf in respect of the loss was said and done through his son, W. H. Houseman, who prosecutes this action as next friend. He gave notice of the loss to the Flat Top Insurance Agency, through which, as soliciting agent, the insurance was procured. He received the correspondence addressed to the plaintiff concerning the loss, and answered it, occasionally in his own name, generally in plaintiff's name. Whatever was done to protect the interest of his father he did or caused to be done, or was the active agent in that behalf; and, if any proof was furnished, he secured and delivered the data to Hurt, the adjuster, who, for the purpose of ascertaining the amount of the loss, represented the companies carrying risks on the property insured.

As the important witnesses, Hurt and W. H. Houseman contradicted each other on material questions only as to what was done in respect of the proof of the loss sustained and the ownership of the property. They met soon after the fire. Although Hurt admitted Houseman then furnished him data, which, together with some invoices later delivered, were sufficient to enable him to make up the requisite proofs except as to ownership, Houseman testified the proofs were prepared and verified by his affidavit in the presence of Hurt, who took and retained them. Subsequent negotiations had between them by correspondence and interviews, in which counsel for plaintiff in part participated, however, seem to

have proceeded as if something remained open for further consideration and concurrence upon the question of the sufficiency of the data and formality of the proofs.

Without undertaking to detail the contents of the numerous letters addressed, received, and answered, and the personal discussion at such interviews, it suffices to say that, when summarized, the evidence sufficiently shows that defendant did not question the adequacy of the data, except upon the question of ownership. For not only did Hurt, as a witness for defendant, admit he had information sufficient to enable him to make the necessary formal proof, but also that his custom was to formulate the memoranda at his office in Bluefield, and, except where complications arose, to accept and forward them to the companies carrying risks on the property, all of whom, in this instance, he represented. December 30, 1913, he wrote plaintiff: "Referring further to the loss on your stock of merchandise, I beg to advise that when you visit the Flat Top Insurance Agency for the purpose of discussing this matter with them, if you will bring me a complete list of your purchases I will submit the same to the several insurance companies and see what they have to say about the matter. The main trouble regarding your loss is the ownership of the property." "In taking up this loss under a nonwaiver agreement it developed that you had no interest in any of this property, but that your son W. H. Houseman, was the sole and unconditional owner. I submitted these facts to the insurance companies, and they have requested me to advise you that if you feel you have any claim against them you are referred to the conditions of your policy contracts, and they hereby give you notice of their intent to insist upon a full compliance with all the conditions of their policy contracts."

January 4, 1914, he also wrote plaintiff: "If you will send me a correct list of your purchases from date of your inventory [of July 1, 1913] to time of fire, also correct amount of merchandise returned, I will make up statement of loss and submit it to the companies and advise you of their decision."

With these requests the testimony satisfactorily shows Houseman complied, and that Hurt did what he promised. For, evidently speaking for the companies, he said: "We wanted this assured [the plaintiff] to furnish proof of loss so as to establish the ownership of this property." "We wanted to know if George C. Houseman owned that property or owned interest in it sufficient to consume those policies. That is what we wanted to know. When two ownerships

were asserted, we wanted to know who did own that" property.

Besides, at a meeting of the representatives of the companies interested, convened at the instance of Hurt, who laid before them all the facts possessed by him, they declined to pay the loss, except upon compliance with certain designated provisions contained within lines numbered from 7 to 30 and 67 to 80 of the insurance contracts. So far as now material, these provisions relate to an adjustment by agreement, or by appraisal if the parties fail to agree, the avoidance of the policy in the event of concealment or misrepresentation of any material fact concerning the insurance or the subject-matter thereof, or if "the interest of the insured be other than unconditional and sole ownership."

What effect, then, shall be given these negotiations upon the demurrer to the evidence, conceding the apparent conflict of the testimony upon the question of the proof of loss? In such case, it is for the jury to say whether the inventory and other data offered by the assured, conceding the information furnished, was of that character only, was accepted by the defendant through its agent, and by him retained as sufficient proof of the loss sustained. *North British & M. Ins. Co. v. Edmundson*, 104 Va. 486, 52 S. E. 350. Moreover, upon a demurrer to evidence, the demurrant waives the benefit of all his evidence which conflicts with that of the demurree, and to it concedes as proved all the facts it tends to establish, as well as all the inferences a jury trying the case could reasonably draw from them. So that, if when considered alone or with other proof not in conflict therewith, together with all reasonable inferences deducible therefrom, the evidence of the demurree be sufficient to support a finding in his favor, the demurrer ought to be overruled and judgment entered on the conditional verdict, as was done by the circuit court. *Barrett v. Raleigh Coal & Coke Co.* 55 W. Va. 395, 47 S. E. 154; *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686.

Was the proof of plaintiff of that positive and convincing character as would, under the liberality thus allowed on demurrer thereto, and the restrictions imposed on that tending to controvert it, support a verdict in his favor? W. H. Houseman unequivocally testified, as we have seen, that Hurt, in his presence and with his assistance, made up, and he signed and by his affidavit verified, a full and formal proof of loss on the occasion of their first meeting after the fire, and that Hurt took it with him and did not return it; nor did Hurt produce it at the trial when requested to

do so. This testimony, it is true, Hurt denied; but his denial, however true it may be, necessarily is eliminated by the rules appertaining to demurrers to evidence, and hence cannot be considered. It must be ignored as completely as if it were not before us. Besides, what later occurred or was done by or between Hurt and Houseman, or contained in the correspondence or said in the conferences, antagonistic to plaintiff, was explained in the testimony of the next friend as having been done only for the purpose of affording information of the correctness of such proofs. A jury could, with propriety, accept this explanation with reasonable certitude; for if all the proof to the contrary were excluded, as virtually it was by the demurrer, the facts testified to by him must necessarily have been adopted by the jury as correct because of their probative force and effect.

Moreover, another rule prevailing in this state and supported by ample authority, when applied to the facts of this case, excused plaintiff from making any further attempt to furnish defendant such proofs, conceding they were not furnished. When an insurance company denies liability on its contract for indemnity against loss by fire, on grounds other than want of such proofs, the company will be deemed and treated as having waived the same. *Sheppard v. Peabody Ins. Co.* 21 W. Va. 368; *Deitz v. Providence Washington Ins. Co.* 33 W. Va. 526, 25 Am. St. Rep. 908, 11 S. E. 50; *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.* 35 W. Va. 666, 14 S. E. 237; *Cleavenger v. Franklin F. Ins. Co.* 47 W. Va. 595, 35 S. E. 998; *Medley v. German Alliance Ins. Co.* 55 W. Va. 342, 47 S. E. 101, 2 Ann. Cas. 99.

That defendant assumed itself acquit of any obligation to render compensation for the loss, on grounds other than failure to prove by the usual requisite formal methods the quantum of the damages done, there can be no reasonable doubt. Hurt, acting for defendant and its coinsurers, empowered by it so to do, virtually advised plaintiff of its intention to attempt to exonerate itself from liability exclusively by relying on the insured's alleged misrepresentation or concealment of the true status of the title. That he was so authorized seems reasonably clear; or, if not clear, a jury could infer such authority from the facts and circumstances detailed in the correspondence emanating from the different companies or inspired by them. This authority appears from the letters alluded to, in which Hurt promised to lay the facts in his possession before his principals, to enable them to determine the course they would pursue or

the attitude they would assume as to their liability, and, when ascertained, to advise Houseman. This promise he evidently kept, as we infer from the information furnished by them through him; for, in effect, as observed, he says they told him they denied liability on account of the uncertain state of the title.

Moreover, if it be conceded that plaintiff did not sufficiently comply with the requirement as to the proof of loss, and could not furnish it or the data therefor, or verify it when made, because insane at the time of and since the fire, and confined in a hospital for treatment or detention, was he thereby excused from compliance with the condition of the contract requiring such proofs? This question arose in *Insurance Cos. v. Boykin*, 12 Wall. 433, 20 L. ed. 442, upon an instruction asked by defendant, and refused, that the insanity of the assured would not exempt him from the condition as to proofs of loss. In reply thereto the court, in the opinion, said the proposition "is too repugnant to justice and humanity to merit serious consideration," and, in the syllabus, "if the insured was so insane as to be incapable of making an intelligent statement, this would, of itself, excuse that condition of the policy." More positive terms were used in *Woodmen Acci. Asso. v. Pratt*, 62 Neb. 673, 55 L.R.A. 291, 80 Am. St. Rep. 777, 87 N. W. 546, regarding the preliminary notice required in an accident policy.

Was plaintiff the sole and unconditional owner of the property insured at the time of the loss? On the question of ownership of the property at the date of the insurance contract, and since, the evidence was ample, on demurrer, to prove that plaintiff had the legal title. Of its status the underwriters, through the soliciting agent, were at that time informed and advised. Although upon the question of the continuity of ownership there is some conflict, yet, as on defendant devolved the duty of establishing the contrary situation in respect thereof by such preponderant evidence as to overcome the proof in support of the continuing ownership, where plaintiff has made out a prima facie case in respect thereof, the correctness of the jury's conditional verdict, on defendant's demurrer, must be determined in favor of the plaintiff. That the burden did rest on the demurrant cannot be doubted. *Sheppard v. Peabody Ins. Co.* 21 W. Va. 368; *Rochester German Ins. Co. v. Monumental Sav. Asso.* 107 Va. 701, 60 S. E. 93.

As W. H. Houseman had theretofore failed in business, paying a large per cent of the indebtedness incurred, plaintiff furnished

him the money to purchase the property insured and left to him the management of the store, with the understanding, not denied, that the title thereto, and to any other property purchased to replenish the stock as the conduct of the business from time to time required, should vest and remain in the father until he was repaid the money so furnished, with interest. These facts, and the further fact that the agreement or option was not consummated by fulfilment of the condition as to repayment of the money invested in the goods, are proved, and not controverted except as hereafter noted.

An affidavit purporting to have been made by W. H. Houseman immediately after the fire, and statements attributed to him by Hurt, Fisher, and Katzen, are relied on to cast doubt upon the question of the real ownership of the goods insured. They tend to show a claim by him antagonistic to plaintiff. Of these, however, no knowledge was traced to George C. Houseman. He was not cognizant of any effort to reflect uncertainty upon the right to have and enjoy the benefit of the insurance indemnity. His mental condition and absence denied him an opportunity to speak in his own behalf. His mouth was closed. And from him defendant cannot withhold the fruits of the contract of insurance merely on the ground that a title adverse to his is asserted in his absence without an opportunity on his part to deny or contest it. But W. H. Houseman challenged the correctness of the affidavit, and denied he claimed any interest in the subject-matter of the insurance except as custodian and manager, coupled with the right to purchase it by repayment of the money originally advanced by his father on it. Furthermore, he testified that he informed Fisher and Hurt that his father was the sole owner of the property, and that, with this information, Hurt, under the Pythian sign of distress, assured him no harm would result and no prejudice would arise from anything said or done by him in respect of the claim of ownership. That Hurt did make this statement, in the circumstances detailed, he does not declare to be untrue. He does not frankly deny it, but equivocates. When inquired of as to what occurred with reference to the secret distress signal, he replied: "There was nothing of any consequence passed except to exchange greetings along that line."

There is also some proof in the record that W. H. Houseman admitted he procured from plaintiff a letter conceding his ownership, and of statements made by him that he had operated the store in the father's name in order to elude his creditors. But L.R.A.1917A.

no such letter was produced, and he denied receiving any; and no outstanding debts were proved, and he testified there were none incurred by him that remained unsatisfied. Then why should he seek to disguise or conceal the true status of the title to the property?

Nor does the conditional contract of sale, of which W. H. Houseman testified, divest the title of plaintiff until the performance of the condition by repayment of the purchase money of the goods. For, as held in *Erb v. Fidelity Ins. Co.* 99 Iowa, 727, 69 N. W. 261, and *Vogel v. People's Mut. F. Ins. Co.* 9 Gray, 23, a vendor of personal property, reserving the title until payment of the purchase money, is not guilty of misrepresentation or concealment when, in purchasing insurance thereon, he represents himself to be the sole and unconditional owner, although he has delivered possession thereof to the vendee. See also notes in 7 Ann. Cas. 498, and 20 L.R.A.(N.S.) 779. Why may not plaintiff and his son, who occupy a similar business relation, also find protection under the same legal principle? Nor will an option to purchase personal property work a change in the title of the owner until the offer is accepted and the conditions are performed. *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723; *Davis v. Quincy Mut. F. Ins. Co.* 10 Allen, 113; *Rochester German Ins. Co. v. Monumental Sav. Asso.* 107 Va. 701, 60 S. E. 93. And to effectuate a breach of a condition in a policy of insurance, avoiding it in respect of a change in title or ownership, the sale or transfer must have been actual and valid as between the parties. *Orrell v. Hampden F. Ins. Co.* 13 Gray, 431, and note in 7 Ann. Cas. 498. So, in *Gerling v. Agricultural Ins. Co.* 39 W. Va. 690, 20 S. E. 691, it was held that "a deed of conveyance made by the insured during the policy and before the loss, but invalid by reason of the grantor's mental incompetency to make such deed, was not such a change or transfer of title as would forfeit the policy."

These legal propositions defendant did not discuss. The burden of showing a transfer of title, as we have seen, devolved on it; and from what has been said the conclusion is inevitable that it has failed to establish its pretension that plaintiff was other than sole and unconditional owner of the property insured and damaged. Nor, in view of the well-recognized principles governing demurrers to evidence, can it be said there were such gross inconsistencies or contradictions in the testimony of W. H. Houseman as to discredit the title of plaintiff, when considered with respect to his mental

condition and lack of knowledge of the adverse claims to the contrary. Besides, we have been unable to perceive wherein W. H. Houseman has been so grossly variant as to subject himself to criticism, except as noted. These so-called deviations he has explained; and the explanation given was not so doubtful as to be unreasonable or unworthy of credence, or that a jury ought

not to have accepted it as true if the case had been submitted to them, or the court reached the same conclusion on the demurrer.

Finding no error in the record, we affirm the judgment.

Petition for rehearing denied May 19, 1916.

Annotation—Insurance: insanity or sickness of insured as excuse for failure to give notice or furnish proofs of loss as required by policy of fire insurance.

As to when strict compliance with requirement as to time of notice in accident or health policy is excused, see annotation to Jennings v. Brotherhood Acci. Co. 18 L.R.A.(N.S.) 109, and Hilmer v. Western Travelers' Acci. Assn. 27 L.R.A.(N.S.) 319.

As to delay in giving notice of claim under employers' indemnity policy, see annotation to Stevens v. Frankfort M. Acci. & Plate Glass Ins. Co. 47 L.R.A.(N.S.) 1214.

As to when delay in giving notice or making proof of death under policy of life insurance is excusable, see annotation to Metropolitan L. Ins. Co. v. People's Trust Co. 41 L.R.A.(N.S.) 285.

As to effect of insanity or failure to pay insurance premium when due, see annotation to McCann v. Supreme Conclave, I. O. H. 46 L.R.A.(N.S.) 537.

It will be noticed that the court in HOUSEMAN v. HOME INS. CO. ante, 299, in coming to its conclusion that the insured's insanity at the time a loss occurred and thereafter constituted an excuse for noncompliance with the condition of the policy requiring proofs of loss, relied on the decision in Insurance Cos. v. Boykin (1871) 12 Wall. (U. S.) 433, 20 L. ed. 442, where it was held that if the insured was so insane as to be incapable of making an intelligent statement of his loss by fire, this would excuse compliance with the condition of the policy requiring proof of loss.

The phraseology of fire policies concerning the giving of notice and furnishing proof of loss varies somewhat. Where the provisions require that these things be done "forthwith," "as soon as possible," etc., they have been construed as requiring notice or proofs within a reasonable time, and, in determining whether the time within which notice was given or proofs furnished was reasonable, the insanity or sickness of the insured has been considered.

Thus, in American F. Ins. Co. v. L.R.A.1917A.

Hazen (1885) 110 Pa. 530, 1 Atl. 605, a finding that proof of loss submitted about eight months after a fire occurred were furnished "as soon as possible" within the meaning of a policy on partnership property was held justified where there was evidence that for a long time after the fire one of the partners, who was required to join in the proofs, was in a feeble condition physically and mentally; that two of his sons (one of whom was evidently the other partner) died some months after the fire; that for six months after the loss occurred the father's memory was so affected that he was totally unfit to attend to business and did not pretend to do so; that he submitted to a surgical operation and as soon as he sufficiently recovered gave the proofs his attention; that his attorney, who prepared the proofs, was unable on account of the insured's illness to communicate with him and obtain aid from him, but that he prepared the proof as soon as possible. The court said: "The company demanded that W. B. Hazen should join in the proofs, the preparation of which under the requirements of the company involved a considerable degree of detail and exactness of statement. If he was in fact mentally and physically unfit so to do; if as soon as he was sufficiently restored he set about the business of preparation; if his attorney advanced the work as rapidly as he could under the circumstances; if there was not upon the part of either any neglect or want of due diligence, until the time the final proof was furnished,—the delay which ensued could not bar the plaintiffs' recovery."

And a finding that proofs filed two months after a loss were furnished "forthwith" was held to be justified in Harnden v. Milwaukee Mechanics' Ins. Co. (1895) 164 Mass. 382, 49 Am. St. Rep. 467, 41 N. E. 658, where it appeared that the fire was of such an ex-

tent as to cause confusion in the entire community, and there was testimony that the insured, by reason of impaired health, was unable to examine his affairs for upwards of three weeks; that he could not get his books for a week; that he had to take an account of stock for three years; that it was customary to wait for the committee of adjusters to finish their work; and that after the proofs were prepared they had to be printed and sworn to, when they were given by a broker to the insurers' local agent.

In *Parker v. Middlesex Mut. Assur. Co.* (1901) 179 *Mass.* 528, 61 N. E. 215, it was held that a provision of a fire policy that proofs of loss should be furnished "forthwith" meant that they should be sent as soon as the exercise of reasonable diligence would permit, and that it was not complied with where proofs were not mailed until sixty-six days after a fire, although it appeared that the insured's husband was somewhat of an invalid; and that she was troubled with asthma and heart trouble, and suf-

fered from these by reason of the excitement of the fire; that four days after the loss, in response to a telegram stating that her son's child was ill, she went to a town in New York, where he lived; that after the child's death she remained with her son for about twenty days caring for his wife, who was so ill that she did not think it prudent to leave her; that she then returned to the nearest village to that in which the burned property was located; that she remained there for about a week, when she moved to her son's, in New York, where she was ill for two weeks. The court stated that if they assumed that the several illnesses excused the insured from preparing and sending the proofs during the entire periods in which there was any illness of either of the persons, yet there was no evidence to show that she used due diligence to send the proofs during the intervals between, when, so far as appeared, she could easily have prepared and forwarded them.

J. T. W.

GEORGIA SUPREME COURT.

GEORGE B. POWELL, Plff. in Err.,
v.
MRS. F. M. BERRY.

(— Ga. —, 89 S. E. 753.)

Negligence — intoxication — excuse.

1. If one voluntarily drinks liquor until he is intoxicated, and so negligently operates an automobile as to cause injury to another, his intoxication will furnish no excuse for his negligence or its proximate results.

For other cases, see Automobiles, II. a, in Dig. 1-52 N. S.

Evidence — negligence — intoxication.

2. Voluntary intoxication is not per se negligence. But in an action to recover on account of an alleged negligent tort, in which it was alleged, on the one hand, that the defendant was intoxicated and negligent, and, on the other hand, that the plaintiff himself had been drinking and was negligent, so as to affect his right to recover, the condition of the parties, respectively, as to intoxication, is a fact which could be proved for the consideration of the jury, in connection with the other evidence as to negligence, if any, in determining the dili-

gence or negligence of the parties respectively.

(a) If in some cases the undisputed evidence may be such that the case may be controlled by the court as matter of law. this is not one of them.

(b) If a person was injured by reason of the negligent operation of an automobile by another, and was himself negligent, in determining the effect of such negligence on his right to recover for the injury, if he had voluntarily drunk liquor until he was intoxicated, this would furnish no excuse for his negligence, or relief to him from the consequences thereof.

(c) Negligence, as herein employed, refers to the failure to use that degree of care which it was the duty of the parties, respectively, to use under the circumstances, without discussing whether in the particular case it would be, as to the one or the other, extraordinary, ordinary, or slight diligence. *For other cases, see Automobiles, II. b; Evidence, XI, h; Trial, II. c, 8, in Dig. 1-52 N. S.*

Instructions — requests.

3. Some of the requests to charge did not contain accurate statements of the law. Some were covered by the general charge. *For other cases, see Trial, III. in Dig. 1-52 N. S.*

Damages — death — last earnings.

4. Where suit was brought to recover for the alleged negligent homicide of one who was conducting a dairy, it was error to charge as follows: "You look to the testimony, and determine what the gross receipts from the dairy were, and then you

Headnotes by LUMPKIN, J.

Note. — As to intoxication of person operating automobile, see annotation following this case, post, 313.
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take all the expenses that contributed to this fund, the rent of his land, and any expenses that he incurred in and about the running of his dairy, and the difference between the total expenses and the total receipts would be his net earnings, and that would be his average yearly loss; and you multiply his average yearly loss by the expectation of years, and that would give you the gross amount of the plaintiff's recovery."

For other cases, see Trial, III. c, 2, in Dig. 1-52 N. S.

Appeal — failure to instruct jury.

5. Under previous rulings of this court, in a suit for a negligent tort, where the question of diminution of damages by reason of negligence on the part of the person injured is not raised by the pleadings of either party, it does not constitute reversible error for the court, in the absence of a request, to omit to charge on that subject, where he has charged fully as to the effect of the negligence of the injured person upon the right to recover at all; although it is the better practice to charge on the subject of comparative negligence and diminution of damages, where the evidence authorizes it.

For other cases, see Appeal and Error, VII. m, 4, b, in Dig. 1-52 N. S.

(August 21, 1916.)

ERROR to the Superior Court for Fulton County to review a judgment overruling a motion for a new trial of an action brought to recover damages for the alleged negligent homicide of plaintiff's son caused by defendant's negligent driving of an automobile. Reversed.

Statement by Lumpkin, J.:

Mrs. F. M. Berry brought suit against George Powell, to recover damages for the homicide of her son. Her petition alleged that her son was riding with the defendant in his automobile about 8 o'clock at night; that the car was driven by the defendant at a rapid and reckless rate of speed, and that, when a curve in the road was reached, the defendant did not slacken the speed, by reason of which the car ran from one side of the road to the other, and finally off the highway upon an embankment, where it suddenly stopped, throwing the plaintiff's son from the car, which fell upon him, and his head struck against a rock or some other hard substance, from which death resulted; that the plaintiff's son had nothing to do with the operation of the car, and no control over or direction of the defendant, but was riding as a guest of the latter; that the defendant was under the influence of liquor or other strong drink to such an extent as to make him careless and reckless, and regardless of the safety of the plaintiff's son; and that her son lost his life

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through the negligence and carelessness of the defendant. There were also allegations as to the age and earning capacity of the deceased, his contribution to the plaintiff's support, and her dependence upon him.

The defendant denied liability, or that he was guilty of negligence as alleged. He averred that he was driving the car cautiously and carefully and at a moderate rate of speed; that, as it was going around a curve, a large touring car, running at a rapid rate of speed, approached on the same side of the road as that on which was the defendant's automobile; that it was equipped with and was using brilliant headlights, the light of which flashed into the defendant's eyes and momentarily blinded him; that, in order to avoid a collision with the approaching car, he attempted to cross the road, but his car was struck by the other and turned completely around; and that he was in no way to blame for the injury to the decedent. By amendment the defendant alleged that at the time of the accident both the plaintiff and the defendant were riding in the car of the latter on a public highway; that they were engaged in a joint enterprise, and were returning from a place whither they had gone to obtain whisky for their joint consumption; that the whisky was purchased by the decedent; that both of them were in an intoxicated condition on a public highway of the state; that the defendant was intoxicated, and the deceased knew it when he entered the car, and he remained there with full knowledge of the defendant's condition, and made no effort to control the defendant in the operation of the car, and did not remonstrate with him about his driving; and that the deceased was guilty of such negligence in entering the car and remaining there as to prevent a recovery.

The jury found in favor of the plaintiff, \$4,117. The defendant moved for a new trial, which was refused, and he excepted. Other necessary facts appear in the opinion.

Messrs. Rosser, Slaton, Phillips, & Hopkins, for plaintiff in error:

Deceased contributed to and occasioned the drunkenness of the driver, and there can be no recovery.

Peavy v. Georgia R. & Bkg. Co. 81 Ga. 488, 12 Am. St. Rep. 334, 8 S. E. 70; Roach v. Western & A. R. Co. 93 Ga. 786, 21 S. E. 67; Lynn v. Goodwin, 170 Cal. 112, L.R.A. 1915E, 588, 148 Pac. 927, 9 N. C. O. A. 915; Robinson v. New York C. & H. R. R. Co. 66 N. Y. 11, 23 Am. Rep. 1; Smith v. New York C. & H. R. R. Co. 38 Hun, 33; Wrightville & T. R. Co. v. Gernto, 120 Ga. 212, 58 S. E. 769; City Electric R. Co. v.

Shropshire, 101 Ga. 36, 28 S. E. 508, 3 Am. Neg. Rep. 369; *Pickett v. Central of Georgia R. Co.* 138 Ga. 181, 74 S. E. 1027, Ann. Cas. 1913C, 1380; 1 *Thomp. Neg.* §§ 502, 503; *Titus v. New Scotland*, 90 Hun, 468, 35 N. Y. Supp. 971.

The charge as to the measure of damages was error.

Central R. Co. v. Ray, 129 Ga. 349, 58 S. E. 844; *Atlanta R. & Power Co. v. Gaston*, 118 Ga. 418, 45 S. E. 508; *Southern R. Co. v. Scott*, 128 Ga. 246, 57 S. E. 504; *Atlanta Consol. Street R. Co. v. Bates*, 103 Ga. 349, 30 S. E. 41, 4 Am. Neg. Rep. 128; *Southern Bell Teleph. & Teleg. Co. v. Shamos*, 12 Ga. App. 472, 77 S. E. 312; *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 428; *Central R. Co. v. Thompson*, 76 Ga. 771; *Western & A. R. Co. v. Moore*, 94 Ga. 458, 20 S. E. 640; *Florida C. & P. R. Co. v. Burney*, 98 Ga. 1, 26 S. E. 730; *Richmond & D. R. Co. v. Allison*, 86 Ga. 149, 11 L.R.A. 43, 12 S. E. 352; *Central of Georgia R. Co. v. Perkereson*, 112 Ga. 936, 53 L.R.A. 210, 38 S. E. 365.

A drunken man is to be measured by the same standard as a sober man as to the use of ordinary diligence, and it was essential that the jury should understand this to be the law, since it was a vital question in this case.

Rollestone v. Cassirer, 3 Ga. App. 175, 50 S. E. 442.

If plaintiff by ordinary care could have avoided the consequences to himself, caused by the defendant's negligence, he is not entitled to recover.

Southern R. Co. v. Hogan, 131 Ga. 159, 62 S. E. 64; *Columbus v. Griggs*, 113 Ga. 597, 84 Am. St. Rep. 257, 38 S. E. 953, 10 Am. Neg. Rep. 28; *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 54 L.R.A. 802, 39 S. E. 306, 10 Am. Neg. Rep. 227; *Mansfield v. Richardson*, 118 Ga. 250, 45 S. E. 269; *May v. Central R. & Bkg. Co.* 80 Ga. 363, 4 S. E. 330; *Atlanta & C. Air Line R. Co. v. Leach*, 91 Ga. 419, 44 Am. St. Rep. 47, 17 S. E. 619; *Evans v. Charleston & W. C. R. Co.* 108 Ga. 270, 33 S. E. 901; *Hicks v. Georgia S. & F. R. Co.* 108 Ga. 304, 32 S. E. 880; *Steele v. Central R. Co.* 123 Ga. 237, 51 S. E. 438; *Bell v. Western & A. R. Co.* 70 Ga. 566; *Parish v. Western & A. R. Co.* 102 Ga. 285, 40 L.R.A. 364, 29 S. E. 715; *Columbus v. Griggs*, 113 Ga. 597, 84 Am. St. Rep. 257, 38 S. E. 953, 10 Am. Neg. Rep. 28; *White v. Kennon*, 83 Ga. 343, 9 S. E. 1082; *Hoyle v. Excelsior Steam Laundry Co.* 95 Ga. 34, 21 S. E. 1001; *Hazlehurst v. Brunswick Lumber Co.* 94 Ga. 535, 19 S. E. 756.

Messrs. Simmons & Simmons, also for plaintiff in error.

Messrs. J. C. Clark and Westmoreland & Westmoreland for defendant in error. L.R.A.1917A.

Lumpkin, J., delivered the opinion of the court:

1. Voluntary drunkenness furnishes no excuse for negligence; nor does it relieve a drunken man from exercising the degree of care required of a sober man in the same circumstances. If a person is required to use ordinary care, this means that care which every prudent man would exercise under similar circumstances. In taking the conduct of every prudent man as a standard, reference is made to the normal man; that is, the sober man. Ordinary care is not to be measured by what every prudent drunken man would do under like circumstances, but what every prudent sober man would do under like circumstances. If ordinary care under certain circumstances would require that a certain thing should be done, the requirement is binding on a man whether sober or drunk; and getting drunk will not relieve the person from that duty. To hold otherwise would be to put a premium upon drunkenness. *Woollen & T. Intoxicating Liquors*, §§ 1184 et seq. A similar rule has been applied in holding that voluntary drunkenness furnishes no excuse for crime. If ordinary care is not the measure of diligence required in the particular case, what is said above is equally applicable to the degree of diligence which is required.

2. As drunkenness does not furnish an excuse for negligence, neither does it constitute negligence as matter of law. It is possible, whether probable or not, for one man to act with the care of a prudent man while intoxicated, and for another to act with a lack of ordinary care while sober. If the conduct of the drunken man measures up to the standard fixed by law, the drunkenness alone will not authorize a recovery for an injury caused by him. Still it is one of the facts entering into the transaction, and is provable as such. It is not negligence per se for a man to have a defective vision, or to have an impotent hand; but if a person so afflicted should undertake to drive a powerful automobile on a crowded thoroughfare, and injury should occur from a collision with another passer, the condition of the driver of the machine would be a provable fact, under proper allegations, for consideration by the jury in determining whether in his entire conduct he was negligent. It is not negligence per se to have a cork leg. But it may be negligent for a man with a cork leg to chase and seek to board a moving train; or the condition of a passenger, known to a carrier, may have an effect upon what due care requires of the carrier.

As liquor may affect not only the brain, but the nerves, the muscles, and the eye-

sight, if a person voluntarily becomes intoxicated, and in that condition undertakes to drive an automobile, and injury results to another from the negligent operation of it, his condition would be a fact for the consideration of the jury, in determining whether he acted with diligence or negligence; or, if injury should result to him, and he should bring suit, whether he had voluntarily created a condition which affected his action is a matter which the jury may consider in determining whether he was diligent or negligent. It has sometimes been said that this condition of the person whose act is under consideration is a part of the *res gestæ* of the transaction. One riding in an automobile is bound to use ordinary care for his own safety. If there should be evidence tending to show that he voluntarily became so intoxicated as to be unable for that reason to exercise ordinary care, and did so fail, and that by the use thereof he could have avoided the consequences to himself of the negligence of the driver, such question would be one for the jury, under proper instructions. One riding in a car driven by another, though a mere guest and having no control over the person driving the car, may be guilty of such negligence as to preclude a recovery for a personal injury resulting from negligent operation of the car. If a driver, from intoxication, is in a condition which renders him incapable of operating it with proper diligence and skill, and this is known or palpably apparent to one entering the car, this is a fact which may be proved for the consideration of the jury, along with other facts, to throw light on the question of whether such person exercised ordinary care in entering the car or in remaining in the car, or in reference to his conduct while in it. So, if a guest took drinks of liquor with the owner and driver of the car, some of the liquor being furnished by the owner and some by the guest, this may be shown for the purpose of aiding in the determination of whether the guest was negligent. See, in this connection, *Rollestone v. Cassirer*, 3 Ga. App. 161(4), 174, 59 S. E. 442; 1 *Shearm. & Redf. Neg.* 6th ed. §§ 93, 110, and notes.

In some states statutes have been enacted, which are commonly known as "civil damage laws," which give a right of action against liquor dealers to innocent parties who sustain injury by the intoxication of persons supplied with liquor by the dealers, or the consequences of such intoxication, or by the acts of the intoxicated persons, or by the furnishing of liquor to minors or drunkards. The action so given is entirely statutory; the elements necessary for a recovery are dependent upon the particular statute; and a discussion of decisions based L.R.A.1917A.

upon them will be omitted, though some of them deal with the subjects of proximate cause and contributory negligence. *Black, Intoxicating Liquors*, §§ 277 et seq.

In some jurisdictions there are decisions declaring that the jury can be instructed that particular acts do or do not constitute negligence which will, or will not, authorize or prevent a recovery. But in this state, as a general rule, whether an act is negligent is a question for the jury; and except where a given act is forbidden, and rendered negligent *per se* as to the injured person, or an act is commanded and its omission rendered negligent, by a statute or valid municipal ordinance, the presiding judge should not instruct the jury what ordinary care requires to be done in a particular case. *Atlanta & W. P. R. Co. v. Hudson*, 123 Ga. 108, 51 S. E. 29, and citations. *Central of Georgia R. Co. v. Cole*, 135 Ga. 72, 68 S. E. 804; *Atlantic Coast Line R. Co. v. McDonald*, 135 Ga. 635(6), 636, 70 S. E. 249. Nevertheless, in some cases, the undisputed facts may be so clear as to leave no room for a jury to find save one way, and the question may become one of law and be dealt with on demurrer or motion for a nonsuit. This case is not of that character. The evidence as to the condition of the parties, and how the drinking began, was not so clear as to authorize the judge to declare as matter of law the status of each as to negligence. The defendant did admit in his amended answer his intoxication. In this state, also, the doctrine of comparative negligence prevails, and it is not all negligence which contributes to an injury that will necessarily prevent a recovery. Civil Code 1910, § 4426. This case was before the supreme court in 143 Ga. 50, 84 S. E. 121, on exception to the overruling of a demurrer. What was said in the opinion, in reference to there being nothing to show that the decedent himself was aware of the defendant's condition, must be considered in the light of the question there for decision, and not as ruling that the court should give requested charges like those made on the trial.

Evidence that while the plaintiff's son was riding with the defendant in the automobile of the latter they took several drinks together, and then went to a place where the plaintiff's son procured three bottles of liquor, from which they took additional drinks, and that the injury occurred while they were returning from such place, would not require the giving of a charge that if they were on the same mission, or on a joint pleasure trip or a common undertaking, and were using the automobile for that purpose, the plaintiff's son was under a duty to take "the necessary steps" to prevent the negli-

gence of the owner of the machine and to prevent any injury to himself. The evidence on this subject was for the consideration of the jury in determining the diligence or negligence of the parties. But it did not require the giving of the requested instruction as stated.

3. The case naturally divides itself into two parts: (1) Was the plaintiff entitled to recover at all, or not? (2) If so, what was the measure of damages? Relatively to the conduct of the defendant, and its effect on the right to recover at all, the crucial questions would be: Did he fail to exercise that degree of care which the law required of him? and if so, was such failure the proximate cause of the death of the plaintiff's son? Relatively to that of the plaintiff's son, and its effect on the right to recover at all, they would be whether he was negligent, and, if so, whether his conduct was such as to prevent a recovery for his homicide. This is only a brief outline of the points, and not a full statement of them. But the acts of the parties, their condition, and the like, would be matters for consideration in determining the controlling questions. Most of the requests to charge were defective in undertaking to state, in effect, that certain specific things would constitute negligence, or prevent a recovery, and in some instances even without making reference to their possible effect in connection with the injury. Some of the requests were covered by the general charge. The presiding judge may have charged somewhat briefly on the subject of the condition of the parties as to intoxication; but it is unnecessary to discuss each of the various requests at length, and to point out specifically the inaccuracies of some, and where others were sufficiently covered by the charge.

4. The decedent conducted a dairy. On the subject of the measure of damages the court gave the following charge: "You look to the testimony and determine what the gross receipts from the dairy were, and then you take all the expenses that contribute to this fund, the rent of his land, and any expenses that he incurred in and about the running of his dairy, and the difference between the total expenses and the total receipts would be his net earnings, and that would be his average yearly loss; and you multiply his average yearly loss by the expectation of years, and that would give you the gross amount of the plaintiff's recovery."

It was error to assume that, if a man at a particular time was deriving a certain net income from a dairy business, the same net income would continue during his expectation of life and would represent his earning capacity, and to charge in effect

that the net loss for one year, or even the average for several years, multiplied by the number of years of the dairyman's life expectancy, would give the gross loss, or, as the court expressed it, "the gross amount of the plaintiff's recovery." This was error for two reasons: First, the question to be determined was as to the average earning capacity of the decedent, not the actual net earnings of his business; and, second, it left out of consideration altogether any contingencies, and took it for granted that the net earnings of the dairy business in the future would be the same as those in the past, and would represent his earning capacity during life.

5. It has been held not to be error requiring a reversal, in the absence of a request, to omit to charge on the subject of reducing damages by reason of negligence on the part of the injured person, unless perhaps one party or the other raises such question in his pleadings, although it is the better practice to do so where the evidence authorizes such a charge. Except as herein indicated, there was no error requiring a reversal.

In the foregoing discussion no reference has been made to what is known as the automobile law of 1910, amended in 1913, and embodied in 1 Park's Code, §§ 828(a) and 6 Park's Code, § 528(c). Neither party invoked that statute or treated it as applicable to the facts of this case. And we have dealt with the case as made.

Judgment reversed.

All the Justices concur.

Atkinson, J., specially concurring:

I concur in the ruling announced in the fourth division of the opinion, but not in all that is said in the other divisions. The plaintiff's right to a recovery was limited to the grounds of negligence alleged in the petition. These were in substance that the defendant was intoxicated "to such an extent" as to render him "careless and reckless," and while in such condition driving his automobile at the reckless rate of speed of 60 miles per hour, and upon approaching a curve in the road, he did not slacken the speed, but continued, and the machine ran first from one side of the road to the other, and finally left the road and ran against an embankment, causing the plaintiff's son, who was his guest, to be thrown from the machine and killed. These allegations, properly construed, mean that the injury was the result of the defendant's recklessness in driving the machine, and that his recklessness was the result of his intoxication, thus making an unbroken chain of causal events or direct relation between defendant's intoxication and the in-

jury. Therefore, according to the allegations of the petition intoxication of the defendant is made a basal element of negligence for which damages are sought to be recovered. Not only will the plaintiff be limited to the alleged grounds of negligence for recovery, but as the allegations as against the plaintiff amounted to admissions in *judicio*, the plaintiff would be estopped from denying them, and hence as against the plaintiff they are to be treated as true. In addition to such admissions there was uncontradicted evidence to the following effect: In the afternoon, between 4 and 5 o'clock, Berry, who was the person killed, was at a store at Buckhead, near Atlanta. The defendant, Powell, drove up to the store in his automobile. Powell was drinking to some extent. An engagement was made between them to go driving in the automobile. Before going they went into the rear end of the store and exchanged drinks from bottles which each had, Powell giving the first drink. Before they left the store, each of them, with a third person, took two drinks from a jug which Powell brought into the store. After this they proceeded to ride in the direction which led away from Atlanta. They stopped at a certain place where Powell proposed to get out, but Berry protested and urged that Powell "crank up" the machine and proceed with the ride, which he did. They finally went to the house of a man in the country, where Berry bought 3 quart bottles of whisky, from which they each drank at the house, and treated others who were present, and, upon leaving in the automobile, each had one of the bottles of whisky. Shortly thereafter, which was about 8 o'clock at night, just before reaching the curve at which the catastrophe occurred, Berry insisted upon Powell taking another drink out of his bottle, which was done, and the bottle returned to Berry. Upon rounding the curve, the injury occurred; and when Berry's body was removed, it was found that he had a broken whisky bottle in his pocket. It thus appears, first, that the plaintiff's son was a voluntary participant in the excursion which the two made about the country, and which lasted for several hours; second, that Berry, the deceased participated in causing the defendant's intoxication, by drinking with him and continuing the excursion while he was drinking the intoxicants, and by giving him whisky, the last drink being accepted by the defendant almost immediately before the catastrophe. Under these circumstances, the plaintiff's son was obliged to know of the defendant's intoxication, and that he had helped to bring it about. The chain of events connecting Berry with the result of the catastrophe was complete. This is all L.R.A.1917A.

the more apparent when the dangerous character of the machine is considered, together with the necessity for skill and care in operating it. If Berry was also drunk, his drunkenness would not excuse his negligence or demeanor. If he was not drunk, for the greater reason should he have desisted from continuing the excursion and encouraging the intoxication and recklessness of the defendant. Under the circumstances in which he was a principal actor, ordinary care would have required Berry to desist. No reasonable mind could draw any other inference or conclusion from the undisputed evidence than that the excursion was dangerous from its inception, and that such an injury as occurred would probably result. Berry's participation amounted to independent negligence, and showed an utter want of ordinary care, while within his own knowledge the negligence of the defendant was in progress.

In Civil Code, § 4426, it is declared: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

It is also a doctrine of the common law that a plaintiff cannot recover for a tort if the injury was done by his consent or was caused by his negligence. See *Macon & W. R. Co. v. Johnson*, 38 Ga. 409, 11 Am. Neg. Cas. 292. In *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 54 L.R.A. 802, 39 S. E. 306, 10 Am. Neg. Rep. 227, Mr. Justice Cobb discussed at length the Code sections which announced the above rules, and in the course of the opinion said: "If the plaintiff knows of the defendant's negligence, and fails to exercise that degree of care and caution which an ordinarily prudent man would exercise under similar circumstances to prevent an injury which will result from such negligence, it is well settled that he cannot recover. See *Georgia R. & B. Co. v. Neely*, 56 Ga. 544; *Central R. Co. v. Harris*, 76 Ga. 508; *Americus P. & L. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Briscoe v. Southern R. Co.* 103 Ga. 224, 227, 28 S. E. 638, 3 Am. Neg. Rep. 360; *Central of Georgia R. Co. v. Dorsey*, 106 Ga. 826, 828, 32 S. E. 873; *Hopkins v. Southern R. Co.* 110 Ga. 85, 88, 35 S. E. 307. If the negligence of the defendant was existing at the time that plaintiff was hurt, and he, in the exercise of that degree of care and caution which an ordinarily prudent person would exercise under similar circumstances, could have discovered the defendant's negligence, and, when discovered, could by the exercise of a like degree of care, have avoided the

same, then he cannot recover. See *Atlanta & W. P. R. Co. v. Loftin*, 86 Ga. 43, 45, 12 S. E. 186; *Americus P. R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Brunswick & W. R. Co. v. Gibson*, 97 Ga. 489, 497, 25 S. E. 484; *Cain v. Macon Consol. Street R. Co.* 97 Ga. 298, 22 S. E. 918; *Western & A. R. Co. v. Bradford*, 113 Ga. 276, 38 S. E. 823. If at the time of the injury an ordinarily prudent person, in the exercise of that degree of care and caution which such a person generally uses, would have reasonably apprehended that the defendant might be negligent at the time when and place where the injury occurred, and, so apprehending the probability of the existence of such negligence, could have taken steps to prevent the injury, then the person injured cannot recover, if he failed to exercise that degree of care and caution usually exercised by an ordinarily prudent person to ascertain whether the negligence which might have been reasonably apprehended really existed. See *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604, 611; *Smith v. Central R. Co.* 82 Ga. 801, 10 S. E. 111; *Jenkins v. Central R. & Bkg. Co.* 89 Ga. 756, 15 S. E. 655; *Central R. & Bkg. Co. v. Attaway*, 90 Ga. 657, 661, 16 S. E. 956; *Macon & I. S. Street R. Co. v. Holmes*, 103 Ga. 655, 30 S. E. 563, 4 Am. Neg. Rep. 25; *Lloyd v. City & S. R. Co.* 110 Ga. 167, 35 S. E. 170, 7 Am. Neg. Rep. 591. If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained; and if he fails to do this, and is injured, he will not be allowed to recover, if by taking proper precautions he could have avoided the consequences of the negligence of the person inflicting the injury."

When the principles reiterated by Mr. Justice Cobb as above are applied to the present case, it is clear, without further multiplying authorities, that a state of circumstances existed which so connected Berry with the causative negligence producing the injury that he could not recover. When the case was before this court on exception to a judgment overruling a demurrer (143 Ga. 59, 84 S. E. 121), it was held: "Where, in a suit brought by a mother to recover for the tortious homicide of her son, the petition alleges that the injuries to the son which resulted in his death were the result of the defendant's driving his automobile at a dangerous and negligent rate of speed around the curve of a road, L.R.A.1917A.

that the decedent was sitting on a back seat of the automobile and had no control or direction of the defendant, the driver and owner of the car, who was then under the influence of liquor to such an extent as to make him careless and reckless, and that in consequence of the carelessness and negligence of the defendant her son was killed by the overturning of the machine, there being nothing in the petition to show that the decedent himself was aware of the defendant's intoxicated condition, the court properly overruled a general demurrer to the petition."

The clear inference was that the judgment overruling the demurrer would not have been affirmed if it had appeared upon the face of the petition that the plaintiff's son was aware of defendant's intoxicated condition. In *Lynn v. Goodwin*, 170 Cal. 112, L.R.A.1915E, 588, 148 Pac. 927, 9 N. C. C. A. 915, it was said: "While it is true that in general the negligence of the driver of a vehicle is not imputable to a passenger so as to bar that passenger's right of recovery, . . . yet the conduct of the plaintiff in riding, and in continuing to ride, in an automobile when he must have known that the driver was intoxicated, established independent negligence upon the plaintiff's part, independent from the driver's negligence, barring the right of recovery."

See also *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577; *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* 28 N. D. 128, L.R.A. 1915A, 761, 147 N. W. 791.

Where the evidence will admit an issue as to whether certain facts show negligence or want of ordinary care, the question is for the jury. But it is a mistake to hold under all circumstances, where the charge of negligence on the one hand, or want of ordinary care on the other, is made, that the question is for the jury. If the facts are undisputed, and there is no basis for reasonable minds to differ as to the inferences or conclusions to be deduced therefrom, the question becomes one of law. Each case must stand upon its peculiar facts. Among cases holding the evidence insufficient to authorize submission of the case to the jury, or a verdict for the plaintiff, are those collated in the excerpts, *infra*, from the opinion in *Western & A. R. Co. v. Ferguson*, *supra*. While the facts of these cases are different from those now involved, the cases sufficiently illustrate the rule above stated in regard to the right of the court to pass upon cases where as matter of law negligence or want of ordinary care is charged, and under the pleadings and evidence a verdict for the defendant was demanded.

Annotation—Intoxication of person operating automobile.

For annotation on the general question of intoxication as affecting negligence, see *McIntosh v. Standard Oil Co.* 47 L.R.A.(N.S.) 730.

As to imputed or contributory negligence of passenger riding in automobile driven by another precluding recovery against third person for injury, see annotation to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953.

Generally as to imputed negligence of driver to passenger, see annotations to *Schultz v. Old Colony Street R. Co.* 8 L.R.A.(N.S.) 597, and *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915A, 761.

It will be noticed that the court in *POWELL v. BERRY*, ante, 306, decides that voluntary drunkenness does not furnish an excuse for negligence, nor relieve a drunken man from exercising the degree of care required of a sober man under the same circumstances; and that if one becomes voluntarily intoxicated, and negligently operates his automobile and injures another, his intoxication furnishes no excuse for his negligence; but holds that drunkenness itself does not constitute negligence as a matter of law, but is a fact to be considered by the jury in determining whether the intoxicated person was negligent.

This conclusion finds support in *Shepard v. Johnson* (1912) 11 Ga. App. 280, 75 S. E. 348. In that case which was an action to recover for an injury inflicted by the defendant's automobile, it was alleged that he was intoxicated and guilty of driving his car in that condition, but there was no evidence to support the allegation. The court, however, stated that the act of intoxication would not be in and of itself such negligence as to authorize a recovery, saying that it might be pleaded and proved by way of inducement for the purpose of illustrating the negligent conduct alleged, but that if one, even though intoxicated, should drive his car in a proper manner and observe the rules and regulations prescribed, an injury inflicted by his machine would not render him liable merely because he might have been under the influence of intoxicants at the time of the injury.

In *Parker v. Smith Lumber Co.* (1914) 70 Or. 41, 138 Pac. 1061, in an action to recover for the death of a motorcycleist who collided with obstructions left in a street, special findings of the jury that he was intoxicated, and

that his intoxication contributed to his injury were held conclusive upon those questions and a bar to the action. In this case an instruction was held not erroneous which stated in effect that if the jury believed from the evidence that the motorcycleist was so intoxicated that he had lost such control of his brain or muscles as an ordinary prudent and cautious man in the full possession of his faculties would exercise under similar conditions, and the defendant was ignorant of such condition; and if they further found from the evidence that such intoxication contributed proximately to the injury,—no recovery could be had. The court said: "The decedent, by voluntarily becoming intoxicated, and attempting to travel on a motorcycle when in that condition, was guilty of contributory negligence; and the jury, in addition to finding that he was intoxicated at the time that he was fatally injured, found, also, that his intoxicated condition contributed proximately to said injury. These two facts constitute a complete bar to the plaintiff's cause of action. If the defendants had been guilty of negligence contributing to said accident, the decedent's intoxicated condition, and the further fact that it contributed proximately to the accident, constituted contributory negligence, and bars all right of recovery for the injury. . . . In *Bageard v. Consolidated Traction Co.* (1900) 64 N. J. L. 322, 49 L.R.A. 424, 81 Am. St. Rep. 498, 45 Atl. 620, 7 Am. Neg. Rep. 290, the court says: 'The true rule is that voluntary drunkenness does not relieve the drunken man from the degree of care required of a sober man in the same circumstances, and, if his drunkenness renders him incapable of exercising such care, then it contributed to any injury thereby sustained, and bars recovery for another's negligence.' 2 Wood, Railroads, page 1457, states the law thus: 'The fact that the person injured was at the time intoxicated does not necessarily constitute contributory negligence on his part, though this fact is to be considered with others in determining whether or not he exercised ordinary care to protect himself. One cannot voluntarily incapacitate himself from ability to exercise ordinary care for his own self-protection, and then set up such incapacity as an excuse for his failure to use care; and if the intoxication contributed to the injury, as a proximate

cause thereof, it is a complete bar to any action for damages sustained in consequence of it.' In volume 1 of Thompson's Commentaries on Negligence, § 341, he states the law thus: 'But it should be carefully kept in mind that voluntary intoxication on the part of a person killed or injured is not to be regarded as equivalent to contributory negligence accordingly as it contributes or does not contribute to bring about the injury, or accordingly as it is or is not to be regarded as the proximate cause of the injury.' If intoxication does not contribute to cause the injury, it is not contributory negligence. If, as in this case, it contributes proximately to cause the injury, it is contributory negligence."

In *Allen v. Pearson* (1915) 89 Conn. 401, 94 Atl. 277, a new trial was asked by one against whom a motorcyclist had recovered a judgment because of an injury sustained through the defendant's negligent operation of an automobile, on the ground of newly discovered evidence that the motorcyclist was intoxicated at the time he was injured. The court stated that if the respondent was operating his machine while under the influence of liquor, he was violating chap. 85, Pub. Acts 1911, but that this fact would not be enough to change the result of the former trial; that to effect this result the petitioner must show that the violation of the statute was a proximate cause of the respondent's injury, since the statute merely imposed a penalty for a violation, and did not provide that a violation should prevent a recovery for injuries inflicted on the offender by another person, where the violation of the statute was not a cause of the injury; and it was held that a new trial would not be granted where there was no evidence showing that the motorcyclist's injuries were caused, in whole or in part, by his intoxication.

It has been held in New York that under § 290, subdiv. 3, of the Highway Law, the operation of a motor vehicle by a person in an intoxicated condition is expressly prohibited, and that an innocent party injured in consequence of a violation of this statute is entitled to his civil remedy for damages. *Lincoln Taxicab Co. v. Smith* (1915) 88 Misc. 9, 150 N. Y. Supp. 86. In this case, which was an action to recover damages sustained by reason of the defendant's automobile colliding with the plaintiff's machine, evidence that at the time of the collision the defendant, who had been placed under arrest, was intoxicated, was held material, especially where

there was further evidence that the defendant's car was proceeding in a "wabbly" condition along the street, and when the plaintiff's car was near the center of the street it was struck by the defendant's car, and that a collision would not have occurred if the defendant had driven his car to the rear of the plaintiff's.

It appears that one who rides with a driver of an automobile who is intoxicated may, by so doing, be guilty of such negligence as to bar a recovery for an injury, either from the driver of the car in which he is riding, or the driver of another car with which a collision occurs by reason of the intoxicated driver's negligence.

Thus, it has been held that while it is true as a general rule that the negligence of the driver of a vehicle is not imputable to a passenger so as to bar the latter's right of recovery, yet one who rides with the driver of an automobile, with knowledge that the driver is drunk, is guilty of independent negligence apart from the driver's negligence, and cannot recover from the driver of another automobile for an injury received by a collision between the cars, if the injury was caused by the act of the driver of the machine in which he was riding. *Lynn v. Goodwin* (1915) 170 Cal. 112, L.R.A.1915E, 588, 148 Pac. 927, 9 N. C. C. A. 915.

And it will be noticed that in *POWELL v. BERRY*, ante, 306, the court decided that one riding in an automobile driven by another, though a mere guest, may be guilty of such negligence as to preclude a recovery from the driver for an injury sustained by the negligent operation of the car. J. T. W.

ILLINOIS SUPREME COURT.

TOWN OF CORTLAND

v.

ENNIS LARSON, Appt.

(273 Ill. 602, 113 N. E. 51.)

Municipal corporation — power to prohibit keeping of liquor.

1. Municipal authority to regulate, prohibit, or license the selling of intoxicating

Note.—As to the power to prohibit the keeping of intoxicating liquor irrespective of any intention to sell it in violation of law, see the note to *Eidge v. Bessemer*, 26 L.R.A.(N.S.) 394, and supplement thereto to the case of *Com. v. Smith*, L.R.A.1915D, 172.

liquor does not include power to forbid the maintaining of clubrooms where such liquor is kept for private use, or the use of liquor therein.

For other cases, see Intoxicating Liquors, I. a, 2, in Dig. 1-52 N. S.

Same — police power — extent.

2. Police power of a municipal corporation does not extend to forbidding the keeping of intoxicating liquor by members of clubs in their lockers, for their individual use.

For other cases, see Intoxicating Liquors, I. a, 2, in Dig. 1-52 N. S.

Same — power to declare nuisance — scope.

3. Municipal authority to declare what shall be a nuisance, and prevent and remove the same, does not include power to declare the keeping of intoxicating liquor in the lockers of private clubs, for the individual use of members, to be a nuisance.

For other cases, see Municipal Corporations, II. c, 4, c, in Dig. 1-52 N. S.

(June 22, 1916.)

A PPEAL by defendant from a judgment of the County Court for De Kalb County, convicting him of violating a liquor ordinance. Reversed.

The facts are stated in the opinion.

Messrs. Alschuler, Putnam, & James, for appellant:

A municipal corporation exercises only delegated and limited powers, and can exercise only such powers as are expressly granted or necessarily implied from those expressly given.

Marengo v. Rowland, 263 Ill. 531, 105 N. E. 285, Ann. Cas. 1915C, 198; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *Chicago v. M. & M. Hotel Co.* 248 Ill. 264, 93 N. E. 753; *Earlville v. Radley*, 237 Ill. 242, 86 N. E. 624; *Chicago v. McCoy*, 136 Ill. 344, 11 L.R.A. 413, 26 N. E. 363.

The power of a municipal corporation to pass a particular ordinance must be found in its charter in express terms, or it must be necessary in order to carry out the powers expressly granted, or be essential, and not simply convenient, to the declared objects and purposes of the corporation.

Chicago v. O'Brien, 268 Ill. 228, 109 N.

E. 10; *People ex rel. Huntley Dairy Co. v. Oak Park*, 268 Ill. 256, 109 N. E. 11; *Chicago v. P. F. Pettibone & Co.* 267 Ill. 573, 108 N. E. 698; *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285, Ann. Cas. 1915C, 198; *Chicago v. Weber*, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; *Roswell v. Eastern R. Co.* 16 N. M. 685, 120 Pac. 303; *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361.

The grant of power to the town to regulate, prohibit, and license the selling of liquor, does not authorize the enactment of the provisions of the ordinance here in question.

Haskell v. Howard, 269 Ill. 550, L.R.A. 1916B, 893, 109 N. E. 992; *Sullivan v. Oneida*, 61 Ill. 242; *Christopher v. Massotti*, 173 Ill. App. 241; *Chicago v. Weber*, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; *Chicago v. P. F. Pettibone & Co.* 267 Ill. 573, 108 N. E. 698; *Zion v. Behrens*, 262 Ill. 510, 51 L.R.A.(N.S.) 562, 104 N. E. 836, Ann. Cas. 1915A, 1057; *Shreveport v. Hill*, 134 La. 352, 64 So. 137, Ann. Cas. 1916A, 283; *Roswell v. Eastern R. Co.* 16 N. M. 685, 120 Pac. 303; *Com. v. Campbell*, 133 Ky. 50, 24 L.R.A.(N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; *Eidge v. Bessemer*, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; *Com. v. Smith*, 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340; *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; *State v. Williams*, 146 N. C. 618, 17 L.R.A.(N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; *Woollen & T. Intoxicating Liquors*, §§ 98, 99.

The power to "declare what shall be nuisance" does not authorize the town to declare anything to be a nuisance which is not a nuisance in fact.

Chicago v. Weber, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831.

Municipal corporations cannot enforce ordinances which infringe the spirit of the state law, or are repugnant to the public policy of the state.

Marengo v. Rowland, 263 Ill. 531, 105 N. E. 285, Ann. Cas. 1915C, 198; *Chicago v. Union Ice Cream Mfg. Co.* 252 Ill. 311, 96

The power to prohibit or restrict one using intoxicating liquor, or having the same in his possession for his own use, is discussed in the note to *Com. v. Campbell*, 24 L.R.A.(N.S.) 172. And this note is also supplemented in the note to *Com. v. Smith*, above referred to. For the relation of the questions to the Webb-Kenyon act, see annotation following *West Virginia v. Adams Exp. Co.* L.R.A.1916C, 299, 303. L.R.A.1917A.

As to the applicability of liquor laws to social clubs dispensing liquors to members, see notes to *South Shore Country Club v. People*, 12 L.R.A.(N.S.) 519; *Cuzner v. California Club*, 20 L.R.A.(N.S.) 1095; *Manning v. Cannon City*, 23 L.R.A.(N.S.) 192; *Ada County v. Boise Commercial Club*, 38 L.R.A.(N.S.) 101; and *State ex rel. Harvey v. Missouri Athletic Club*, L.R.A. 1915C, 876.

K. E. 872, Ann. Cas. 1912D, 675; Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; Henderson v. Heyward, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590; Eidge v. Bessemer, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; Shreveport v. Hill, 134 La. 352, 64 So. 137, Ann. Cas. 1916A, 283.

It is not unlawful for a citizen who has purchased liquors lawfully in wet territory to receive the manual possession thereof in dry territory, from a common carrier which has transported same for him from wet territory.

Carthage v. Duvall, 202 Ill. 234, 66 N. E. 1099; Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; People v. Young, 237 Ill. 196, 86 N. E. 589.

A citizen may own intoxicating liquor and have it in his possession in anti-saloon territory.

People v. Young, *supra*.

Defendant has the right, under the Constitution of the United States, to receive interstate shipments of intoxicating liquors.

Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Adams Exp. Co. v. Kentucky, 238 U. S. 190, 59 L. ed. 1267, L.R.A.1916C, 273, 35 Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Wilson Act, 1890; Webb-Kenyon Act, 1913; Re Luera, 28 Cal. App. 185, 152 Pac. 738.

Where the terms of an ordinance are so broad as to exceed the limits of the power of the municipality to enact it, the court will not, by construction, limit the ordinance to the scope of the municipal power, but will hold the ordinance invalid.

Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 492, 52 L. ed. 297, 307, 28 Sup. Ct. Rep. 141; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 680.

The enforcement of the provisions of the ordinance arbitrarily deprives appellant of the use of his property, abridges his privileges and immunities as a citizen, deprives him of the equal protection of the laws, and restrains his personal liberty, in violation of the guaranties of the state and Federal Constitutions.

People ex rel. Friend v. Chicago, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; People ex rel. Huntley Dairy Co. v. Oak Park, 268 Ill. 256, L.R.A.1917A.

109 N. E. 11; People v. Weiner, 271 Ill. 74, L.R.A.1916C, 775, 110 N. E. 870; Lincoln v. State, 27 Vt. 328; Com. v. Campbell, 19 Ann. Cas. 159, note; Eidge v. Bessemer, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; Henderson v. Heyward, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590; Fears v. State, 102 Ga. 274, 29 S. E. 463; State v. Gilman, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; Com. v. Smith, 163 Ky. 227, L.R.A.1915D, 172, 173 S. W. 340; Preston v. Draw, 33 Me. 559, 54 Am. Dec. 641; Re Luera, 28 Cal. App. 185, 152 Pac. 738; Ex parte Wilson, 6 Okla. Crim. Rep. 451, 119 Pac. 596; Sullivan v. Oneida, 61 Ill. 242; Zion v. Behrens, 262 Ill. 510, 51 L.R.A.(N.S.) 562, 104 N. E. 836, Ann. Cas. 1915A, 1057; Freund, Pol. Power, §§ 453, 454; Ex parte Brown, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; Black, Intoxicating Liquors, 50; Titworth v. State, 2 Okla. Crim. Rep. 268, 101 Pac. 288; Beebe v. State, 6 Ind. 501, 63 Am. Dec. 391.

Messrs. J. E. Matteson and C. D. Rogers, for appellee:

An ordinance may derive its validity from several different grants of power; its validity does not necessarily depend upon any single clause or section of the statute. Goodrich v. Busse, 247 Ill. 366, 139 Am. St. Rep. 335, 93 N. E. 292; Williams v. Chicago, 266 Ill. 267, 107 N. E. 599, Ann. Cas. 1916B, 514.

The liquor business is peculiarly subject to the police power of the state.

Chicago v. Netcher, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; Schwuchow v. Chicago, 68 Ill. 450; Dennehy v. Chicago, 120 Ill. 627, 12 N. E. 227.

Under the nuisance clause of its charter the town of Cortland had the power to pass the ordinance in question.

King v. Jacksonville, 3 Ill. 305.

The town of Cortland had the power, under its charter, to prevent the establishment of a drinking place of intoxicating liquors, to save itself the necessity for police supervision and the added expense of police protection.

Dennehy v. Chicago, 120 Ill. 627, 12 N. E. 227.

An ordinance passed in pursuance of express power cannot be held void unless the legislature was powerless to confer the authority.

Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011.

A city or village can exercise only such powers as are expressly delegated to it by the legislature, and such powers as are necessarily implied in or incident to those expressly given; but the legislature has

delegated to cities and villages the police powers of the state over the sale of liquor.

Chicago v. M. & M. Hotel Co. 248 Ill. 264, 93 N. E. 753; *Schwuchow v. Chicago*, 68 Ill. 450; *Dannehy v. Chicago*, 120 Ill. 627, 12 N. E. 227; *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812.

Cities, in enacting ordinances in the exercise of their police powers, must necessarily be allowed considerable discretion, and the courts will not hold such ordinances void unless they clearly are so.

Williams v. Chicago, 266 Ill. 267, 107 N. E. 599, Ann. Cas. 1916B, 514; *Plymouth v. McWherter*, 152 Ill. App. 114; *Stanton v. Chicago*, 154 Ill. 23, 39 N. E. 987.

The local-option law suspends all ordinances which are inconsistent with it, but does not prevent cities and villages from enacting and enforcing ordinances which are consistent with it.

Mayhew v. Eugene, 56 Or. 102, 104 Pac. 727, Ann. Cas. 1912C, 33; *Gunnarsaohn v. Sterling*, 92 Ill. 569; *Decatur v. Schlick*, 269 Ill. 196, 109 N. E. 737.

Section 2 of the ordinance prohibits all forms of so-called locker clubs.

State v. Nickerson, 30 Kan. 545, 2 Pac. 654; *State v. Horacek*, 41 Kan. 87, 3 L.R.A. 687, 21 Pac. 204; *State v. Peak*, 66 Kan. 701, 72 Pac. 237; *State ex rel. Jackson v. Topeka Club*, 82 Kan. 756, 29 L.R.A. (N.S.) 722, 109 Pac. 183, 20 Ann. Cas. 320.

The general assembly may enact legislation to prohibit all things hurtful to the health, welfare, and safety of society, even though the prohibition invades the right of liberty or property of the individual.

People v. Eldering, 254 Ill. 582, 40 L.R.A. (N.S.) 893, 98 N. E. 982.

Equal protection cannot be said to be denied when the law operates alike on all persons and property similarly situated.

Barbier v. Connolly, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357.

A city may constitutionally provide that no liquor shall be used or kept in the city for any purpose whatever.

State v. Clark, 28 N. H. 176, 61 Am. Dec. 611.

The statute forbidding the keeping of intoxicating liquors in any locker or other place in any social club, or carrying it to such club, is not unconstitutional.

Perrin v. United States, 232 U. S. 478, 58 L. ed. 691, 34 Sup. Ct. Rep. 387; *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182; *United States v. Sutton*, 215 U. S. 291, 54 L. ed. 200, 30 Sup. Ct. Rep. 116; *Hallowell v. United States*, 221 U. S. 317, 55 L. ed. 750, 31 Sup. Ct. Rep. 587; *Ex parte Webb*, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; *United States v. L.R.A.1917A*.

Wright, 229 U. S. 226, 57 L. ed. 1160, 33 Sup. Ct. Rep. 630; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Munn v. Illinois*, 94 U. S. 124, 24 L. ed. 83; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *State v. Bixman*, 162 Mo. 1, 62 S. W. 828; *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1109, 18 Sup. Ct. Rep. 674; *Eidge v. Bessemer*, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; *Seima v. Brewer*, 9 Cal. App. 70, 98 Pac. 61; *Heisembrittle v. Charleston*, 2 McMull. L. 233; *Fasley v. Pegg*, 63 S. C. 98, 41 S. E. 18; *Wright v. Macon*, 5 Ga. App. 750, 64 S. E. 807.

Craig, Ch. J., delivered the opinion of the court:

The appellant was convicted in the county court of De Kalb county of a violation of §§ 2 and 3 of a municipal ordinance of the town of Cortland, and was fined \$25 for the violation of § 2, and \$30 for the violation of § 3. Propositions of law which were submitted by the defendant and refused by the trial court raised the question of the constitutionality and validity of the ordinance under which the defendant was convicted. He has appealed directly to this court on the ground that the validity of the ordinance is involved, the trial court having made the necessary certificate.

The sections of the ordinance involved are as follows:

"Section 2. Whoever shall within said corporate limits, directly or indirectly, keep or maintain by himself or by associating or combining with others, or shall in any manner aid, assist or abet in keeping or maintaining, any clubroom or other place in which any intoxicating liquor or spirituous, vinous, malt or fermented liquor, in any quantity whatsoever, is received or kept for the purpose of use, gift, barter, exchange or sale as a beverage or for distribution or division among the members of any club or association by any means whatever, and whoever shall use, barter, exchange, sell or give away, or assist or abet another in bartering, exchanging, selling or giving away any intoxicating liquor or spirituous, vinous, malt or fermented liquor, or any mixture of any of the said liquors, or any drinks which contain any spirituous, vinous, malt or fermented liquor, in any quantity whatsoever, so received or kept, shall upon conviction thereof be fined not less than twenty-five dollars (\$25) nor more than fifty dollars (\$50) for each and every offense.

"Section 3. All places within the said corporate limits where orders are taken or

agreements made for the sale or delivery of any intoxicating liquor or spirituous, vinous, malt or fermented liquor, or any mixture of said liquors, or any drinks which contain any spirituous, vinous, malt or fermented liquor in any quantity whatsoever, or where any said liquors are sold, given away, bartered, exchanged or in any manner disposed of, or are kept for sale, or are received or kept for the purpose of use or distribution or division among the members of any club or association by any means whatsoever, shall be taken and held and are declared to be a nuisance and may be abated as such; and whoever shall keep any such place, either as principal, clerk or servant, shall on conviction thereof be fined not less than thirty dollars (\$30) nor more than fifty dollars (\$50), and it shall be part of the judgment, upon the conviction of the keeper, that the place so kept shall be shut and abated by the constable until the keeper shall give bond, with sufficient security to be approved by the court, in the penal sum of one thousand dollars (\$1,000) payable to the said town, conditioned that he will not violate or permit any violation of this ordinance at such place: Provided, that if the keeper refuses or neglects to abate such nuisance instantly after being notified so to do by the president or constable of said town, the president may order any such place summarily shut up and abated."

The facts were stipulated as follows: "The claimed violation of said ordinance charged against defendant in this case is that he did, within the corporate limits of said town, keep or maintain, by himself or by associating or combining with others, or assist or abet in keeping and maintaining, a certain clubroom in which intoxicating liquor was received and kept for the purpose of use as a beverage, and did use intoxicating liquor so received and kept. The facts are that the defendant is a resident of said town and a citizen of the state of Illinois and a citizen of the United States of America, and is a member and officer of a certain club having its rooms in a building situated upon the south three fourths of lot 4 in block 11, in said town of Cortland, within the corporate limits thereof, which said building is neither the residence nor store building of defendant or any other member of said club, but is used exclusively by said club; that, as such member and officer, the defendant, by associating with the other members, keeps or maintains, or assists and abets in keeping or maintaining, the clubrooms; that in said clubrooms intoxicating liquor is received and kept by defendant in his individual locker, to which he alone has access, for

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his own individual, personal use as a beverage; and that other members of said club receive and keep their own individual liquor in individual lockers in said clubrooms for their individual personal use as a beverage. It is not contended that intoxicating liquor is sold, bartered, exchanged, or given away at, in, or by said club or by defendant, or any member thereof, or received or kept there for any of said last-mentioned purposes. Defendant orders and purchases his own intoxicating liquor for himself, only, by United States mail, in places outside said town of Cortland, where it is not unlawful to sell or purchase same, and said liquor is forwarded and delivered to him by a common carrier and is received, kept, and stored by defendant at said club for his own individual, personal use as a beverage, and is there drunk by him only. The members of said club, who keep liquor there, order, receive, keep, and drink their own individual liquor in the same manner. Each orders, receives, keeps, and drinks his own individual liquor and that only. The defendant and other members of said club are men of good standing in the community, and their behavior has been orderly and gentlemanly. There has been no breach or disturbance of the peace nor any fighting, brawling, carousing, or drunkenness at or about said club. Only members of said club enter the clubroom. There is no 'treating' nor any distribution or division of liquor among the members."

The town of Cortland was incorporated under a special charter conferring upon it all the rights, powers, and privileges granted to the town of Belvidere in the act under which the latter was incorporated; § 10 of that act being as follows: "Section 10. The board of trustees shall also have power to make regulations to secure the general health of the inhabitants; to declare what shall be nuisance, and prevent and remove the same; . . . the exclusive power to regulate, prohibit or license the selling of spirituous, vinous and malt liquors of any kind within the corporate limits; . . . to make all such ordinances from time to time, and alter, amend and repeal the same, as shall be necessary to carry into effect and execution the powers specified in this act, so that the same be not inconsistent herewith nor with the laws or Constitution of the United States or of this state; to impose fines, forfeitures and penalties for the breach of any ordinance of the incorporation, and to provide for the recovery and appropriation of any such fine or forfeiture and the enforcement of any such penalty; . . . to regulate the police of the town."

The appellant contends that the town of

Cortland was without power to adopt the ordinance in question, and that the ordinance is in violation of the Constitution of the United States and of the state of Illinois. The power of a municipal corporation to pass an ordinance must be found expressed in its charter, or must be necessary to carry out the powers granted. By § 10, quoted above, the board of trustees of the appellee are given the exclusive power to regulate, prevent, or license the sale of spirituous, vinous, or malt liquors of any kind within the corporate limits, to declare what shall be a nuisance, and prevent and remove the same, and to make all such ordinances as shall be necessary to carry into effect and execution the powers specified, so that the same be not inconsistent with its charter or with the laws or Constitution of the United States or of this state. Under the stipulation of facts on which appellant was convicted, it is conceded that he did not sell, barter, exchange, or give away any intoxicating liquor at said club. The only portion of the ordinance, therefore, of which the appellant was found guilty, is embraced within the following portion: "Whoever shall within the corporate limits, directly or indirectly, keep or maintain by himself or by associating or combining with others, or shall in any manner aid, assist or abet in keeping or maintaining, any clubroom or other place in which any intoxicating liquor, . . . in any quantity whatsoever; is received or kept for the purpose of use . . . as a beverage, . . . and whoever shall use . . . any intoxicating liquor . . . so received or kept, shall upon conviction thereof be fined," etc.

Appellant, then, was convicted for assisting or aiding in keeping a clubroom, at which place he, like other members of the club, received his own liquor for his own individual use as a beverage, and kept such liquor there for such purpose only, and used such liquor so kept for his own individual use as a beverage. Appellant was an officer of the club, but what office he held or what officers the organization had, or their several duties, if any, is not shown, nor is the admission in the stipulation of facts that he was an officer material, as it is the theory of counsel for appellee that his actions, as a mere member of the club, in keeping and using intoxicating liquor there, were in violation of the provisions of the ordinance. And so they were. In brief, the appellant was convicted for assisting in keeping a place in which intoxicating liquor was received and kept for the purpose of use, and for using such liquor.

Under its charter the town of Cortland had the exclusive power to license, regulate, and prohibit the selling of spirituous, L.R.A.1917A.

vinous, and malt liquors of any kind within the corporate limits, and also had the power to regulate the police of the town. The question to be determined is: Did it have any power or authority, by reason of its charter, to prevent the receiving, keeping, or using of intoxicating liquors under any and all circumstances? In *People ex rel. Huntley Dairy Co. v. Oak Park*, 268 Ill. 256, at page 261, 109 N. E. 11, this court said: "If a doubt exists concerning the grant of power, the doubt is, by the authorities, to be resolved against the municipality (*Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; *Chicago v. Ross*, 257 Ill. 76, 43 L.R.A. (N.S.) 205, 100 N. E. 159; *Chicago v. M. & M. Hotel Co.* 248 Ill. 264, 93 N. E. 753); and the enumeration of the powers operates to exclude such as are not enumerated (*People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *Cairo v. Bross*, 101 Ill. 475)."

The enumeration in the statute of the powers which may be exercised by a municipal corporation excludes such powers as are not enumerated. *People ex rel. Huntley Dairy Co. v. Oak Park*, supra. Tested by the rule laid down in that case, and supported by ample authority, there is nothing in the charter of the appellee to authorize the enactment of those portions of § 2 of the ordinance above set forth which apply to the facts of this case according to the stipulation, and under which appellant is convicted. It is very clear that the express words of the charter, "to regulate, prohibit or license the selling" of intoxicating liquor, do not include the power to make it an offense to receive, keep, or use liquor at a club or other place for individual, personal use as a beverage, only, where there is no element of selling or even giving away or disposing of the same, nor anything in the conduct or actions of those who received, kept, and used the liquor that gave others any ground for complaint, except the mere fact of receiving, keeping, or using it. Nor can it be fairly said that the power to make it an offense to maintain a club where liquor is received, kept, or used as a beverage by the individual owner thereof for his personal use, only, is necessarily or fairly implied or incident to the power expressly granted to regulate, prohibit, or license the selling of liquor. In *Decatur v. Schlick*, 269 Ill. 181, 109 N. E. 737, this court held an ordinance valid which was substantially in the same language as the local option act, except that it also contained the provision that intoxicating liquor should not be distributed or divided among the members of any club

or association by any means whatever, when such distribution or division shall be an illegal sale or gift of such liquor. The ordinance in question contains no such qualification, and the decision of this court in the last-mentioned case was based on the fact that the receiving and distribution of intoxicating liquor by means of the agency of the club, so called, was, in effect and in fact, a shift or device to evade the provisions of the ordinance against the selling or giving away of intoxicating liquor.

We have heretofore held that a club, or assembly of individuals or association as a club, cannot be used as a means to accomplish a violation of the provisions of the dramshop law (Hurd's Rev. Stat. 1915-16, chap. 43), or the local option law (Hurd's Rev. Stat. 1915-16, chap. 43, §§ 25-43), or city or village ordinances of similar import (People ex rel. Stevenson v. Law & Order Club, 203 Ill. 127, 62 L.R.A. 884, 67 N. E. 856; People v. Gardt, 258 Ill. 468, 101 N. E. 687; Decatur v. Schlick, supra). But the distinction in regard to those cases is that sales were there actually made, and the court held the facts in those cases showed actual sales of intoxicating liquor contrary to the law, notwithstanding the agency of the so-called club. The ordinance in question by its terms applies not only to a clubroom, but to any other place in which any intoxicating liquor, in any quantity whatsoever, is received or kept for the purpose of use, and also applies by its terms to whoever shall use any such liquor so received or kept. Under the section in question, it is an offense for anyone within the corporate limits of the town of Cortland to keep any place in which any intoxicating liquor, in any quantity whatsoever, is received or kept for the purpose of using it as a beverage, or to use any intoxicating liquor so received or kept. There is no law in this state which prohibits a person from receiving, keeping, or using intoxicating liquor for private consumption, when such receiving, keeping, or using is done in such a manner as does not interfere with the rights of others, and there is no intoxication or disturbance, as was stipulated in this case, and city or village councils have no power or authority to enact ordinances prohibiting such keeping, receiving, or using. Sullivan v. Oneida, 61 Ill. 242.

While the selling or giving away of intoxicating liquor may be regulated or altogether prohibited by municipalities and by appellee, under its charter, intoxicating liquor is not contraband and is recognized as property. Under the strict terms of this ordinance, if it is constitutional and valid, a person could be penalized for keeping li-

quor for use or for using liquor in his private home. As far as an unlawful sale or giving away of liquor is concerned, it is the fact of selling or giving away that makes the act unlawful and a violation of the law, no matter how, where, or when such unlawful selling or giving away takes place in any locality in which the local option law is in force, or where a valid ordinance has been enacted forbidding the sale or gift of intoxicating liquor. It is just as unlawful to make such sale in a private home as it would be in a club or a store or on the street. A "club" is an assemblage of individuals for a common purpose and may be an entirely lawful organization, and there are many such. "Club-rooms" are the rooms or quarters used by a club, and the word has no other meaning. If it is still the law that a man may lawfully bring liquor into or receive liquor in territory where its sale is prohibited by statute or ordinance, and may lawfully own liquor and consume or use such liquor as long as he does so in such a manner that the rights of others are not interfered with, what difference does it make whether he receives or keeps or drinks or uses such liquor at his house, or at his barn, or at his club? He would have the same right in a house that he leased as in a house that he owned. Accordingly, if he rented a room at a club and lived there, he would have the right to keep liquor there and use it there; and, if he rented a locker at the club instead of a room, would he not have the same right?

In Sullivan v. Oneida, supra, on page 248 of 61 Ill., it is said: "Spirituuous liquors, ale and beer, are property—as much so as money or lands. They are chattels—are articles of consumption and of commerce. The ordinance recognizes them as property and directs their sale on execution, and permits druggists to keep them. Their abuse may be restrained, and punishment inflicted upon those who sell them to the injury of others. They may, as well as other chattels, come under the designation of nuisance, and, to a certain extent, lose their quality as property, but they cannot, per se, lose their quality as property."

In People v. Young, 237 Ill. 196, 86 N. E. 589, in construing the effect of the local option law, it was held that the law, being penal in character, must be strictly construed; that its purpose was to prevent the sale, barter, and exchange of intoxicating liquor in dry territory, and not to prevent one who has become the owner of intoxicating liquor in wet territory from taking it into dry territory. On page 203 of 237 Ill., it is said: "The act does not in

any of its provisions attempt to prohibit a sale and delivery of liquor in wet territory, nor is there any attempt to prevent one who has become the owner of intoxicating liquor in wet territory from bringing that liquor into dry territory. Such transactions as the two last mentioned have none of the unlawful elements of a sale, barter, or exchange of intoxicating liquor in dry territory. It is true that the transaction in this case enabled the purchaser to have the beer delivered to him in dry territory by a common carrier, pursuant to a sale and shipment made by the brewer in wet territory, and enabled him to own the beer and to have it in his immediate possession in dry territory; but these things the statute has not forbidden. We think there is no evidence of any attempt to evade any of the provisions of the act by the use of a shift or device of any kind."

As to the right of appellees to enact the ordinance in question under its police powers, conceding that the provision of its charter "to regulate the police of the town" gives it all the power counsel claim for it in this case, it could not, under the guise of the police power, assume to regulate and control the acts and conduct of a citizen by which the public or others are in no way affected in any of their rights and interests. Black, in his work on *Intoxicating Liquors* (§ 38, p. 50), says: "But it is justly held that a provision in such a law that no person, without a state license, shall 'keep in his possession, for another, spirituous liquors,' is unconstitutional and void. The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void."

In *Haskell v. Howard*, 269 Ill. 550, L.R.A. 1916B, 893, 109 N. E. 992, in which a section of a village ordinance prohibiting signs or advertisements of intoxicating liquor was held invalid, it was said, on page 553 of 269 Ill., of the opinion: "The exercise of the police power is limited to enactments tending to promote the public health, safety, morals, or general welfare. It is for the legislature to determine when an exigency exists for the exercise of the police power, but what is the subject of such exercise is a judicial question. Under the guise of police regulation, the personal rights or liberties of citizens cannot

be arbitrarily invaded. *Ruhstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41, 12 Am. Crim. Rep. 453; *Bailey v. People*, 190 Ill. 28, 54 L.R.A. 838, 83 Am. St. Rep. 116, 60 N. E. 98; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A. (N.S.) 998, 94 N. E. 920; *In People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292, it was held that if a city was clothed with the whole police power of the state, it would not have authority to deprive a citizen of valuable property rights under the guise of prohibiting or regulating something that had no tendency to injure the public health, safety, morals, or general welfare. In *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A. (N.S.) 998, 94 N. E. 920, it was held the police power does not justify interference with private rights for purposes unconnected with the safety, health, morals, or general welfare of the public."

To the same effect is *Zion v. Behrens*, 262 Ill. 510, 51 L.R.A. (N.S.) 562, 104 N. E. 836, Ann. Cas. 1915A, 1057, in which it was held that an ordinance prohibiting the smoking of tobacco in certain specified places, including public streets and parks, without reference to any particular circumstances or conditions, is invalid in so far as it applies to such streets and parks, as being an unreasonable restraint upon the personal liberty of the citizen. As stated in that case on page 511 of 262 Ill.: "Many cases decided by this court sustaining various ordinances and statutes under the police power are cited and relied upon. None of the cases heretofore decided by this court go to the extent of sustaining the power of a city to pass an ordinance forbidding an act under all circumstances which can only be offensive or harmful to others under certain conditions."

It has been generally held that the police power does not extend to the deprivation of a citizen of the right to have intoxicating liquor in his possession for his own use. *Com. v. Campbell*, 133 Ky. 50, 24 L.R.A. (N.S.) 172, 117 S. W. 383, 19 Ann. Cas. 159; *Ex parte Brown*, 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S. W. 554; *Lincoln v. Smith*, 27 Vt. 328; *Titsworth v. State*, 2 Okla. Crim. Rep. 268, 101 Pac. 288; *Partridge v. State*, 88 Ark. 267, 20 L.R.A. (N.S.) 321, 129 Am. St. Rep. 100, 114 S. W. 215; *State v. White*, 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132; *State v. Gilman*, 33 W. Va. 146, 6 L.R.A. 847, 10 S. E. 283; *Preston v. Drew*, 33 Me. 559, 54 Am. Dec. 639; *State v. Williams*, 146 N. C. 618, 17 L.R.A. (N.S.) 299, 61 S. E. 61, 14 Ann. Cas. 562; *Eidge v. Bessemer*,

164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246; *Henderson v. Hayward*, 109 Ga. 373, 47 L.R.A. 366, 77 Am. St. Rep. 384, 34 S. E. 590. The only decision to the contrary to which we have been referred is that of *State v. Phillips*, 109 Miss. 22, L.R.A.1915D, 530, 67 So. 651, in which it was held that a state does not unconstitutionally deprive one of equal protection of the laws by forbidding the keeping of intoxicating liquor in any locker or other place in any social club, or carrying it to such club, although a property right in such liquor is recognized by the law. The opinion in that case is based largely on the dissenting opinion in *Eidge v. Bessemer*, 164 Ala. 599, 26 L.R.A.(N.S.) 394, 51 So. 246, and hence is contrary to the holding in that case, and also contrary, we think, to the great weight of authority. The court assumed that the ultimate purpose of the Mississippi law was to prohibit the use of liquor as a beverage, which is not the purpose of the local option law of this state, nor within the powers granted to municipalities, which are limited in their power solely to regulating and suppressing the sale, and not the use, of liquor.

There can be no doubt that, if it were possible by law to prevent any intoxicating liquor from being introduced into a town, or kept there under any circumstances, it would be most effective as a prohibition measure, as there would be no drinking if there were nothing to drink. The power of the appellee, however, extended only to licensing, regulating, and prohibiting the sale of intoxicating liquor by adopting such ordinances as would be reasonably necessary to accomplish that purpose, and not to the depriving of residents or persons within the municipality of their property. The ordinance in question made it unlawful to keep or use what the law recognized as property, and under circumstances in which the public and others were in no way affected or interested. It amounted to depriving appellant and others similarly situated of their property, and to the extent to which it affected appellant, under the stipulation of facts in this case, was *ultra vires* and invalid.

What has been said about the 2d section of the ordinance applies to the 3d section. The power delegated to cities to determine what are nuisances does not include the power to declare something a nuisance which is not a nuisance *per se*, or recognized as a nuisance by common law or statute. *Chicago v. Weber*, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831. Whether any of the places mentioned in the 3d section would be nuisances in fact would, of course, depend on

the manner in which they were conducted. If it were a case of a member of a family at his own or any private home, or the member of a private club where the public are not allowed, using liquors, that would not make the place where such liquors are used a nuisance. It is not within the power of the city or of the state, nor is it the policy of the latter, to regulate the private life or conduct of a citizen in the use of his property in matters in which he, alone, is affected, and others are not necessarily affected. *Haskell v. Howard*, 269 Ill. 550, L.R.A.1916B, 893, 109 N. E. 992, and cases cited. As said in *Carthage v. Munsell*, *supra*, on page 478 of 203 Ill.: "Nor do we think, under the agreed state of facts, that the delivery of such liquors transported from another state to purchasers in the city of Carthage, in this state, can be held to be a nuisance. In the case of *Laugel v. Bushnell*, 197 Ill. 20, on page 26, 58 L.R.A. 266, 63 N. E. 1086, we had before us the question of nuisances as applied to the sale of intoxicating liquors, and we said: 'Nuisances may thus be classified: First, those which in their nature are nuisances *per se*, or are so denounced by the common law or by statute; second, those which, in their nature, are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be conducted, managed, etc.; third, those which, in their nature, may be nuisances, but as to which there may be honest differences of opinion in impartial minds. The power granted by the statute to the governing bodies of municipal corporations to declare what shall be nuisances, and to abate the same, etc., authorizes such bodies to conclusively denounce those things falling within the first and third of these classes to be nuisances; but as to those things falling within the second class, the power possessed is only to declare such of them to be nuisances as are in fact so.' As we view this case, under the stipulations in this record the transaction properly falls within the second class of nuisances, as above classified, and could only become a nuisance from the manner in which it might be conducted, managed, etc. The right of the citizen to purchase goods for his own consumption from dealers in other states, and the right to have those goods carried and delivered to him, are to be classed among the highest rights of the citizen, and can only be curtailed when, in the manner of conducting the business, they may endanger the health, life, or property of other citizens. There is nothing in intoxicating liquor inherently dangerous. It can only be said to be dangerous to those who use it. It is

not like explosives or dangerous drugs, that may carry with them a menace to the persons and property of others, and there is nothing in the stipulation to disclose that the business as conducted was other than the ordinary course in relation to the carrying and delivering of other articles of trade and commerce that might be, and ordinarily are, carried by such companies. In other words, there is nothing to show that, in the method of delivery or in the manner of conducting the business, there was anything that could be said to be offensive to the public morals or good order, or could in any way tend to disturb anybody in his tranquillity of mind, health, or body, safety, or right of property. In the absence of such showing, it cannot be successfully contended that such business or transaction may be declared to be a nuisance."

Section 3 in effect declares any place a nuisance where two persons keep liquor to be divided between them. If any place is maintained within said town where persons assemble for the purpose of drinking liquor, and in so doing conduct themselves in a disorderly manner, or in such a way as to interfere with the peace, comfort, and rights of others,—or, in other words, if such place is, in fact, allowed to become a nuisance,—it can be abated as such; but, under the stipulation in this case, there was nothing of that kind.

The sections of the ordinance in question, in the particulars that have been shown, were invalid and void, and for that reason the judgment of the lower court will be reversed.

NEBRASKA SUPREME COURT.

CHARLES B. WRIGHT et al.

v.

LIZZIE PFRIMMER, Appt.

(99 Neb. 447, 156 N. W. 1060.)

Covenant — restrictive — who may enforce.

1. Where the owner of a tract of land subdivides it into lots, and makes public a general plan of improvement or development, and executes deeds to the lots with uniform restrictive covenants, pursuant to the general plan, purchasers may enforce such covenants against each other.

For other cases, see Covenants and Conditions, III. c, in Dig. 1-52 N. S.

Same — deed to common grantor.

2. Purchasers of lots cannot enforce against each other restrictive covenants imposed upon their respective lots in a deed to their common grantor, when such covenants were not part of a general plan of improvement, but were imposed for the benefit of other land retained by the original owner.

For other cases, see Covenants and Conditions, III. c, in Dig. 1-52 N. S.

Evidence — burden of proof — purpose of covenant.

3. In a suit by a prior grantee to enforce a restrictive covenant in the deed of a subsequent grantee from the common grantor, the burden is on plaintiff to prove that such

covenant was intended for the benefit of his land.

For other cases, see Evidence, II. k, in Dig. 1-52 N. S.

(Morrissey, Ch. J., and Letton and Sedgwick, JJ., dissent.)

(March 4, 1916.)

APPPEAL by defendant from a decree of the District Court for Douglas County in plaintiffs' favor in an action brought to enjoin defendant from using a residence lot for rooming and boarding purposes, in alleged violation of restrictive covenants in her deed. Reversed.

The facts are stated in the opinion.

Messrs. Mahoney & Kennedy, for appellant:

Covenants of the character involved in this case are presumed to be for the benefit of the grantor, rather than for the benefit of the tract, or purchasers of parcels, and the burden is upon the party asserting that such covenants are for the benefit of the tract to prove the same.

Mulligan v. Jordan, 50 N. J. Eq. 383, 24 Atl. 543; *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744; *Sharp v. Ropes*, 110 Mass. 381; *Keates v. Lyon*, L. R. 4 Ch. Div. 218, 38 L. J. Ch. N. S. 357, 20 L. T. N. S. 255, 17 Week. Rep. 338; *Renals v. Cowlishaw*, L. P. 11 Ch. Div. 866, 48 L. J. Ch. N. S. 830, 41 L. T. N. S. 116, 28 Week. Rep. 9; *Post v. Weil*, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145.

A restrictive covenant prescribing the kind of a building that may be erected is not violated by the use to which the build-

Headnotes by BARNES, J.

Note.—Upon the question who may enforce restrictive covenant or agreement as to use of property, see annotation following this case, post, 328.
L.R.A.1917A.

ing is put, where such use does not affect exterior appearances, and where, of course, the use is otherwise lawful.

Levy v. Schreyer, 27 App. Div. 282, 50 N. Y. Supp. 584; *Kurtz v. Potter*, 44 App. Div. 262, 60 N. Y. Supp. 764.

Covenants of this character are to be strictly construed. They are not to be extended by construction, and all cases of doubt are resolved in favor of the free use of the property.

American Unitarian Asso. v. Minot, 185 Mass. 589, 71 N. E. 551; *Quatman v. McCray*, 128 Cal. 285, 60 Pac. 855; *Peck v. Hartshorn*, 189 Mass. 110, 75 N. E. 133; *Waters v. Collins*, — N. J. Eq. —, 70 Atl. 984; *Marx v. Brogan*, 111 App. Div. 480, 98 N. Y. Supp. 88; *Kitching v. Brown*, 180 N. Y. 414, 70 L.R.A. 742, 73 N. E. 241; *Lignot v. Jaekle*, 72 N. J. Eq. 233, 65 Atl. 221.

Messrs. H. W. Morrow and Warren Switzler, for appellees:

While the courts generally hold that restrictive covenants in deeds inure to the benefits of all buyers, some of them hold that a different rule obtains in regard to prior purchasers from that which applies to subsequent buyers, and that, as to the former, a general plan must be shown, while, as to the latter, this is unnecessary.

Roberts v. Scull, 58 N. J. Eq. 396, 43 Atl. 583; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122; *Fete v. Foertstel*, 159 Mo. App. 75, 139 S. W. 820; *Bowen v. Smith*, 76 N. J. Eq. 456, 74 Atl. 675; *Coughlin v. Barker*, 46 Mo. App. 54; *Hall v. Wesster*, 7 Mo. App. 56; *Coates v. Cullingford*, 147 App. Div. 39, 131 N. Y. Supp. 700; *Parker v. Nightingale*, 6 Allen, 341, 38 Am. Dec. 632; *McDougall v. Schneider*, 134 App. Div. 208, 118 N. Y. Supp. 861.

Restrictive covenants are binding on each buyer, although the deeds vary, and some deeds do not contain the covenants.

Allen v. Detroit, 167 Mich. 464, 36 L.R.A. (N.S.) 890, 133 N. W. 317.

Restrictive covenants are binding, though there is no reference in one deed to the other, where a general plan is shown.

McNichol v. Townsend, 73 N. J. Eq. 276, 67 Atl. 938; *Barton v. Slifer*, 72 N. J. Eq. 812, 66 Atl. 899.

A general plan may be shown and established by circumstances only, or by simply being made public by the grantor.

Jones, Real Estate in Conveyancing, §§ 771, 772.

Purchasers are bound to take notice by observation merely of the building plan and scheme, and are bound thereby.

Tallmadge v. East River Bank, 26 N. Y. 105.

The plan or scheme may be shown by the L.R.A.1017A.

deeds recorded, although some omit the restrictive clauses, and may also be shown by what the grantor told buyers when they purchased, and by surrounding circumstances.

Allen v. Detroit, 167 Mich. 464, 36 L.R.A. (N.S.) 890, 133 N. W. 317.

Injunction is the proper remedy, and will issue without regard to the question of whether the property of the complainant is damaged by the violation of restrictions.

3 Pom. Eq. Jur. §§ 1295, with note, and 1342; 1 *Jones*, Real Estate in Conveyancing, § 823; *Peck v. Conway*, 119 Mass. 546; *Hall v. Wesster*, 7 Mo. App. 56; *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122.

Defendant is violating the exclusive private residence covenant in her deed when she herself admits that she maintains a public transient hotel which she calls a boarding house.

Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 6 L.R.A. 809, 26 Am. St. Rep. 325, 44 N. W. 226; *Skillman v. Smathest*, 57 N. J. Eq. 1, 40 Atl. 855; *Sayles v. Hall*, 210 Mass. 281, 41 L.R.A. (N.S.) 625, 96 N. E. 712, Ann. Cas. 1912D, 475; *Barnett v. Vaughan Inst.* 134 App. Div. 921, 119 N. Y. Supp. 45; *Koch v. Gorrufflo*, 77 N. J. Eq. 172, 140 Am. St. Rep. 552, 75 Atl. 767; *Gannett v. Albree*, 103 Mass. 372; 32 Cyc. 537; 22 Cyc. 1072d.

Barnes, J., delivered the opinion of the court:

This is a suit to enjoin defendant from using a residence lot in Omaha for rooming and boarding purposes in alleged violation of restrictive covenants in her deed. From a decree granting an injunction, she has appealed.

Plaintiffs are not parties to the conveyance through which defendant acquired title, and their right to an injunction is challenged on the ground that the restrictive covenants do not inure to their benefit. The covenants in question are as follows:

"Subject however to . . . the following restrictions and agreements which shall be considered and construed as covenants running with the land for a period of twenty-five years from the 17th day of May. A. D. 1909:

"(1) That for twenty-five years from the above date, said property shall be used for residence purposes exclusively and there shall only be erected thereon one separate private residence with the necessary stables and other outhouses in connection therewith. the residence herein specified not to include any apartment house, flat or connected house of any description.

"(2) That any residence erected on said property shall be fronted on Cuming street

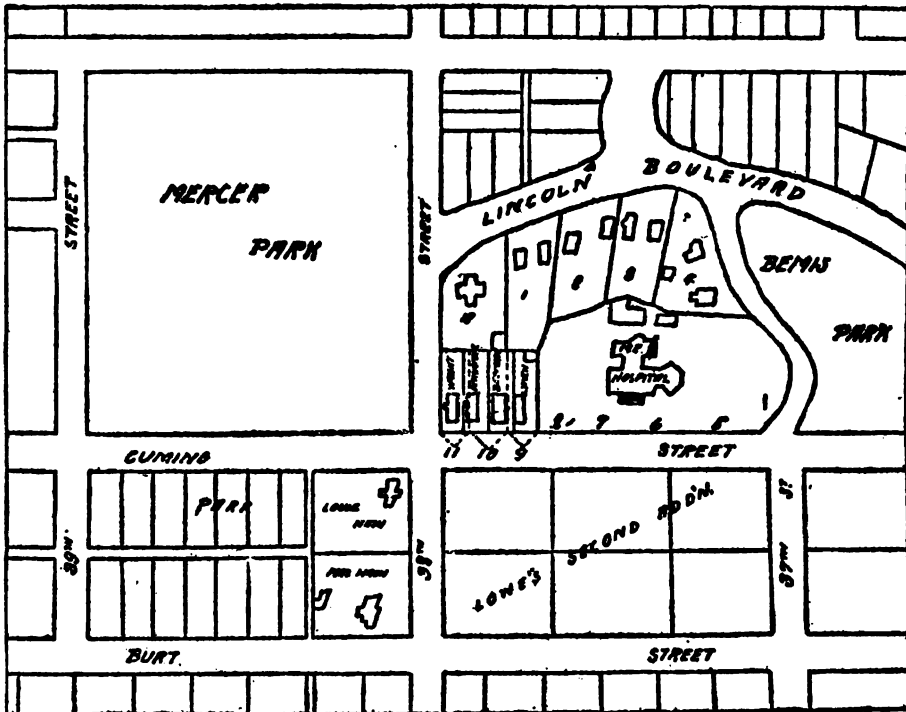
and the front line thereof shall be placed as nearly as practicable in line with the residence now located on west 50 feet of lot 11, block 12, Bemis park.

(3) That any residence erected on said property shall cost not less than \$3,500."

The accompanying map is an aid in understanding the facts:

W. Garloch purchased the other two lots, subject to the restrictions contained in defendant's deed, and, after building a house on each, sold the lot adjoining the Wright property to defendant March 15, 1909, and the other to plaintiff Beeman March 5, 1910.

The covenants in the Smith deed were as



Defendant owns a lot composed of parts of lots 10 and 11 in block 12, Bemis park, an addition to Omaha. Lots 9, 10, and 11 were originally owned jointly by Mrs. E. W. Nash and her son-in-law, L. F. Crofoot, and were afterwards subdivided into four lots. The grounds of the Methodist Hospital, east of these lots, had been purchased at an earlier date from Mr. Nash without restrictions. Diagonally across the intersection of Cumming and Thirty-Eighth streets, Mrs. Nash owned a tract of land having a frontage of 150 feet on Cumming street, where she had resided for many years. Of the four lots mentioned, the one on the east was conveyed to plaintiff Wright on June 27, 1907. The lot adjoining the hospital grounds was conveyed to Frederick L. Smith, December 11, 1906. Subsequently, Mrs. Nash conveyed all of her real estate, for the purpose of management, to the C. B. Nash Company, in which she was the principal stockholder. May 17, 1909, George L.R.A.1917A.

follows: "Subject however to the following covenants which are hereby expressly made to grantors, their heirs, executors, administrators and assigns, by Frederick L. Smith, for and as binding upon himself, his heirs, executors, administrators and assigns, to wit: (1) That said property shall be used for residence purposes only; (2) that any residence erected thereon shall cost not less than twenty-five hundred dollars (\$2,500) and that the front line of same shall stand at least thirty-five (35) feet from the south line of said property; (3) that these covenants shall be considered and construed as covenants running with the land."

The covenants in the Wright deed were as follows:

"Subject to the following restrictions and agreements which shall be considered and construed as covenants running with the land:

"(1) That said property shall be used only for the purpose of erecting thereon one

separate, detached private residence. The term residence as herein used shall not include an apartment house, brick flats, or connected or adjoining houses of any description.

"(2) That said residence shall cost, when completed, not less than \$4,500.

"(3) That said residence, when erected, shall front south on Cuming street, and the front line thereof shall stand at least 30 feet from the south line of said property."

May the restrictive covenants in defendant's deed be enforced at the suit of plaintiffs, who are not parties to that deed? Authorities on this subject are collected in 37 L.R.A.(N.S.) 12, in a note to *Korn v. Campbell*, 192 N. Y. 490, 127 Am. St. Rep. 925, 85 N. E. 687. In general, such a covenant may be enforced by another grantee of the common grantor only when it was made for the benefit of the adjacent land. When similar covenants are inserted in deeds from the common grantor, pursuant to a general plan of improvement or development made public by the grantor, each grantee has such an interest in the restrictive covenants in the other deeds, in view of the general plan under which he purchased, that he may enforce such covenants against other grantees. When a general plan of improvement has not been published by the grantor, one grantee can enforce the covenants against another only when they were intended for the benefit of the adjacent lots. The intention to give such right to enforce the covenants must be expressed in the deeds themselves, or must be evident from the covenants in the deeds when viewed in the light of the surrounding circumstances. *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Sailer v. Podolski*, 82 N. J. Eq. 459, 88 Atl. 967; *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040. Restrictive covenants being in derogation of the land owner's free use of his property, one who claims a right to enforce such covenants has the burden of proving that they were made for his benefit. *McNichol v. Townsend*, 73 N. J. Eq. 276, 67 Atl. 938; *Sharp v. Ropes*, 110 Mass. 381.

It is contended that plaintiffs may maintain this action, and *Roberts v. Scull*, 58 N. J. Eq. 396, 43 Atl. 583, is cited as sustaining this contention: "But this rule, while operative to enable a subsequent purchaser of land to be benefited by a restrictive covenant to enforce it against the prior purchaser, who made it, and against his assigns, with notice of it, does not work inversely to support the claim of a prior purchaser from the original owner to enforce a restriction imposed by the latter upon a lot subsequently conveyed. *De Gray v. Mon-*

mouth Beach Club House Co. supra. . . .

In order to entitle prior purchasers from a common vendor, or those claiming under them, to enforce such covenants, it must be shown that they are parts of a general plan adopted for the development and improvement of the property by laying it out in streets and lots, prescribing a uniform building scheme, regulating size and style of houses, or uses to which the buildings may be put." *Ibid.*

It is also claimed by defendant that plaintiff Beeman, being a subsequent purchaser, is not in a position to enforce the restrictive covenants imposed upon defendant's lot. It should be observed that *Garloch*, in 1909, purchased the two middle lots from the original owner, who imposed the restrictions sought to be imposed in this action. He sold one lot to defendant in 1909, and the other lot to plaintiff Beeman in 1910. The question is: May Beeman enforce the covenant imposed upon *Garloch*, and the two middle lots in the original deed to *Garloch*, by the original owners of the four lots? There are not many cases which bear directly on this subject, but the weight of authority denies Beeman's right to sue. In the note to *Korn v. Campbell*, *supra* (page 22 of 37 L.R.A.(N.S.)), the annotator says: "Ordinarily, where the owner of a tract of land sells part of it subject to restrictions, it is a purchaser of part of the land retained who seeks to enforce the restrictions: but where the land sold burdened with the restriction is afterwards divided up, and passes into the hands of different purchasers, the question has been raised whether such purchasers from the original vendee can enforce, as between themselves, the restrictions imposed upon their grantor's land. The courts are not in harmony on this question, but in this class of cases it would seem that the rights of portions of the servient estate to enforce the restriction would be exceedingly doubtful, since the restriction was imposed for the benefit of a different tract of land; that is, the land retained by the grantor,—the dominant estate."

The only case cited holding that the action can be maintained is *Winfield v. Henning*, 21 N. J. Eq. 188, where it is said: "This view is supported by the dictum of Lord Romilly, in a case heard before him at the Rolls, in 1866, *Western v. Macdermot*, L. R. 1 Eq. Cas. 499. And by a decision of the supreme court of Rhode Island, *Greene v. Creighton*, 7 R. I. 1."

The Rhode Island decision is not authority for the rule.

The supreme court of Massachusetts, however, has held that such an action cannot be maintained. *Jewell v. Lee*, 14 Allen, 145,

92 Am. Dec. 744. In that case, Bigelow, Ch. J., said: "The main ground on which the plaintiff rests his claim to equitable relief is that the condition annexed by the original owner and grantor to his grant of the entire tract of land, of which the plaintiff and defendant now by mesne conveyances severally hold distinct parcels, constitutes a perpetual restriction on the use of the part now owned by the defendant, in the nature of a servitude or easement, on the observance of which the plaintiff, as the owner of the other part of the original parcel, has a right to insist. It is doubtless true that such may be the effect of a condition in a class of cases where it is apparent that the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels and be owned by different individuals, or when the manifest object of a restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed. But, in the absence of any fact or circumstance to show such purpose or object, a condition annexed to a grant can have no effect or operation either at law or in equity beyond that which attaches to it by the rules of the common law. The benefit of the condition would in such cases inure only to the grantor and his heirs or devisees, and the burden of it would rest on the estate to which it was annexed, and on those who held it or any part of it subject to the condition. Indeed, no restriction on the use of land and no condition annexed to its possession and enjoyment can be for the benefit of the grantee or those holding his estate in the granted premises, unless it be as a consideration of some restriction on other land, which may operate as an advantage or convenience in the use and occupation of the granted premises. Inasmuch as a grantee can restrict the use of land of which he is the owner according to his own will and pleasure, it is clear that he can derive no benefit from a restriction or condition as such imposed on its use or enjoyment by any prior grantor."

The grantor in this case did not make public a general plan of improvement of the lots sold. The covenants in the deeds to the lots are not uniform. In the lot first sold, and the one farthest from the Nash residence, there is no express prohibition of flats or apartments as in the other deeds. In the deed to the two middle lots the covenants are limited to a twenty-five year period; after which time business buildings are not prohibited on those two lots. The grantor retained land near the property L.R.A.1917A.

sold. If the latter were devoted to business uses or to the erection of apartment houses or hospitals, it would affect the use and enjoyment of her residence property. The insertion of restrictive covenants in all the deeds, while some evidence of an intent to develop the lots under a general plan, is consistent with a purpose of protecting the property retained by the grantor as a residence. There is nothing in the deeds, outside of the fact that covenants were inserted in all of them, that indicates that they were inserted for the benefit of other grantees. There is no covenant to insert such restrictions in subsequent deeds to the adjoining lots. Defendant is bound by the knowledge imparted to her by the language of the deed, and the surrounding circumstances, and not by the secret intentions of the grantor, or what was orally promised to the other grantees. *Hays v. St. Paul M. E. Church*, 196 Ill. 633, 63 N. E. 1040.

We are of opinion that plaintiffs have not met the burden of proving that the covenants in the deeds from Mrs. Nash were not made exclusively for her benefit, but were made for the benefit of other grantees of adjoining land.

It is insisted that, as to Beeman, he can enforce the covenants under the rule that, where the owner of two lots inserts restrictive covenants in a deed conveying one of the lots, such covenants may be enforced by the grantor or grantee of the remaining lot. That rule is not applicable to the facts in this case. While the deed to defendant from Garloch, the owner of the two middle lots, did contain the restrictive covenants, they were merely the covenants inserted by his grantor.

While the authorities on the questions presented are not entirely in harmony, we feel constrained to follow what seems to be the rule above stated.

We are also of the opinion that plaintiffs have failed to show such a use of defendant's premises as amounts to a violation of the covenant contained in her deed.

The decree of the District Court is therefore reversed, and the action is dismissed.

Morrissey, Ch. J., and Letton and Sedgwick, JJ., dissenting:

Independent of the covenants in the Nash deed, plaintiff Beeman is entitled to the relief sought. Garloch was the owner of two lots. He sold one of them with a restrictive covenant in the deed for the benefit of the lot which he retained. About ten months afterwards he sold the latter lot with a like covenant to plaintiff Beeman. The rule is that where the common grantor of two adjoining lots sells one and retains the other,

and inserts in the deed of the one sold a covenant restricting the manner in which buildings to be erected on the lot sold may be used, or where or how they shall be built, which covenant is plainly for the benefit of the lot which he retains, and he afterwards sells the latter lot, the covenant passes to the purchaser of the same, and he may enforce it against the owner of the other lot. The majority opinion holds that the restriction in Garloch's deed to defendant cannot be enforced by Beeman because that restriction was the same in substance as in Garloch's deed from Nash. No reason is given for this statement, and we apprehend that

no reason can be given for holding that Garloch could not enforce the same restriction on the property deeded by him that was in the deed under which he himself took title. Repeating a quotation in the majority opinion from *Jewell v. Lee*, 14 Allen, 145, 92 Am. Dec. 744, "inasmuch as a grantee can restrict the use of land of which he is the owner, according to his own will and pleasure," the restriction in Garloch's deed to defendant would be enforceable by either Garloch or his subsequent grantee.

Petition for rehearing denied.

Annotation—Who may enforce restrictive covenant or agreement as to use of property.

- I. Introduction, 328.*
- II. Restrictions for benefit of land retained, 329.*
- III. Restrictions for benefit of land conveyed, 329.*
- IV. Restrictions for benefit of whole tract:*
 - a. Where whole tract is sold, 330.*
 - b. Mutual covenants, 330.*
 - c. Building scheme 330.*
- V. Effect of priority of purchase, 332.*
- VI. Restrictive covenants as easements, 333.*

This note is supplementary to the note appended to the case of *Korn v. Campbell*, 37 L.R.A.(N.S.) 12. The earlier note should be consulted as to the limitations of the subject.

As to the right of a grantee to enforce restrictive covenants in prior conveyances by his grantor of other parcels, see note to *Ball v. Milliken*, 37 L.R.A.(N.S.) 623.

See note to *Cotton v. Cresse*, 49 L.R.A.(N.S.) 357, as to effect of unrecorded agreement, not incorporated in a conveyance, restricting use of property, upon successor to title.

As to oral or implied building restrictions as to parcels retained by the grantor, see note to *Sprague v. Kimball*, 45 L.R.A.(N.S.) 962.

I. Introduction.

As stated in the note to *Korn v. Campbell*, 37 L.R.A.(N.S.) 12, whether a person not a party to a restrictive covenant has a right to enforce it depends upon the intention of the parties in imposing it. Where a restrictive covenant clearly appears to have been made for the benefit of a subsequent owner of the prop-

erty, such owner may enforce it. Thus, a purchaser of land may enforce against a purchaser of adjoining land the covenant entered into by their respective grantors for the purpose of establishing and maintaining a building line, wherein the grantors engaged to bind themselves and their land to the observance of the building line, and expressly make it bind the parties and their heirs and assigns. *Wootton v. Seltzer* (1914) 83 N. J. Eq. 163, 90 Atl. 701, affirmed in (1915) 84 N. J. Eq. 207, 93 Atl. 1087. It is stated that when such agreements are expressly made to bind the parties and their heirs and assigns, the equitable right to the enforcement of the agreement by a purchaser from one party, against the purchaser from the other party, with notice of the agreement, necessarily exists. It is unnecessary to regard such covenants as creative of easements; the equitable right to enforce the covenant is transferable as a part of the land to which it is attached, and may be enforced upon the equitable principle of preventing one having knowledge of the just rights of another from defeating such rights. The deed to the defendant in this case was made "subject to . . . such board walk and park easements and building restrictions as appear of record." The agreement in question between the grantors was acknowledged and duly recorded.

But where there is no general plan or scheme, and no language in the deed conveying lots with restrictions from which any intent can be gathered to annex the benefit of the restrictions to another lot, the owner of the other lot is not entitled to enforce the restriction against the former. *Webber v. Landrigan* (1913) 215 Mass. 221, 102 N. E. 460; *McNichol v. Townsend* (1908) 74 N. J. Eq. 618, 70 Atl. 965. The owner of a lot

cannot enforce a building restriction against the owner of another lot which had been sold by a common grantor prior to the sale of complainant's lot, where there is no general building scheme or plan, and nothing to indicate that the restrictive covenant was made in the earlier deed for the benefit of subsequent purchasers of lots owned by the grantor. *Sailer v. Podolski* (1913) 82 N. J. Eq. 459, 88 Atl. 967. In such a case the burden is upon the owner of the lot subsequently sold, who would enforce a restrictive covenant in a lot sold prior thereto, to show that the intention was to clothe him with the right of enforcement of the covenant. The fact that the lots are adjacent to each other does not furnish such showing.

The insertion by the grantor of a restrictive covenant in a subsequent conveyance by him cannot be properly regarded as a circumstance in aid of the intention or purpose of the parties to the prior deed. (N. J.) *Ibid*.

In *Millbourn v. Lyons* (1914) 83 L. J. Ch. N. S. (Eng.) 737, an action to compel the specific performance of a contract for the purchase of real property, an owner of several adjacent tracts of land contracted to sell one of the tracts, and provided that the vendee should covenant with the vendor, his heirs and assigns, as owners and occupiers of the adjacent land, as to the use of the property sold. In the meantime the owner died, and his trustees sold the adjacent property without any mention of the restrictions in the contract of sale. Subsequently the trustees completed the contract of sale, conveying the property in question, and the vendee covenanted with the trustees as to the use of the property, as agreed upon in the contract. The objection of the purchaser was that this covenant restricted him as to the use of the property. In holding to the contrary, *Swinfen Eady* says that "before the conveyance was made pursuant to it [the contract] the whole of the property referred to in this agreement as the adjoining or neighboring property was sold and conveyed away by the vendors, so that at the time . . . [the vendors] executed the conveyance of the property comprised in this agreement, they had no remaining property left in them for the benefit of which they could take the covenant, and consequently when the conveyance is framed, the language of it departs from the language of the agreement. According to the agreement, the conveyance was to contain a covenant with the vendors, their heirs and assigns, L.R.A.1917A.

owners and occupiers as aforesaid, but at the date of the conveyance the vendors were not owners and occupiers as aforesaid,—they had sold and conveyed away all the land in question. Accordingly when you come to the conveyance, the language of it differs from the language in the agreement because the circumstances have changed and the language is adapted to the changed circumstances." The fact that the covenant was made with the trustees was then referred to, and the court continues: "There are no words of limitation and no evidence of any intention to annex the benefit of the covenant to any land whatever."

The restriction involved in *Hobart v. Weston* (1916) 223 Mass. 161, 111 N. E. 779, a sale of land at the ocean side, was that no building or structure could be placed on the land or any part thereof; and there is stated to be nothing in this language which imposes a restriction on this land for the benefit of the subsequent grantee of another tract.

II. Restrictions for benefit of land retained.

See note in 37 L.R.A.(N.S.) 12, for earlier cases.

Purchasers of lots may enforce restrictive building agreements in prior deed of the grantor of lots out of the tracts, where the restrictions were for the benefit of the remaining lots, and the owners of the lots had notice of the restrictions, actual or constructive. *Appel v. Buckbinder* (1913) 82 Misc. 312, 143 N. Y. Supp. 710, reversed without opinion in (1914) 161 App. Div. 910, 145 N. Y. Supp. 1112.

The fact that the heirs of the grantor (one of whom was the purchaser of the first lots), in partitioning the land and for the purpose of straightening the lot lines, conveyed all the lots, including those sold to the heirs, to a third party, without any mention of the restrictive covenant in the deeds to the lots thus sold, and had the same reconveyed, does not extinguish the restrictive covenant, where it was not the intention of the heirs to extinguish such restrictions. (N. Y.) *Ibid*.

See *Webber v. Landrigan* (1913) 215 Mass. 221, 102 N. E. 460, supra.

III. Restrictions for benefit of land conveyed.

See note in 37 L.R.A.(N.S.) 12, for earlier cases.

The owner, through mesne conveyances, of property which had been sold, and a covenant given by the grantor, re-

stricting himself as to property retained by him to a certain building line, was held to have the right to have the agreed building line retained, in an action by the owner of the servient tenement to determine an adverse claim under a Code provision. *Porter v. Denny* (1915) 170 App. Div. 546, 156 N. Y. Supp. 1016.

A restrictive covenant by a grantor not to convey any remaining lots except by a deed containing certain restrictions, contained in a deed of a lot, and as part of the consideration, was held enforceable by the grantee against a purchaser of one of the remaining lots, with notice, in *Howland v. Andrus* (1912) 80 N. J. Eq. 276, 83 Atl. 982. But upon appeal ([1912] 81 N. J. Eq. 175, 86 Atl. 391), the covenant in complainant's deed was held not so clearly violated by the erection of the defendant's residence as to entitle the complainant to an injunction.

IV. Restrictions for benefit of whole tract.

a. Where whole tract is sold.

See note in 37 L.R.A.(N.S.) 12, for discussion of this question.

b. Mutual covenants.

See note in 37 L.R.A.(N.S.) 12, for earlier cases.

A tenant for years of a city block may enforce a building restriction by which the owners of the lots in the block in question agreed not to erect any building nearer than a stated distance from the lot line. It is immaterial whether or not the covenant be one which may be said to run with the land. *Johnson v. Robertson* (1912) 156 Iowa, 64, 135 N. W. 585, Ann. Cas. 1915B, 137.

An owner of land by mesne conveyances from a common grantor may enforce against another owner by mesne conveyances from the common grantor a restrictive covenant binding upon the grantee, his heirs and assigns, of which the defendant not only had constructive notice in her deed and also in the record of her title, but personal notice, although plaintiff may not be damaged by its violation. *Iselin v. Flynn* (1915) 90 Misc. 164, 154 N. Y. Supp. 133. See *Wootten v. Seltzer*, supra I.

c. Building scheme.

See note in 37 L.R.A.(N.S.) 12, for earlier cases.

The restrictive covenants most frequently sought to be enforced are those inserted in deeds conveying lots in a

tract which is being developed according to a general plan or building scheme. The rules applicable to the enforcement of restrictive covenants under such a situation are stated in *Hooper v. Lottman* (1914) — Tex. Civ. App. —, 171 S. W. 270, as follows: Where there is a general plan or scheme adopted by the owner of a tract, for the development and improvement of the property, by which it is divided into streets and lots, and which contemplates a restriction as to the uses to which lots may be put, or the character and location of improvements thereon, to be secured by a covenant embodying the restriction to be inserted in the deeds to purchasers, and it appears from the language of the deed itself, construed in the light of the surrounding circumstances, that such covenants are intended for the benefit of all the lands, and that each purchaser is to be subject thereto, and to have the benefit thereof, and such covenants are inserted in all the deeds for lots sold in pursuance of the plan, a purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with actual or constructive knowledge of the scheme, and the covenant was part of the subject-matter of his purchase." See discussion in earlier note also.

Accordingly, where there is such a general plan or scheme of improvement, the owner of a lot may enforce such a covenant against an immediate purchaser of another lot whose deed contains the covenant (*McNeil v. Gary* (1913) 40 App. D. C. 397, 46 L.R.A.(N.S.) 1113; *Henderson v. Champion* (1914) 83 N. J. Eq. 554, 91 Atl. 332), or against a subsequent purchaser (*Oliver v. Kaliek* (1916) 223 Mass. 252, 111 N. E. 879; *Velie v. Richardson* (1914) 126 Minn. 334, 148 N. W. 286; *Thompson v. Diller* (1914) 161 App. Div. 98, 146 N. Y. Supp. 438).

A purchaser of a lot out of a tract of land which had been platted by its owners for the purpose of sale was held entitled to recover damages from a purchaser of another lot, for violation of a building restriction contained in all deeds made by the owner of lots in this tract, including the deeds of the plaintiff and defendant. *Alderson v. Cutting* (1912) 163 Cal. 503, 126 Pac. 157, Ann. Cas. 1914A, 1.

This is true whether the owner attempting to enforce the restrictions is an immediate purchaser from the original grantor (*McNeil v. Gary* (D. C.) and *Henderson v. Champion* (N. J.) supra),

or an owner through mesne conveyances (*McNeil v. Gary* (D. C.); *Thompson v. Diller* (N. Y.); and *Oliver v. Kalick* (Mass.), — *supra*).

A restrictive covenant may be enforced by a purchaser of a lot in a tract which is being developed according to a general building scheme, against a subsequent purchaser of a lot, with notice, although his deed did not contain the restrictive covenant. *Wiegman v. Kusel* (1915) 270 Ill. 520, 110 N. E. 884 (the restrictive covenant was in first deed in his chain of title, and his abstract showed this); *Chapin v. Dougherty* (Ill.) *infra*; *Duester v. Alvin* (1915) 74 Or. 544, 145 Pac. 660 (restriction was in first deed in defendant's chain of title, but was inadvertently omitted in the deed to him).

The owner of a lot by mesne conveyances from a grantee who purchased a lot under a restrictive covenant that no buildings other than dwelling houses and the usual structures appertinent thereto should be erected on the premises, and fixing the distance from the street for the erection of buildings, was held, in *Hartt v. Rueter* (1916) 223 Mass. 207, 111 N. E. 1045, entitled to enforce the restrictions against the owner of another lot by mesne conveyances from a subsequent grantee of the common grantor, whose deed contained the same restrictions as those in the deed to the former grantee, where the restrictions were imposed and intended as a part of a general scheme or plan of improvement and development. Such restrictions are in the nature of equitable restrictions running with the land. The fact that several of the lots did not have similar restrictions is not material, where the absence of such restrictions does not materially affect the general plan. The action in this case was a petition to register and confirm title.

The fact that deeds under which the party who is seeking to enforce the restrictions claims title do not specifically refer to the restrictions does not indicate that they are merely personal covenants. (Mass.) *Ibid*.

The owner of a lot in a subdivision where uniform restrictions are imposed according to a general plan of allotment upon all the lots therein, the owner covenanting in the deed of conveyance of each separate lot that all sales or leases of other lots in that tract, similarly located, shall be subject to such restriction, may maintain an action to enjoin the owner of another lot through mesne conveyances from using the same for purposes other than the uses to which L.R.A.1917A.

the lots are restricted, although it is intended to devote the land to road and street purposes. *Wallace v. Clifton Land Co.* (1915) 92 Ohio St. 349, 110 N. E. 940.

The purchaser of a lot has been held entitled to enforce a restriction as to the building line, and limiting buildings to houses for dwelling purposes, against land which had been sold prior to the platting of the tract, where the owner of such land had subsequently covenanted with the owner of the tract to abide by the building restrictions. *Hartz v. Kales Realty Co.* (1914) 178 Mich. 560, 146 N. W. 160. The fact that the grantee did not sign the deed does not prevent the enforcement of the restrictive covenant. It is stated that the part of the tract which had been sold prior to the platting thereof was brought within the zone of the building restrictions by the agreement, which was made for the benefit of the property owners in the tract, who might therefore enforce it.

Where land is platted and a general building scheme established, a purchaser of a lot therein is entitled to enforce a restriction as to a building line against a subsequent purchaser, although, at the time the plaintiff's predecessor in title obtained his deed from the common grantor, the grantor did not own the land conveyed to the defendant's predecessor in title, but included it in the building scheme, and, upon obtaining title, conveyed it by deeds containing the restrictions and reference to the general map. *Schmidt v. Palisade Supply Co.* (1912) — N. J. Eq. —, 84 Atl. 807. It is stated that if an owner of land "projects a building scheme, and includes in his project land to which he has not yet acquired title, and his scheme clearly defines the land, including the land which he does not yet own, I think it proper to hold that when he acquires the land to which he did not have the title originally, and conveys it with restrictions, the purchasers of such subsequently acquired land will be answerable to the purchasers of the other land (that originally owned by the common grantor), provided there was a general building scheme of which they had notice, and the restrictions upon them are clearly defined."

A purchaser of a lot out of the tract which is being developed under a building scheme may complain of the violation of the restriction by a railroad company which has taken certain of the lots for its right of way. *Diamond v. New York, W. & B. R. Co.* (1913) 170 App. Div. 736, 156 N. Y. Supp. 506; *Flynn v.*

New York, W. & B. R. Co. (1916) 218 N. Y. 140, 112 N. E. 913.

After the plan has once been established and rights acquired by purchasers of lots, the original owner cannot change the restriction so as to affect the rights of the purchasers. *Duester v. Alvin* (1915) (Or.) supra; This is true although the method adopted is a reconveyance to the original owner, who thereupon reconveys by a deed without any restriction. The rights of the parties cannot thus be changed. The original owner, when he repurchases the lots, is in the same position as any other purchaser in the chain of title. *Wiegman v. Kusel* (Ill.) supra.

The original owner of the entire tract attempted to release the restrictive covenants, in *Hartt v. Rueter* (Mass.) supra, but nothing is said of this in the opinion. The attempt is treated as being ineffective.

In *Duester v. Alvin* (Or.) supra, it is held unnecessary to consider the nature of a covenant that any violation of the restrictive covenants or either of them should work a forfeiture of the estate of the grantee, his heirs or assigns, in and to the premises, in view of the fact that the defendant in this case had notice of the restrictive covenants.

A general plan is not shown such as entitled a purchaser of the lot to enforce a restrictive covenant against others, where part of the lots in the tract were conveyed without restriction, and those conveyed by a deed containing a restriction have no uniformity of location such as would evidence an intention to limit the application of the claimed improvements to any particular portion of the tract, and it further appears that the original owners of the tract on two occasions, by a deed, extinguished the restrictive covenant in the title to lots theretofore conveyed. *Davidson v. Dunham* (1913) 159 App. Div. 207, 144 N. Y. Supp. 489. In an action apparently between the same parties, relief was refused on the ground that there was no mutuality of covenants (1915) 152 N. Y. Supp. 16.

Nor is a building scheme made out where the owner of six lots conveyed three of them by restrictive covenants that all buildings thereafter erected on the premises should be set back from the street on a line with buildings already erected thereon; two others by fixing the building line at least 10 feet from the street, except that any circular front on a building might extend 2 ft. 6 in. in front of this line; and the last lot without any restrictions. Nor L.R.A.1917A.

is this changed by the fact that the last lot conveyed to the confidential business adviser of the grantor, who conveyed it a year later by a deed containing a restriction similar to that contained in the first three. Nor does the fact that it was expected that the restrictions would benefit the premises which were subject to them, and be a common advantage to all of the lots, establish a general scheme or plan. *Webber v. Landrigan* (1913) 215 Mass. 221, 102 N. E. 460.

The purchaser, who was attempting to enforce the restrictive covenant in *Davidson v. Dunham* (N. Y.) supra, was the owner of three lots, one of which had been conveyed by the original proprietors by a deed containing no restrictive covenant, but after the conveyance to the defendant, the grantee in the plaintiff's chain of title reconveyed to the original proprietors, and received a second deed, containing a restrictive covenant. It is stated that the original proprietors having parted with the defendant's title, no subsequent act of theirs could increase or diminish defendant's rights in connection therewith, so that the complainant had no right to relief as to this lot; the other lots of which the complainant was the owner were held through a purchaser of these and other lots, the deed to the other lots having no restrictive covenant. It is stated that the complainant had no better standing with reference to this title than his grantor; that by holding part of the lots in the tract without restrictive covenant, he could not assert a restrictive covenant against another purchaser.

The fact that the restrictions are not exactly the same in all of the deeds does not tend to show that the restrictions as to building was not intended to apply alike to all. *Allen v. Barrett* (1912) 213 Mass. 36, 99 N. E. 575, Ann. Cas. 1913E, 820; *Hartt v. Rueter* (1916) 223 Mass. 207, 111 N. E. 1045; *Velie v. Richardson* (1914) 126 Minn. 334, 148 N. W. 286. The deed of the defendant contained a restriction. But see *Webber v. Landrigan* (Mass.) supra.

Nor does the fact that two of the lots were sold without written restrictions prove that no general plan was intended. *Velie v. Richardson* (Minn.) supra.

V. Effect of priority of purchase.

See note in 37 L.R.A.(N.S.) 12, for discussion of this phase of the question.

VI. Restrictive covenants as easements.

See note in 37 L.R.A.(N.S.) 12, for earlier cases.

It is the theory of some cases that the purchaser of a lot in a tract, subject to conditions which are adopted by the owners of the tract as part of a general plan or scheme whereby the property is to be devoted exclusively to residence purposes certain restrictions being placed thereon, who has been induced to pay a higher price for his lot because of the restrictions, has a right, in the nature of an easement or servitude, which he may enforce against a subsequent grantee with notice of the condition, although no restrictions were contained in such grantee's deed.

Chapin v. Dougherty (1911) 165 Ill. App. 426.

The grantee of a lot sold and conveyed to him with certain building restrictions in his deed, which were imposed as part of a general plan for the benefit of the several lots in a tract, may enforce the restrictions against a grantee of another of the lots, although there is no direct contractual relations between the two grantees. *Allen v. Barrett (Mass.) supra.*

Each grantee, under such circumstances, has a right in the nature of an easement, which will be enforced in equity against the grantee in another of the lots. *(Mass.) Ibid.* See *Hartt v. Rueter (Mass.) supra.* W. A. E.

MINNESOTA SUPREME COURT.

ELIZABETH T. GODLEY, Resp't.,
v.

I. WEISMAN, Appt.

(— Minn. —, 157 N. W. 711.)

Covenant — adoption by deed.

1. A deed to "lot 11" and other lots, contained a covenant that the deed was subject to building restrictions contained in a prior deed which conveyed only lot 11. This adopted the building restrictions in the former deed, and applied them to all lots conveyed by the later deed so far as the restrictions could be made applicable thereto.

For other cases, see Covenants and Conditions, II. d, in Dig. 1-52 N. S.

Same — building plan — scope.

2. Where the owner of a lot subject to no building restrictions conveys it, and in the deed inserts restrictive covenants, these covenants cannot, in the absence of some general building plan, be regarded as inuring to the benefit of lots previously conveyed by him, and prior grantees cannot enforce such restrictions. Where, however, a number of lots in the same locality, and some contiguous to others, were conveyed by a single deed containing building restrictions applicable to all, and the grantees conveyed one tract to plaintiff and later a contiguous tract to defendant, and in each deed incorporated the building restrictions under which he held his title, these transactions evince a purpose to adopt a general building plan. An owner need not have a multitude of lots in order to have a build-

ing plan. He may have such plan for two lots as well as for more.

For other cases, see Covenants and Conditions, III. c, in Dig. 1-52 N. S.

Same — who may enforce.

3. Where there is a general building plan with restrictions, the restrictions are for the benefit of all of the land subject thereto, and each grantee of any part of the land may enforce the restrictions against his neighbor.

For other cases, see Covenants and Conditions, III. c, 1, in Dig. 1-52 N. S.

Same — violation — estoppel.

4. Plaintiff has not forfeited her right to enforce a restriction against the building of duplex houses, by the fact that a one-story sun room or porch of her house extends beyond the building line, the main portion of her house being within the line. *For other cases, see Covenants and Conditions, III. a, in Dig. 1-52 N. S.*

(May 5, 1916.)

APPEAL by defendant from an order of the District Court for Hennepin County denying a motion for a new trial in an action brought to enjoin defendant from building a duplex house on his property in alleged violation of building restrictions. Affirmed.

The facts are stated in the opinion.

Messrs. Cohen, Atwater, & Shaw for appellant.

Messrs. Roberts & Strong, for respondent:

The Hopwood deed imposed building restrictions upon all the property described therein.

Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632; *Allen v. Detroit*, 167 Mich. 464, 36 L.R.A.(N.S.) 890, 133 N. W. 317; *Erichsen v. Tapert*, 172 Mich. 457, 138 N. W. 330; *Allen v. Barrett*, 213 Mass. 36, 99

Headnotes by HALLAM, J.

Note.—The question, who may enforce restrictive covenant or agreement as to use of property, is discussed in the annotation following *Wright v. Pfrimmer*, ante, 328, and see other annotations there referred to L.R.A.1917A.

N. E. 575, Ann. Cas. 1913E, 820; Sprague v. Kimball, 213 Mass. 380, 45 L.R.A.(N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431; 1 Joyce, Inj. §§ 480, 481; Hopkins v. Smith, 162 Mass. 444, 38 N. E. 1122.

Plaintiff is not barred from demanding that there be a substantial compliance with the important features of the building restriction imposed upon her and upon her neighbor when he begins to erect his improvement.

Bacon v. Sanberg, 179 Mass. 396, 60 N. E. 936; McGuire v. Caskey, 62 Ohio St. 419, 57 N. E. 53; Rowland v. Miller, 139 N. Y. 93, 22 L.R.A. 182, 34 N. E. 765; Alderson v. Cutting, 163 Cal. 506, 126 Pac. 157, Ann. Cas. 1914A, 1; Tripp v. O'Brien, 57 Ill. App. 407; Seawright v. Blount, 139 Ga. 323, 77 S. E. 152; Schadt v. Brill, 173 Mich. 647, 45 L.R.A.(N.S.) 726, 139 N. W. 878; Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808; Stewart v. Finkelstone, 206 Mass. 28, 28 L.R.A.(N.S.) 634, 138 Am. St. Rep. 370, 92 N. E. 37; Newbery v. Barkalow, 75 N. J. Eq. 128, 71 Atl. 752; Brown v. Huber, 80 Ohio St. 183, 28 L.R.A.(N.S.) 705, 88 N. E. 322.

The restriction imposed upon one lot is for the benefit not only of the grantor, but also for the benefit of his grantee, and is a covenant for the benefit of the land, and not of the individual.

Ball v. Milliken, 31 R. I. 36, 37 L.R.A.(N.S.) 623, 76 Atl. 789, Ann. Cas. 1912B, 30; Korn v. Campbell, 192 N. Y. 490, 37 L.R.A.(N.S.) 1, 127 Am. St. Rep. 925, 85 N. E. 687; Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104.

Hallam, J., delivered the opinion of the court:

The easterly half of block 4 of Lake of the Isles addition to Minneapolis is divided into 11 lots 100 feet in width, numbered consecutively from 1 to 11.

On May 17, 1912, William McK. Barbour executed a deed conveying lot 11 in block 4 to Charles G. Gates. This conveyance was made—

"subject to the following building restrictions, which shall run with the land and be binding upon the grantee herein, and his heirs and assigns, viz.:

"No. 1. That said premises, when improved, shall be improved by the erection of either one or two buildings, and if garages are desired, by the erection of either one or two garages in the rear of said dwellings.

"No. 2. The front foundation of said dwelling or dwellings, exclusive of porch, shall be placed forty (40) feet and six (6) L.R.A.1917A.

inches back from the front line of said lot eleven (11), and that said dwelling or dwellings shall face Lake place, but permit of an entrance on West Twenty-fifth street, and shall not be what is known as a duplex or flat building or store, or be arranged for more than one family for each dwelling.

"No. 3. That whatever dwelling is erected on said premises shall cost, exclusive of lot and garage, not less than five thousand (\$5,000) dollars."

On November 18, 1914, Gates having died, his devisees executed a deed without warranty, conveying to Frank P. Hopwood lot 11, part of lot 10, lot 5, and the southerly portion of lot 4, in block 4, and lots 7, 8, and 9 in block 14. This conveyance was made subject to "the building restrictions and limitations" contained in the deed from Barbour to Gates.

On December 21, 1914, Hopwood executed a deed conveying the northerly half of lot 5 in block 4 to plaintiff, subject to "the building restrictions" contained in the deed from the Gates devisees to himself, "with reference to above-described property."

On August 14, 1915, Hopwood executed a deed conveying the southerly portion of lot 4 in block 4 to defendant, and inserted therein a provision that the conveyance was made "subject to the building restrictions and limitations" contained in the deed from Barbour to Gates. This tract is contiguous to that conveyed to plaintiff.

Plaintiff has erected a dwelling house upon her property, at an expense of nearly \$10,000, in which she resides with her family. Defendant is about to erect a duplex or "two-family" residence, upon his property. Plaintiff brought this action to enjoin defendant from building a duplex, and the trial court granted a permanent injunction forbidding its erection. Defendant moved for a new trial, and appealed from an order denying his motion.

Whether plaintiff is entitled to an injunction depends upon the force and effect to be given to the above four deeds. Plaintiff's claim rests upon the contention that, by virtue of the provisions inserted in the above deeds, she has acquired the right to compel defendant to comply with the building restrictions contained in the deed from Barbour to Gates. In order to sustain her contention, plaintiff, not being in privity with defendant, must establish that these restrictions were imposed upon the property owned by defendant, and were imposed thereon for the benefit of the property owned by herself. McNichol v. Townsend, 73 N. J. Eq. 276, 67 Atl. 938; Hays v. St.

Paul M. E. Church, 196 Ill. 633, 63 N. E. 1040.

1. Defendant contends that the deed from Gates to Hopwood, by incorporating the building restrictions contained in the Barbour deed, imposed those restrictions only upon lot 11; the lot conveyed by the Barbour deed. The language of the Gates deed is not free from doubt, but we are of the opinion that by inserting in it the provisions above quoted the parties intended to adopt the restrictive covenants contained in the Barbour deed, and to extend them to all lots conveyed. This seems to us the reasonable construction of the language. True, some of the restrictions in the earlier deed could not apply to all lots in the later deed, such, for example, as that requiring an entrance on Twenty-fifth street, but most of the restrictions could apply to all lots conveyed by the later deed, and this is true of the particular restriction which is here involved. If the language used in the later deed is to be limited in its application to lot 11, it serves no useful purpose at all, since lot 11 was already subject to these building restrictions in the hands of Gates and his heirs and assigns, and inasmuch as the later deed was without covenants of warranty, no exceptions of encumbrances in it were required. We hold that the deed from Gates's devisees to Hopwood adopted and applied to all lots thereby conveyed, the building restrictions contained in the Barbour deed, so far as the same could be made applicable. We are also of the opinion that the language above quoted from the deeds to plaintiff and to defendant was intended to carry the same restrictions forward into those deeds. If the language of these deeds did not have this meaning, then, admittedly, it had no meaning at all.

2. It may be conceded that where the owner of a lot subject to no building restrictions conveys it, and in the deed inserts restrictive covenants, those covenants cannot, in the absence of some general building scheme or plan, be regarded as inuring to the benefit of contiguous property previously conveyed by him, and prior grantees cannot enforce such covenants. *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Mulligan v. Jordan*, 50 N. J. Eq. 363, 24 Atl. 543; *Summers v. Beeler*, 90 Md. 474, 48 L.R.A. 54, 78 Am. St. Rep. 446, 45 Atl. 19; *Doerr v. Cobbs*, 146 Mo. App. 342, 123 S. W. 547. But this is not such a case. We have here this case: The owner of a number of lots in the same locality, some of which are contiguous to each other, and all of which are subject to the same building restrictions created by L.R.A.1917A.

the same deed, sold one tract to plaintiff, and later a contiguous tract to defendant, and in each deed incorporated the building restrictions under which he held his title. Both of these tracts are still subject to the restrictions contained in the original deed of the whole. The facts of this case disclose a purpose to adopt a general building plan applicable to all lots embraced in the deed from Gates's devisees to Hopwood. An owner need not have a multitude of lots in order to have a building plan. He may have such a plan for two lots as well as for two hundred. *Clark v. Martin*, 49 Pa. 289. A building restriction in the original deed of the whole, which is also put in all subsequent deeds to purchasers of individual lots, is sufficient evidence of a general plan for the improvement and benefit of all of the land. *Tobey v. Moore*, 130 Mass. 448, 451. See also *St. Andrews Lutheran Church's Appeal*, 67 Pa. 512.

3. Where there is a general building plan applicable to a number of adjacent or contiguous lots, and lots are conveyed according to such plan, the grantee of any part of the land subject thereto has the right to enforce the restrictions against his neighbor. *Velie v. Richardson*, 126 Minn. 334, 148 N. W. 286; *Clark v. McGee*, 159 Ill. 518, 524, 42 N. E. 965; *Sharp v. Ropes*, 110 Mass. 381, 385; *Francis v. Ziering*, 128 App. Div. 253, 112 N. Y. Supp. 647.

That Hopwood could shake off these building restrictions by conveying the land seems impossible doctrine. See *Sprague v. Kimball*, 213 Mass. 380, 45 L.R.A.(N.S.) 962, 100 N. E. 622, Ann. Cas. 1914A, 431. Equally clear is it that both grantees, the first as well as the last, can enforce the restrictions. These restrictions would be of little avail if they could not. Plaintiff is not a party to the covenant in defendant's deed, but the original restrictive covenants in the deed from Gates to Hopwood were for the benefit of all of the land conveyed by that deed, and plaintiff's lot was one of the lots so conveyed. Similar covenants in the later deeds of the separate parcels to plaintiff and defendant likewise inured to the benefit of all land subject to the original restriction.

4. We think that plaintiff has not forfeited her right to restrain the building of a duplex upon defendant's lot by the fact that she projected a one-story sun room or porch upon her house beyond the building line. The main portion of the house is within the line. *Bacon v. Sandberg*, 179 Mass. 396, 60 N. E. 936; *Schadt v. Brill*, 173 Mich. 647, 652, 45 L.R.A.(N.S.) 726, 139 N. W. 878.

Order affirmed.

**UNITED STATES CIRCUIT COURT
OF APPEALS, SIXTH CIRCUIT.**

**NATIONAL SURETY COMPANY, Im-
pleaded, etc., Plff. in Err.,**

v.

**UNITED STATES OF AMERICA FOR
USE OF PITTSBURGH & BUFFALO
COMPANY et al.**

and

**PLUTO POWDER COMPANY et al., Inter-
vening Complainants.**

(143 C. C. A. 99, 228 Fed. 577.)

**Action — to enforce contractor's bond
— form.**

1. An action at law may be brought upon a bond given under the Act of Congress of 1894 as amended in 1905, by a contractor for public work to pay for labor and materials.

For other cases, see Action or Suit, II. a, in Dig. 1-52 N. S.

**Bond — contractors — providing for
board of employees.**

2. A claim for provisions furnished the contractor to feed his employees as part of their pay is not covered by a bond given under the Federal statute requiring it to protect persons who furnish labor or materials used in the construction or repair of the work.

For other cases, see Bonds, II. a, in Dig. 1-52 N. S.

**Same — machinery — permanent equip-
ment.**

3. Machinery and appliances furnished a contractor for the prosecution of his work, which become a part of his permanent outfit, are not within the protection of a bond given under the Federal statute requiring it to protect persons who furnish labor and material used in the construction or repair of the work, although the machinery is worn out before the completion of the job so that it cannot be used elsewhere.

For other cases, see Bonds, II. a, in Dig. 1-52 N. S.

Same — materials used up in work.

4. Blasting powder, drills, and lumber used up in scaffolds and forms for concrete constructions, are within the protection of a bond given under the Federal statute requiring it to protect persons who furnish

labor or materials used in the construction or repair of the work.

For other cases, see Bonds, II. a, in Dig. 1-52 N. S.

**Same — material for repairing ma-
chinery.**

5. Material for the repair and equipment of the machinery used by a contractor in the performance of his work, including tools, waste, packing for boats, and overalls for divers, electric light wire and bulbs, and paint, is not within the protection of a bond given under the Federal statute requiring it to protect persons who furnish labor and material used in the construction or repair of the work.

For other cases, see Bonds, II. a, in Dig. 1-52 N. S.

Same — soap and towels.

6. Soap, towels, stovepipe, rat traps, and other material for outfitting a boarding house for employees, are not within the protection of a bond given under the Federal statute requiring it to protect persons who furnish labor and material used in the construction or repair of the work.

For other cases, see Bonds, II. a, in Dig. 1-52 N. S.

**Appeal — different claims united in one
judgment — partial reversal.**

7. Where several different claims are united in one suit at law on a contractor's bond, and one judgment is entered, the reviewing court may regard them as separate judgments, and affirm some and reverse others.

For other cases, see Appeal and Error, VIII. b, in Dig. 1-52 N. S.

(January 14, 1916.)

ERROR to the District Court of the United States for the Western District of Michigan, Southern Division, Clarence W. Sessions, Judge, in favor of plaintiff and intervening claimants in a suit to recover an unpaid balance due for coal furnished by the plaintiff company to the contractor company for its use in dredging the channel of a river. Affirmed in part.

Argued before Knappen and Denison, Circuit Judges, and McCall, District Judge.

Statement by Denison, Circuit Judge:

The Standard Contracting Company received an award from the United States for deepening the channel in a portion of St. Mary's river, and entered into a contract to do the work pursuant to the award. It gave to the United States the bond required by the Act of August 13, 1894, as amended February 24, 1905, with the National Surety Company as surety, and in the sum of \$25,000. Before completing the work, the contractor failed, and the job was finished by its receiver. In the court below, sitting as a court of law, suit was commenced by summons by the Pittsburgh & Buffalo Com-

Note. — The nature of labor or materials which support an action upon a contractor's bond is discussed in the notes to Standard Boiler Works v. National Surety Co. 43 L.R.A.(N.S.) 162, and United States Rubber Co. v. Washington Engineering Co. L.R.A.1915F, 951.

For analogous questions of mechanics' liens, see Index to L.R.A. Notes, under the title, "Mechanics' Liens," §§ 10-13; and see especially notes in 38 L.R.A.(N.S.) 866; 51 L.R.A.(N.S.) 1040, and L.R.A.1915E, 986, on mechanics' lien for materials wholly or partially consumed in process of work, but not becoming a part of the structure. L.R.A.1917A.

pany, as plaintiff, but in the name of the United States, against the contractor and the surety, as defendants. The suit was based upon the bond, and was to recover an unpaid balance of \$4,200 owing for coal furnished by the Pittsburgh & Buffalo Company to the contractor company for its necessary use in the dredging and other work required by the contract. Subsequently there were ten intervening claims: By Hanna & Company for coal, \$4,200; by the Pluto Powder Company for dynamite and electric exploders, \$6,180; by the Pattison Supply Company for iron, machinery, hardware, and general supplies, \$3,500; by George Kemp for coal, \$3,000; by the Soo Hardware Company for supplies for dredges, tugs, and drill boat, which supplies consisted of oil, paint, nails, rope, valves, round iron, etc., \$500; by the George Worthington Company for hardware and supplies, \$1,900, which hardware and supplies consisted of nuts, bolts, valves, packing, files, iron pipe, square iron, etc.; by the Upton-Walton Company for cordage, tackle, ship supplies, and ship chandlery articles, \$900; by the Cleveland Steel Casting Company for miscellaneous castings as ordered, \$200; by J. P. Brogan for groceries and supplies for the company boarding house, \$4,600; by David Helman for oak timbers, \$600. The surety appeared and pleaded to the merits to the original claim and separately upon each intervention. The summons was served by publication against the contractor, but the record does not show either its appearance or its default for not appearing. Such omission in the record is not relied upon by any party, and so will not be further noticed.

A jury was waived, and the court made findings of fact to the effect that there were unpaid claims as above recited, and findings of law to the effect that supplies consumed or used up by the contractor in the progress of the work were within the security contemplated by the bond, but that materials which became a part of the permanent equipment of the contractor and survived the completion of the work were not secured. Under this classification, the claims of plaintiff and eight interveners were allowed, in amounts aggregating about \$28,000; and since the penalty of the bond was only 90 per cent of the liability, each claimant was given a judgment for 90 per cent of his allowed claim. This judgment took the form of a single entry, giving the name of each successful claimant, and reciting the 90 per cent allowed to him, forming a total of \$25,000, and adjudging that the United States, for the use and benefit of the claimants whose claims had been allowed recover from the contractor and surety company \$25,000 for its damages, and also recover the costs of each intervener. To review this judgment, the surety company brought this writ of error, alleging as errors that a court of law had no jurisdiction, because the statutory proceeding could be only in equity, and that the conclusion of law as to the liability to each successful claimant was erroneous. The sufficiency of the assignments will be further mentioned.

Messrs. Tolles, Hogsett, Ginn & Morley, for plaintiff in error:

One who advances money to pay labor acquires no lien.

47 Cyc. 44; Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. 765; Hamilton v. Stillwaught, 11 Ohio C. C. 182; Evans v. Lower, 67 N. J. Eq. 232, 58 Atl. 294; Gaylord v. Loughridge, 50 Tex. 573; Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360; Uvalde Asphalt Paving Co. v. New York, 191 N. Y. 244, 84 N. E. 83; McCormick v. Los Angeles City Water Co. 40 Cal. 185.

One who furnishes board to laborers does not acquire a lien.

Perrault v. Shaw, 69 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724.

One who furnishes board does not supply labor or materials within the meaning of the Act of February 24, 1905.

Sears v. Mahoney, 66 Fed. 860; United States use of Sica v. Kimpland, 93 Fed. 403; Giant Powder Co. v. Oregon P. R. Co. 8 L.R.A. 700, 14 Sawy. 560, 42 Fed. 470; Carson & Co. v. Shelton, 128 Ky. 248, 15 L.R.A.(N.S.) 509, 107 S. W. 793; Ferguson v. Despo, 8 Ind. App. 523, 34 N. E. 575; Luttrell v. Knoxville, L. F. & J. R. Co. 119 Tenn. 492, 123 Am. St. Rep. 737, 105 S. W. 565; Dudley v. Toledo, A. A. & N. M. R. Co. 65 Mich. 655, 32 N. W. 884; Pennsylvania Co. v. Mehaffey, 75 Ohio St. 432, 116 Am. St. Rep. 746, 80 N. E. 177, 9 Ann. Cas. 305.

Coal and powder are to be classed as materials only in so far as they take the place of implements actually consumed in the performance of the work.

Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; City Trust, S. D. & Surety Co. v. United States, 77 C. C. A. 397, 147 Fed. 155.

Claims for wages may be legally assigned, and when so assigned the assignee can assert these claims against the surety on a bond given pursuant to the Act of February 24, 1905.

United States use of Fidelity Nat. Bank v. Rundle, 40 C. C. A. 450, 100 Fed. 400; United States Fidelity & G. Co. v. United States, 231 U. S. 238, 58 L. ed. 201, 34

Sup. Ct. Rep. 88, 111 C. C. A. 71, 189 Fed. 339.

It was error to allow claims for tools or other materials or equipment which became a part of the permanent plant of the contractor.

United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 474; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717; City Trust, S. D. & Surety Co. v. United States, 77 C. C. A. 397, 147 Fed. 155; Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A. (N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; Giant Powder Co. v. Oregon P. R. Co. 8 L.R.A. 700, 14 Sawy. 560, 42 Fed. 470.

Mr. J. M. Garfield also for plaintiff in error.

Messrs. E. S. B. Sutton and John A. Chene. for defendant in error and intervening claimants:

One-furnishing coal and powder consumed in the construction of a public work is entitled to a lien therefor under the mechanics' lien laws, and is given a right to recover under the Federal statute.

Giant Powder Co. v. Oregon P. R. Co. 8 L.R.A. 700, 14 Sawy. 560, 42 Fed. 470; Schaghticoke Powder Co. v. Greenwich & J. R. Co. 183 N. Y. 306, 2 L.R.A. (N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; City Trust, S. D. & Surety Co. v. United States, 77 C. C. A. 397, 147 Fed. 155; Giant Powder Co. v. San Diego Flume Co. 78 Cal. 193, 20 Pac. 419; Zipp v. Fidelity & D. Co. 73 App. Div. 20, 76 N. Y. Supp. 386.

The W. A. Pattison Supply Company claim is within the act under the evidence, as they furnished suitable and necessary material for the work.

Title Guaranty & T. Co. v. Crane Co. 219 U. S. 34, 55 L. ed. 77, 31 Sup. Ct. Rep. 140; United States Fidelity & G. Co. v. United States, 111 C. C. A. 71, 189 Fed. 339; Giant Powder Co. v. Oregon P. R. Co. 8 L.R.A. 700, 14 Sawy. 560, 42 Fed. 475; American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 721.

The right to recover for repairs and other necessary material used in the work, although it may not remain permanently in the work, is within the meaning of the act.

Ibid.

Models for castings, paraphernalia for light housekeeping, false work, and scaffolding come within the provisions of the Federal act.

American Surety Co. v. Lawrenceville Cement Co. 110 Fed. 717; United States use of Thomas Laughlin Co. v. Morgan, 111 Fed. 474; City Trust, S. D. & Surety Co. L.R.A. 1917A.

v. United States, 77 C. C. A. 397, 147 Fed. 155; Title Guaranty & T. Co. v. Puget Sound Engine Works, 89 C. C. A. 618, 163 Fed. 168; United States Fidelity & G. Co. v. United States, 111 C. C. A. 71, 189 Fed. 339; Title Guaranty & T. Co. v. Crane Co. 219 U. S. 24, 55 L. ed. 72, 31 Sup. Ct. Rep. 140; United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; Lybrandt v. Eberly, 36 Pa. 347; Bangs v. Berg, 82 Iowa, 350, 48 N. W. 90; Kollock v. Parcher, 52 Wis. 393, 9 N. W. 67.

Messrs. Smith, Taft, Arter, & Smith, for claimant Pattison Supply Company:

A liberal construction is to be given to the bond, and a recovery permitted those who have furnished labor and material used in the prosecution of the work,

United States use of Hill v. American Surety Co. 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; Ulster County Sav. Inst. v. Young, 161 N. Y. 23, 55 N. E. 483; Supreme Council, C. K. A. v. Fidelity & C. Co. 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 48; American Surety Co. v. Pauly, 170 U. S. 160, 42 L. ed. 987, 18 Sup. Ct. Rep. 563.

Messrs. Thompson, Hine & Flory, and John W. Shine also for intervening claimants.

Denison, Circuit Judge, delivered the opinion of the court:

We pass by, without deciding, certain considerations affecting the right of the surety company to insist that a court of equity had exclusive jurisdiction, and assume that it had, and has, the full right to be heard on that question. Its contention is fully supported by the opinion of the circuit court of appeals of the second circuit in *Illinois Surety Co. v. United States*, 129 C. C. A. 584, 212 Fed. 136, filed since the hearing of this case below. The contrary result has been reached in the seventh circuit. *Illinois Surety Co. v. United States*, 141 C. C. A. 409, 226 Fed. 653, 664. In the present case the bond is not sufficient to pay all the claims, and if, upon a writ of error attacking only certain claims, they are set aside, whereby the fund becomes sufficient to pay all, the other claimants who have not assigned error can get no benefit, according to the common-law rule affecting several judgments. In such a case the defendant surety might go free of part of its liability; and so there is direct force in the argument that a court of equity is the appropriate tribunal, and that therefore it will be presumed that Congress intended to put the jurisdiction there: yet, even since the amendment of the statute, so many courts—and the Supreme Court so

many times¹—have assumed that there was jurisdiction in the law court that we are reluctant to consider all these decisions inadvertent. It is enough to turn the scale when we observe, as was done in the seventh circuit, that, by the enactment of June, 1915, § 274a of the Judicial Code,—and which enactment applies to pending cases,—the only effect of holding in this case that the true jurisdiction was in equity would be to send the case back to be transferred to the equity side and heard over again by the same judge upon probably the same proofs. Upon the whole we are better satisfied to say that the court below had jurisdiction.

The statute involved has been many times considered, but the Supreme Court has never had occasion to declare broadly the meaning of "labor and materials." The standard lien statutes with reference to buildings, in force, probably, in every state, contemplate materials and labor which directly enter into the structure itself. We are not aware of any decisions extending these state statutes so as to reach and create liens for labor or materials which contribute to the construction so indirectly as do the supplies consumed by the contractor in operating his plant. Of course, where the statute, by its words or by judicial interpretation, gives a lien for labor or materials furnished to subcontractors, it carries us one step away from the structure itself; but this does not necessarily mean more than that the rule of direct contribution is to be applied to the work of the subcontractors.

The language of the present Federal statute does not seem to be materially different from the typical state lien statute. There is a distinction between the original and the amended act. The Act of 1894 directed that the bond given to the United States to secure the completion of the contract should have "the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them labor or materials in the prosecution of the work," and further specified that suit might be brought and recovery had upon this bond by any person who had supplied "labor or materials for the prosecution of such work." When the statute was amended in 1905, there was no change in the language fixing the condition of the bond, but it was specified that recovery

thereon could be had by the person who had "furnished labor or materials used in the construction or repair" of the work. The substitution of this language, which adopted the usual phraseology of the lien statutes in the place of the former more general reference to "materials for the prosecution of the work," is not to be overlooked, and at least has a tendency to bring this statute into harmony with the lien statutes of the states. Some of the decisions, even since the amendment to the statute, speak as if it contained only the provisions fixing the form of the bond, and reached all persons "supplying the contractor with labor and materials in the prosecution of the work," regardless of whether these things were "used in the construction;" but it is obvious that the two clauses must be read together, and that the provision which gives a right to an intervenor only in case he has furnished labor and materials "used in the construction or repair" must receive its due force in interpreting the statute as a whole.

The Supreme Court has repeatedly declared that the bond provided for by this statute is a substitute for the lien of the mechanics' lien laws (*United States Fidelity & G. Co. v. Golden Pressed & Fire Brick Co.* (*United States Fidelity & G. Co. v. United States*) 191 U. S. 410, 425, 48 L. ed. 242, 246, 24 Sup. Ct. Rep. 142; *United States use of Hill v. American Surety Co.* 200 U. S. 197, 203, 50 L. ed. 437, 440, 26 Sup. Ct. Rep. 108; *United States v. Ansonia Brass & Copper Co.* 218 U. S. 452, 471, 54 L. ed. 1107, 1114, 31 Sup. Ct. Rep. 49; *Title Guaranty & T. Co. v. Crane Co.* 219 U. S. 24, 32, 55 L. ed. 72, 76, 31 Sup. Ct. Rep. 140; *Equitable Surety Co. v. United States*, 234 U. S. 448, 455, 58 L. ed. 1394, 1396, 34 Sup. Ct. Rep. 803); and this declaration of purpose at least suggests that the scope as well as the purpose may be discerned from comparison with the state statutes. The Supreme Court in the Pressed Brick Company Case extended the protection of the statute to subcontractors: in the Hill Case, to materials furnished to a subcontractor; and in the Equitable Company Case, to a contract which had been somewhat changed after the surety's undertaking was made. In each of these cases there is a statement or intimation that the statute is to be construed liberally to accomplish its purpose, rather than strictly; but in each case the labor or material involved was of the class which entered directly into the work, and no one of these cases decides whether or not this liberality of construction will avail to reach classes of materials

¹ *Mankin v. United States*, 215 U. S. 533, 54 L. ed. 315, 30 Sup. Ct. Rep. 174; *United States v. Congress Constr. Co.* 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44; *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct. Rep. 550. I. R. A. 1917A.

not commonly thought within state statutes.²

The subject of what specific materials are included we find touched upon by that court in only two cases, *Title Guaranty & T. Co. v. Crane Co.* 219 U. S. 24, 32, 55 L. ed. 72, 76, 31 Sup. Ct. Rep. 140, and *United States Fidelity & G. Co. v. United States*, 231 U. S. 237, 58 L. ed. 200, 34 Sup. Ct. Rep. 88. In the former case, certain claims for cartage and towage are approved as leading to liability under the bond. Page 34 of 219 U. S. The contract related to building a boat; the towage and cartage claims were, apparently, for hauling some materials. The facts show that they could not have been for labor, and so they must have been for materials. If we seek to apply the word "furnished" found in the statute, it would seem that the materials delivered at the work, through hauling or towing done by a carrier, were furnished jointly by the vendor and the carrier, and that the value of the transportation entered into and became a part of the value of the delivered material.³ The case is therefore not necessarily inconsistent with the idea that the "materials" contemplated by the statute are those commonly so considered under the lien statutes. The case also allows a claim for patterns furnished to his molding department for the contractor who was building the marine engine, which was a part of the boat. This pattern claim seems to be for labor rather than for materials. The engine builder normally makes patterns, makes molds, pours the castings, and machines them. All these things are done by the labor of his employees. If he gets someone else to make the patterns for him, their price is none the less part of the labor cost of producing the engine. The value of

the raw material in patterns is negligible; and so it could not be assumed that they had any value for preservation to be used again, in the sense that they would become or might become a part of the contractor's outfit for other use. That this claim was regarded by the Supreme Court as for labor is apparent by the analogy stated between those who make patterns and those who erect scaffolding.

In the other case (*United States Fidelity & G. Co. v. United States*) the contractors were to build a breakwater. They owned a quarry, and, to perform their contracts, must open their quarry, get out the stone, transport it, and dump it in the water. There could have been here no question of furnishing materials to the contractors, for they owned the materials from the beginning. The question involved was the labor cost of quarrying and hauling the materials. The court held the whole of this was labor performed on the contract. It did not appear that the quarry, so far as stripped, remained of any value for future operation; and it is a proper inference that the work of stripping was performed on this contract just as much as the work of quarrying. The case seems clearly to show an instance of labor furnished directly in the construction of the work.

The decisions of courts other than the Supreme Court, and which are chiefly relied upon to extend the benefit of the bond to the "materials" now involved, are the so-called powder cases and coal cases (e. g., *Schaghticoke Powder Co. v. Greenwich & J. R. Co.* 183 N. Y. 306, 2 L.R.A.(N.S.) 288, 111 Am. St. Rep. 751, 76 N. E. 153, 5 Ann. Cas. 443; *City Trust, S. D. & Surety Co. v. United States* (C. C. A. 2d C.) 77 C. C. A. 397, 147 Fed. 155). In the former, blasting powder used in making excavations has been held to give a liability under the bond. These powder cases stand on reasoning peculiar to themselves. The powder, or similar explosive, is a direct substitute for manual labor, and it is expended or used directly and immediately on the construction work. This statute, like the lien statutes, must extend to excavating as well as to erecting, and, unless powder may be considered materials used in that work, there would often be nothing to which the name "materials" could be applied.

The coal cases are one step further away. The powder directly shatters the rock. The coal serves to carry away the broken rock, but does so indirectly, through the intervention of the boiler which makes the steam which operates the engine which lifts the dredge bucket. The powder is material used in the work; the coal is material the use

² The present force of Judge Putnam's comment in *American Surety Co. v. Lawrenceville Cement Co.* (C. C.) 110 Fed. 717, 719, to the effect that this statute should not be limited, like the lien statutes, to materials added to the value of the structure, may be somewhat lessened because it had reference to the original act, and because it was written before the Supreme Court had so often declared that the bond was a substitute for the liens.

³ "Ordinarily the contractor for the material delivers the same, and includes the expense of the hauling in the price of the material. No objection, so far as we are aware, has ever been made to thus including the expense of the hauling and the price of the material. If it may be so included, and lien made to cover the same, why may not the cartman make a separate contract for hauling and acquire a valid lien therefor?" *Kehoe v. Hansen*, 8 S. D. 198, 200, 59 Am. St. Rep. 759, 65 N. W. 1075, 1076. L.R.A.1917A.

of which contributes to the work.⁴ However, it is not necessary to determine whether the coal cases are rightly decided. Some of the claims here allowed were for coal, and error was assigned on such allowance; but the briefs show that the intention was to raise only subordinate questions, and the general rightfulness of the allowance for coal is not questioned. We refer to these cases only because we must know whether they rest upon principles which require allowances of the supplies involved in this case; and since this case may be well distinguished from them, their correctness need not be determined.

The questions saved for this review, interpreting the assignments by the brief, pertain to claims which may be divided into three classes: (1) Those for groceries and provisions for the men; (2) those for machines or appliances of such a character as to become a part of the contractor's quasi permanent outfit, and as not to be used up or worn out on this job, unless they happened to be; and (3) those for machine or miscellaneous repairs or supplies of a more temporary character.

The Brogan claim was for groceries furnished to the contractor's boarding house. We cannot attach any importance to the fact that the character of the country where this work was done made it necessary for the contractor to board its men on the job—in other words, compelled it to give them their board as a part of their pay for their work. Even if there may be distinctions between one who furnishes food consumed by the men in their contractor's boarding house, and food consumed by the same men in an outside boarding house, it is not seen how it can be of any importance whether the men agree to board at the contractor's place, because it is the only one, or do so for some other reason; nor can there be one rule in a city and another in a wilderness. The provisions, in one case as in the other, either are or are not "labor" or "materials" used in the construction of the work.

Counsel agree that in no case under this statute has the liability been extended to provisions, and that in the cases decided under the state lien statutes such liability has been denied (*Perrault v. Shaw*, 69 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724; *Carson v. Shelton*, 128 Ky. 248, 15 L.R.A. (N.S.) 509, 107 S. W. 793; *Luttrell v. Knoxville L. F. & J. R. Co.* 119 Tenn. 492,

519, 123 Am. St. Rep. 737, 105 S. W. 565;⁵ *Dudley v. Toledo, A. A. & N. M. R. Co.* 65 Mich. 655, 32 N. W. 884; *Pennsylvania Co. v. Mehaffey*, 76 Ohio St. 432, 116 Am. St. Rep. 746, 80 N. E. 177, 9 Ann. Cas. 305); but it is said they stand on the same basis as the coal for the engine, as they provide the energy which makes the machine—in this case, the human machine—do the work. The district court, while regarding the question as very close, thought this final step in the reasoning could not be avoided. We find a sufficient distinction in the difference between labor and materials. Coal has been allowed as a material; it is expended as a material; it never is and never can be transformed and merged into that labor which is the "labor performed," as distinguished from the "material furnished," for each of which the statute gives a right of recovery. The logic of the coal cases—regardless of its persuasiveness—is that the word "materials" in the statute should be thought to include coal, because the latent energy of the coal was developed into a mere substitute for that human labor which is expressly included in the law, and unless this energy thus put into the work is protected in this way it is not protected at all. On the other hand, the food for the men never contributes to the work, except after it is transmuted into the form of that labor which, as labor, is protected. It is not to be thought that the statute gives twice a claim for the one thing.

In this case the entire labor right has been satisfied. The contractor paid the men their wages and furnished them their board, and they have no claim. Money that he may have borrowed to pay part of their wages is, on this principle (though not in responsiveness to the name "materials"), difficult to distinguish from the food he borrowed—bought on credit—to pay the balance of their wages; but such money loans are not lienable. 47 Cyc. 44. Nor, if a claim were to be allowed for food for the men, could we well refuse one for rent of their quarters, special clothing, free tobacco, or anything else which the contractor might have agreed to provide as part of their pay. Indeed, among the items allowed on this claim, we find soap and towels, bedding, matches, kitchen and table furniture, etc. These last-named items only illustrate that if, by vague equities, or by the supposed liberal policy of the statute, we are led away from the field of direct and immediate

⁴ The leading Federal coal case (*City Trust, S. D. & Surety Co. v. United States*, *supra*) arose under the Act of 1894, unamended; and even under the original act the court of appeals of the District of Columbia reached the opposite conclusion *re L.R.A.1917A*.

garding coal (*United States use of Chapman v. City Trust, S. D. & Surety Co.* 23 App. D. C. 153).

⁵ This case reviews many decisions and carefully classifies many articles now involved. See 119 Tenn. 512-520.

use in the construction, we find no place to stop short of what the supreme court of New Hampshire called "interminable litigation and confusion." *Perrault v. Shaw*, 60 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724. We cannot believe that these provisions sold by Brogan constitute "labor furnished or materials used in the construction of the work," save in a sense so indirect and remote as not to be within the fair contemplation of the statute.

While the cases above cited from the state courts denying a lien to board or provision claims, are not under the statute now involved, we do not see controlling distinctions, either in the state statutes cited in these cases or in the reasoning of the decisions. In the Federal courts the point has not been directly decided, but it has been twice argumentatively pointed out that board or provisions are not materials for construction work. In *Giant Powder Co. v. Oregon P. R. Co.* (C. C.) 8 L.R.A. 700, 14 Sawy. 560, 42 Fed. 470, 475, Judge Deady says: "The food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used."

He then distinguishes between this remote use, for which there will be no lien, and the more direct use of powder in blasting, or of water in making mortar, or of lumber used in scaffolding, no one of which remains in the final structure, but each of which is so directly used as to support a lien.

In *United States v. Sica v. Kimpland* (C. C.) 93 Fed. 403, Judge Thomas was considering this statute in its 1894 form, and he said (page 408): "Is the board which the contractors have agreed conditionally to pay out of the men's wages, labor or material supplied in the prosecution of the work? . . . It is considered that the word 'labor,' as used in the statute, does not admit of such remote and indirect equivalents, but requires the sureties to insure the payment for the visible material that was furnished for direct use and incorporation in the work. . . . Thereby the sureties had a clear conception of the limits of their liability. They were not concerned to see to it . . . that persons who furnished stores or food or lodging to the workmen, under an agreement by the contractor to pay for the same out of the wages due those benefited, should be paid. The contractor was under no such primary duty to the United States. His duty as a contractor, and as regards the sureties, was to pay the laborers their wages, and allow

them to buy their board and clothing where they would."

United States Fidelity & G. Co. v. United States, 231 U. S. 237, 58 L. ed. 200, 34 Sup. Ct. Rep. 88, is clearly a case where a claim was allowed for labor upon the theory that the unpaid wages of the laborers had been assigned to the claimant (see Justice Day's comment on page 243 of 231 U. S.); and so, although the original claim was for board, the claim allowed was for labor, and the case has no application here. *Lybrandt v. Eberly*, 36 Pa. 347, and *Bangs v. Berg*, 82 Iowa, 350, 48 N. W. 90, are instances where liens were allowed for that agreed price of labor or materials and board which had been made a part of the contract price. In *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67, the statute was express.

The second class of items here involved may be typified by the "Rand drills." As a matter of common knowledge, such drilling machines are portable engines operated by suitable power, and intended to be used in one location after another until they are worn out. Their life depends upon the care given to them. It was found as a fact as to these machines that, because they had been either so much used or so badly used upon this work, or because the business was to be liquidated, the receiver considered them not worth moving and they were abandoned. If the bond is to extend at all to machines, tools, and appliances used upon the work, their inclusion must be determined by their inherent character, and not by the length of time for which or the manner in which they happen to be used. Such drilling machines become a part of the permanent outfit of the contractor. True, they might wear out sooner than a dredge, or a crane or a hoisting engine; but they might outlive any of these things. In our judgment, they cannot be regarded as materials used in the construction of the work. Of the same class are many other things found among items allowed. Rope in large quantities, wire cable, anchor chains, etc., are clearly normally a part of the permanent or quasi permanent outfit of the contractor. They obviously would outlast any short piece of work; and the proper name to give them must be fixed by the nature of the materials, and not by the length of the job. If, in fact, any of these things, like rope, was intended for current consumption in the direct doing of the work, it does not so appear upon this record. Things of this class are not normally intended for specific use and exhaustion upon the work where they are first sent. They are not materials used in the work; they are facilities for doing that work and any other work to which they may be applied.

The third class consists of miscellaneous supplies and repairs for the contractor's plant. This plant consisted of a dredge and its machinery, a drill boat and its machinery, two tender tugs, and the boarding house. So far as these supplies may have been specifically intended for current consumption directly on the work, they are allowable, like the blasting powder, and like the lumber actually consumed in scaffolding or in concrete forms. Of this character would be the drills used in the drilling machines, or the material therefor. The record does not show certainly the amount of these articles, but steel generally described may have been for this purpose. These drills are made to be used up currently. Their life is a matter of days, if not of hours. The contractor buys only his current needs on the particular job. The drills are used up in direct and immediate contact with the rock, the removal of which is the "construction of the work," and we are satisfied, by analogy to the powder cases, to regard such drills as materials under the statute.

The great part, however, of the items allowed as supplies and repairs, were for the ordinary and current repairs on the machinery and for miscellaneous articles used in the maintenance and operation of the boats and dredges. The articles for outfitting the boarding house (the soap, etc., above mentioned) really belong in the same class. These supply items are of infinite variety, as would be expected when we see that they are not for use directly on the work, but are for the maintenance of buildings, boats, and machinery in suitable condition for living in the buildings or on the boats, navigating and operating the boats, and operating the machinery. As a class we think they are beyond the statute. We may specify belts and nuts, valves, cylinder heads, electric wire, lanterns, wrenches, files, electric light globes, divers' overalls, waste, oakum, packing, grindstones, kerosene, paints, etc. We even find among the items to which specific attention apparently was not called, but which were allowed against the general objection, two typewriter ribbons, five lengths of stovepipe, and three rat traps. It cannot be denied that even these last items may be necessary supplies for the proper keeping of the boats or buildings in habitable condition, but we cannot think they are "materials used" in the deepening of St. Mary's river; and this not because they are extreme and striking instances, but because they typify things which are either additions to the contrac-

tor's working outfit, or are intended to maintain the existing outfit in as good order as possible against the wear and depreciation which would otherwise accrue. We approve generally and apply the rules of separation of items as stated by Judge Webb in *United States v. Thomas Laughlin Co. v. Morgan* (C. C.) 111 Fed. 474, 488.

It results that the judgments in favor of the Pattison Supply Company, the Soo Hardware Company, the George Worthington Company, the Upson-Walton Company, and J. P. Brogan must be reversed. As to the Brogan claim, no new trial will be awarded, since, upon the undisputed facts, there can be no recovery. In each of the other claims just named, the claimant may be able to furnish proof which, under our view of the statute, will show a liability as to some of the items. As to each of these claims there will be a new trial, unless counsel, before the mandate goes down, file a stipulation fixing the amounts recoverable under the rules we have indicated. In that event the mandate will direct judgments accordingly, and our action will then be final and subject to immediate review. See *Re Martin* (C. C. A. 6th C.) 119 C. C. A. 363, 201 Fed. 31, 38.

We see no practical way of considering the judgment below as one at law and still subject to partial review, except to treat it as eleven separate judgments in favor of or against eleven separate claims, which for convenience were united in one group proceeding, one hearing, and one judgment, with the same force and effect as if they were consolidated actions. *Diggs v. Louisville & N. R. Co.* (C. C. A. 6th C.) 14 L.R.A.(N.S.) 1029, 84 C. C. A. 330, 156 Fed. 564. No one of the powder or coal claimants complained of the cutting down of its claim to 90 per cent, but each accepted its judgment for that amount; and we affirm the judgments so rendered. There seems to be no insuperable difficulty in allowing part of the judgments to stand, although they are united in one entry with the judgments which are reversed.

The plaintiff in error will recover its costs against the five defendants in error whose judgments are reversed. The four defendants in error whose judgments are affirmed will collectively recover costs against plaintiff in error.

Petition for a writ of certiorari denied by the Supreme Court of the United States, May 1, 1916, 241 U. S. 870, 60 L. ed. 1230, 36 Sup. Ct. Rep. 721.

NEW YORK COURT OF APPEALS.

RE CLAIM OF GUSTAV HEITZ, Resp't.,
v.
JACOB RUPPERT et al., App'ts.

(218 N. Y. 148, 112 N. E. 750.)

Master and servant — workmen's compensation — loss of eye — altercation with fellow workman.

The loss of an eye by one employed to care for his employer's horses, in an altercation with a fellow workman as to the amount of water which should be put upon them when coming into the stable, which results in the latter's finger being thrust into the eye, is an accidental injury arising out of and in the course of his employment, within the operation of the Workmen's Compensation Act.

For other cases, see Master and Servant, II, a, 1, in Dig. 1-52 N. S.

(Hiscock and Hogan, JJ., dissent.)

(May 2, 1916.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an award made by the State Workmen's Compensation Commission to claimant in a proceeding by him to recover under the Workmen's Compensation Act for injuries received while in the employ of the defendant Ruppert. Affirmed.

The facts are stated in the opinion.

Mr. Grant C. Fox, with Messrs. Ashbel P. Fitch and Mott & Grant, for appellants:

The disability of the claimant Heitz did not result from an accidental injury "arising out of and in the course of his employment."

Fitzgerald v. W. G. Clarke & Son [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; Plumb v. Cobden Flour Mills Co. [1914] A. C. 62, 7 B. W. C. C. 1, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174; Challis v. London & S. W. R. Co. [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23; Armitage v. Lancashire & Y. R. Co. [1902] 2 K. B. 178, 71 L. J. K. B. N. S. 778, 66 J. P. 613, 86 L. T. N. S. 883, 18 Times L. R. 648; McNicol's Case, 215 Mass. 497, L.R.A.

Note. — As to right under Workmen's Compensation Acts to compensation for injury sustained as a result of an assault, see footnote to Coronado Beach Co. v. Pillsbury, L.R.A.1916F, 1164. L.R.A.1917A.

1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; 8 Thomp. Neg. § 4575c; Ruegg, Employers' Liability Act & Workmen's Compensation Act, 7th ed. p. 273; Moore v. Lehigh Valley R. Co. 169 App. Div. 177, 154 N. Y. Supp. 620; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Moore v. Manchester Liners [1909] 1 K. B. 417, 79 L. J. K. B. N. S. 1175, 100 L. T. N. S. 164, 25 Times L. R. 202; Andrew v. Failsworth Industrial Soc. [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429.

The burden is on the claimant to establish that he sustained an accidental injury arising out of and in the course of his employment.

Collins v. Brooklyn Union Gas Co. 171 App. Div. 381, 156 N. Y. Supp. 957; Barnabas v. Bersham Colliery Co. [1910] 103 L. T. N. S. 513, 53 Sol. Jo. 63; Pomfret v. Lancashire & Y. R. Co. [1903] 2 K. B. 718, 72 L. J. K. B. N. S. 729, 52 Week. Rep. 66, 89 L. T. N. S. 176, 19 Times L. R. 649; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

Mr. S. John Block, for respondent:

The decision of the Commission is final as to all questions and conclusions of fact. It is a question of fact whether or not the injury was sustained "in the course of and arose out of the employment." This court may not review the conclusions of fact made by the Commission.

Goldstein v. Centre Iron Works, 167 App. Div. 526, 153 N. Y. Supp. 224; Schwab v. Emporium Forestry Co. 167 App. Div. 614, 153 N. Y. Supp. 234; Powley v. Vivian & Co. 169 App. Div. 170, 154 N. Y. Supp. 426, 10 N. C. C. A. 835; Harnett v. Thomas J. Steen Co. 216 N. Y. 101, 110 N. E. 170.

The presumptions created by § 21 of the Workmen's Compensation Law, and which established the validity of the claim, have not been overcome by any substantial or other evidence.

McQueeney v. Sutphen, 167 App. Div. 528, 153 N. Y. Supp. 554; Rheinwald v. Builders' Brick & Supply Co. 168 App. Div. 425, 153 N. Y. Supp. 598.

Assuming, but not conceding, for the sake of argument, that this court may review the conclusions of the Commission, those conclusions must be affirmed and the award sustained, for the injury was sustained in the course of and arose out of the employment.

McNicol's Case, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Smith v. Price, 168 App. Div. 421, 153 N. Y. Supp. 221; Re Petrie, 215 N. Y. 335, 109 N. E. 549.

Mr. E. C. Alken, with Mr. E. E. Woodbury, Attorney General, for the State Industrial Commission:

The accidental injuries sustained by Heitz arose out of and in the course of his employment.

Challis v. London & S. W. R. Co. [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23; *Rowland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852; *Trim Joint Dist. School v. Kelly* [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493 [1914] W. C. & Ins. Rep. 359, 136 L. T. Jo. 605, 48 Ir. Law Times 141, 7 B. W. C. C. 274, Ann. Cas. 1915A, 104, 6 N. C. C. A. 1010; *Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 20 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268; *Addison v. Balfour*, 3 N. C. C. A. 275, note; *Weekes v. William Stead* [1914] W. C. & Ins. Rep. 434 [1914] W. N. 263, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 30 Times L. R. 586, 58 Sol. Jo. 633, 7 B. W. C. C. 398, 6 N. C. C. A. 1010; *McNicol's Case*, supra.

Pound, J., delivered the opinion of the court:

This is an appeal by the employer and the insurance carrier from an order of the appellate division, third department, affirming by a divided court an order of the State Workmen's Compensation Commission awarding compensation. Claimant was injured when engaged in a hazardous employment. Workmen's Compensation Law (Consol. Laws, chap. 67; Laws 1914, chap. 41), § 2, group 27. The question is whether he received an "accidental" injury "arising out of and in the course of employment." Workmen's Compensation Law, § 3, subdiv. 7.

The decision of the Commission is final on all questions of fact (Workmen's Compensation Law, § 20), and it is presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the act (Workmen's Compensation Law, § 21); but, when the undisputed facts in connection with the testimony of the claimant, supported by every favorable inference that can be drawn therefrom, do not warrant an award, this court will, upon an appeal from a nonunanimous affirmance by the appellate division, reverse upon the question of law thus presented. *Jerome v. Queen City Cycle Co.* 163 N. Y. 351, 357, 57 N. E. 485. L.R.A.1917A.

The facts are as follows: Claimant on July 14, 1914, was employed as a driver by Jacob Ruppert, Incorporated, which was engaged in the business of carrying on a brewery. He brought his horses into the stable, where Guth, a fellow workman, and he, unharnessed the horses and proceeded to wash them off with the hose. Claimant told Guth he was using too much water on the horses, and Guth then intentionally sprinkled some water on claimant. Shortly after claimant, having briefly left the place where the horses were being washed, was returning to his work of cleaning the horses, when he met Guth. As they passed, claimant touched Guth on the shoulder, saying: "George, don't do that again." Guth slapped claimant on the shoulder, and, as claimant turned around, Guth's finger stuck in claimant's left eye, causing injuries by reason of which it was necessary to remove the eye.

That the injury was accidental within the meaning of the statute seems clear. It was a sudden and unlooked-for misfortune, and the purpose of the act is to insure the workman at the expense of the employer against personal injuries not expected or designed by the workman himself, provided such injuries arise out of and in the course of employment. *Trim Joint Dist. School Bd. of Management v. Kelly*, by Viscount Haldane, Lord Chancellor, House of Lords [1914] A. C. 667, at page 679, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. Law Times, 141, Ann. Cas. 1915A, 104. But the statute does not provide an insurance against every accident happening to the workman while he is engaged in the employment. The words "arising out of and in the course of employment" are conjunctive, and relief can be had under the act only when the accident arose both "out of" and "in the course of" employment. The injury must be received: (1) While the workman is doing the duty he is employed to perform; and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work. A premeditated fatal assault upon a schoolmaster by bad and unruly pupils has been held to be an accident arising out of and in the course of the employment. *Trim Joint Dist. School Case*, supra. The death of a workman, while he was doing the work for which he was hired, as the result of an assault upon him by an intoxicated fellow workman whose vicious habits and disposition were known to the foreman, was held

to be due to the causal connection between the injury to the deceased and the conditions under which the defendant required him to work. *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522. On the other hand, the act has not been applied to accidents resulting from the chances of life in general to which the victim of misfortune was exposed in common with all mankind rather than as employee. In *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560, for example, the nursery-maid, frightened by a cockchafer or giant beetle which flew into the room where she was at work, involuntarily threw up her hand to drive it away, and stuck her finger in her eye, thus causing permanent defective vision, and it was held that this was a risk common to all, an accident that might happen to anyone, and not arising out of or caused by the employment. See also *Rayner v. Sligh Furniture Co.* 180 Mich. 168, 146 N. W. 665, Ann. Cas. 1916A, 386, s. c. L.R.A. 1916A, 22, with notes of cases generally on Workmen's Compensation Acts. Injuries received through skylarking or horseplay during working hours and at the place of work have been considered by the courts, and it has been held that an accident caused to a workman, while engaged in his work, by the wrongful act of a fellow workman, entirely outside the scope of his employment, has no relation to the employment and is not within the act. *Hulley v. Moosbrugger*, — N. J. —, L.R.A. 1916C, 1203, 95 Atl. 1007, reversing s. c. 87 N. J. L. 103, 93 Atl. 79, 8 N. C. C. A. 283. Altercations and blows may, however, arise from the act of a fellow servant while both are engaged in the employer's work, and in relation to the employment. The employer may be badly or carelessly served by two men engaged in his work, and yet it may be inferred, when one injures the other in a quarrel over the manner of working together in a common employment, that the accident arose out of the employment, and was not entirely outside of its scope, if it was connected with the employer's work and in a sense in his interest. Such cases necessarily present close questions of fact. In *McIntyre v. A. Rodger & Co.* 41 Scot. L. R. 107, the court of sessions held that an accident resulting from a tussle between two workmen over the possession of a brush to be used in the work arose out of and in the course of the employment. "But they were both at work," says Lord Trayner; "McIntyre doing his work, and Clark anxious to get at his work, and in the course of

preparing himself for the continuance of his work."

We shall not attempt to formulate any more accurate rules to govern all cases than the general principles above stated. Each case must to a certain extent stand alone. In negligence cases it is not unheard of for different juries to reach opposite conclusions on the same evidence, when no claim could be made that either verdict was without evidence to support it. Where conflicting inferences from the same facts are possible, different triers of facts may draw different conclusions, and the weight of evidence is not for consideration in this court. *Re Case*, 214 N. Y. 199, 203, 108 N. E. 408. The evidence in this case is sufficient to permit the Commission to find that the following facts sought to be proved were established: That it was an obligation of claimant's employment to take care of the horses which he drove and to see that they were not injured by injudicious wetting or otherwise by his fellow workmen; that in the course of their employment, while the two men were at work, a quarrel or argument over the wetting of the horses arose and personal injury grew out of the physical contact resulting from the quarrel; and that therefore the accident (a) arose out of and (b) in the course of employment.

The act was passed to benefit workmen in hazardous employments who were without a legal remedy. Compensation is given without regard to the fault of the master at common law or under the Employers' Liability Acts. The law has been and should be construed fairly, indeed liberally, in favor of the employee. Against its justice or economic soundness nothing can be said. *Jensen v. Southern P. Co.* 215 N. Y. 514, L.R.A. 1916A, 403, 109 N. E. 600, Ann. Cas. 1916B, 276. The power of the legislature to enact such laws is expressly declared to be beyond the limitations of the state Constitution. N. Y. Const. art. 1, § 18. It would not be difficult, by an adherence to the concepts of liability for negligence, based on the failure to foresee and prevent accident (*Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517), rather than to the principles of industrial insurance for injuries suffered by workmen in the course of their employment, without regard to fault as a cause of such injury (Workmen's Compensation Law, § 10; *Post v. Burger*, 216 N. Y. 544, 111 N. E. 351, Ann. Cas. 1916B, 158, 10 N. C. C. A. 888), to defeat the purpose of the constitutional and legis-

lative provisions. We think that the doctrine of liability without fault is now too firmly established to require this court to dispose of the question on the facts here presented as a question of law.

The order appealed from should be affirmed, with costs.

Willard Bartlett, Ch. J., and Collin, Cuddeback, and Seabury, JJ., concur.

Hiscock and Hogan, JJ., dissent.

Petition for rehearing denied May 30, 1916.

NEW YORK COURT OF APPEALS.

MARY WATERS et al., Resp'ts.,

v.

WILLIAM J. TAYLOR COMPANY et al.,
App'ts.

(218 N. Y. 248, 112 N. E. 727.)

Master and servant — workmen's compensation — assisting employee of co-contractor.

Injury received in the attempt by an employee of a contractor for one portion of the work of constructing a building, to extricate an employee of a contractor for another portion of the work from a cave-in occurring during excavation, in which the latter was employed, arises out of and in the course of his employment, within the meaning of the Workmen's Compensation Act.

For other cases, see *Master and Servant*, II. a, 1, in *Dig.* 1-52 N. S.

(May 12, 1916.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of the Workmen's Compensation Commission, in favor of claimants, in a proceeding under the Workmen's Compensation Act, to obtain compensation for the death of their husband and father. Affirmed.

The facts are stated in the opinion.

Mr. William A. Jones, Jr., for appellants:

The injuries sustained by Roger Waters, and which subsequently resulted in his death, did not arise out of and in the course of his employment.

1 Bradbury, Workmen's Compensation, 2d ed. p. 308; McNicol's Case, 215 Mass. 498, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 322; Newman v. Newman, 169 App. Div. 745, 155 N. Y. Supp. 665; Spooner v. Detroit Saturday Night Co. 187 Mich. 125,

L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647; Smith v. Lancashire & Y. R. Co. [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51, 79 L. T. N. S. 633, 47 Week. Rep. 146, 15 Times L. R. 64, 1 W. C. C. 1; Reed v. Great Western R. Co. [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 46 Scot. L. R. 700, 2 B. W. C. C. 109; Plumb v. Cobden Four Mills Co. [1914] A. C. 62, 83 L. J. K. B. N. S. 197, 109 L. T. N. S. 759, 30 Times L. R. 174, 58 Sol. Jo. 184, 7 B. W. C. C. 1; Kerr v. William Baird & Co. 48 Scot. L. R. 646, 4 B. W. C. C. 397; Whiteman v. Clifden, 6 B. W. C. C. 49; Burns v. Summerlee Iron Co. [1913] S. C. 227, 50 Scot. L. R. 164, 6 B. W. C. C. 320; Davies v. Crown Perfumery Co. 6 B. W. C. C. 649; M'Diarmid v. Ogilvy Bros. 50 Scot. L. R. 883, 6 B. W. C. C. 878; Hartz v. Hartford Fidelity Co. 90 Conn. 539, 97 Atl. 1020.

Mr. E. C. Aitken, with Mr. E. E. Woodbury, Attorney General, for respondents:

An accident occurring while making an attempt to save the life of a fellow man while engaged in a common enterprise arises out of and in the course of the employment.

Aitken v. Finlayson Bousfield & Co. 51 Scot. L. R. 653, 7 B. W. C. C. 918; Matthews v. Bedworth Brick, Tile & Lumber Co. 106 L. T. Jo. 485, 1 W. C. C. 124; London & E. Shipping Co. v. Brown, 42 Scot. L. R. 357, 7 Sc. Sess. Cas. 5th series, 488; Rees v. Thomas [1899] 1 Q. B. 1015, 68 L. J. Q. B. N. S. 539, 47 Week. Rep. 504, 80 L. T. N. S. 578, 15 Times L. R. 301; 1 W. C. C. 9; Hapelman v. Poole, 25 Times L. R. 155, 2 B. W. C. C. 48; Dragovich v. Iroquois Iron Co. 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; Sloss-Sheffield Steel & I. Co. v. Moore, 6 Ala. App. 317, 59 So. 311.

Hiscock, J., delivered the opinion of the court:

Roger Waters, the husband of the claimant, was in the employ of the William J.

Note.—The American cases as to injuries "arising out of and in the course of" the employment within the Workmen's Compensation Acts are discussed at pages 232 et seq., of the annotation in L.R.A.1916A, 23, on the general subject of workmen's compensation acts; see, specifically, page 238, for an injury sustained while attempting to rescue a fellow workman. In this L.R.A.1917A.

connection, attention is called to the somewhat analogous point considered in the annotation at p. 322, as to the right to compensation for injuries received while trying to save personal belongings from loss. The English cases construing and applying the phrase "arising out of and in the course of" the employment will be found at pages 40 et seq., of the annotation above referred to.

Taylor Company, which had a contract for performing part of the work necessary in the construction of a building. The Duffy Contracting Company was a contractor engaged in performing other work in said construction which necessitated an excavation. While one of the employees of the last-named company was at work in the excavation, the bank thereof caved in and he was caught. This occurred about 20 feet from where Waters was at work, and he went to the assistance of the endangered employee. While he was engaged in the attempt to release him, another cave-in occurred, which so seriously injured Waters that he subsequently died.

On these facts the question arises whether the accident to Waters could be found to be one "arising out of and in the course of his employment," emphasis being especially placed on the denial by the insurance company that it arose out of the employment. There is no question that Waters's attempt to rescue his fellow workman immediately led to his own injuries, and therefore the only debatable phase of the inquiry must be whether his general employment included and required or authorized the attempt to rescue from a sudden peril which threatened his life a fellow laborer working only a few feet away on the same general undertaking, although for a different employer. It seems to us that this act should be regarded as an incident to and within the fair scope of his employment as the latter should be measured for the purposes of the Workmen's Compensation Act (Consol. Laws, chap. 67). It occurred while he was at work on the undertaking for which he had been hired, and therefore during the course of his employment. It was his employment which brought him where he was, and in a general sense caused him to be confronted with the condition and emergency which he sought to meet. His act was prompted by the relationship existing between himself and a fellow workman, caused by their employment on a common undertaking. It must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employees to stand still while the life of a fellow workman, working a few feet away, was imperiled by such an accident as occurred here, and it seems to us that the accident arose out of his employment.

It has been held by the supreme court of Illinois in a well-considered case (*Dragovich v. Iroquois Iron Co.* 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475) that injuries received by one workman while trying to

rescue from serious danger another workman of a common employer arose out of his employment. It is true that that decision was, to some extent, based on the proposition that it would be the duty of the employer himself to attempt to rescue his endangered servant, and therefore that the attempt of the employee who came to the latter's rescue was performed in the interest of and for the benefit of his employer. We think, however, that the principle of that case, when broadened as it properly may be, tends to sustain the award in this one. Independent of any legal obligation which might require the master to attempt to rescue a servant from the dangers of an emergency, there is a moral duty, resting on principles of humanity, and those principles ought to apply to a contract of employment and broaden its scope so as to permit a servant to do as Waters did in attempting to rescue a fellow workman, although technically working for a different employer.

Even the rather rigid rules of an action at law for negligence bend before such a situation of peril, and, without penalty to his rights, permit a casual bystander to take risks in the attempt to save life which would be prohibited under any other circumstances. *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721.

And certainly it would be a narrow and disappointing view if, in judging the conduct of a workman under the remedial provisions of the Workmen's Compensation Act, we should hold that the legislature intended to deprive him of the benefits of that act because, in going to the rescue of another workman, under such circumstances as arose here, he has stepped somewhat beyond the limits which would fix the scope of his employment under ordinary circumstances. That act is framed on broad principles for the protection of the workman. Relief under it, generally speaking, is not based on the negligence of the employer, or limited to the absence of negligence on the part of the employee. It rests on the economic and humanitarian principles that compensation should be given at the expense of the business to the employee or his representatives for earning capacity destroyed by an accident in the course of or connected with his work, and this not only for his own benefit, but for the benefit of the state, which otherwise might be charged with his support. This purpose ought not to be defeated by placing too narrow a limit upon the nature of the acts which will be regarded as pertaining to his employment.

Of course what we thus say is to be read in the light of the facts presented on this appeal. There is no trouble in outlining

a case where an employee, even with the laudable purpose of helping another, might go so far from his employment and become so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment. It is sufficient to say that we

do not regard the case now presented to us as being such an one as we have suggested. The order should be affirmed, with costs.

Willard Bartlett, Ch. J., and Collin, Cuddeback, Hogan, Seabury, and Pound, JJ., concur.

NEW YORK COURT OF APPEALS.

MARY E. O'NEIL, Resp't.,
v.

CARLEY HEATER COMPANY et al.,
App'ts.,

(218 N. Y. 414, 113 N. E. 406.)

Master and servant — workmen's compensation — injury from attempt to take medicine.

Death of an employee engaged in installing machinery in a factory of one other than his employer, by the latter's direction, through mistake in attempting to take medicine recommended by an employee of the factory owner, which was said to be kept at a designated place in the factory, is not an accident arising out of the employment, within the meaning of the Workmen's Compensation Act.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

(June 16, 1916.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an award of the State Industrial Commission in favor of claimant in a proceeding under the Workmen's Compensation Act, to recover compensation for the death of her husband. Reversed.

The facts are stated in the opinion.

Messrs. Nadal, Jones, & Mowton, for appellants:

The death of claimant's intestate did not arise out of his employment.

Fitzgerald v. Clarke [1908] 8 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Clifford v. Joy*, 43 Ir. Law Times, 193, 2 B. W. C. C. 32; *Sheldon v. Needham*, 111 L. T. N. S. 729, 30 Times L. R. 590, 58 Sol. Jo. 652, 7 B. W.

C. C. 471; *Reed v. Great Western R. Co.* [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 25 Times L. R. 30, 53 Sol. Jo. 31, 99 L. T. N. S. 781, 2 B. W. C. C. 109; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Butler v. Burton-on-Trent Union*, 106 L. T. N. S. 824, 5 B. W. C. C. 355; *Nash v. The Rangatira* [1914] 3 K. B. 978, 83 L. J. K. B. N. S. 1496, 111 L. T. N. S. 704, 58 Sol. Jo. 705, 7 B. W. C. C. 590; *Frith v. The Louisiana* [1912] 2 K. B. 155, 81 L. J. K. B. N. S. 701, 106 L. T. N. S. 667, 28 Times L. R. 331, 5 B. W. C. C. 410.

Mr. E. C. Alken, with Mr. Egbert E. Woodbury, Attorney General, for respondent:

The death of claimant's intestate arose out of and in the course of his employment.

Brintons v. Turvey [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137; *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213; *Hurle's Case*, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 356, 7 N. C. C. A. 527; *Johnson's Case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843; *H. P. Hood & Sons v. Maryland Casualty Co.* 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329; *Columbia Paper Stock Co. v. Fidelity & C. Co.* 104 Mo. App. 157, 78 S. W. 880; *Vennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A. 1916A, 273, 154 N. W. 640, 10 N. C. C. A. 729; *Archibald v. Ott*, — W. Va. —, 87 S. E. 791; *McKinnon v. Hutchison* [1915] S. C. 867, 52 Scot. L. R. 691, [1915] 2 Scot. L. T. 22, 8 B. W. C. C. 624.

Hiscock, J., delivered the opinion of the court:

An award has been made to the claimant-respondent, and sustained by the appellate division, to compensate her for the death of her husband. It was, in substance, found by the Commission that the deceased was

Note. — The general subject of workmen's compensation acts is treated in annotation in L.R.A.1916A, 23, and other annotation there referred to. The English cases construing the phrase "arising out of and in the course of" the employment are set out at pages 40 et seq., and the American cases at pages 232 et seq. L.R.A.1917A.

As to the rights and remedies under such acts, where injuries are caused by third person, see annotation following *Peet v. Mills*, L.R.A.1916A, 360.

The L.R.A. Digest should be consulted, under the title, "Workmen's Compensation," for later cases under these acts.

in the employ of the Carley Heater Company, a corporation engaged in the manufacture and installation of tannery machinery; that at the time of decedent's death this company was installing machinery for another company and the decedent was engaged in the performance of this work: that on the day of the occurrence in question he suffered from some form of illness, and was told by an employee of the company for which the machinery was being installed to take some Epsom salts, and was informed where a large quantity of these were stored in the factory; that he went to the place indicated, but by mistake took some chlorid of barium, which almost immediately caused his death.

Assuming that this occurrence constituted an accident under the act, and that it arose in the course of decedent's employment, we are entirely unable to see that it "arose out of his employment." The findings do not indicate that his illness in any manner resulted from his employment, or, even if it did, that his employer, as an incident to or condition of such employment, had undertaken to supply medical attendance or medicines in ministering to such an illness as this was; it not being of an emergent character. The employer had done nothing to authorize or induce the decedent to take the poison on the supposition that it was something which he needed or which would be beneficial to him. Decedent's illness and his attempt to minister thereto were not ordinary and natural incidents to his employment. On the contrary, it is found that decedent's mistake was the result of his voluntary action, in-

duced by the advice of one who was not even in the employment of his employer, but legally was an utter stranger thereto. It was an employee of the company for which decedent's employer was working who persuaded or advised him to take the medicine, and who guided him to the place where, instead of taking such medicine, he obtained the poison which caused his death. It seems to us that the case is not different than it would have been if the decedent, voluntarily acting upon the advice of a stranger, had visited a physician who injured him by malpractice, or had sought a dispenser of prescriptions who gave him poison instead of helpful medicine; and certainly it could not be said that such an occurrence would have arisen out of his employment within the meaning of the statute.

The case is clearly distinguishable from those cited by the learned counsel for the respondent, where an employee, seeking to do something which was inevitably connected with his employment and an incident thereto, as obtaining a drink of water, had been injured by foul water which he might have been expected to drink, or by some poisonous liquid placed at a point where it might reasonably be mistaken for drinking water.

We think that the order should be reversed, and the claim dismissed, with costs against the Commission.

Willard Bartlett, Ch. J., and Chase, Cuddeback, Hogan, Cardozo, and Pound, JJ., concur.

NORTH DAKOTA SUPREME COURT.

HANS H. KOLOEN, Appt.,
v.
PILOT MOUND TOWNSHIP et al., Respts.

(— N. D. —, 157 N. W. 672.)

Highway — congressional grant — acceptance.

In order to constitute an acceptance of the congressional grant of right of way for public highways across public lands, there must be either user by the public for such a period of time and under such conditions as to establish a highway under the laws of this state, or there must be some positive act or acts on the part of the proper public au-

thorities clearly manifesting an intent to accept such grant with respect to the particular highway in question.

For other cases, see *Highways, I. a, in Dig.* 1-52 N. S.

(March 29, 1916.)

APPEAL by plaintiff from a judgment of the District Court for Griggs County, in defendants' favor, in an action brought to enjoin them from grading and otherwise exercising dominion over a strip of land which defendants claim is dedicated to use as a highway. Reversed.

The facts are stated in the opinion.

Messrs. Lee Combs and L. S. B. Ritchie, for appellant:

The evidence does not show an acceptance of the grant sufficient to entitle the defendants to claim the road.

Schwerdtle v. Placer County, 108 Cal. 589, 41 Pac. 448; Wells v. Pennington Coun-

Headnote by CHRISTIANSON, J.

Note. — As to necessity and sufficiency of acceptance of grant of right of way over public land for public highway, see annotation following this case, post, 355. L.R.A.1917A.

ty, 2 S. D. 1, 30 Am. St. Rep. 758, 48 N. W. 305; *Rolling v. Emrich*, 122 Wis. 134, 99 N. W. 464; *Walbridge v. Russell County*, 74 Kan. 341, 86 Pac. 473.

There can be no highway lawfully claimed unless there was a sufficient dedication and user of the particular tract claimed to conclusively establish the same.

Red River & L. of W. R. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; *Wayne v. Caldwell*, 1 S. D. 483, 36 Am. St. Rep. 750, 47 N. W. 547; *Smith v. Nofsinger*, 86 Neb. 834, 126 N. W. 659; *Randall v. Rovelstad*, 105 Wis. 410, 81 N. W. 819.

The proceedings of laying out and dedicating a public highway must be a matter of public record, so that all may know of the same, and that the public rights may be clearly defined.

Wayne v. Caldwell, 1 S. D. 483, 36 Am. St. Rep. 750, 47 N. W. 547; *Woodworth v. Spirit Mound Twp.* 10 S. D. 504, 74 N. W. 443.

The public cannot, by miscellaneous use of different trails over an individual's land, for any period of time, in that manner lay out and dedicate a highway, especially where such land is wild or unimproved.

Smith v. Nofsinger, 86 Neb. 834, 126 N. W. 659; *Kendall-Smith Co. v. Lancaster County*, 84 Neb. 654, 121 N. W. 960; *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082.

In the laying out of highways the proceedings of the commissioners must conform strictly to the instructions and provisions of the statute; and a failure to comply with them will oust them of jurisdiction, and the proceedings will be null and void.

Highway Comrs. v. Harper, 38 Ill. 103; *Highway Comrs. v. People*, 4 Ill. App. 391; *Hyslop v. Finch*, 99 Ill. 171; *Wabaunsee County v. Muhlenbacker*, 18 Kan. 129; *People ex rel. Chubb v. Seio Twp.* 3 Mich. 121; *Keen v. Fairview Twp.* 8 S. D. 617, 67 N. W. 1151.

Mr. Benjamin Tufte for respondents.

Christianson, J., delivered the opinion of the court:

The only ultimate question presented for our determination in this case is whether there exists a highway across a quarter section of land in Griggs county, possessed by plaintiff under a contract of purchase from the board of university and school lands of the state of North Dakota. The plaintiff asserts that no such highway exists, and brought this action to enjoin the township officials from grading the same and otherwise exercising dominion over the strip of land which defendants claim is dedicated to such highway use. The trial court decided in favor of defendants and dismissed L.R.A.1917A.

plaintiff's action, and also adjudged that a legal public highway existed across said land. Plaintiff has appealed from this judgment, and demanded a trial de novo in this court.

Unfortunately litigation of this character is ordinarily accompanied by bitter personal feelings on the part of the litigants and the different members of the community interested in the outcome of the litigation, and usually the evidence presents a hopeless conflict. In this case, however, there is little or no conflict in the evidence regarding the material facts, and the testimony of all the witnesses impresses us with its apparent truthfulness. In the instances wherein differences occur in the testimony of the various witnesses, such variation seems to be due to the difference in observation and recollection of the witnesses, rather than to any desire or intention to testify falsely.

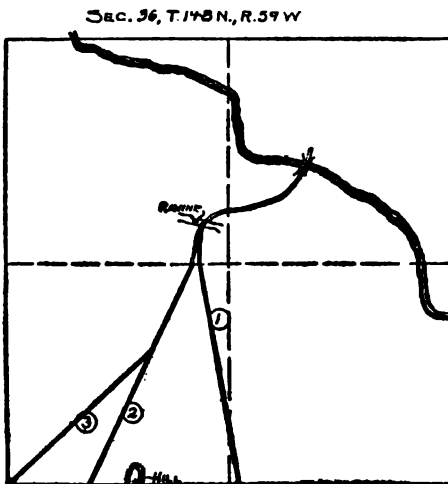
The land involved herein, to wit, the S. W. 1/4, section 36, township 148, range 59, was formerly school land, which was granted to the state of North Dakota by Congress in the Enabling Act (enacted in 1889) for the support of the common schools in the state. The plaintiff purchased this quarter section of land from the state at a public sale held on December 13, 1909, and since that time plaintiff has possessed, and exercised dominion over, said tract.

The evidence shows that in 1883 the public began to use and travel a trail over the land in question. This trail led to Coopers-town, and entered the tract in controversy on the north boundary line thereof at a point some rods west of the east quarter line, running thence in a southeasterly direction, intersecting the east quarter line of such tract a short distance north of the southeast corner thereof. This trail was designated upon the trial as trail No. 1. This trail was traveled for about six years when a man named Cameron became possessed of the quarter lying immediately south of the tract in controversy. Cameron broke up that portion of his land crossed by trail No. 1, and this trail was used no more. Thereupon, as is usual in such cases, the public began to use another trail. This trail was designated upon the trial as trail No. 2. This trail entered the tract in controversy at the north boundary line at or about the same place as trail No. 1, or some distance west thereof. Trail No. 2, however, ran in a southwesterly direction and emerged from, and intersected the south boundary line of, the tract in controversy at a distance about 80 rods west of the point where trail No. 1 intersected the same line. Trail No. 2 was traveled by the public for about two years, when Cameron constructed

a house on his land lying south of the tract in controversy, whereupon he stopped travel upon his land over trail No. 2, and the public thereupon ceased to travel upon this trail and began to use a third trail known upon the trial as trail No. 3. Trail No. 3 branched off from trail No. 2 at some distance south of the north boundary line of the tract in controversy. (The evidence does not disclose the exact distance, but it is apparently about 25 or 30 rods south of the north boundary line.) Trail No. 3, however, emerged from the tract in controversy at the southwest corner thereof, or a distance of about 80 rods west of the point where trail No. 2 emerged from such tract. Trail No. 3 was traveled for a period of about two years, when obstructions were placed in its way by Cameron along the north line of his land, and the public again began to use trail No. 2, which was used for about six years, or until the spring or summer of 1900.

One Elof Olson became the owner of the Cameron quarter in June, 1897, and in 1900 he broke up and subsequently fenced that part of the quarter where it was crossed by trail No. 2. Thereupon travel over trail No. 2 across the Cameron land as well as across the land in controversy was wholly or practically abandoned, and the public again used trail No. 3, and continued to use the same for about ten years thereafter, or up to some time in July, 1910, when plaintiff broke that part of the quarter in controversy crossed by trail No. 3. Trail No. 3 was thereupon abandoned, and the public again began to travel over trail No. 2, which continued to be traveled until this action was brought in July, 1913.

Upon the trial the plaintiff offered in evidence the following plat showing the approximate location of the three trails:



The witnesses are practically all agreed that the general location, direction, and points of egress of the trails are correctly shown on the plat, but they differ as to whether the plat correctly shows the point where the trail No. 2 enters the tract at the north boundary line. With respect to this, plaintiff's witnesses claim that the plat is correct, while defendant's witnesses claim that trail No. 2 entered upon the premises at the same (or practically the same) point as that where trail No. 1 entered the same.

The laws of the territory of Dakota, applicable to the opening and laying out of highways, in force in 1884, provided as follows:

"Whenever twelve freeholders of the county, six of whom shall reside in the immediate neighborhood, shall petition the board of county commissioners for the location, vacation, or change of any public highway, other than on section or quarter-section lines, such board, if they shall be satisfied that notice of such application has been given by publication three weeks successively in a newspaper published in the county, or by posting up notices in three of the most public places in the neighborhood of such highway, or change, at least twenty days before the meeting of the board at which such petition is to be presented, shall appoint three persons to view such highway." Pol. Code, Rev. Codes 1877, § 18, chap. 29.

"The board of county commissioners has power to establish, change, and vacate highways upon section and quarter-section lines, when the initial and terminal points, and the course of the highway, can be clearly described without the appointment of viewers, or the services of a surveyor; but in all other respects the proceedings therein shall be governed by the provisions of the preceding subdivision of this chapter, relating to the establishment, vacation, and change of highways not on such lines." Pol. Code, Rev. Codes 1877, § 30, chap. 29.

"All public highways which have been or may hereafter be used as such, for twenty years or more, shall be deemed public highways." Pol. Code, Rev. Codes 1877, § 37, chap. 29.

"All public roads and highways within this territory which have been open and in use as such, and included in a road district in the town in which the same are respectively situated during twenty years next preceding the time when this act shall take effect, are hereby declared to be public roads or highways and confirmed and established as such whether the same have been lawfully laid out, established and opened or not." Laws 1883, § 1, subsec. 2, chap. 112.

See also *Walcott Twp. v. Skauge*, 6 N. D. 382, 389, 71 N. W. 544.

It is conceded that the land in controversy was not within the limits of any organized township, and that the proceedings to establish a highway over the same would necessarily have to be brought before the county commissioners.

Under the laws of the territory of Dakota in force in 1884, public highways might become established in such territory in any one of the following ways: (1) Section lines, whether traveled or not, were already highways by virtue of legislative declaration, and might be traveled and subjected to such use as far as practicable. Pol. Code 1877, § 1, chap. 29. (2) Roads, other than on section or quarter lines, could be established by the board of county commissioners, upon a petition signed by twelve freeholders of the county, six of whom resided in the immediate neighborhood of the proposed road. (3) Roads might be created by user for a period of twenty years.

It is undisputed that the proceedings prescribed by § 18, chap. 29, Pol. Code 1877, were not had. It is undisputed that no petition was ever filed with, or presented to, the county commissioners, asking for the location of the highway in controversy, and that no notice of the presentation of a petition or application was ever published or posted. The undisputed evidence shows that the county and township road officers never exercised or attempted to exercise any control over any part of the road so surveyed by Ulland and acted upon by the county commissioners of Griggs county, but that the whole of the proposed highway was, with the single exception of the trail leading over the land in controversy, abandoned; that about 1891 Cameron obstructed and stopped travel upon such alleged highway across the premises lying immediately south of the land in controversy, and thereby stopped travel thereover for a period of about two years; and that in 1900, Olson, the then owner, broke and subsequently fenced the land lying immediately south of the tract in controversy and thereby stopped travel over such proposed highway across the so-called Cameron land, and that the proposed highway as surveyed across such land has never since been traveled; and upon the trial of this action the township officers disclaimed any intent of claiming a highway across the Cameron land. The undisputed testimony further shows that no work or repair of any kind was ever performed on such alleged road at any time or at any place on the land in controversy.

It is conceded by respondent that the decision of this court in *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082, is *de L.R.A.1917A.*

cisive of the fact that the public user of the trails over the land in controversy did not create a highway by prescription. But respondent's counsel claims, and the trial court found, that Congress granted a highway over said premises, and that the county commissioners of Griggs county accepted such grant and thereby created such highway. Respondents rest this claim upon certain evidence showing that one Ulland, the county surveyor of Griggs county, in the spring of 1884, at the request of the county clerk or one of the county commissioners of Griggs county, made a proposed survey of a proposed road commencing at or near the northeast corner of section 1, township 148, range 59, running thence a distance of some 15 or 20 miles, and terminating at or near Cooperstown; that the proposed road shown in this survey ran across the quarter section in controversy in approximately the same place occupied by trail No. 2; and that the records of the county clerk of Griggs county show that on April 11, 1884, the county commissioners of that county appointed three viewers to view such proposed highway; that on May 19, 1884, the report of the viewers was accepted and three reviewers of such proposed road selected by the county commissioners, and that the report of such reviewers was "received, and, on motion, opened."

The grant upon which respondents rely is the following law enacted by Congress in 1866: "The right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." U. S. Rev. Stat. § 2477, Comp. Stat. 1913, § 4919.

The Federal grant was accepted by the legislative assembly of the territory of Dakota in 1871, by an enactment which provided: "That hereafter all section lines in this territory shall be and are hereby declared public highways as far as practicable." Laws 1870-71, chap. 33.

That provision has remained in force in the territory and state since its enactment. See *Wenberg v. Gibbs Twp.* 31 N. D. 46, 153 N. W. 440.

The establishment of a system of highways is not altogether a matter of local concern or interest, but is a matter which concerns and affects in a measure the state as a whole. The legislature, in its acceptance of the congressional grant, recognized this fact, and, as a matter of governmental policy, established a system of highways to be constructed as far as practicable along the various section lines. In construing the statutory provisions enacted by the territorial legislature, in the case of *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709, the supreme court of our sister state said:

"It will be observed that by the act of

1871 the lawmaking power has clearly expressed its intention in language susceptible of but one construction. The expression, 'all section lines shall be and are hereby declared public highways as far as practicable,' was evidently intended to make every section line in the then territory and now state a highway over which the people of the state would have an easement and right of way subject to the qualifications therein contained for the purpose of passing from one section of the state to another. Declaring section lines 'public highways' means that they are roads which every citizen has a right to use. . . . The legislature evidently intended that the term 'highway,' as used in the law of 1871, should have the ordinary meaning, and that section lines throughout the territory as far as practicable, and not interfering with the then-existing highways in the settled portions of the territory, should be open to the use of the public, and no action of boards of county commissioners or supervisors of townships is required to establish or open such highways as are practicable on section lines. The highways so established by the legislative authorities cannot lawfully be obstructed by private citizens until changed or vacated in the manner provided by law.

"Appellants attach much importance to the clause, 'as far as practicable;' but it is quite evident that the only purpose of that qualification was to relieve the counties from the expenditure of money in the opening of highways not practicable without such expenditure, and do not limit or qualify the general language of the section, providing that 'all section lines shall be and are hereby declared public highways,' as applicable to section lines which could be used as such highways without any additional expenditure of money or labor thereon."

In discussing the effect of the congressional grant and what is essential to constitute a sufficient acceptance thereof the supreme court of Washington, in *Vogler v. Anderson*, 46 Wash. 202, 9 L.R.A.(N.S.) 1223, 123 Am. St. Rep. 932, 89 Pac. 551, said: "The grant is for a right of way to establish a public highway, and a public highway must be established in some of the ways provided by statute before the grant takes effect. If the road is established under the statute providing for their establishment by the board of county commissioners, it takes effect when the commissioners lawfully established the road; but, if the road is established by adverse user, it takes effect when the adverse user ripens into a right by prescription.

We are not called upon in this case, how-
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ever, to determine whether the language used by the Washington court should be literally adopted as the rule in this state. But in so far as it holds that "if the road is established by adverse user, it takes effect when the adverse user ripens into a right by prescription," it is in harmony with the law announced by this court in *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082. As already stated, it is conceded that, in the case at bar, the adverse user had not ripened into, or resulted in the establishment of, a highway by prescription. The authorities seem agreed that there can be no acceptance of the congressional grant by public user alone, unless such user continues for a length of time sufficient to ripen into a right by prescription, as defined by the laws of the state or territory where such highway is located. The authorities also seem agreed that in all other cases acceptance of the Federal grant must be by some positive act on the part of the public authorities authorized to establish and maintain highways, showing a clear intent on the part of such authorities as agents for the public to accept the grant. See *Vogler v. Anderson*, supra; *Smith v. Nofsinger*, 86 Neb. 834, 126 N. W. 659; *Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793, and authorities cited in these cases. See also *Keen v. Fairview Twp.* 8 S. D. 558, 67 N. W. 623; *Wayne v. Caldwell*, 1 S. D. 483, 36 Am. St. Rep. 750, 47 N. W. 547; *Meek v. Meade County*, 12 S. D. 162, 80 N. W. 182; *Shanline v. Wilsie*, 70 Kan. 177, 78 Pac. 436, 3 Ann. Cas. 140; *Smith v. Smythe*, 197 N. Y. 457, 35 L.R.A.(N.S.) 524, 90 N. E. 1121; *Randall v. Rovelstad*, 105 Wis. 410, 81 N. W. 819.

In this case we are convinced that no such acceptance has been shown. The mere fact that the county surveyor made a proposed survey of a proposed highway, and that subsequently the county commissioners appointed viewers and reviewers of such highway, and accepted their reports, when taken in connection with the undisputed facts that shortly thereafter the authorities permitted Cameron and other owners of land crossed by the alleged highway to obstruct the same; that such obstructions resulted in a repeated change to widely divergent routes of travel over the land in controversy; that the public officers never exercised or sought to exercise dominion or control over the alleged highway, even across the land in controversy, and never caused any labor to be performed either in the construction or repair thereof, although labor was performed on the highway on the township line adjacent thereto; that the entire proposed highway, as surveyed by Ulland, some 15 miles and over in length (with the

single exception of the routes traveled over the land in controversy), has long since been wholly abandoned,—in our opinion, fails to show any acceptance of a right of way for, or the establishment of, a highway over the land in controversy. If the public authorities believed that they had established the proposed highway surveyed by Ulland, it is difficult to understand how Cameron and others could be permitted with impunity to

intentionally obstruct the same and prevent all travel thereover.

We have reached the conclusion that a highway was not established over the land in controversy. The judgment is therefore reversed, and the cause remanded, with directions that judgment be entered in conformity with the views expressed in this opinion.

Annotation—Necessity and sufficiency of acceptance of grant of right of way over public land for public highway.

As to effect of limited use of way by the public as an acceptance of dedication, see note to *Phillips v. Stamford*, 22 L.R.A.(N.S.) 1114.

As to dedication and acceptance of street so as to make municipality liable for defects or obstructions therein, see subd. VII. d, p. 558, of note to *Elam v. Mt. Sterling*, 20 L.R.A.(N.S.) 513.

As to assessment or nonassessment of property as affecting its dedication or acceptance for public use, see note to *Ramstad v. Carr*, L.R.A.1916B, 1175.

And as to establishment of highways over public land subsequent to entry thereon by one who has not perfected his title, see note to *McAllister v. Okanogan County*, 24 L.R.A.(N.S.) 764.

Cases dealing with railroad rights of way across public lands are not included in the present note. See, however, cases cited in the last preceding note, to the effect that a railroad is a highway within the meaning of the congressional grant of the right of way for the construction of highways over public land.

The present note is concerned principally with the construction and effect of the Act of Congress of 1866 (U. S. Rev. Stat. § 2477, Comp. Stat. 1913, § 4919), which provides that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This is the statute referred to when the term "congressional grant" is used in the note.

It should be observed that the cases in the present note deal with the question of the necessity and sufficiency of acceptance of the congressional grant as against adverse claimants; that is, as against persons who claim to have acquired rights to the land under title derived from the government; and that in none of the cases is the question presented as to the necessity and sufficiency of an acceptance for the purpose of determining liability for injuries sustained on the alleged highway.

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Although there is some confusion in the opinions regarding the matter, the weight of authority supports the conclusion reached in *KOLOEN v. PILOT MOUND TWP.* ante, 350, that, in order to constitute an acceptance of the congressional grant of the right of way for public highways across public lands, there must be either user by the public for such a period of time and under such conditions as to establish a highway under the laws of the state, or there must be some positive act or acts on the part of the proper public authorities, clearly manifesting an intent to accept such grant with respect to the particular highway in question.

Before proceeding to consider specifically what will constitute an acceptance of the congressional grant above referred to, it seems proper to state some observations by the courts as to the purpose and nature of the grant; because on these considerations depend the necessity and sufficiency of an acceptance.

"The object of the grant," it was said in *Wells v. Pennington County* (1891) 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305, "was to enable the citizens and residents of the states and territories where public lands belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highway and roads was made by competent authority or by public use, the dedication took effect by relation as of the date of the act; the act having the same operation upon the lines of the road as if specifically described in it. . . . The parties to a dedication are the owners and the public; and it must be remembered that the public is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them. . . .

It may, however, be admitted that the right acquired by the territory or the public was necessarily imperfect until the land accepted for highways was surveyed, and capable of identification; but when the land was surveyed, and the various section lines were designated to be public highways as far as practicable, the right of the territory attached to them for that purpose, and took effect as of the date of the territorial law" (the grant having, in this instance, been accepted, as to section lines, by a territorial statute).

Regarding the congressional grant, it was said in *Wallowa County v. Wade* (1903) 43 Or. 253, 72 Pac. 793: "The act of Congress is more than a mere general offer to the public, being in effect a dedication of the land, which becomes operative and relates back to the date of the act whenever the public, either by user or by some appropriate act of the highway authorities, affirmatively manifests an intention to use a certain definite portion of the public land as a highway. The right is necessarily indefinite, and, in a sense, floating, and liable to be extinguished by a sale or disposition of the land until the highway is surveyed and marked on the ground, or in some other way identified or designated; but when the public authorities lay out and locate a road over public land of the United States by surveying and marking it on the ground, or by some legislative act, or when it is shown by user, the right becomes complete, and an intention to accept the dedication is manifested, and subsequent settlers on the land take subject to the easement. . . . The act of Congress already referred to does not make any distinction as to the methods recognized by law for the easement of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located."

The last proposition, that a highway may be established under the grant on public land in any of the ways recognized by the laws of the state in which the lands are located, appears to be generally recognized in the cases cited in the present note, with the exception of an Alabama case noted below. For instance, this doctrine was expressly recognized in *Smith v. Mitchell* (1899) 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667, the act of Congress being said to L.R.A.1917A.

be an unequivocal grant of the right of way for highways over public lands, without limitation as to the method for their establishment.

And in *Butte v. Mikosowitz* (1909) 39 Mont. 350, 102 Pac. 593, it was said that the method by which the highway is to be established is not specified in the congressional grant, and it must therefore be held that Congress intended that any act by which the public might acquire a public road over private property, other than by purchase, would be sufficient to constitute an acceptance of the grant or dedication.

The congressional grant should not, however, be construed as granting rights of way for public highways and establishing such highways contrary to the laws of the state in which the lands affected are located. *Tucson Consol. Copper Co. v. Reese* (1909) 12 Ariz. 226, 100 Pac. 777.

And the offer or dedication of lands for highways in the congressional grant will not become effective by acceptance unless the acceptance is such as would establish a public highway under the laws of the state. *Stofforan v. Okanogan County* (1913) 76 Wash. 265, 136 Pac. 484.

Under the above rules, it seems clear that there may be an acceptance of the congressional grant, before adverse interests have attached, by an act of the state legislature expressly or impliedly accepting the grant, by the action of the proper public authorities in establishing highways under the state laws, or by a public user, if the laws of the state permit the establishment of public highways in this manner.

Acceptance by statute.

The proposition that the congressional grant may be accepted by an act of the state legislature is supported by a number of cases. Thus, it has been held that a subsequent act of the state or territorial legislature, declaring all section lines within the state or territory, or within a particular county, to be public highways, is an acceptance of the grant. *Tholl v. Koles* (1902) 65 Kan. 802, 70 Pac. 881; *Walbridge v. Russell County* (1906) 74 Kan. 341, 86 Pac. 473; *Wells v. Pennington County* (1891) 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; *Smith v. Pennington County* (1891) 2 S. D. 14, 48 N. W. 309; *Keen v. Fairview Twp.* (1896) 8 S. D. 558, 67 N. W. 623; *Riverside Twp. v. Newton* (1898) 11 S. D. 120, 75 N. W. 899; *Great Northern R. Co. v. Viborg* (1903) 17 S. D.

374, 97 N. W. 6; *Lawrence v. Ewert* (1908) 21 S. D. 580, 114 N. W. 709.

That the Act of 1871, enacted by the territorial legislature of Dakota, declaring all section lines to be public highways as far as practicable, constituted an acceptance of the congressional grant of the right of way for the construction of highways over public lands, is apparently assumed in such cases as *Wenberg v. Gibbs Twp.* (1915) 31 N. D. 46, 153 N. W. 440, where it was held that the Northern Pac. R. Company, whose plat of definite location was not filed until 1873, took the land granted to it by the Act of Congress of 1864, subject to the highway so established.

In *Tholl v. Koles* (Kan.) *supra*, it was said: "The congressional Act of 1866, as will be observed, is in language a present and absolute grant, and the Kansas enactment of 1867 is a positive and unqualified declaration establishing highways on all section lines. . . . The general government, in effect, made a standing proposal,—a present grant of any portion of its public land not reserved for public purposes for highways,—and the state accepted the proposal and grant by establishing highways and fixing their location over public lands. . . . The act of the legislature did not specifically refer to the congressional grants, nor declare in terms that it constituted an acceptance, but we cannot assume that the legislature was ignorant of the grant, or unwilling to accept it in behalf of the state for highways. The law of Congress giving a right of way for public purposes over the public lands . . . was in force when the legislature acted, and it was competent for it to take advantage of that law, and the general terms employed by it are sufficiently broad and inclusive to constitute an acceptance."

It was held in *Riverside Twp. v. Newton* (S. D.) *supra*, that the act of Congress of 1861, under which the territory of Dakota was organized, providing that when the land in the territory should be surveyed, sections numbered 16 and 36 in each township should be reserved for school purposes, did not reserve these sections for public use within the meaning of the congressional grant; and the state statute declaring all section lines to be public highway was, therefore, held applicable to these school land sections, and one who purchased school land from the state after the acceptance was held to take it subject to the right to open a public highway on a section line along his land without com-

pensation. (See also *Peterson v. Baker* (1905) 39 Wash. 275, 81 Pac. 681.)

In *Wells v. Pennington County* (S. D.) *supra*, the court overruled the contention that the territorial statute declaring all section lines to be public highways, as far as practicable, could not be considered an acceptance of the congressional grant, because the territory was not clothed with authority to construct highways, and the grant was in the nature of a general offer which became operative only when its terms were complied with by such municipalities as were authorized by law to construct public highways. It was said: "The congressional act does not imply in its grant that the grantee shall be constructor of the highway. It grants the right of way only. It does not say how or by whom they may be constructed. The right to construct highways over the public land is what is given and granted, and that right is not restricted by the manner or mode of construction. The territorial law located the highways upon all public lands upon the section lines, and this public grant or dedication was so accepted, and became valid as against the government, and therefore valid as against a subsequent grantee, who must take the land subject to this right."

In the above cases, in which the question arose as to the effect of the state statute as an acceptance of the congressional grant, the claimant of the land taken for highways had entered on the public land, or claimed under an entry made after the passage of the state law, and it was held that he took subject to the easement so established, and that a highway on a section line along or through his land could be opened without payment of compensation. Thus, in *Wells v. Pennington County* (S. D.) *supra*, it was said that the congressional grant and the territorial law declaring all section lines, as far as practicable, to be public highways, and designating such highways to be 66 feet wide, were notice to all persons filing on public lands subsequent to the passage of these laws that they took them subject to the right of way for highway purposes, if such section lines were found to be practicable.

However, under the Nebraska statute of 1879, considered as an acceptance of the congressional grant of the right of way for the construction of highways over public lands, the right to recover damages for the opening of public roads on section lines is reserved to landowners. The statute provides: "Section

lines are hereby declared to be public roads in each county in this state, and the county board of such county may, whenever the public good requires it, open such roads without any preliminary survey, and cause them to be worked in the same manner as other public roads: provided, that any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided." Thus, in *Scott's Bluff County v. Tri-State Land Co.* (1913) 93 Neb. 805, 142 N. W. 296, it was held that one who obtained title by homestead entry under the laws of the United States after 1879, was, under the statute, entitled to damages for the opening of a highway on a section line through his land. And this decision was approved and followed in *Rule v. Sioux County* (1913) 94 Neb. 736, 144 N. W. 806. In the above decisions, the court relied upon the following cases, which, among possibly others, sustain the landowner's right, under the statute, to damages for the opening of a highway on a section line along or through his land: *Henry v. Ward* (1896) 49 Neb. 392, 68 N. W. 518; *Barry v. Deloughrey* (1896) 47 Neb. 354, 66 N. W. 410; *Howard v. Clay County* (1898) 54 Neb. 443, 74 N. W. 953; *Seace v. Wayne County* (1904) 72 Neb. 162, 100 N. W. 149; *Beste v. Cedar County* (1910) 87 Neb. 689, 128 N. W. 29. The word "owner," as used in the statute, was said in the *Beste* and *Rule* Cases, to apply to all persons having an interest in the estate taken or damaged.

An acceptance of the congressional grant may be effected by the subsequent enactment of a state statute declaring all roads to be public highways which have been used as such for a certain length of time; so that, by operation of the statute, the grant becomes effective as to a highway over government land, used as such by the public the required length of time. Thus, in *McRose v. Bottyer* (1889) 81 Cal. 122, 22 Pac. 393, the court considered a statute providing that all roads used as such for five years shall be public highways as constituting an acceptance by the state of the dedication of land for public highways contained in the act of Congress, and held that one who subsequently acquired title from the United States to the land over which a highway so established passed, although after the use of the highway by the public had ceased, took it subject to the easement so created, if it had not been extinguished under the state laws.

The doctrine that the congressional L.R.A.1917A.

grant is an offer of dedication, and that a subsequent state statute declaring all roads in a particular county used as public highways for two years or more before its passage to be public highways, is an acceptance of the offer, so that a road across public land meeting the statutory requirements was thereby constituted a public highway, and the land, when it subsequently passed into private ownership, was taken subject to the easement, was approved in *Schwerdtle v. Placer County* (1895) 108 Cal. 589, 41 Pac. 448. But the court held that it could not take judicial notice that the land over which the alleged highway passed was a part of the public domain at the time of the acceptance, although it would take judicial notice of the act of Congress and of the state statute.

So, an acceptance of the congressional grant may be effected by a statute subsequently enacted, providing that all public highways which have been or may thereafter be used as such for twenty years or more shall be deemed public highways. *Walcott Twp. v. Skauge* (1897) 6 N. D. 382, 71 N. W. 544; *Great Northern R. Co. v. Viborg* (1903) 17 S. D. 374, 97 N. W. 6. In these cases, it was held that, in view of this grant and acceptance, the principle that adverse user cannot run against the government was not applicable. See also, on the latter point, *Smith v. Mitchell* (1899) 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667, holding that, under the congressional grant of land for public highways, a prescriptive right in favor of the public to land used as a highway might begin before the occupant, who held the land over which the highway passed as a homestead, had obtained a patent therefor from the United States.

In *Walcott Twp. v. Skauge* (N. D.) supra, it was held that, in view of the congressional grant and acceptance by the state statute, where the user of a road for twenty years was of such a nature as would otherwise establish it as a public highway, the fact that, during a part of this time, the land over which the road passed was a part of the public domain, would not prevent such establishment.

It was held also in *Walcott Twp. v. Skauge* (N. D.) supra, that the congressional grant was not in the nature merely of a license, revocable at the pleasure of the grantor, and that therefore the establishment under the statute of a highway by public user could not be prevented on the ground that adverse user

cannot be predicated on a user by virtue of a license.

Under the congressional grant and a state statute enacted in 1873, declaring roads laid out and recorded as highways by order of the board of supervisors, and all roads used as such for five years, to be public highways, the court, in *People v. Quong Sing* (1912) 20 Cal. App. 26, 127 Pac. 1052, considered that evidence of user of a road for ten years prior to 1873 was sufficient, apart from certain proceedings of the supervisors in relation thereto, to establish the road as a highway across government land.

An acceptance of the congressional grant by a state statute declaring all public roads and highways, used as such for more than seven years, and so used at the time the statute was enacted, where they have been worked and maintained at the public expense, to be lawful roads and highways, is implied in *Peterson v. Baker* (1905) 39 Wash. 275, 81 Pac. 681, in holding that a highway was established by the grant and the acceptance over a section of land reserved by the Act of Congress of 1853 for school purposes in Washington territory, such land not thereby being reserved for public uses within the meaning of the congressional grant. (See also *Riverside Twp. v. Newton* (1898) 11 S. D. 120, 75 N. W. 899.)

Acceptance by public user.

As to acceptance by user under statute accepting the congressional grant as to roads in use for a certain period, see cases cited above.

It seems well established that an acceptance of the congressional grant may be effected by public user, if the laws of the state permit the establishment of highways generally by prescription. Thus, it has been said that the congressional grant is an express dedication of a right of way, and an acceptance of the grant, while the land is a part of the public domain, may be effected by a public user alone, without any action on the part of the public highway authorities; and when an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon land, and subsequent entrymen and claimants take subject to such easement. *Montgomery v. Somers* (1907) 50 Or. 259, 90 Pac. 674.

An acceptance of the congressional grant is shown by evidence of user for such a length of time and under such conditions as would establish a road by prescription if the land over which it

passed had been the subject of private ownership. *Butte v. Mikosowitz* (1909) 39 Mont. 350, 102 Pac. 593.

And in *Sprague v. Stead* (1914) 56 Colo. 538, 139 Pac. 544, it was held that an acceptance by the public of the congressional grant of land for public highways was sufficiently shown where it appeared that the public began to use the road in question at a time when it passed over the public domain, and continued to use it in practically the same place and along the line originally established for more than thirty years, without objection from the plaintiff and his predecessor in interest, who, more than twenty years before the trespass in question, had obtained a patent to the land over which the highway passed. Regarding the congressional grant, the court said: "This was an express dedication for a right of way for a road over the land belonging to the government, not reserved for public use. The acceptance of such grant while the land was a part of the public domain may be effected by public use. An appropriation in this manner is made with the consent of the owner, previously given, and, when confined to a reasonably certain and definite line, creates an easement for the purposes of a highway, and subsequent entrymen and claimants take such land subject to that easement. The road involved has been used by the public ever since it was established, without objection until 1910. This is sufficient to show an acceptance by the public of the congressional grant, and establish that the title to this land was taken subject to the right of way for such roads."

In view of the congressional grant, the doctrine that limitation or adverse user will not run against the government has no application to prevent the establishment of a highway by acceptance of the grant by public user. *Walcott Twp. v. Skauge* (1897) 6 N. D. 382, 71 N. W. 544; *Great Northern R. Co. v. Viborg* (1903) 17 S. D. 374, 97 N. W. 6; *Smith v. Mitchell* (1899) 21 Wash. 536, 75 Am. St. Rep. 858, 58 Pac. 667. Therefore, such cases as *Smith v. Smith* (1885) 34 Kan. 293, 8 Pac. 385, decided without reference to the congressional grant, and holding that a highway was not established by user across land belonging to the United States, under the doctrine that limitation will not run against the government, are clearly distinguishable from the cases in the present note, dealing with the effect of the congressional grant. The *Smith Case* has been distinguished on this ground in decisions

by the same court in *Molyneux v. Grimes* (1908) 78 Kan. 830, 98 Pac. 278, and *Hughes v. Veal* (1911) 84 Kan. 534, 114 Pac. 1081.

Assuming that in 1866, the land over which the road passed was a part of the public domain, the court, in *Van Wanning v. Deeter* (1907) 78 Neb. 282, 110 N. W. 703, held that there was sufficient evidence of the establishment of the road as a public highway by dedication and acceptance under the congressional grant of that date, the acceptance being shown by user by the public without objection during the preceding thirty years, and by work on the road by the public authorities, so that a title taken from the United States when the road was in use as a highway was subject to the easement. On rehearing, however, in (1907) 78 Neb. 284, 112 N. W. 902, it was held that the above assumption, on which the decision was based, that the land was a part of the public domain at the time of the congressional grant in 1866, was erroneous, and the judgment rendered on the hearing of the case was set aside, the court holding that, independent of the act of Congress, the user (being of wild, uninclosed prairie land, and without the knowledge of the owner) was insufficient to establish a highway by prescription.

The decision in *Cross v. State* (1906) 147 Ala. 125, 41 So. 875, that the method of establishing highways by public user is not applicable to the establishment of highways under the congressional grant, does not appear in accord with the other cases which have considered this question. It seems that in that state the establishment of a public highway by twenty years' continuous, adverse user by the public is recognized. (See, for instance, *Harper v. State* (1896) 109 Ala. 66, 19 So. 901.) Nevertheless, in the *Cross Case*, the court, although saying that while the land in question was yet government land, a roadway traversed it which had been used by the people of the vicinity for more than twenty years, stated that the road was not shown to have been recognized by any act of the county as a public highway, and such use would be presumed to have been permissive, and not adverse to the government; also that the congressional grant could not be construed to mean that a roadway used by the public over government land may become a public highway from mere user or prescription.

There is some confusion in the opinions as to the length of the user by the public necessary to constitute an accept-

ance of the Congressional grant, assuming that an acceptance may be effected in this manner. The weight of authority directly on the question seems now in favor of the conclusion in *KOLOEN v. PILOT MOUND TWP.* ante, 350, that such user must continue for a length of time sufficient to ripen into a right by prescription, as defined by the laws of the state or territory where the highway is located.

Thus, it was held in *Vogler v. Anderson* (1907) 46 Wash. 202, 9 L.R.A. (N.S.) 1223, 123 Am. St. Rep. 932, 89 Pac. 551, that the establishment of a public highway in some manner provided by statute is necessary to constitute an acceptance of the congressional grant of a right of way across public lands and perfect the grant; and that, therefore, a mere user short of the time necessary to establish title by adverse possession is not sufficient. It was said that, "to hold that a lesser period would suffice in this state would violate the terms of the grant made by Congress. The grant is for a right of way to establish a public highway, and a public highway must be established in some of the ways provided by statute before the grant takes effect."

However, the doctrine that the user by the public need not continue for the prescriptive period in order to constitute an acceptance of the congressional grant is supported by the language and reasoning of the court at least in several cases. The doctrine on which the cases rest in which the courts have apparently considered a public user for less than the prescriptive period sufficient to constitute an acceptance of the congressional grant is apparently that on which other cases are based which have held such user sufficient to constitute an acceptance of a dedication of a right of way over private land generally. On this point, it is said in 13 Cyc. 465, that "an offer of dedication, to bind the dedicator, need not be accepted by the city or county, or other public authorities, but may be accepted by the general public.

. . . Except when user is relied on to raise a presumption of dedication, the duration of the user is wholly immaterial. It is not necessary that such user should continue any definite length of time. . . . While no dedication will be presumed from user alone, unless the user has been so long and so general that the public convenience would be materially affected by its interruption, no such requirement applies strictly as to the user which constitutes the acceptance of a dedication otherwise estab-

lished, it being only necessary that those who would naturally be expected to enjoy it do, or have done so, at their pleasure and convenience."

In *Okanogan County v. Cheetham* (1905) 37 Wash. 682, 70 L.R.A. 1027, 80 Pac. 262, the court, in passing on the question of the length of time the user by the public must continue under the congressional grant, called attention to the fact that the question was not one whether there had been an establishment of a highway by prescription, but whether there had been an acceptance of a grant; and it was held that public use of a strip of land as a highway for a period of seven years before the rights of a homestead entry attached to it is sufficient acceptance of the benefits of the congressional grant, and that it is not necessary that there shall have been a formal acceptance of the grant, or a user for the prescriptive period. In this case no public funds had been expended on the road in question, and the Washington statute (cited in *Peterson v. Baker* (1905) 39 Wash. 275, 81 Pac. 681), declaring all public roads and highways in the state, used as such for not less than seven years, and maintained at the expense of the public, to be lawful roads and highways, was apparently inapplicable. Nevertheless, in *Vogler v. Anderson* (Wash.) *supra*, in holding that mere user short of the time necessary to establish title by adverse possession is not sufficient to constitute an acceptance of the congressional grant, the same court distinguished the *Cheetham* Case as follows: "In that case the trial court decided, by analogy to the statute of limitations for the recovery of real property, that, in order to constitute a way across public land, the user must have continued for a period of ten years or more. This court reversed that decision, holding that continuous user for a period of seven years was sufficient to establish the way as a public highway. But it was not said, or intended to be said, that a user for any lesser period than seven years would be sufficient for that purpose. . . . The shortest period allowed by statute to establish a highway by user in this state is seven years . . . and no user, short of this period, can therefore be held to be an acceptance of the grant contained in the act of Congress cited."

In *Montgomery v. Somers* (1907) 50 Or. 259, 90 Pac. 674, the court instructed the jury that "long-continued user" by the public is sufficient to establish an acceptance by the public of the congressional grant.

and that if they found that while the land over which the road in question passed belonged to the United States, the public "for a long period, viz., ten years or more," used as a public highway a definite path or trail as a means of passage from one point to another, then the trail had become a public highway. It was unnecessary to decide whether "long-continued user" by the public, or user for ten years or more, was necessary to constitute an acceptance by the public of the congressional grant, as the court construed the instruction as meaning merely that such user would be sufficient to constitute an acceptance, and not that it was essential thereto; and held that even if the instruction might have been construed otherwise by the jury, it was evident that it had been properly construed by them, as a finding that the highway in fact existed was necessary to the verdict rendered. However, the court was apparently of the opinion that to constitute an acceptance by the public of the congressional grant, the public user need not be for such a length of time as would establish a highway by prescription or limitation.

See also statement in *Hughes v. Veal* (Kan.) *infra*, to be the effect that long-continued user is not necessary to constitute an acceptance of the congressional grant. The statement is, however, apparently obiter.

In several cases the holding that a highway across government land was not established by user appears to turn on the insufficiency of the user to establish a highway across private land generally.

Thus, in *Rolling v. Emrich* (1904) 122 Wis. 134, 99 N. W. 464, it was held that a few months' desultory use by a few persons of a logging road or trail through the woods on government lands, with no action by the public authorities, would not constitute an acceptance of the offer made by the government in the grant of the right of way for the construction of highways over public lands.

And, although it appeared that one of the defendants laid out a road over public land, and that he and a few others had for about twenty years preceding used it occasionally for hauling and other purposes, it was held in *Sutton v. Nicolson* (1896) 5 Cal. Unrep. 348, 44 Pac. 805, that a finding was justified that the road had not become a public highway, in view of the fact that it did not appear that any road had ever been laid out and recorded as a highway, that the alleged road was only from 7 to 9 feet wide, and that it had never been worked

as a public road. In regard to the contention that the road had become a public highway under the grant of Congress of the right of way for the construction of highways over the public lands not reserved for public use, the court said this statute simply granted a right of way for roads, and the question whether a road had been so constructed as to make it a public highway was one which could be solved only by consideration of the laws of the state.

See also *Stofforan v. Okanogan County* (1913) 76 Wash. 265, 136 Pac. 484.

Acceptance by user and acts of public authorities.

In a number of cases the question of the sufficiency of the public user to constitute an acceptance of the congressional grant has arisen in connection with the question of the sufficiency of acts of the public authorities in attempting to establish the road in question as a public highway. Generally it seems that the user itself is sufficient in these cases to constitute an acceptance; and the courts have, for the most part, held the user, together with the acts of the public authorities, sufficient to constitute an acceptance, even if the latter in themselves were insufficient.

Thus, it was held in *Hughes v. Veal* (1911) 84 Kan. 534, 114 Pac. 1081, that the congressional grant of a right of way for the construction of highways over public land may be accepted by the acts of the public authorities or by the public itself, or by the concurrent action of both; that where the officers of the county undertake to establish a highway, and the proceedings taken are insufficient to meet all the requirements prescribed by the statutes of the state for establishing highways, but they cause the highway to be surveyed and located over public lands, and the public itself adopts their action and uses the road as a highway, the combined acts of the officers and the public are sufficient to constitute an acceptance of the congressional grant. The court said: "In the case at bar we have not only the act of the officers, who, acting for the public, caused a road to be surveyed across appellant's land, but we have the action of the public itself in using this road, which the trial court found was a 'clearly marked and well defined road,' and this continued for more than thirty-five years before the suit was brought. . . . A long user by the public is not necessary to an effectual ac-

ceptance of a dedication where the owner (the United States in this instance) has given consent and is holding out a standing offer to dedicate land for a highway. Where there is consent by the owner, the length of time of the public use is not important, for, upon an acceptance by use, the rights of the public to an easement immediately pass and vest. . . . Here the acceptance does not rest on use alone, but on the action of the officers, who acted for the public, combined with the use by the public itself. The steps taken by the officers toward laying out the road are sufficient evidence of a purpose to make a highway over appellant's land. It was viewed and located by them, and, while there was an error in the plat filed, the evidence of their action leaves little doubt of the location of the road. The public has since that time used the road, and, with very little deviation, the travel has been confined to the line located by the officers. The use by the public was immediate and long continued. Some work has been done on the road by those in charge of the highways in that locality, and everybody appears to have treated it as a highway. . . . It is not necessary to rest the decision on the user by the public for the statutory period of fifteen years, but it is placed rather on the concurring acceptance of the officers and public itself, at and shortly after the location of the road."

And in *Streeter v. Stalnaker* (1901) 61 Neb. 205, 85 N. W. 47, it was held that evidence of long-continued use by the public tends to show the establishment of a road by dedication over the public domain; as does also the surveying, marking out, platting, and improvement of a road by the public authorities. And in this case, where it appeared that in 1877 a county board, on petition, appointed a special commissioner to inquire into the expediency of establishing a proposed highway on land belonging to the United States, that the commissioner proceeded to survey, plat, and mark the road, that his report was accepted by the board, that the public authorities assumed control of the road and improved a part of it, and that the public had used the road for more than twenty years, it was held that there was sufficient evidence of an acceptance of the grant, so that the highway could not be obstructed by one claiming title under an entry made in 1894, under the Timber Culture Act. The court said that the contention was for the establishment of a public road by dedication and acceptance, not

by adverse user; that the act of Congress was a standing offer of a free right of way over the public domain; that as soon as it was accepted in an appropriate manner by the agents of the public, or the public itself, a highway was established; and that, although the action of the county authorities was perhaps insufficient to show the establishment of a road under the general road law, it was enough to indicate an acceptance of the grant.

To the same effect is *Eldridge v. Collins* (1905) 75 Neb. 65, 105 N. W. 1085, where the facts were similar. In this case it appeared that the road in question was well defined and in common use by the public as early as 1859; that in 1867, the county surveyor surveyed and platted the road, and his report was filed with the county clerk and approved by the county board; that about 1872 the road overseer, acting under the authority of the county board, constructed a culvert and made other improvements on the road, and that for almost fifty years the road had been in constant use by the public. The court considered that, under the doctrine of *Streeter v. Stalnaker* (Neb.) *supra*, the road had become a public highway by dedication as early as 1867, and could not be obstructed by one claiming under a patent from the government in 1878.

Without examining the alleged insufficiency of the proceedings to establish a highway under the statute, the court in *Wallowa County v. Wade* (1903) 43 Or. 253, 72 Pac. 793, held that, under the congressional grant, there was sufficient evidence of an establishment of the road in question as a public highway either by dedication or prescription over land belonging to the United States, where it appeared that the road was traveled by the public as early as 1880, that in 1888, on petition of the requisite number of householders, after proper notice, the county court appointed viewers and a surveyor to locate a county road along the same route, that they surveyed and marked out a highway along practically the line of travel, that their report was approved and the road ordered opened, and was thereafter continuously used by the public for thirteen years.

Acceptance by acts of public officers alone.

In several cases the question has arisen as to the sufficiency of an acceptance of the congressional grant by acts of the public authorities authorized to establish highways. And it has been

held that if an acceptance by this method alone is relied upon, the acts must be of such a nature as would establish a highway over private land generally under the laws of the state; and that if they are of this character, they constitute a sufficient acceptance.

Thus, in *Molyneux v. Grimes* (1908) 78 Kan. 830, 98 Pac. 278, it was held that an order of a board of county commissioners, otherwise regular, undertaking to establish a highway across public land of the United States, operated as an effectual acceptance of the congressional grant of the right of way for the construction of highways, and that one deriving title to such land through a settlement subsequently made took it subject to the easement so created. The court said that it would seem that the public might directly accept the offer of Congress by general and long-continued use, and that some decisions were to that effect; but that whether this was so or not, it was clear that an effectual acceptance might be made by the officers to whom the matter of establishing highways had been committed by the legislature.

In *Stofferan v. Okanogan County* (1913) 76 Wash. 265, 136 Pac. 484, it was held that the Oregon Statute of 1903, authorizing boards of county commissioners to accept highways as granted by the Act of Congress of 1866, to a width of not less than 30 nor more than 60 feet, was intended merely as an authorization to the boards to avail themselves of the grant by the establishment of roads across lands of the United States not reserved for public use; that the establishment of a highway across such land must be in some manner recognized by the laws of the state; and that a resolution of a board of county commissioners expressly accepting the grant to the extent of 30 feet on each side of the center line of all wagon roads existing on land of the United States in the county, not reserved for public use, was not such an acceptance of the grant as to an existing road as would give the county complete title from that date.

And in *Tucson Consol. Copper Co. v. Reese* (1909) 12 Ariz. 226, 100 Pac. 777, where it appears that public highways could be established only by following the statutory provisions for their establishment by the boards of supervisors of the various counties, and not by adverse user or prescription, it was held that a public highway across land of the United States was not established by the adoption by the board of supervisors of a county of a resolution, which was re-

corded with the county recorder, expressly accepting the right of way for the construction of highways over public lands as granted by the act of Congress, as far as it related to a certain road in the county, if the resolution was not adopted on petition of taxpayers, as required by statute, or the location was not recorded as the statute required, although the road in question had been in open and constant use by the public for more than thirty years.

Miscellaneous.

Section 10 of the Act of Congress of 1906 for the allotment of the tribal lands of the Osage Indians in Oklahoma provides that public highways of a certain width on each side of all section lines in the Osage Indian Reservation may be established without compensation therefor. And it was held in *Mills v. Glasscock* (1910) 26 Okla. 123, 110 Pac. 377, that this act was accepted by a territorial statute in force at the time the act was passed, declaring all section lines in the territory to be public highways, and, by § 2 of art. 16 of the Constitution of the state, providing that the state hereby accepts all reservations and lands for public highways made under any grant, agreement, or act of Congress; and that highways were thereby established without additional legislation.

A vote of a town, giving the right to certain named persons to make a designated road over the public land, provided they gave a deed to the town of their own land, 2 rods wide, was held in *Curtiss v. Hoyt* (1848) 19 Conn. 154, 48 Am. Dec. 149, to grant a mere license for the construction of the road which ceased to have effect unless it was executed by the making of the road in a reasonable time and manner for public travel; and it was held that the license had expired without the establishment of the highway, where, more than forty years after the vote, the place in question remained substantially in its natural state, impassable and dangerous, although a slight amount of work had been done thereon, and the deed required by the vote had been given.

Among possibly other cases relating to toll roads, see *Estes Park Toll Road Co. v. Edwards* (1893) 3 Colo. App. 74, 32 Pac. 549, holding that the construction of a toll road across land of the United States, subsequent to the congressional grant of the right of way for the construction of highways over public land not reserved to public uses, is a sufficient acceptance of the grant to pass the gov-

ernment title to the right of way and vest it in the grantee permanently, subject to defeasance in case of abandonment. The question was whether the toll road company had such property in the right of way as was subject to taxation. The court considered the case as analogous to that of a grant to a railway of a right of way across the public domain.

As before indicated, the question whether there was a sufficient acceptance of the congressional grant to establish a highway has generally arisen as against one claiming under a title from the government to the land over which the road passes. In this connection, the question may arise whether the congressional grant is a grant in present, taking effect, upon acceptance, as of the date of the grant, so as to cut off intermediate interests. This question in itself is not within the scope of the note, because it presupposes an acceptance, and the question with which this note is concerned is the necessity and sufficiency of an acceptance. Nevertheless, it seems proper to call attention to what appears from the cases cited in the note as the better view of this question. Although there are a number of cases expressly stating that the grant of Congress is a present grant, and it has been distinctly asserted (see, for instance, *Wells v. Pennington County* (1891) 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305), that when the location of the road is made by competent authorities or by public use, the dedication takes effect by relation as of the date of the act, it appears in the cases where it was so stated that such a holding was not necessary to the decision. It seems that, as against adverse interests which have attached to the land over which the highway passes, the rights of the public, upon acceptance of the congressional grant, will not take effect as of the date of the grant, but only as of the date of the acceptance; or, perhaps, as of the date of the initiatory steps which ripen into a complete acceptance.

Thus, in *McAllister v. Okanogan County* (1909) 51 Wash. 647, 24 L.R.A. (N.S.) 764, 100 Pac. 146, the court considered that the congressional grant was not a grant in present, which imported an immediate transfer of interest, so that when a highway was definitely located the title would attach from the date of the act, cutting off all intermediate interests, the holding on this point in *Okanogan County v. Cheetham* (1905) 37 Wash. 682, 70 L.R.A. 1027, 80 Pac.

262, being overruled. And it was held that the right of the public to a strip needed for a highway under the act of Congress above cited dates only from the time the initiatory steps are taken which ripen into a completed title; and that the public, therefore, cannot interfere with a settler who incloses the land through which the highway is desired, prior to an attempt to establish a highway over it.

The decision in *McAllister v. Okanogan County* (Wash.) supra, was approved and followed in *Stofforan v. Okanogan County* (1913) 76 Wash. 265, 136 Pac. 484. In the latter case it was said: "The net result of our decisions, therefore, is that the United States statute takes effect as a grant only when the res comes into being; that is, when the road has been established on petition, as prescribed by our statutes, or by use for the period required for prescription prior to the attaching of any adverse rights upon the public lands over which it passes."

And it was held in *Stofforan v. Okanogan County* (Wash.) supra, that land reserved for the use of the Indians was reserved for public use within the meaning of the congressional grant above referred to, and therefore was not within the grant until it was thrown open for settlement; so that the ten years' statutory period within which a road might become a public highway by prescription did not begin until the land was thrown open to settlement, and the rights of one who, before the expiration of such period, took possession and fenced the land over which the road passed, under an application for a soldier's additional homestead, could not be taken without compensation. The court said that since the grant contained in the act of Congress is not a grant in presenti, it could only attach upon the acquiring of title by the complete lapse of the period of prescription subsequent to the opening of the reservation for settlement, and prior to the attachment of any adverse rights. R. E. H.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

M. E. GALVIN, Admr., etc., of J. W. Galvin, Deceased.

(— Okla. —, 158 Pac. 1153.)

Evidence — cost of rebuilding.

1. In an action for the recovery of the value of a building destroyed by fire, in order to make evidence as to the cost of rebuilding the same competent, there must also be produced evidence showing the original cost and the depreciation from use, age, and other causes.

For other cases, see Evidence, XI. f and g, in Dig. 1-52 N. S.

Damages — destruction of building.

2. The measure of damages for the loss of a building destroyed by fire is the actual cash value of the building at the time and place of its destruction.

For other cases, see Damages, III. k, 2, in Dig. 1-52 N. S.

Appeal — immaterial error — statute.

3. Section 6006, Rev. Laws 1910, provides that no judgment shall be set aside on the ground of misdirection of the jury, or the improper admission or rejection of evidence, unless, in the opinion of the su-

preme court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a violation of a constitutional or statutory right of the aggrieved party.

For other cases, see Appeal and Error, VII. m, 3 and 4, in Dig. 1-52 N. S.

(June 27, 1916.)

ERROR to the County Court for Grant County to review a judgment in plaintiff's favor in an action brought to recover the value of a building destroyed by fire, alleged to have been caused by the negligent operation of defendant's railroad. Affirmed.

The facts are stated in the opinion.

Messrs. Kent W. Shartel, C. O. Blake, R. J. Roberts, and W. H. Moore, for plaintiff in error:

Evidence of the cost of reproduction of the building was inadmissible for the reason that it was based upon plans and specifications that were not proved to be correct, and which were not introduced in evidence, for the inspection of the jury.

Wall v. Platt, 169 Mass. 398, 48 N. E. 274; *St. Louis & S. F. R. Co. v. Dickerson*, 29 Okla. 386, 118 Pac. 141; *4 Sutherland, Damages*, 3d ed. p. 2967; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661; *Hearn v. McDonald*, 60 W. Va. 435, 71 S. E. 568; *Close v. Ann Arbor R. Co.*

Headnotes by MATHEWS, C.

Note.—As to measure of damages for destruction of, or damage to, building, see annotation following this case, post, 367. L.R.A.1917A.

169 Mich. 392, 135 N. W. 346; Chicago & E. R. Co. v. Ohio City Lumber Co. 131 C. C. A. 57, 214 Fed. 751; Wigmore, Ev. §§ 672, 680, 682, 1230.

It is error to instruct upon a point on which there is no evidence.

Waters v. Dore, — Okla. —, 150 Pac. 885; St. Louis & S. F. R. Co. v. Henry, — Okla. —, 149 Pac. 132; White v. Oliver, 32 Okla. 479, 122 Pac. 156; Miller Bros. v. McCall Co. 37 Okla. 634, 133 Pac. 183; Frick-Reid Supply Co. v. Aggers, 28 Okla. 425, 114 Pac. 622; Shuler v. Collins, 40 Okla. 126, 136 Pac. 752; Muskogee Electric Traction Co. v. Staggs, 34 Okla. 161, 125 Pac. 481; Obenchain v. Roff, 29 Okla. 211, 116 Pac. 782; Chambers v. Van Wagner, 32 Okla. 774, 123 Pac. 1117.

Mr. Sam P. Ridings, for defendant in error:

In the absence of a statement that all the evidence is included in the record, it is impossible for this court to pass upon any point necessitating an examination of the evidence.

Lilly v. Russell & Co. 4 Okla. 94, 44 Pac. 212; Van Arsdale-Osborne Brokerage Co. v. Wiley, 40 Okla. 651, 140 Pac. 153; Graham v. Atwood, 41 Okla. 30, 136 Pac. 1080; White v. Harlow, 36 Okla. 191, 128 Pac. 111.

The measure of damages in case of loss of a building by fire is not the market value of the building at the time of the loss, nor what someone would have paid for it, but the actual cash value of the property at the time of the loss.

Fire Asso. of Philadelphia v. Farmers' Gin Co. 39 Okla. 162, 134 Pac. 443.

Evidence of the reproduction of the building is admissible as a criterion to aid the jury in finding the actual value.

13 Am. & Eng. Enc. Law, p. 537; Cleland v. Thornton, 43 Cal. 437.

Mathews, C., filed the following opinion:

This was an action for the recovery of the value of a building destroyed by fire in the town of Medford, Grant county, Oklahoma, on the 25th day of June, 1911. The parties will be designated as in the trial court. It was plaintiff's contention that the said fire originated from sparks escaping from defendant's engine while it was being used in the operation of its railroad running through the said town of Medford. The defendant answered by general denial. The case was tried by a jury, W. H. C. Taylor, of Pond Creek, special judge, presiding. Judgment was for the plaintiff in the sum of \$512.50. Defendant.

ant's motion for a new trial having been overruled, this appeal followed.

The principal assignment of error relates to the admission of certain testimony as to cost of rebuilding the destroyed house. A witness for plaintiff testified that the actual cash value of the building, on the date of its destruction, was \$900. Fire Asso. of Philadelphia v. Farmers' Gin Co. 39 Okla. 162, 134 Pac. 443. There is no objection raised to the qualification of this witness or the admission of his testimony on this point. But another witness was permitted to testify that it would cost \$1,200 to rebuild the destroyed building with new material, and it is against this testimony that the main claim for reversal is predicated. This witness testified as to the cost of rebuilding only, and defendant insists that such testimony, standing alone, was incompetent, and that in order to make the same competent there must have been further testimony as to the original cost of the building and as to its depreciation from use, age, and other causes. This contention seems to be supported by all the authorities. Sutherland on Damages, 3d ed. vol. 4, page 2967, says: "The real value of a building is to be ascertained by taking into account the original cost and the cost of replacing it, and making allowance for depreciation from use, age, and other like causes." Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co. 27 Fla. 1, 157, 17 L.R.A. 33, 9 So. 661; Hearn v. McDonald, 69 W. Va. 435, 71 S. E. 568; Close v. Ann Arbor R. Co. 169 Mich. 392, 135 N. W. 346; Chicago & E. R. Co. v. Ohio City Lumber Co. 131 C. C. A. 57, 214 Fed. 751; Wall v. Platt, 169 Mass. 398, 48 N. E. 270.

But, conceding the error, should the judgment be reversed? Section 6005 expressly provides that no judgment shall be set aside on account of the improper admission of evidence, unless it appears that such admission has probably resulted in a miscarriage of justice. It is apparent that the evidence complained of, standing alone, has but little probative value. Without evidence as to the original cost and depreciation of the building the jury could derive but little information from the evidence as to the cost of rebuilding. From the facts that the witness testified that it would cost \$1,200, to reproduce the building, and the jury returned a verdict for \$512.50, it is apparent that the jury was not influenced by the testimony complained of. When we consider that another witness testified that the actual cash value of the building, at the time it was burned, was \$900, it becomes almost conclusive that the jury did

not consider the testimony complained of, and that it could not have had any weight with them. The case of *St. Louis & S. F. R. Co. v. Hart*, 45 Okla. 659, 148 Pac. 436, following the uniform rule laid down by this court, says: "Section 6005, Rev. Laws (Okla.) 1910, which provides that no judgment shall be set aside on the ground of misdirection of the jury, or the improper admission or rejection of evidence, unless, in the opinion of the supreme court, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a violation of a constitutional or statutory right of the aggrieved party." *Yukon Mills & Grain Co. v. Imperial Roller Mills Co.* 34 Okla. 817, 127 Pac. 422; *Dolezal v. Bostick*, 41 Okla. 743, 139 Pac. 964.

The defendant excepted to the giving of the following instruction: "Any evidence offered in this case, proving, or tending to prove, the cost of building or restoring the building destroyed at the time of the de-

struction thereof, may be considered by the jury for the purpose of furnishing data to enable the jury to determine the true amount of the damages; but the same is not to be considered by the jury as constituting the measure of damages or recovery, but you may take the same into consideration for the purpose of determining and arriving at the actual cash value of the property at the time of the destruction thereof."

There being no evidence introduced as to the original cost of the building, and the evidence as to the reproduction cost being improperly admitted, the giving of this instruction was a technical error; but, for the reason set out above, we are of the opinion that it is not probable that the error resulted in any prejudice to the rights of the defendant.

We recommend that the judgment be affirmed.

Per Curiam:

Adopted in whole.

Annotation—Measure of damages for destruction of or damage to building.

Generally as to measure of damages for wrongful cutting or destruction of standing timber, see notes to *Bailey v. Chicago, M. & St. P. R. Co.* 19 L.R.A. 653; *J. F. Ball & Bro. Lumber Co. v. Simms Lumber Co.* 18 L.R.A.(N.S.) 244; and *Reynolds v. Great Northern R. Co.* 52 L.R.A.(N.S.) 91.

As to measure of damages for injury to or destruction of trees or shrubbery valuable for their timber or firewood, see notes to *Bailey v. Chicago, M. & St. P. R. Co.* 19 L.R.A. 653; *Louisville & N. R. Co. v. Beeler*, 11 L.R.A.(N.S.) 930; and *Cleveland School Dist. v. Great Northern R. Co.* 28 L.R.A.(N.S.) 757.

The basic principle of the law of damages is compensation for the loss sustained; and in order to give satisfaction measured with money, such rules are formulated as are thought best to accomplish this purpose.

Building injured or destroyed by fire.

No hard and fast rule applicable to all cases can be laid down as to the measure of the loss suffered by the destruction of buildings by fire. Some authorities proceed upon the theory that buildings have a value separate and distinct from the land, and hold that the measure of damages is the actual cash value of the building at the time of its injury or destruction. L.R.A.1917A.

Thus it is decided in *Chicago & N. W. R. Co. v. Kendall* (1911) 108 C. C. A. 251, 186 Fed. 139, that buildings have a value detached from the realty, and that such value is a proper measure of damages.

So, actual value was the measure of damages for destruction of house by fire in *McMahon v. Dubuque* (1898) 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517, 5 Am. Neg. Rep. 147, the court stating that to prove the market value of the land immediately before and after the fire would be accomplishing by circumlocution what might be directly ascertained, for such difference would be the value of the house. Location may sometimes have a bearing, as where a building is so situated as not to be useful for the purpose of its construction. In such cases this must be taken into consideration in fixing the real value. But it could be as readily done by estimating this separate from as with the land. True, such property may have no market value. It does, however, have actual value, and this is then the measure of recovery.

So, in *White v. Chicago, M. & St. P. R. Co.* (1890) 1 S. D. 326, 9 L.R.A. 824, 47 N. W. 146, it is held that the proper measure of damages for buildings destroyed or injured by fire through negligence is not the difference in the value of the land upon which they are situated,

before and after the injury, but in the value of the buildings themselves.

So, where a dwelling house was burned, it was held, in *Norfolk & W. R. Co. v. Thomas* (1910) 110 Va. 622, 66 S. E. 817, that the measure of recovery was the value of the property destroyed, and the court held misleading, and not clear, an instruction "that in considering the value of the house they must take in view its location, and, if they believe from the evidence that the value of the house upon the farm was not such a sum as would replace it, the jury shall only award such a sum as the place has suffered by reason of its destruction."

So, in *Fire Asso. of Philadelphia v. Farmers' Gin Co.* (1913) 39 Okla. 162, 134 Pac. 443, the court states that the measure of damages in case of loss by fire, if the property destroyed is a building, is not the market value of the building at the time of the loss, nor what someone would have paid for it, but the actual cash value at the time of the loss. See also, to the same effect, *St. Louis, I. M. & S. R. Co. v. Weldon* (1913) 39 Okla. 369, 135 Pac. 8.

So, actual cash value of the building at the time and place of destruction is the measure of damages adopted in *CHICAGO, R. I. & P. R. Co. v. GALVIN*, ante, 365.

On the other hand, some authorities regard buildings merely as part of the land on which they stand, and hold that the measure of damages is the difference in value of the land before and after the fire, where the land has a market value.

Thus, in *Pacific Exp. Co. v. Smith* (1891) — *Tex.* —, 16 S. W. 998, the measure of damages for the destruction of a house by fire was held to be the difference between the market value of the house and lot before and after the fire, where the house and lot together had a market value.

So, in *Pacific Exp. Co. v. Lasker Real Estate Asso.* (1891) 81 *Tex.* 81, 16 S. W. 792, where a house was partially destroyed by fire, the measure of damages was held to be the difference between the value of the land immediately before and after the injury, and not what it would cost to rebuild, since that would give the owner more than just compensation.

So, where a house was destroyed by fire, in *Louisville & N. R. Co. v. Home Ins. Co.* (1912) 146 Ky. 281, 142 S. W. 398, the measure of damages was the difference between the value of the

house and lot before and after the fire, and not the fair market value of the house alone. The court said: "What the plaintiff was entitled to recover, if anything, was the loss he sustained by the destruction of his house. This measure of recovery would compensate him, and it was clearly proper to allow him to prove what it would cost to replace the house that was destroyed; and it was also admissible to give in evidence every relevant fact that would throw light upon its value, and aid the jury in ascertaining the amount of the loss the plaintiff had sustained; such, for example, as the value of the land where the house stood before it was destroyed, and its value afterwards. But we do not understand how it would be practicable for any person to say what the market value of a house was detached from the land on which it stood, unless it was intended to remove the house to another place, or tear it down, as, ordinarily, houses have little value separate from the land, upon which they are located. They are regarded as a part of the land, and when we speak of the market value of a building it is generally understood to include the ground on which the building is located. The court did not refuse to permit counsel for the railroad company to prove the value of the place before and after the house was burned, but only ruled that it was incompetent to ask, 'What was the fair market value of that house at the time it was destroyed by the fire last year?'"

It was stated in *Jeffress v. Norfolk Southern R. Co.* (1912) 158 N. C. 215, 73 S. E. 1013, that the house destroyed by the fire being a part of the land, and the injury being to the freehold, the inquiry, therefore, for the jury, was, "How much has the land been depreciated in value by the fire?" which is but another way of ascertaining the difference in the value of the land before and after the fire. It was, of course, competent to introduce evidence as to the size of the house, the quality and cost of the material used in its construction, the workmanship and other relevant facts, as bearing on the question of the decrease in value of the land.

But in *Houston & T. C. R. Co. v. Smith* (1898) — *Tex. Civ. App.* —, 46 S. W. 1046, it was held erroneous to instruct that the measure of damages to buildings, etc., by fire, was the difference between the market value of the land with the buildings, etc., thereon at

the time of the fire, and the value immediately thereafter, where such damages were not claimed in the pleading, nor were facts alleged from which a right to recover them could be deduced as a legal conclusion.

Where, however, the real estate has no market value, recovery has been confined to the intrinsic loss.

Thus, where the real estate upon which a barn destroyed by fire was situated had no market value, it was held in *Highland v. Houston, E. & W. T. R. Co.* (1901) — *Tex. Civ. App.* —, 65 S. W. 649, that the measure of damages was not the difference between the market value of the real estate immediately before and immediately after the fire, but that recovery should be allowed for the intrinsic loss, the extent of such loss being determinable by facts and circumstances as to the cost of a new building of like character as the one destroyed, and the extent to which the old building had deteriorated by reason of age and use.

So, in *Tyler Southeastern R. Co. v. Hitchins* (1901) 26 *Tex. Civ. App.* 400, 63 S. W. 1069, where it was questionable, under the evidence, whether the real estate had a market value, the court said that a wrongdoer will not be permitted to escape all liability for the destruction of valuable property merely because its value cannot be fixed with mathematical certainty; that the jury should, therefore, have been instructed as to the measure of damages as to the realty on the basis of its intrinsic or reasonable cash value as affected by the consequences of the fire.

Usually the real or ordinary value of a building, based upon its cost, age, condition, location, and the uses to which it has been put, furnishes a fair measure of the loss occasioned by the fire; or, where the property has no market value, or the market value is inadequate, its reasonable or fair cash value for the purposes of the owner is considered a proper measure of damages.

Thus, where buildings destroyed by fire negligently set by locomotive were located in a small village, and had little, if any, market value, and the use made of them in connection with the other property destroyed materially affected their value, the measure of damages was not their market value, detached from the land and separated from the use to which they had been put, but the fair and reasonable value of the buildings, taking into consideration their age, depreciation, reconstruction, and their use L.R.A.1917A.

in connection with the other property destroyed by the same fire. *Chicago, & E. R. Co. v. Ohio City Lumber Co.* (1914) 131 C. C. A. 57, 214 Fed. 751.

It is stated in *Cincinnati, N. O. & T. P. R. Co. v. Falconer* (1906) 30 *Ky. L. Rep.* 152, 97 S. W. 727, that if the houses burned and sued for in this suit added little or nothing to the market value of the land upon which they were situated, because, perhaps, there was no market at that place for a storehouse or tenement houses of that class, it is nevertheless true that the owner was entitled to them uninjured by the negligence of anyone else, and her right is, as against anyone tortiously destroying them, to have her condition restored by giving her such sum in money as will replace the destroyed tenements.

So, where a barn was destroyed by fire, its value as it stood upon the farm before its destruction was, in *Matthews v. Missouri P. R. Co.* (1897) 142 *Mo.* 645, 44 S. W. 802, 3 *Am. Neg. Rep.* 699, held to be the loss plaintiff sustained, and for which he was justly entitled to compensation. The court said that in such case the owner is entitled to reimbursement for the loss he suffered, and it is very manifest that the difference between the value of the real estate before and its value after the injury would not generally afford a fair rule for measuring the damages. It might often happen that a certain character of building would add nothing to the market value of the real estate upon which it is situated. For example, a cheap dwelling house on a valuable lot in a business block would possibly depreciate the salable value of the lot to the extent of the cost of removing it, yet it could not be fairly said that the house had no value, though it added nothing to the market value of the lot. The owner has the right to use his real estate in any lawful manner he may wish, and if the improvements he has chosen to erect upon it are destroyed by another, he is entitled to reimbursement for the loss he suffers. The court further observed that, for the purpose of ascertaining the value of the barn at the time of its destruction, plaintiff was entitled to put the jury in possession of all the facts bearing upon the question. There was, therefore, no error in permitting witnesses to testify to the original cost, though materials may then have been more costly than when the building was burned. Defendants had the right to show the difference in the cost and the depreciation in value by use and natural

causes. So, with respect, to ascertaining value, see *Alabama*, G. S. R. Co. v. Johnston (1900) 128 Ala. 283, 29 So. 771; *Southern R. Co. v. Slade* (1915) 192 Ala. 568, 68 So. 867, and *Cleland v. Thornton* (1872) 43 Cal. 437.

So, where one purchased a building for the purpose of removing it, the measure of damages for its destruction by fire because of the seller's negligence was, in *Kaw Feed & Coal Co. v. Atchison, T. & S. F. R. Co.* (1908) 129 Mo. App. 498, 107 S. W. 1034, held to be the value of the building as it stood on the land, and not the purchase price, or the value of the lumber of which it was composed, or the value of the stones in the foundation on which it was set, or the value of the tin which composed the roof with which it was covered.

So, where a barn and crib were destroyed by fire from a locomotive, the measure of damages was, in *Louisville & N. R. Co. v. Brewer* (1916) 170 Ky. 505, 186 S. W. 166, held to be their reasonable value, not exceeding the amount claimed in the petition.

So, the measure of damages for destruction of a store building was, in *Missouri, K. & T. R. Co. v. Mitchell* (1914) — *Tex. Civ. App.* —, 166 S. W. 126, held to be the reasonable value of the building immediately before the fire, considering its age, location, and all other circumstances bearing upon such value. The court said that compensation for the loss sustained is the end sought by the law in all cases; and while a plaintiff undoubtedly would be entitled in a case like the present to recover the difference in the value of his land immediately before and immediately after the fire, and while this, perhaps, is the better and safer rule for all cases, yet there is no sound reason for denying him the right to recover the market value, or the real value, in the absence of a market value, of the improvements or fixtures destroyed, considered separate and apart from the realty; for, if such values be justly appraised by the jury, the damages when thus measured can by no possibility exceed the damages when measured by the rule first stated.

It is stated in *Wall v. Platt* (1897) 169 Mass. 398, 48 N. E. 270, that ordinarily, in determining the market value of buildings, they are valued either for the purpose of removal, or, as was the case here, in connection with the land on which they stand. The first, manifestly, would not afford just compensation in the present instance. In the L.R.A.1917A.

second case the value depends on the location, and other considerations entering into the value of the land, and therefore would not necessarily constitute a just criterion of the loss actually sustained by the destruction of the buildings. Buildings adapted to the land on which they stand are not bought and sold in the market separate from the land. We think that the manner in which the auditor arrived at the damages approaches more nearly the correct rule, in cases like the present. We understand him to have assessed them according to the real value of the buildings at the time of the fire, and to have ascertained that by taking into account the original cost and the cost of replacing them, and making such allowance as depreciation from use, age, and other like causes, and the condition in which they were, required. See also *CHICAGO, R. I. & P. R. Co. v. GALVIN*, ante, 365.

So, where a building had no market value, its fair cash value, based upon all facts connected with the property, such as its cost, the uses to which it had been put, its age, location, and the like, was, in *William R. Roach & Co. v. Blair* (1916) — *Mich.* —, 155 N. W. 696, held to be the measure of damages.

Where an elevator building having no market value is destroyed by fire, the measure of damages is the real or ordinary value, to be determined upon all the facts connected with such property, such as its cost, the uses to which it has been put, its age, its condition, location, and the like. But the value of good will or the success of the business ought not to be used to swell or depreciate the compensation to be paid when the building in which the business is conducted is destroyed by fire; no malice or active wrongdoing being charged to the one responsible for the fire. *Close v. Ann Arbor R. Co.* (1912) 169 Mich. 392, 135 N. W. 346.

Where destruction is not total, or where there is salvage recovered from the building greater in value than the cost of removing and saving it, the value of such salvage must be deducted from the entire cash value of the building in ascertaining the damages for which the tort-feasor is liable. *Chicago, R. I. & P. R. Co. v. Quigley* (1916) — *Okla.* —, L.R.A.—, —, 156 Pac. 669.

So, where, among other things, buildings were destroyed by fire set by sparks from a locomotive, it was held in *Jack-sonville, T. & K. W. R. Co. v. Peninsular Land Transp. & Mfg. Co.* (1891) 27 Fla.

1, 17 L.R.A. 33, 9 So. 661 (rehearing denied in (1891) 27 Fla. 157, 17 L.R.A. 65, 9 So. 689), that the measure of damage in cases where the property of one has been destroyed unintentionally, but by the negligence of another, where there is no element of wilfulness or maliciousness in its destruction, is just compensation in money for the property destroyed,—such an amount as will fully restore the loser to the same property status that he occupied at the time of the destruction. To arrive at the amount of such compensation, inquiry, in the absence of malice, is to be confined strictly to the ascertainment of the value of the property destroyed, with interest thereon for the retention of such value from the date of the destruction.

So, the measure of damages for partial destruction of a building by fire is the reasonable cost of restoring it so that it will be as valuable as it was before, considering its age and depreciation; and it is not the cost of a new building the same as that destroyed. *Anderson v. Miller* (1896) 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615.

So, a railroad company which negligently sets fire to shacks used by one who has contracted to cut and saw a lot of standing timber, for housing his help, is liable for the value of supplies destroyed and the cost of replacing the shacks. *Thompson v. Seaboard Air Line R. Co.* (1914) 165 N. C. 377, 52 L.R.A. (N.S.) 97, 81 S. E. 315 (see note to this case as to loss of profits as element of damages for wrongful destruction or conversion of logs or timber).

In the following cases market value of the property destroyed was held to be the measure of damages:

The market value of the property destroyed at the date of its destruction was the measure of damages adopted in *Hubbard v. New York, N. H. & H. R. Co.* (1898) 70 Conn. 563, 40 Atl. 533, where two ice houses and their contents were, without malice, destroyed by fire set by a locomotive.

In *Pittsburgh, C. C. & St. L. R. Co. v. Indiana Horseshoe Co.* (1900) 154 Ind. 322, 56 N. E. 766, an action to recover the value of a building, machinery, tools, and materials destroyed by fire through negligence, the jury assessed the damages at the market value of the property destroyed, and the court said that it was proper for a witness to state what was the value of the property destroyed as an entirety. L.R.A.1917A.

Building injured or destroyed by excavating, blasting, explosives, etc.

Usually where buildings have been destroyed or injured by excavating, blasting, explosives, etc., the measure of damages is held to be the cost of restoration, or the sum it will take to put the building in the condition in which it was before the injury, although in some instances, it will be observed, the measure of damages adopted was the difference in the value of the property before and after the injury.

Thus, it is stated in *Harrison v. Kiser* (1887) 79 Ga. 588, 4 S. E. 320, the suit being for an injury to plaintiff's house by the removal of lateral support, and not to his land, the true measure of damages would be whatever sum it would require to put the house in the condition in which it was before it was injured. While it was error to charge that the measure of damages was the difference between the value of the property before the injury was done and the value afterwards, yet in this case it was an immaterial error, inasmuch as, under the facts, the plaintiff was not entitled to recover any damages, and a verdict for defendant was right.

Where recovery for damages to the house itself, and not to freehold, was sought, it was held, in *Empire Mills Co. v. Burrell Engineering & Constr. Co.* (1916) — Ga. App. —, 89 S. E. 530, that the jury should have been instructed that the proper measure of damages was the amount necessary to restore the building to the condition in which it was before the injury. This was an action to recover a balance on contract for erection of a concrete elevator, the defendant claiming damages because plaintiff had, by improper construction of the elevator, injured and damaged a brick building near which the elevator was erected.

In *Shrieve v. Stokes* (1848) 8 B. Mon. (Ky.) 453, 48 Am. Dec. 401, the measure of damages for the falling of the walls of a house by negligent digging and removing earth from lots adjoining plaintiff's premises was the cost of rebuilding the old wall, not the cost of a new wall.

Where a house was caused to fall by changing the grade of a street, the court, in *Freeland v. Muscatine* (1859) 9 Iowa, 461, said: "There was no error in instructing the jury that, in estimating the damages, the cost of rebuilding or repairing was proper to be taken into consideration, if we understand it as having reference to the quality and condition

of the building before the accident, and the instruction cannot be taken in any other sense. It is the cost of rebuilding or repairing, which implies the restoring it to as good a condition as before, and not the putting a new and firm building in the place of an old or decayed one. And so the loss of the plaintiff in being deprived of the use of his house, might be considered, if this was the immediate and necessary consequence of the act of the defendant."

Where buildings sublet by a tenant were injured by excavating on adjoining land, it was held, in *Austin v. Hudson River R. Co.* (1862) 25 N. Y. 334, that plaintiffs were entitled to recover the amount of damages they had actually sustained, including loss of rent, occasioned by subtenants being deprived of occupancy and use of premises for half of season, by reason of injury.

In *Lexington & E. R. Co. v. Baker* (1913) 156 Ky. 431, 161 S. W. 228, where a house and barn were injured by blasting, the court stated that the injury not being permanent, the measure of damages was a sum sufficient to restore the property to the condition in which it was prior to the injury, and such further sum as would compensate the plaintiff for the diminution in the value of the use of the property during the continuance of the injury.

So, in *McFadden v. Rausch* (1888) 119 Pa. 507, 13 Atl. 459, where a house was injured by blasting, the court stated that generally the rule for the measure of damages in cases of injuries of this nature was actual compensation for the injury done. The owner of the property may recover for an injury which permanently affects or depreciates his property, and the ordinary rule would be actual compensation; that is, such compensation as would make the plaintiff whole for the injury which she may have suffered at the hands of the defendant.

Where a house being built by contractors was damaged by a blast set off by a general contractor, the court, in *Winniford v. MacLeod* (1913) 68 Or. 301, 136 Pac. 25, held erroneous an instruction to the effect that the plaintiffs would be entitled to recover not only what it would cost them to put the house back into the condition in which it was before the blast, but also for the loss of time occasioned by the blast, and, moreover, for the loss of profits which they anticipated they would reap as the fruit of their contract in building the house. The court said the cardinal principle of damages is compensation, and L.R.A.1917A.

the defendant would fulfil his whole duty to the plaintiffs in that respect if he paid such a sum as would fairly compensate them for the injury complained of. The restoration of the shingling, plastering, and other work would necessarily include the time involved in their installation, and that time would be all that would be necessarily lost by the plaintiffs. To allow them an additional item of \$300 for loss of time would be to pay them twice for the same thing. The testimony about the profits was purely speculative. The plaintiffs claimed that they expected to make a profit, but could not give any light on whether they either made or lost by the transaction. Their gain depended upon whether they could construct the house according to their engagement for less than the contract price. If the defendant has sufficiently compensated them so as to restore them to the situation which they occupied at the time of the explosion, he has performed his whole duty, and they have been made whole, so that the profit is not affected further by the act of the defendant. The court was in error in instructing the jury as it did on the measure of damages.

The cost of restoration of the property to its former condition, however, does not always furnish a true criterion for determining damages. Sometimes to make such a restoration would be an uneconomical and improper way of using the property. It might involve a very large and disproportionate expense to relieve from the consequences of a slight injury. Consequently, in case of damage to a building by improperly digging on adjacent land, the measure of damages has been held to be the difference between the fair market value of the property before the injury and its market value after the injury. *Hopkins v. American Pneumatic Service Co.* (1907) 194 Mass. 582, 80 N. E. 624.

In *McGrath v. Heman Constr. Co.* (1914) 183 Mo. App. 522, 167 S. W. 1086, where a building was damaged by excavating, it was held not reversible error to instruct that the measure of damages was the value of the house and lot before the injury, less the value of both thereafter. The court said that the jury must have been well aware that no injury to the lot was claimed or sought to be shown, and the value of the lot being the same before and after the injury, in estimating the damages to the building by deducting the value of the house and lot just after the injury from their value just prior thereto, the result would be

the same as if the word "lot" had been omitted from the instruction.

In *Tunnicliffe & Hampson v. West Leigh Colliery Co.* [1906] 2 Ch. (Eng.) 22, 75 L. J. Ch. N. S. 512, 94 L. T. N. S. 715, 22 Times L. R. 521, an action for damages for injury to mills by subsidence, owing to removal of minerals from under the site of the mills, it was held that the measure of damages was the difference in market value before and after the injury. The court stated that the referee properly assessed the necessary repairs at a certain amount, and the depreciation of the premises, including the risk of future damages, at a further sum.

Where a building was destroyed by an explosion of gas, it was held, in *Linforth v. San Francisco Gas & E. Co.* (1909) 156 Cal. 58, 103 Pac. 320, 19 Ann. Cas. 1230, that the measure of damages is the cost of restoration to the original condition, when this can be done at a reasonable expense, together with compensation for the loss of the use of the property.

The measure of damages for injuring a building by use of explosives near it is the cost of restoring it to its former condition. *Fitz Simons & C. Co. v. Braun* (1902) 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9.

And the damages to be allowed for injury to a building by explosion of gas may include the loss of rent up to the time when, with reasonable diligence it could have been restored, whether it was in fact restored or not. *Higgins v. Los Angeles Gas & E. Co.* (1911) 159 Cal. 651, 34 L.R.A.(N.S.) 717, 115 Pac. 313.

The measure of damages for injury to a mill by the negligent construction of a wall was, in *Ludlow v. Yonkers* (1865) 43 Barb. (N. Y.) 493, held to be the actual injury sustained, with interest from the time of the injury. If rent is recoverable, it would only be for such time as was necessary to repair the premises and restore them to their usefulness.

Where, without right, a house was destroyed to stay a conflagration, it was stated in *Parsons v. Pettingell* (1866) 11 Allen (Mass.) 507, that it was proper for the jury to consider whether there was any possibility of saving the property destroyed, although it was not proved to have been on fire; and that they should not have assessed more than nominal damages for that which could not have been saved.

Where the injury to a building by an explosion of dynamite was permanent in L.R.A.1917A.

character, the proper measure of damages was, in *Forster v. Rogers Bros.* (1915) 247 Pa. 54, 93 Atl. 26, held to be the difference between the value of the real estate before and after the explosion; that is, the deterioration in the market value of the whole property, caused by the destruction of the building.

Building damaged by water.

The measure of damages for injury to buildings by water is usually the cost of restoration, or the actual damage sustained.

Thus, where a house was damaged by a flood, in consequence of the improper building of a railroad, it was held that plaintiff could recover the sum necessary to put the building in as good condition as it was in before the overflow, with reasonable compensation for any deprivation of its use, necessarily suffered while it was being repaired. *Galveston, H. & S. A. R. Co. v. Ware* (1887) 67 Tex. 635, 4 S. W. 13.

It was held in *Nims v. Troy* (1875) 59 N. Y. 500, that plaintiff was entitled to recover for injury sustained to a house by the bursting of a sewer, and the fact that it was built by contract, and was not completed, did not detract from his right to the house as it was, or to recover for its destruction. It was proper to allow plaintiff the rental value of the house for the time during which he was deprived of its use by reason of the injuries to it, and there appeared to be no good objection to the allowance of the other item for which the recovery was had.

Where a house was damaged by the melting of ice stored on adjoining premises, it was stated in *Barrick v. Schifferdecker* (1890) 123 N. Y. 52, 25 N. E. 365, reversing (1888) 48 Hun, 355, 1 N. Y. Supp. 21, that the rental value to the time of the trial, and, in addition, the sum necessary to repair the house, and put it in condition which would prevent future injury from the same cause, would cover the total damages possible to be sustained; but when to that permanent depreciation is added, damages are given for what cannot occur; the cost of prevention and the result of continuance cannot both be given; the award of the one must necessarily exclude the other.

The measure of damages for injury to a building by water from a canal, through negligence of state officers, agents, and servants, was, in *Slavin v. State* (1897) 152 N. Y. 45, 46 N. E. 321,

held to be the expense necessary to restore the building in a reasonable manner, and, in addition thereto, any loss of rental value during time required to make necessary repairs. The court said that the ordinary rule of damages in case of an unlawful injury to real property is the depreciation in value caused thereby. Where the injury is to a building, and is one which admits of reparation at a reasonable cost, and this would be the ordinary method of remedying the injury, the cost of the repairs would generally measure the depreciation and the indemnity to which the owner would be entitled. In addition, he would be entitled to recover any loss in rental value, if any, during such reasonable time as would be required to make repairs. In the nature of the case there can be no exact ascertainment of the loss incurred by the owner, but the rule stated will, in most cases, work out substantial justice. The right of action accrues as soon as the wrong is complete; and the owner cannot lie by, neglecting to make the necessary repairs, and hold the wrongdoer liable for loss of rental value for an indefinite period. In this case the expense of placing gravel in the cellar, to enable it to be used, was in the nature of an expense of repairs, which might properly have been allowed. The claimant was also entitled to be compensated for the injury to the walls and building, measured by the sum which it would be necessary to expend to restore them in a reasonable manner. So, also, he would be entitled to any loss of rental value during the time required to make the necessary repairs. The board, we think, erred in confining the right of compensation to the actual outlay made by the claimant in the partial restoration made by him, and in refusing to consider the general claim for the injury to the walls and structure of the claimant's building. In reviewing this award we pass no judgment upon the amount of damages the claimant should recover. His claim may be exaggerated, but, if so, this does not affect the question before us.

Where property was damaged by water in consequence of the negligent construction of an embankment, it was held, in *Galveston, H. & S. A. R. Co. v. Becht* (1893) — *Tex. Civ. App.* —, 21 S. W. 971, that the measure of damages was compensation for injury done to house and lot, considered as realty; and was to be ascertained by showing the diminution in its value, occasioned by the act of the defendant. In the above case it

was stated that, in ascertaining the value of the house and lot after the injury had been done, its market value at the time when the consequences of the embankment and of the flowing of water caused by it had become sufficiently apparent to have their permanent effect upon such value, and any increase or diminution in value resulting from other causes than from the act of defendant, should be excluded from the estimate. If it should appear that the owner of the property, by such reasonable precautions as a person of ordinary prudence would have employed when the water was thrown upon his property, could have diverted it and limited the amount of the damage to a materially less sum than the difference in value, the plaintiff would be entitled to such sum only as it would have cost him to do this.

So, where a house was injured by putting earth upon a street in such a way as to shut off the natural flow of water down a hillside, stopping it, and letting it soak into the ground, it was stated in *Lucot v. Rodgers* (1893) 159 Pa. 58, 28 Atl. 242, that the measure of damages was simply compensation. Plaintiff was entitled to what the house was worth on the particular lot, less what the foundations and material would be worth torn down. Plaintiff is entitled to have the lot placed in a condition such as it was in before.

The actual damage suffered was held to be the measure of damage for injury to a house by the overflow of a sewer, in *Harrigan v. Wilmington* (1888) 8 *Houst. (Del.)* 140, 12 Atl. 779, the court stating that if there was a finding for the plaintiff, she was entitled to recover for whatever actual damages her own movable goods suffered from the water, and such sum of money besides as would be the aggregate of the diminution of the annual value of the house for the period of thirteen years from the time of the injury, with deduction therefrom for taxes, repairs, insurance, and rebate of interest.

Where a building was damaged by a leaking water main it was held, in *Dammann v. St. Louis* (1899) 152 *Mo.* 186, 53 S. W. 932, that the measure of damages was the difference in the value of the building before and just after the injury, less the actual value of any improvements or repairs made thereon by a city, there being evidence "of what materials it was constructed, what it cost, and in what condition it was at the time of the accident; the effect of the accident upon it, and the condition in which

it was left afterward; and evidence tending to prove how much it would cost to restore the building to its original condition."

The rule is stated in *Keats v. Gas Co.* (1905) 29 Pa. Super. Ct. 480 (injury by overflow of stream), that where an injury to a house is not of a permanent character, the measure of damages is the cost of restoring the property to its former condition, together with compensation for the loss of its use, unless such cost should exceed the value of the building, in which case such value would be the measure of damages. In this case it was not alleged that the damages sustained exceeded the value of the building, and hence the measure of damages was the cost of restoring it to its former condition, together with compensation for the loss of its use.

Miscellaneous cases.

Other cases not admitting of a distinct classification have applied various rules in arriving at proper compensation.

Where a house damaged by a car running into it could not be repaired and put in as good condition as it was before the injury without its being taken down and a new one built, it was held, in *Kentucky Traction & Terminal R. Co. v. Bain* (1914) 161 Ky. 44, 170 S. W. 499, that the measure of recovery was the diminution in the fair and reasonable value of the house; that is, the difference between its fair and reasonable value just before and just after the injury.

Fair compensation was, in *McPhillips v. Fitzgerald* (1902) 76 App. Div. 15, 78 N. Y. Supp. 631 (affirmed without opinion in (1904) 177 N. Y. 543, 69 N. E. 1126), held to be the measure of damages for destruction of a building by the fall of an adjoining building.

In trespass for tearing down an ice house, it was held proper, in *Clark v. Lake St. Clair & N. U. River Ice Co.* (1872) 24 Mich. 508, to estimate the damages according to its capacity for storing ice.

The measure of damages for the removal of a barn is the value of the barn as it stood on the premises at the time of the removal. *Kent County Agri. Soc. v. Ide* (1901) 128 Mich. 423, 87 N. W. 369.

The measure of damages for the partial destruction of a house is what it would reasonably cost to repair the injury. *Hooper v. Smith* (1899) — Tex. Civ. App. —, 53 S. W. 65 (malicious destruction).

In *Marks v. Culmer* (1890) 6 Utah, L.R.A.1917A.

419, 24 Pac. 528, the measure of damages for the partial destruction of a house was what it would cost to reproduce it, and the value of its use while that was being done (malicious destruction). -

The measure of damages for the destruction of the roof of a house was, in *Hearn v. McDonald* (1911) 69 W. Va. 435, 71 S. E. 568, held to be the value of the roof; that is, what it would cost to replace it new, less an allowance for depreciation from use, age, or like cause.

Where a house was damaged by the negligent removal of a tree, it was stated, in *Bates v. Warrick* (1909) 77 N. J. L. 387, 71 Atl. 1116, that if the injury was so slight that the house could be restored to its original condition at a less cost than the amount of the depreciation in the value of property would be if no repairs were made, and where the repairs would not enhance the value of the property beyond that it possessed at the time of the injury, the cost of restoring the house to the condition in which it was before the injury was the measure of damages.

Damages for injury caused by the construction upon another's building of a windmill so negligently that it falls may include the injury to the articles stored in the building. *Flint & W. Mfg. Co. v. Beckett* (1906) 167 Ind. 491, 12 L.R.A.(N.S.) 924, 79 N. E. 503.

It was stated in *Cleveland, C. C. & St. L. R. Co. v. Born* (1911) 49 Ind. App. 62, 96 N. E. 777, where premises were entered and buildings and personal property destroyed, that the measure of damages to the leasehold depended upon the diminution in the value of the use of the premises for the balance of the term of rental, and any other depreciation in value of the leasehold brought about by the wrongful act complained of.

In *Bennett v. Clemence* (1863) 6 Allen (Mass.) 10, an action for cutting down part of an unfinished building, the court stated that if the plaintiff had a right to recover damages, it was for the injury done to his building as it then was, and that questions as to what the building would rent for annually when finished according to the plans, and what the building would cost when finished, were improper.

When a building in which the owner is pursuing his ordinary business has been summarily removed by the act of a municipal corporation, and the city is found to have no legal power thus to act, it is held, in *Evens v. Cincinnati* (1856) 2

Handy (Ohio) 236, that the measure of damages should be the cost of repairs to the owner, including the cost of the material injured or destroyed in the demolition of the building. The court observed that the owner should be paid, in addition, for the loss of rent for the time he was deprived of the use of his building, as well as the ordinary profits of his business, if the vocation is such as to furnish means of estimation without resorting to merely contingent or speculative damages.

It is stated in *Silva McAlester* (1915) — Okla. —, 148 Pac. 150, a suit to restrain a city from tearing down certain buildings, that ordinarily the measure of damages for the removal or destruction of buildings from real estate, to which they are attached as a part thereof, is what it would cost to replace them, not exceeding the value of the entire property; but if, for any reason, the buildings could not be replaced, the measure of damages would be the difference in the value of the entire property before and after the removal or destruction of the buildings.

Where a creditor destroyed a house delivered to him as a guaranty for payment of debts, the court, in *Bonjoe v. Cuison* (1909) 13 Philippine, 301, said: "In the present case there is no question as to the collection of any money debt, or of any default on the part of the defendant, but of indemnity for the value

of a house which the defendant had no right to destroy, and of the prejudice that he caused the plaintiffs by his unlawful and unjust act; and it is quite obvious that the actual and true extent of such damages, which has not been controverted by the appellant, is what must serve as the basis and measure for the indemnity, according to the most elemental principles of justice and law."

The measure of damage to a building by lessees' removal of certain partition walls, partitions, gas fixtures, etc., was held, in *Agate v. Lowenbein* (1875) 6 Daly (N. Y.) 291, to be the diminished value of the property, or difference between its value before the alterations and after,—the difference in the market value,—the court stating that "the rule that the defendant must answer for the diminished value of the premises, and not the cost of restoration, is especially appropriate in this case, where the express right to alter was reserved, and where the limit of such right was any injury to the premises. If they were so injured that the rental value was lessened, if they were worth less when altered than before, and could not be let so easily or profitably, defendants must make up the difference; if they were in nowise lessened in market value or rental value, plaintiffs have suffered nothing; and this is wholly irrespective of the cost of any restoration whatever." J. D. C.

TENNESSEE SUPREME COURT.

M. E. BAIRD
v.

W. G. SMITH, Appt.

(128 Tenn. 410, 161 S. W. 492.)

Monopoly — statute — agreement not to re-enter business.

An agreement collateral to the sale of a store, that the seller will not enter into any line of competing business in the town

for the period of five years, does not contravene a statute making illegal any contract or combination made with a view to lessen, or tending to lessen, full and free competition.

For other cases, see Contracts, III. c, 2, in Dig. 1-52 N. S.

(November 28, 1913.)

APPEAL by defendant from a decree of the Chancery Court for Campbell County in complainant's favor in an action to

Note.—As to the extent to which contracts in partial restraint of trade are affected by modern anti-trust acts, see annotation following this case, post, 379.

Upon the question whether a combination to control the price of labor or other personal service is a violation of a statute against trusts and monopolies, see note to *State v. Duluth Bd. of Trade*, 23 L.R.A. (N.S.) 1260, and the case of *Rohlf v. Kessemeier*, 23 L.R.A. (N.S.) 1284.

As to validity of contract provisions seeking to control price at which an article shall be resold, see annotation to *Grogan* L.R.A.1917A.

v. Chaffee, 27 L.R.A. (N.S.) 395, and *Fisher Flouring Mills Co. v. Swanson*, 51 L.R.A. (N.S.) 522.

As to validity of contract by selling shareholder not to engage in business in competition with the corporation, see annotation to *Buckhout v. Witwer*, 23 L.R.A. (N.S.) 506.

As to validity of stipulation to discontinue or not to engage in a particular business, when not ancillary to a lawful contract, see note to *Clemmons v. Meadows*, 6 L.R.A. (N.S.) 847.

As to validity of agreement not to com-

recover damages for alleged breach of a contract of sale with a provision for compensation should the vendor re-enter business. Affirmed.

The facts are stated in the opinion.

Mr. H. K. Trammell for appellant.

Mr. John Jennings, Jr., for appellee:

The sole object of the rules and principles laid down for the exposition of contracts is to do justice to the parties by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made.

McNairy v. Thompson, 1 Sneed, 141; Perkins Oil Co. v. Eberhart, 107 Tenn. 409, 64 S. W. 760; Mills v. Farris, 12 Heisk. 456; Ruohs v. Traders' F. Ins. Co. 111 Tenn. 405, 102 Am. St. Rep. 790, 78 S. W. 85; Hardwick v. American Can Co. 113 Tenn. 657, 88 S. W. 797; Nashville & N. W. R. Co. v. Jones, 2 Coldw. 574; Hyde v. Darden, 3 Heisk. 515; Taylor v. Meblett, 4 Heisk. 491; Nunnally v. Warner Iron Co. 94 Tenn. 282, 29 S. W. 124; Mumford v. Memphis & C. R. Co. 2 Lea, 393, 31 Am. Rep. 616; Nashville L. Ins. Co. v. Mathews, 8 Lea, 499; New Memphis Gaslight Co. Cases, 105 Tenn. 268, 80 Am. St. Rep. 880, 60 S. W. 206.

Parol evidence is admissible to show the situation, surroundings, and motives of the parties to this contract.

Leinau v. Smart, 11 Humph. 308.

The language of a contract is to be taken more strongly against the party using it.

Crouch v. Shepard, 4 Coldw. 383.

Parol evidence is admissible to explain what was intended.

Sargent v. Adams, 3 Gray, 72, 63 Am. Dec. 718; Reed v. Merchants' Mut. Ins. Co. 95 U. S. 23, 24 L. ed. 348; Jones, Ev.

pete, ancillary to sale or lease of property, as affected by a covenantor's purpose to procure a monopoly, see annotation to Anderson v. Shawnee Compress Co. 15 L.R.A. (N.S.) 846, and the later case of Merchants' Ice & Cold Storage Co. v. Rohrman, 30 L.R.A. (N.S.) 973.

As to validity of contract restraining the practice of one's profession after expiration of term of service with another, see annotation to Freudenthal v. Espey, 26 L.R.A. (N.S.) 961.

As to validity of agreement by employee not to engage in competing business, as affected by its scope in time and territorial extent, see annotation to Taylor Iron & Steel Co. v. Nichols, 24 L.R.A. (N.S.) 933, and Kinney v. Scarbrough Co. 40 L.R.A. (N. S.) 473.

As to validity of agreement in restraint of trade, ancillary to the sale of a business or profession, as affected by its territorial scope, see annotation to Fleckenstein Bros. L.R.A.1917A.

562 et seq.; Hines v. Willcox, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914; Mills v. Farris, 12 Heisk. 451; Ferguson v. Rafferty, 128 Pa. 337, 6 L.R.A. 33, 18 Atl. 484; Durkin v. Cobleigh, 156 Mass. 108, 17 L.R.A. 270, 32 Am. St. Rep. 436, 30 N. E. 474; Gibson's Suits in Ch. § 538.

As agreements entered into by the seller of a business with the buyer, not to compete within reasonable limits against the business sold, are not considered invalid as in restraint of trade at common law, they are properly held not to be within the meaning of statutes directed against restraint of trade.

27 Cyc. 900; Bailey v. Master Plumbers' Asso. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; Turner v. Abbott, 116 Tenn. 718, 6 L.R.A. (N.S.) 892, 94 S. W. 64, 8 Ann. Cas. 150; Bradford v. Montgomery Furniture Co. 115 Tenn. 616, 9 L.R.A. (N.S.) 979, 92 S. W. 1104; Kramer v. Old, 119 N. C. 1, 34 L.R.A. 389, 56 Am. St. Rep. 650, 25 S. E. 813.

Buchanan, J., delivered the opinion of the court:

On May 9, 1910, the parties above named entered into a written contract whereby Smith sold to Baird the entire stock of merchandise and fixtures located in a certain storehouse in Jellico, Tennessee, known as the "Racket Store." The contract contains the terms of sale (which are not material to be set out here), and then proceeds as follows:

"Further considerations of this agreement are as follows:

"The said W. G. Smith binds himself in the sum of one thousand dollars (\$1,000), to be paid to the said M. E. Baird, due only

Co. v. Fleckenstein, 24 L.R.A. (N.S.) 913, and Hall Mfg. Co. v. Western Steel & Iron Works, L.R.A.1916C, 620.

As to validity of agreement to patronize particular concern exclusively, see annotation to Peerless Pattern Co. v. Gauntlett Dry Goods Co. 42 L.R.A. (N.S.) 843.

As to validity of contracts for exclusive right to furnish telephone service, see annotation to Central New York Teleph. & Teleg. Co. v. Averill, 32 L.R.A. (N.S.) 494.

As to validity of contracts between telephone companies for exclusive connection, see annotation to Home Teleph. Co. v. Sarcoux Light & Teleph. Co. 36 L.R.A. (N.S.) 124, and Union Trust & Sav. Bank v. Kinloch Long Distance Teleph. Co. 45 L.R.A. (N.S.) 465.

As to legality of combination by dealers not to patronize wholesalers who sell to undesirable persons, see note to Retail Lumber Dealers' Asso. v. State, 35 L.R.A. (N.S.) 1054.

under the following conditions: Should the said W. G. Smith enter into any business other than the business which he is now connected with, viz., the Smith Shoe & Clothing Company, in the town of Jellico, for a period of five (5) years, in any line of merchandise that would be considered in competition to the store sold to M. E. Baird, then the said W. G. Smith agrees to pay one thousand dollars (\$1,000) to said M. E. Baird for this privilege."

The contract was in duplicate, executed in the presence of two witnesses and signed by the respective parties. Baird paid the consideration money, entered into possession of the stock and fixtures, and since the date of the contract has been doing business at the "Racket Store." On November 25, 1912, he brought this suit, seeking a decree against Smith for \$1,000 and interest upon an alleged breach of the above-quoted portion of the contract.

The chancellor decreed as prayed in the bill, and Smith appealed, and has assigned errors in this court.

It is the opinion of the majority of the court (in which the writer, however, does not concur) that the contract was breached by Smith, and that so far as this branch of the case is concerned there was no error in the decree. This branch of the case has been disposed of in an oral opinion and need not be further noticed.

The next and only remaining question arises upon Smith's insistence that the chancellor should have held the clause quoted from the contract void, because it was a contract tending to lessen full and free competition in the sale of merchandise, within the meaning of chapter 140, Acts of 1903. It is urged that the lessening or restraint of competition need not, under the act, be unreasonable, as it must have been at common law, in order to invalidate the contract, but, on the contrary, under the act a mere tendency to lessen full and free competition invalidates the contract.

An analysis of § 1 of the act in question reveals a twofold purpose in the passage of that section.

The first was to preserve full and free competition in the sale of articles of merchandise which had become a part of the mass of property in the state.

The second was to preserve full and free competition in the sale and manufacture of articles of domestic growth and domestic raw material, and to prevent all combinations tending to affect the price or cost thereof to the consumer or producer.

With the second of these purposes we are not concerned in the present case. It is the first purpose of the act, and how far, L.R.A.1917A.

if at all, it has changed the rules of the common law with respect to contracts of this character, that we must consider in the present case.

We think the only change in the common law the statute has wrought is accomplished by the use of the words "tend to" in the 1st section of the act. The test at the common law had been whether, in point of fact, the contract or other matter in question did in fact work an undue or unreasonable restraint upon full and free competition; the test under the statute is whether it "tends to" do so. The statute works no change in the meaning of the word "competition" as it was understood at common law, nor does it change what was at common law undue or unreasonable restraint of trade, or such restraint of the synonymous term, "full and free competition."

So the question before us narrows down to the point of determining whether the contract in suit, or that part of it quoted herein, tended within the meaning of the 1st section of the act to lessen full and free competition, and therefore contravened the public policy underlying the act.

Under the common law in force in this state prior to any legislation on the subject, only such combinations, contracts, or agreements as operated to the prejudice of the public interest by unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the act, injuriously restricted trade, were denounced as void on grounds of public policy.

Such was the holding of the Supreme Court of the United States in *United States v. American Tobacco Co.* 221 U. S. 171, 179, 55 L. ed. 690, 693, 31 Sup. Ct. Rep. 632, where it was said that the statute under consideration there should be so interpreted as not to restrain the power to make "normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose." And so we think the act in question in the present case must be read and interpreted. Every contract by which one person secures to himself the ownership, dominion over, and right to fix a price on or sell, or to keep for his use, a particular portion of the common mass of merchandise in the state, is to that extent an exclusion of the like rights in all others over that property during his ownership, and such person, if under no public duty or contract to part with the merchandise, may keep and use it, or sell it at such price as he sees fit. He is free to do as he likes in respect to it; and so was the vendor from whom he acquired title, if similarly

circumstanced. And, as we see the present case, Smith, who had gathered into his "Racket Store" a part of the common mass of merchandise in the state, and who by sale of merchandise of like character in that place had built up a good name or good will for his business in that particular class of merchandise, had a property right not only in the merchandise and fixtures sold to Baird, but also in the good will or name of the business. The contract between Smith and Baird does not expressly convey the good will of the business; but, notwithstanding this fact, we think Smith's right was clear to sell the stock of merchandise and fixtures, and as an incident of his ownership of the stock and the business conducted by him, and as an element entering into and forming a part of the value thereof, to bind himself not to engage in business in competition with Baird in the town of Jellico for the period of time named in the contract. *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984; *Bradford v. Montgomery Furniture Co.* 115 Tenn. 610, 9 L.R.A.(N.S.) 979, 92 S. W. 1104; *Turner v. Abbott*, 116 Tenn. 725, 6 L.R.A.(N.S.) 892, 94 S. W.

64, 8 Ann. Cas. 150; *Smith v. Webb*, 176 Ala. 596, 40 L.R.A.(N.S.) 1192, 58 So. 913.

We do not think the contract tended to restrain full and free competition within the meaning of the Act of 1903. Our case of *Turner v. Abbott*, 116 Tenn. 725, 6 L.R.A.(N.S.) 892, 94 S. W. 64, 8 Ann. Cas. 150, is controlling authority in the present case.

The act of 1903, upon other phases than that involved in the present case, has been considered by this court in *State v. Wither- spoon*, 115 Tenn. 138, 90 S. W. 852; *State ex rel. Chilhowee Woolen Mills Co. v. Chilhowee Woolen Mills Co.* 115 Tenn. 267, 2 L.R.A.(N.S.) 493, 112 Am. St. Rep. 825, 89 S. W. 741; *Standard Oil Co. v. State*, 117 Tenn. 642, 10 L.R.A.(N.S.) 1015, 100 S. W. 705; *State ex rel. Cates v. Standard Oil Co.* 120 Tenn. 138, 110 S. W. 565. And the act is considered by the Supreme Court of the United States in *Standard Oil Co. v. Tennessee*, 217 U. S. 413, 54 L. ed. 817, 30 Sup. Ct. Rep. 543.

It results, from the views expressed, that the decree of the Chancellor must be affirmed, with costs.

Annotation—Contracts in partial restraint of trade as affected by modern anti-trust acts.

This note is supplemental to the note to *Lanyon v. Garden City Sand Co.* 9 L.R.A.(N.S.) 446, on the same subject, and the note to *Cleland v. Anderson*, 5 L.R.A.(N.S.) 136, on "Legality, under modern anti-trust acts, of combinations or agreements which restrict the class of persons to whom commodities shall be sold, or from whom they may be bought." And, to the extent to which the class of contracts therein treated is affected by anti-trust acts, it is also supplemental to the note to *Walter A. Wood Mowing & Reaping Mach. Co. v. Greenwood Hardware Co.* 9 L.R.A.(N.S.) 501, on "Validity of contract giving one an exclusive right to handle goods in a given locality."

The question with which this note is concerned is as to when agreements otherwise presumably valid as being in reasonable and partial restraint of trade fall within the inhibition imposed by modern anti-trust acts. It does not include cases in which the anti-trust act was held not to apply on the ground that the agreement in question related to a subject-matter not within the operation of the act.

As to the applicability of anti-monopoly laws to contracts relating to goods manufactured by a secret process or L.R.A.1917A.

compounded under a secret formula, see cases set forth in the note to *Grogan v. Chaffee*, 27 L.R.A.(N.S.) 395, at p. 402.

The statement made in the earlier note that the general trend of decision appears to be that an agreement in partial restraint of trade, incidental to a lawful transaction, which was made for the purpose of protecting a party thereto, will not be regarded as violating the so-called anti-trust acts but that where the principal object aimed at is the suppression of competition, the agreement is unlawful, is borne out by the later cases. Some of the statutes, however, are so drawn as to cover such agreements, and expressly permit them only with certain defined limits.

As a general rule, independent of statute, a contract in partial restraint of trade will be upheld when it is an incident to and is in support of another contract or sale in which the covenantor has an interest which is in need of protection, but covenants of this kind will be enforced only when the restraint is no more extensive than is reasonably required to protect the interest of the party in whose favor it is given, and is not so large as to interfere with the interests of the public. If the contract is made for the protection of a private

right created by the contract, and is reasonable in its provisions and scope, the court will uphold it, but if its direct purpose is to restrain trade, or if it results in a combination to create a monopoly, it will be condemned as illegal.

The fact that the restraint of competition is not limited to the locality where the seller was doing business, but is made to extend throughout the territory in which the purchaser expects to do business, tends to show an intention on the part of the purchaser to get more than reasonable protection incidental to the good will of the business sold. *United States v. Great Lakes Towing Co.* (1913) 208 Fed. 733.

Under the Federal act.

As to the relation of a contract or combination to interstate commerce which will bring it within the Federal Anti-trust Act, see annotation to *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.* 10 L.R.A.(N.S.) 268; also the later case of *C. H. Albers Commission Co. v. Spencer*, 11 L.R.A.(N.S.) 1003.

That the Federal act does not apply to contracts whereby the owner of a patent or copyright contracts with purchasers of the patented or copyrighted article as to the price at which such article may be resold, see cases collected in the note to *Grogan v. Chaffee*, 27 L.R.A.(N.S.) 395, at p. 401.

The earlier cases very generally held that agreements in partial restraint of trade, where ancillary to lawful contracts, and not made with a view to the suppression of competition, are not within the Federal Anti-trust Act; and any possible doubt on the point has been removed by the decisions of the Supreme Court in *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734, and *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632, which settle conclusively that the Sherman Act is applicable only to contracts and combinations which are in unreasonable restraint of trade.

That the sale of a business and the transfer of the good will pertaining thereto and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, made as part of the sale of a business, and not as a device to control commerce, is not within the Federal Anti-trust Law, has been held in *Darius Cole Transp. Co. v. White Star Line* (1911) 108 C. C. A. 165, 186 L.R.A.1917A.

Fed. 63, and the *United States v. Great Lakes Towing Co.* (1913) 208 Fed. 733.

But the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser or contractor constitutes an unreasonable restraint under such act. *United States v. Great Lakes Towing Co.* (Fed.) supra.

In *McConnell v. Camors-McConnell Co.* (1907) 81 C. C. A. 429, 152 Fed. 321, in which the violation of a stipulation against competition was sought to be enjoined, it was held that where the contract of sale provided for the organization of a new corporation to monopolize the business, the contract was in violation of the Federal Anti-trust Act, and was therefore void.

In *Darius Cole Transp. Co. v. White Star Line* (1911) 108 C. C. A. 165, 186 Fed. 63, writ of certiorari denied in (1912) 225 U. S. 704, 56 L. ed. 1265, 32 Sup. Ct. Rep. 837, where in connection with the lease of a steamer the lessor agreed "to surrender to the party of the second part all if the good will of the 'river business,' so-called, that may be controlled by it, and to that end agrees not to enter into competition with the party of the second part upon the routes herein named, and not to operate any of its vessels or any vessel whatsoever on the said routes between Detroit and Port Huron or between Detroit and Toledo during the period of the said three years," it was held, in view of the fact that the effect was to give the lessee a monopoly of the traffic, and that the rental reserved was more than the steamer could have earned except under a practically complete monopoly of such traffic, that the restraint imposed was not merely incidental to the lease, but was a device to control interstate commerce and therefore void as in violation of the Sherman Anti-trust Law.

In *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041, the opinion was expressed that agreements for the maintenance of a fixed retail price of a certain commodity, which do not involve the whole market supply of such commodity, are not unenforceable as being in restraint of trade, under the Sherman Act, although, as the case did not involve any question of interstate commerce, the effect of the act was not properly involved.

In *Moroney Hardware Co. v. Goodwin Pottery Co.* (1909) — Tex. Civ. App. —, 120 S. W. 1088, it was held that an agreement made in connection with a sale of goods, to give a rebate if the pur-

chaser should handle the vendor's goods exclusively for the period of one year, was not in restraint of trade and not in violation of the Sherman Anti-trust Act, there being nothing in the contract by which the purchaser bound himself to purchase goods exclusively from the seller.

See also under this head, *American Sand & Gravel Co. v. Chicago Gravel Co.* (1914) 184 Ill. App. 509, *infra*.

Under state anti-trust laws.

State anti-trust laws do not, of course, apply where the contract in question relates to interstate commerce. *Albertype Co. v. Gust Feist Co.* (1909) 102 Tex. 219, 114 S. W. 791; *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.* (1909) 55 Tex. Civ. App. 553, 120 S. W. 532; *Moroney Hardware Co. v. Goodwin Pottery Co.* (1909) — Tex. Civ. App. —, 120 S. W. 1088; *McCall Co. v. J. D. Stiff Dry Goods Co.* (1912) — Tex. Civ. App. —, 142 S. W. 659; *Lock v. Citizens' Nat. Bank* (1914) — Tex. Civ. App. —, 134 S. W. 536. But see *State v. Racine Sattley Co.* (1911) — Tex. Civ. App. —, 134 S. W. 400, and *J. R. Watkins Medical Co. v. Johnson* (1913) — Tex. Civ. App. —, 162 S. W. 394, as holding that, where the goods forming the subject of a sale become part of the common mass of property within the state, provisions in the contract of sale relative to the conduct of the purchaser may render the contract void under the local anti-trust act, notwithstanding the sale itself is a transaction of interstate commerce; also *Segal v. McCall Co.* (1916) — Tex. —, 184 S. W. 188; *Armstrong v. W. T. Rawleigh Medical Co.* (1915) — Tex. Civ. App. —, 178 S. W. 582; and *W. T. Rawleigh Medical Co. v. Fitzpatrick* (1916) — Tex. Civ. App. —, 184 S. W. 549, in which it is held that the local act applies to provisions of a contract relating to acts to be performed by the vendee after the interstate commerce involved in the transaction has been completed.

As a general rule, the fact that the subject of the contract is a patented or copyrighted article will take it out of the operation of anti-monopoly legislation.

Thus, a contract by which a patentee seeks to control the selling price of his invention cannot be regarded as violative of a state anti-trust law, since the state cannot subtract from the monopoly enjoyed by a patentee under the Federal laws. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.* (1907) 83 C. C. A. L.R.A.1917A

336, 154 Fed. 358, writ of certiorari denied in (1907) 207 U. S. 589, 52 L. ed. 354, 28 Sup. Ct. Rep. 255.

A contract giving an exclusive right to sell is not in violation of the Texas Anti-trust Statute, where the subject of the transaction is a patented article. *Lock v. Citizens' Nat. Bank* (1914) — Tex. Civ. App. —, 165 S. W. 536.

The Wisconsin statute, § 1770g (Laws 1905, chap. 506, § 2), does not apply to a contract made in reference to the resale of a patented article whereby the purchaser agreed not to sell it except at a fixed price, and not to sell or permit to be sold on his premises during the term of the contract any similar article, since, if such statute should be regarded as attempting to restrict the rights which a patentee acquires under the Constitution and laws of the United States, it could not be upheld. *Butterick Pub. Co. v. Rose* (1910) 141 Wis. 533, 124 N. W. 647.

But see in this connection discussion in the note to *Grogan v. Chaffee*, 27 L.R.A.(N.S.) pages 401, 402, where it is said that there seems to be ground for a valid distinction in respect to patented and copyrighted articles, between the exclusive right to produce and vend, enjoyed by the owner of the patent or copyright, and the articles themselves, for the purpose of determining the validity of contracts relating thereto.

A covenant incidental to the sale of a business and the good will to a competitor, not again to enter into such business in the town, does not violate the Arkansas Anti-trust Law of 1905, subjecting to a penalty any corporation, partnership, or individual who should become a party of any agreement or combination to regulate or fix the price of any commodity or thing whatsoever, or the price or premium to be paid for insuring property, or to maintain such price when so regulated or fixed, or to fix or limit the amount or quantity of any article or thing, or the price or premium to be paid for insuring property,—the object and purpose of the contract not being to stifle competition, but to sell and transfer a business and the good will of that business. *Kimbro v. Wells* (1914) 112 Ark. 126, 165 S. W. 645.

So, in *Bloom v. Home Ins. Agency* (1909) 91 Ark. 367, 121 S. W. 293, it was held that a contract made by several local insurance agents, as an incident to the consolidation of their respective businesses by a transfer to a new corporation, that they would render their personal service to the carrying on of

the business of such corporation for the term of at least two years, and that they would not, either directly or indirectly, for themselves or as employees for others, for the term of five years within the limits of the county, engage in any line of insurance mentioned and contemplated in the articles of incorporation, save only in the employ of such company, was not invalidated by the Arkansas Anti-trust Law of January 23, 1905 (Laws 1905, p. 1, above summarized), where there was no evidence to show that this was a combination for the purpose of fixing or regulating the price of insurance, or that the agreement in question could have that effect.

In *Ft. Smith Light & Traction Co. v. Kelley* (1910) 94 Ark. 461, 127 S. W. 975, it was held that a contract between a company engaged in the manufacture and distribution of artificial gas, whereby it agreed to purchase a natural gas franchise and a supply of natural gas from another company, was not void under the Arkansas Anti-trust Law of 1905 (above summarized) by reason of a provision therein giving the natural gas company the right to fix the price of natural gas to the consumers for all purposes except for illumination, where, under the contract, the right to fix the price was subject to the qualification that the natural gas company should meet any reduction in price offered by others.

In *Grogan v. Chaffee* (1909) 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745, it was held that California Civil Code, § 1673, which provides that "every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections [which sections provide that the seller of the good will of a business or a withdrawing partner may agree not to compete] is to that extent void," did not invalidate a contract between a producer of olive oil by a secret process and persons selling it at retail, that they will maintain the price fixed by him,—the court saying that the tendency of the modern decisions has been to view with greater liberality contracts claimed to be in restraint of trade, and that the sections of the Civil Code above referred to are to be construed in the light of the general principles governing the validity of such contracts.

In *D. Ghirardelli Co. v. Hunsicker* (1912) 164 Cal. 355, 128 Pac. 1041, it was held that an agreement between a jobber and retailer whereby the latter under-

took to maintain a fixed retail selling price, made in pursuance of a condition imposed by the manufacturer, whose total output constituted only a small part of the general market supply of the article manufactured by him, was valid both at common law as being no more than necessary to afford a fair protection to the business of the manufacturer, and not so large as to interfere with the interests of the public, and under the Cartwright Act (Stat. 1907, p. 984) as amended in 1909 (Stat. 1909, p. 593),—especially in view of the provision in the Amendatory Act of 1909, "that no agreement, combination, or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit." The statute referred to defines a trust as a combination of capital, skill, or acts by two or more persons, corporations, or associations, to create or carry out restraints in trade or commerce, to limit or reduce the production or increase the price of any commodity, to prevent competition in the manufacturing, making, transportation, sale, or purchase of any commodity, to control its price to the public or consumer, to make or enter in to or execute or carry out any contract or agreement not to sell or transport any commodity or article of trade, use, merchandise, commerce, or consumption below a standard figure, or to keep the price at a fixed or graduated figure, or so to establish the price as directly or indirectly to preclude a free and unrestricted competition among themselves or any purchasers or consumers in the sale or transportation of such article or commodity.

In *American Sand & Gravel Co. v. Chicago Gravel Co.* (1914) 184 Ill. App. 509, which involved the validity of a contract whereby one company granted to another a privilege of taking sand and gravel from certain premises, that the grantee would not sell during the contract term any washed products from any of its pits for use in a certain county except to the grantor, it was held that if the restriction of the covenant was partial, reasonable, and calculated to foster the business of the grantee, rather than to destroy competition, it could not be held to be in violation of the Federal or the state statutes declaring guilty of conspiracy any corporation, partnership, individual, or association entering into any pool, trust, agreement, or combination to regulate or fix the price of any article of merchandise

or commodity, or entering into, becoming a member of, or party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in the state, and declaring any contract or agreement in violation of the provisions of the act to be void.

In *Merchants' Ice & Cold Storage Co. v. Rohrman* (1910) 138 Ky. 530, 30 L.R.A.(N.S.) 973, 137 Am. St. Rep. 390, 128 S. W. 599, contracts by which a corporation buying up and consolidating all but a small percentage of the ice manufacturing plants of a city, in order to control the market and suppress competition, required stockholders of the absorbed plants to refrain from re-engaging in the business for a period of ten years, were held, in view of their purpose, to be void as an unreasonable restraint of trade, and to be within § 3915 of the Kentucky Statutes, which declares guilty of conspiracy any corporation or individual which shall enter into any contract having for its object the limiting of the quantity of any commodity to be produced, or the regulation or control of the price of any commodity, notwithstanding it was not shown that any attempt was made to raise the price of ice.

In *Arctic Ice Co. v. Franklin Electric & Ice Co.* (1911) 145 Ky. 32, 139 S. W. 1080, an agreement by an ice company to sell to its only competitor its entire output, which the competitor agreed to retail at prices greatly in advance of those theretofore prevailing, was held, in view of the aim and purpose of the contract, to create a monopoly to be an unreasonable restraint of trade, and violative of § 3915 of the Kentucky Statutes, above summarized.

In *Fields v. Holland* (1914) 158 Ky. 544, L.R.A.1915C, 865, 165 S. W. 699, a contract between competing companies, each engaged in transferring persons and freight in a particular city, by which, in consideration of a cash payment and the agreement that the purchaser should not at any time, within the corporate limits of the city or within the immediate vicinity, go into opposition with the seller in the business of the transferring of freight within said territory, one sold to the other its buses and a baggage transfer wagon, and agreed not at any time to re-enter or go into the business of transferring passengers and their personal baggage, as against the purchaser, within the limits of the city or its vicinity, was held not to be a contract

made for the protection of the private right which it creates, with an incidental, partial, and reasonable restraint of trade, but to be one made between common carriers with a direct purpose to restrain trade and create a monopoly detrimental to the public good, in favor of each of the contracting parties, and therefore to be violative of a constitutional provision directed against the suppression of competition between carriers.

A statute making it a criminal offense to impose a condition in the sale of goods "that the purchaser shall not sell or deal in the goods . . . of any other person" does not prohibit a sale of goods by a manufacturer with an agreement to give a reasonable discount at the end of a certain period, if during that period the purchaser has not dealt in goods of the same kind made by any other manufacturer,—at least where the price to those who sell the goods of others is not made so high in comparison with that to those who sell only the goods of the manufacturer as virtually to make it prohibitive of purchases except by those who sell only the manufacturer's goods. *Com. v. Strauss* (1905) 188 Mass. 229, 74 N. E. 308; *Butterick Pub. Co. v. Fisher* (1909) 203 Mass. 122, 133 Am. St. Rep. 283, 89 N. E. 189.

An offer to sell goods to be resold subject to a rebate if the purchaser will not handle the goods of other dealers may be found to include the intention that the purchaser shall handle only the goods of the seller, and so to be within the provisions of such statute. *Com. v. Strauss* (1906) 191 Mass. 545, 11 L.R.A.(N.S.) 968, 78 N. E. 136, 6 Ann. Cas. 842.

In *Grand Rapids Wood Finishing Co. v. Hatt* (1908) 152 Mich. 132, 115 N. W. 714, a contract for the sale of secret formulas, together with the exclusive right to manufacture and sell all articles in accordance with said formulas, the seller agreeing that he would not, during the life of the contract, sell or divulge the said formulas to any other person, was held not to be invalid under the Michigan Act (No. 29, Pub. Acts 1905) "relative to agreements, contracts, and combinations in restraint of trade or commerce," but to be within the proviso of such statute that "this act shall not apply to any contract mentioned in this act nor in restraint of trade, where the only object of the restraint imposed by the contract is to protect the vendee or transferee of a trade, pursuit, avoca-

tion, profession, or business, or the good will thereof, sold and transferred for a valuable consideration in good faith and without any intent to create, build up, establish, or maintain a monopoly."

An agreement by the transferee of stock in a manufacturing company, not again to engage in the business in a certain locality for a period of years, is likewise within such proviso. *Buckhout v. Witwer* (1909) 157 Mich. 406, 23 L.R.A.(N.S.) 506, 122 N. W. 184.

And an agreement ancillary to the sale of a business, that the seller will not at any time while the purchaser is engaged in such business within the city, either directly or indirectly, re-engage therein, is within such proviso. *Weickgenant v. Eccles* (1913) 173 Mich. 695, 140 N. W. 513.

But a contract of employment by which the employee agrees not to engage in business in the employer's line in such places as he may operate in during his employment, for a period of one year after leaving the employment, is not within the proviso, but is invalid as contrary to the express terms of the statute. *Grand Union Tea Co. v. Lewitsky* (1908) 153 Mich. 244, 116 N. W. 1090.

In *State v. Duluth Bd. of Trade* (1909) 107 Minn. 506, 23 L.R.A.(N.S.) 1260, 121 N. W. 395, it was held that a rule of a board of trade which provides that all members of the board shall charge a uniform and determined rate of commission for selling grain for nonmembers, and imposes penalties for the violation of such rule, did not violate the Minnesota Anti-trust Statute (Rev. Laws 1905, § 5168), which provides that "no person or association of persons shall enter into any pool, trust agreement, combination or understanding whatsoever with any other person or association, corporate or otherwise, in restraint of trade within this state, or between the people of this or of any other state or country, or which tends in any way or degree to limit, fix, control, maintain or regulate the price of any article of trade, manufacture, or use bought and sold within the state, or which limits or tends to limit the production of any such article, or which prevents or limits competition in the purchase and sale thereof, or which tends or is designed so to do," as its direct and necessary tendency was neither to restrain trade by preventing competition in the business of buying and selling grain, nor to limit, fix, control, maintain, or regulate the price or production of any article of trade, manufacture, or use, bought and sold within L.R.A.1917A.

the state, nor to prevent or limit competition in the purchase and sale thereof.

In *Retail Lumber Dealer's Assn. v. State* (1909) 95 Miss. 337, 35 L.R.A.(N.S.) 1054, 48 So. 1021, it was held that an undertaking among themselves by the members of an organization of retail dealers, that they will purchase only from wholesalers who do not sell direct to consumers, is a violation of a statute making a combination intended to hinder competition in the sale of a commodity a criminal conspiracy.

In *Cumberland Teleph. & Teleg. Co. v. State* (1911) 100 Miss. 102, 39 L.R.A.(N.S.) 277, 54 So. 670, it was held that the Mississippi Anti-trust Law (§ 5002 of the Code of 1906, as amended by Laws of 1908, p. 124), in prohibiting contracts in restraint of trade, intended to include within its provisions only those contracts in restraint of trade, those monopolies and attempts to monopolize, that were invalid as against public policy before the enactment of the statute, leaving untouched such contracts in reasonable restraint of trade, which have no design or purpose to create a monopoly, which are only such as to afford a fair protection to the interests of the party in whose favor they are given, and are not so large as to interfere with the interests of the public. It was accordingly held that a contract by a telephone company doing only long distance business, with a local company doing no long distance business, by which the former undertook to furnish apparatus to the latter, and required it not to extend its lines so as to transact long distance business or make long distance connections with other companies without the consent of the contracting party, did not violate such statute.

In accordance with the construction put upon the Mississippi Anti-trust Act in the foregoing case, it was held in *Sivley v. Cramer* (1913) 105 Miss. 13, 61 So. 653, that an agreement on the part of the seller of an insurance agency not to conduct or be interested in any such agency in a certain territory for a period of ten years, without the consent of the purchaser, would not be invalidated thereby, should it be made to appear that the agreement was necessary for the protection of the purchaser, and that such restraint would not be detrimental to the public interest.

In *State ex rel. Hadley v. Standard Oil Co.* (1909) 218 Mo. 1, 116 S. W. 902, affirmed in (1912) 224 U. S. 270, 56 L. ed. 760, 32 Sup. Ct. Rep. 406, Ann. Cas. 1913D, 936, it is said that the Missouri

Anti-trust Law, while prohibiting the making of all contracts and combinations which have for their object and purpose the restraint of trade or the fixing and maintaining of prices, in no manner denounces as illegal any contract regarding trade which has for its object a legitimate purpose and which only incidentally stifles trade.

In *State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.* (1912) 246 Mo. 168, 151 S. W. 101, it was said that the Missouri statute condemns every direct restraint of trade, great or small, and closes the only door through which doubts as to its construction could enter by positively prohibiting defined combinations, without regard to what the courts may think as to the extent of their effect.

In *Home Teleph. Co. v. Sarcoux Light & Teleph. Co.* (1911) 236 Mo. 114, 36 L.R.A.(N.S.) 124, 139 S. W. 108, it was held that a contract between local telephone companies operating in different fields, for exclusive physical connections of their lines for through business, is not prohibited by the Missouri statutes against pools and trusts. This case impliedly overrules an earlier decision of the court of appeals (*Home Teleph. Co. v. Granby & N. Teleph. Co.* (1910) 147 Mo. App. 216, 126 S. W. 773), in which a contrary conclusion was reached.

In *Staroske v. Pulitzer Pub. Co.* (1911) 235 Mo. 67, 138 S. W. 36, it was held that the Missouri Anti-trust Act was not violated by an agreement exacted by a newspaper from its carriers as the condition of their being retained in its service, that they would not deliver papers for a rival newspaper, the carriers being in no manner in competition with each other.

In *C. H. Albers Commission Co. v. Spencer* (1907) 205 Mo. 105, 11 L.R.A.(N.S.) 1003, 103 S. W. 523, it was held that an agreement between two dealers to buy for joint account wheat for delivery during a certain month, in quantities so large as to enable them to control the price of wheat during that month, was not within the prohibition of the Missouri statute (Rev. Stat. 1899, § 8965, Anno. Stat. 1906, p. 4150) making unlawful trusts, agreements, or combinations to fix prices.

In *Engles v. Morgenstern* (1909) 85 Neb. 51, 122 N. W. 688, it was held that the Nebraska Anti-trust Act (§ 1, chap. 91A, Comp. Stat. 1901), entitled "An Act to Define Trusts and Conspiracies against Trade and Business, Declaring the Same Unlawful and Void, and Pro-

viding Means for the Suppression of the Same, and Remedies for Persons Injured Thereby," and defining a trust as "a combination of capital, skill or acts by . . . two or more persons . . . for either, any or all of the following purposes: (1) To create or carry out restrictions in trade. . . . (3) To prevent competition in . . . sale or purchase of merchandise, produce or commodities, . . . (5) . . . with the intent to preclude, or the tendency of which is to prevent or preclude, a free and unrestricted competition among themselves or others or the people generally in the production, sale, traffic or transportation of any such article of merchandise, product or commodity, or conducting a like business,"—is directed against combinations and conspiracies to interfere with the ordinary conduct of trade or business, and does not condemn or render illegal a contract whereby the seller of a business agreed not again to engage, either directly or indirectly, in such business in the city or vicinity while the purchaser should be in such business there.

In *Heim v. New York Stock Exch.* (1909) 64 Misc. 529, 118 N. Y. Supp. 591, affirmed in (1910) 138 App. Div. 96, 122 N. Y. Supp. 872, it was held that chap. 690 of the Laws of 1899, which provides that "every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented, is hereby declared to be against public policy, illegal and void," was not applicable to a resolution of a stock exchange prohibiting its members from buying or selling stocks for any active member of a rival organization engaged in the same business.

In *National Fireproofing Co. v. Mason Builders' Assn.* (1909) 26 L.R.A.(N.S.) 148, 94 C. C. A. 535, 169 Fed. 259, it was held that an agreement between a mason builders' association and a bricklayers' union, that the builders' association shall include in its contracts for building all cutting of masonry, interior brickwork,

fireproofing, etc., and shall not sublet the installation if the labor in connection therewith is bricklayers' work, but that the men employed on the walls shall be given preference, and that no members of the bricklayers' unions will work for anyone not complying with such provision, was not violative of the New York statute above set forth.

In *People v. American Ice Co.* (1909) 120 N. Y. Supp. 443, it was said by Wheeler, J., charging the jury, that the purchase of a going business accompanied by an agreement not to engage in the same business for a limited time and within a prescribed district is not necessarily in and of itself an illegal transaction or a violation of the New York Anti-monopoly Act (Consol. Laws, chap. 20, §§ 340-346, a re-enactment of the statute above set forth); but that whether it is or is not a violation of the statute depends upon the accompanying circumstances of the case and the purpose and object sought to be accomplished by the transaction; that if the purchase of a business with such restrictive agreement against re-engaging in it was made for the sole purpose of acquiring the business sold, and with no ulterior purpose of establishing a monopoly or preventing competition, then, doubtless, it would be an innocent transaction; but if, in taking and exacting from the seller such an agreement, the buyer procured the contract for the purpose and object of creating a monopoly, so as to be able to control prices, then such contract became an illegal agreement.

In *Wooten v. Harris* (1910) 153 N. C. 43, 68 S. E. 898, it was held that the North Carolina statute (Laws 1907, chap. 218, § 1, subsec. e) which makes it unlawful for any person, firm, corporation, or association engaged in buying or selling anything of value in North Carolina, to make or have an agreement or understanding, express or implied, with any other person, firm, corporation, or association, not to buy or sell said things of value within certain territorial limits within the state, with the intention of preventing competition in the selling, or of fixing the price or preventing competition in the buying, of said things of value within said limits, did not operate to invalidate an agreement whereby a partner disposing of his interest to his copartner agreed not to again engage in such business in the town, or near enough thereto to interfere with the purchaser's business, the court saying: "In construing such statute we must consider its object and the evil to be remedied. L.R.A.1917A.

The history of this legislation is known to all. It is an attempt to make unlawful the formation and operation of great trusts and monopolies which may buy out or crush out all competition in certain articles or business with a view to exercise the power of fixing the prices of the raw material and of the manufactured article, that enormous profits may be extorted thereby at the expense of the public. Neither the language, the known purpose of this enactment, nor the history of this legislation will justify its application to the purchase, as here, by one partner of the other's interest in a general store in a village or town; nor to a similar purchase between other individuals. Such contract, when reasonable in its scope and as to duration and territory, cannot possibly lend itself to the formation of trusts or monopolies, unless shown to be one of many similar contracts tending to engross that particular business in a given territory. There is here not shown in evidence any 'intention of preventing competition in selling, or to fix the price or prevent competition in buying, of said things of value within said limits.' This contract is therefore not within the terms of the statute. It might be different if it were shown that this was one of many similar contracts tending to engross or monopolize any given business, or the sale of any article, within the territory named."

In *Standard Fashion Co. v. Grant* (1914) 165 N. C. 453, 81 S. E. 606, it was held that a contract made by a purchaser of merchandise for resale, which stipulated that the purchaser would not sell or permit to be sold any similar merchandise, and would not sell the merchandise in question except at label prices, was plainly in violation of a statute (chap. 167, § 1, subsec. a, Pub. Laws 1911) which provides that it shall be unlawful to make a sale of any goods, wares, or merchandise in North Carolina upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles, or things of value of a competitor or rival in business of the person, firm, corporation, or association making such sales.

In *Fisher v. Flickinger Wheel Co.* (1906) 28 Ohio C. C. 501, it was held that the provisions of the Ohio Anti-trust Act (Rev. Stat. § 4427-8) that "any contract or agreement in violation of the provisions of this act, shall be absolutely void and not enforceable either in law or equity," were not restricted in their application to a mere agreement to form a trust, but were ap-

plicable to contracts made with the intent to carry out the illegal purposes defined by the statute; and, therefore, that a contract whereby a combination of manufacturers purchased all the machinery from one of its constituent members, which stipulated that such member should not compete in business for the period of five years in a territory lying between New York city and Denver, Colorado, was illegal and void where the provisions of the contract and the fact that such machinery was purchased without any plan for its location and use, and remained unused by the purchaser, pointed irresistibly to the conclusion that the main object of the purchase was the restriction of competition.

In *Hulen v. Earel* (1903) 13 Okla. 246, 73 Pac. 927, it was held that a contract between physicians who had been practising in partnership, whereby the co-partnership was dissolved and one of them purchased the other's interest in the partnership property, the other agreeing not to engage in the practice of medicine in the vicinity of the place where they had their office, was violative of the Oklahoma statute (Wilson's Rev. Stat. §§ 819-821) which provides that "every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind," is to that extent void, such contract not being within the exception therefrom that "one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein," such contract not containing any limitation of time within which the retiring partner will refrain from practising medicine; nor within the further proviso that "partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof," such proviso being construed as permitting only contracts that none of the partners, and not any one of them, may contract to refrain from carrying on a similar business.

In *Prescott v. Bidwell* (1904) 18 S. D. 64, 99 N. W. 93, where, after the dissolution of a partnership engaged in the land, loan, abstract, and insurance business, effected by a sale by one partner to the other of his entire interest in

such business, together with the good will and clientage thereof, the selling partner bought from the other certain abstract books, agreeing to keep them, however, in the office of the seller, and to give him the free use thereof at all times, the seller agreeing that he would not compile abstracts or engage in the abstract business within the county, and the other contracting not to engage in the land, loan, or insurance business in the county, it was held that the covenant not to engage in the abstract business, being neither incidental to a sale of good will nor made upon the dissolution of the partnership, was not within the exceptions made in §§ 1277-1279 of the Revised Civil Code, declaring every contract by which anyone is restrained from exercising a lawful profession, trade, or business at any time void, but making the exception that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof so long as the buyer or any person deriving title to the good will from him carries on a like business therein, and that partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted.

In *Sullivan v. Rime* (1915) 35 S. D. 75, 150 N. W. 556, it was held that an agreement whereby a merchant undertook the agency for a certain line of patterns, agreeing not to offer for sale any other make of patterns, was not void as contrary to the provisions of chap. 224, Laws of 1909, which defines a trust or monopoly as "a combination of capital or skill, by two or more persons, firms, corporations or association of persons: First, To create or carry out restrictions in trade. Second, To limit the production or to increase or reduce the price of commodities. Third, To prevent competition in the manufacture, transportation, sale or purchase of merchandise, produce or commodities. Fourth, To fix any standard or figure whereby the price to the public shall be in any manner established or controlled," since, whether treated as an agency or sales contract, there is nothing therein which in the slightest degree tends to the creation of a monopoly, or which in any manner tends to interfere with the right of any other person to offer for sale or sell like merchandise of other

makes in direct competition with the sales under the contract in question.

The purpose of the Texas Anti-trust Law is to denounce certain combinations as illegal without reference to the intent of the parties to prevent or lessen competition, and without reference to the actual effect thereof. *Robinson v. Levermann* (1915) — *Tex. Civ. App.* —, 175 S. W. 160.

In *Malakoff Gin Co. v. Riddlesperger* (1911) — *Tex. Civ. App.* —, 133 S. W. 519, it was held that an agreement by the seller of a cotton gin and gristmill not to re-engage in that business so long as the purchasers operated it was not in violation of Laws of 1903, chap. 94, prohibiting a combination of capital, skill, or acts by two or more persons, firms, or corporations to abstain from engaging in or continuing business, etc., partially or entirely, within the state, as by the transaction neither the capital, skill, nor acts of the parties were brought into any kind of union, association, or co-operative action.

But in *Robinson v. Levermann* (*Tex.*) *supra*, it was held that where two concerns engaged in the paint and wall paper business in a certain city purchased the stock in trade of a third, which they divided between them, the seller agreeing not again to engage in the city in the same line of business so long as the purchasers or either of them should be engaged in such business in the city; there was such a combination of the "capital, skill, or acts" of the purchasers as to render invalid the provision against re-engaging in business, although it was not the purpose of the purchasers to get rid of a competitor and although the effect of the arrangement was not to materially lessen competition in their line of business. The court conceded, however, that the situation would have been otherwise had the contract in question been an incident of a sale made by one concern to another.

In *Crandall v. Scott* (1913) — *Tex. Civ. App.* —, 161 S. W. 925, where the proprietors of two of the three moving picture shows in a certain city each agreed with the third to pay him a certain sum per month in consideration of his warranty that during the period covered by the contract no show business other than the theaters of the other contracting parties should open in the city, they agreeing not to become interested in or to encourage the opening or running of any other show house in the city within said time, it was held that there was a combination in restraint of trade L.R.A.19 7A.

within the Anti-trust Act defining a trust as "a combination of capital, skill or acts by two or more persons, firms . . . or association of persons, or either two or more of them for either, any and all of the following purposes: First. . . . To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state. . . . Seventh. To abstain from engaging in or continuing business, . . . partially or entirely within the state of Texas, or any portion thereof;" and that it was immaterial whether the restraint imposed was reasonable or unreasonable, or whether its result was beneficial or prejudicial.

In *Smith v. Kousiakos* (1915) — *Tex. Civ. App.* —, 172 S. W. 586, it was held that a contract not ancillary to a sale or lease entered into between the lessees of a store and a person operating a lunch stand in the vicinity, that neither they nor their lessees or assigns would conduct or permit to be conducted upon the premises any kind of a lunch counter or lunch stand, was void under the Texas Anti-trust Law, defining a trust as a combination of capital, skill, or acts for either, any, or all of the following purposes: "First. . . . To create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state Seventh. To abstain from engaging in or continuing business, . . . partially or entirely within the state."

In *Jersey-Creme Co. v. McDaniel Bros. Bottling Co.* (1913) — *Tex. Civ. App.* —, 152 S. W. 1187, it was held that a contract the purpose and intent of which were to confer upon one of the parties the exclusive right to sell the product of the other during the life of the contract, in the territory specified, was a "conspiracy in restraint of trade" within the meaning of § 3 of the Anti-trust Statute of 1903, declaring such a conspiracy to exist where "any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity."

In *J. R. Watkins Medical Co. v. Johnson* (1913) — *Tex. Civ. App.* —, 162 S. W. 394, it was held that a contract by which a manufacturer agreed to furnish the other party thereto its medicines at the usual wholesale prices, to be sold

by him at the regular retail prices in certain territory, he agreeing that he would sell no other goods or articles during the term of the contract except those purchased by him from the manufacturer, and that he would sell them only to customers at their residences in the prescribed district, was to be treated as a contract for the sale of goods and as such violative of the Texas Anti-trust Law, it clearly showing by its terms an intention to combine the capital, skill, and act of the parties to fix and maintain a standard of prices upon a certain commodity, and to prevent competition in a given territory.

In *State v. Racine Sattley Co.* (1911) — *Tex. Civ. App.* —, 134 S. W. 400, the state Anti-trust Law was held to be violated by a contract of sale by a manufacturer to a dealer, in which it was provided that the manufacturer would not sell any of its goods to anyone else at the place where the dealer was located, and that the dealer would not buy goods of like character from anyone else during the continuance of the contract, the court saying: "Our Anti-trust Statute has materially enlarged the doctrine of the common law as to monopolies and combines. Under our statute the effect on the public of an agreement which is against public policy is not essential; the tendency is enough to bring it within the condemnation of the law. . . . In view of our Anti-trust Statutes and the decisions thereon, it cannot be doubted that it is the settled policy of this state to prevent restrictions in trade. 'The law did not intend to regulate restrictions in trade, but to prohibit them entirely, without regard to their immediate effect on trade.'"

A contract for a sale of goods, with no reservation of title or restrictions upon the sale thereof except a provision which fixes for the vendee the selling price to the consumer, and a provision which prohibits him from selling other than the goods of his vendor, is violative of the Texas Anti-trust Act as an agreement in restraint of trade. *Segal v. McCall Co.* (1916) — *Tex.* —, 184 S. W. 188.

In *Gust Feist Co. v. Albertype Co.* (1908) — *Tex. Civ. App.* —, 109 S. W. 1139, a provision in a contract of sale, that the buyer should have the exclusive control and resale of the seller's goods in the city, was held to be within the Anti-trust Law of 1903 (Laws of 1903, p. 119, chap. 94).

In *Forrest Photographic Co. v. Hutchinson Grocery Co.* (1908) — *Tex. Civ. L.R.A.* 1917A.

App. —, 108 S. W. 768, it was held that a contract between a grocery company and a photographic company, whereby the latter agreed to furnish the former with trading tickets, each entitling its holder to a photo art calendar at the photographic company's studio when countersigned by the grocery company, and the grocery company agreed to pay a certain amount for each ticket, and the photographic company agreed that from the date of the contract it would not, without the consent of the grocery company, or until the disposal of the tickets furnished, sell any other local grocery company any of such tickets, was not one which is declared void by the Anti-trust Statutes of 1903 (Gen. Laws 1903, p. 119, chap. 94), declaring a conspiracy in restraint of trade to exist "where two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity." Two reasons are given for this decision, the first being that aids to commerce are not included in the statute; and the second being that the tickets and the obligation of the photographic company to give the holders thereof calendars with their respective photographs thereon was essentially a contract for service to be rendered to the grocery company rather than the sale of an article of merchandise, produce, or commodity.

In *Star Mill & Elevator Co. v. Ft. Worth Grain & Elevator Co.* (1912) — *Tex. Civ. App.* —, 146 S. W. 604, it was held that a contract of sale of a quantity of oats, which was entered into with the understanding that the purchaser would not buy grain in that part of the state wherein the seller was doing business except from "legitimate dealers," was for that reason void as in violation of the provision of the state Anti-trust Law (Acts 1903, § 34), declaring an illegal conspiracy in restraint of trade to exist "where any two or more persons, firms, corporations or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation, or association of persons any article of merchandise, produce or commodity."

In *Nickels v. Prewitt Auto Co.* (1912) — *Tex. Civ. App.* —, 149 S. W. 1094, it was held that a retail sales agency contract which in effect conferred the exclusive agency for the sale of a certain make of automobile in a restricted territory for a short period of time did not violate the Texas Anti-trust Statute, the agreement not constituting such a combination of capital, skill, or acts as is necessary to constitute a trust as defined by such statute.

In *Wood v. Texas Ice & Cold Storage Co.* (1914) — *Tex. Civ. App.* —, 171 S. W. 497, a contract whereby a manufacturer of and wholesale dealer in ice agreed to sell to a retail dealer, at a certain price per ton, a certain quantity of ice per day and as much more as it might be able to supply without conflicting with other arrangements, and whereby the retailer agreed to make all his purchases from the manufacturer during the term of the contract, provided the manufacturer should be able to furnish the quantity of ice needed, was held to constitute a conspiracy in restraint of trade under subdivision 1 of the Anti-trust Act, which declares a conspiracy in restraint of trade to exist where two persons, firms, corporations, or associations engaged in buying or selling any commodity agree to refuse to buy such commodity from or sell it to any other person, firm, etc., although the contract also contained a provision that the seller should meet the market price in case the same should fall below the price agreed upon. It was further held that the fact that one of the parties was a wholesaler and the other a retailer did not take the contract out of the statute.

In *W. T. Rawleigh Medical Co. v. Fitzpatrick* (1916) — *Tex. Civ. App.* —, 184 S. W. 549, and *Armstrong v. W. T. Rawleigh Medical Co.* (1915) — *Tex. Civ. App.* —, 178 S. W. 582, it was held that provisions in a contract of sale whereby the purchaser bound himself to buy from no one but the seller and to resell the goods purchased by him at certain fixed prices, and further agreed to have no other business or employment, rendered the contract void as in violation of the Texas Anti-trust Law.

In *Lytle v. Galveston, H. & S. A. R. Co.* (1907) 100 *Tex.* 292, 10 *L.R.A.(N.S.)* 437, 99 S. W. 396, it was held that an agreement between railroad companies and citizens of a municipal corporation for the issuance of special rate tickets for transportation to and from certain entertainments to be held at the municipality did not violate either the state

or Federal Anti-trust Act, although the purpose was to maintain the regular transportation rates to persons not using excursion tickets.

In *Redland Fruit Co. v. Sargent* (1908) 51 *Tex. Civ. App.* 619, 113 S. W. 330, it was held that a contract whereby a company operating a plantation granted the right to erect a store and to conduct a general merchandise business on its premises did not, by reason of a stipulation therein that the company would give no other rights on the premises to other parties for the sale of merchandise, violate the terms of the Anti-trust Act (Act of 1903, p. 119) defining a trust as "a combination of capital, skill or acts by two or more persons . . . for either, any or all of the following purposes: (1) To create, or which may tend to create, or carry out restrictions in trade or commerce, or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the law of this state,"—the right to sell upon the premises of another not being a right given by law, but by consent of the owner.

And in *Wheatley v. Kollaer* (1910) — *Tex. Civ. App.* —, 133 S. W. 903, it was held that a lease of saloon property was not, by reason of a provision therein binding the lessor not to rent any other property which he might own on the same street for the same business, invalid under the state Anti-trust Act of 1903, since in no true sense can it be said that the designated provision of the contract constitutes a combination of capital or skill between the lessee and the lessor, or in any public or prohibitive sense prevents competition.

In *Edwards v. Old Settlers' Asso.* (1914) — *Tex. Civ. App.* —, 166 S. W. 423, it was held that an agreement in a lease that the lessor would not allow any cold drink stand, shows, exhibitions, dance halls, or platforms on the land owned by him within 400 yards of the land leased, or allow the use of land for any purpose or pursuit that would come into competition with or antagonize the interests of the lessee, was not contrary to chap. 1 of title 136, Rev. Stat. 1911, defining and prohibiting trusts, monopolies, and conspiracies against trade.

In *Manson v. Hunt* (1914) 82 *Wash.* 291, 144 *Pac.* 45, a contract between two steamship companies operating boats between the same points, whereby one agreed to withdraw its boats from the route for a period of three years, was

held violative of art. 12, § 22, of the state Constitution, which provides that "monopolies and trusts shall never be allowed in this state and no incorporated company . . . in this state shall directly or indirectly combine or make any contract with any other incorporated company . . . for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity," especially where the parties to the contract, as was evident from the face thereof, treated it as a contract in restraint of competition.

In *McKinley Teleph. Co. v. Cumberland Teleph. Co.* (1913) 152 Wis. 359, 140 N. W. 38, a contract between two telephone companies, each owning rural telephone lines radiating from a city, by which it was provided that, upon the consent of the State Railroad Commission being obtained to a proposed increase of rates, one company should be deemed to have purchased from the other those rural telephone lines which were parallel to its own lines, and should have an option to purchase other rural lines; that the purchaser of the rural lines should refrain from furnishing telephone service in the city, and each party for a period of seven years was to furnish free connection to the patrons of the other, the seller agreeing to erect no new rural lines and not to increase beyond twenty-five the number of telephones on any of the existing rural lines retained by it,—was held, in view of the allegation of the complaint indicating that the object of the contract was to avoid duplication of lines for the same territory, and to avoid the increase of rates which would be occasioned thereby, and, while restricting the respective fields of operation of each company, to increase the extent and efficiency of the service, and of the further circumstance that under the law the State Railroad Commission had power to reduce the rates to be charged by the companies if they should be found excessive,—not to violate Wisconsin statute, § 1791j, which provides that "any corporation organized under the laws of this state which shall enter into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein . . . shall upon proof thereof . . . have its charter or authority to do business in this state canceled and annulled."

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In *Rose v. Gordon* (1914) 158 Wis. 414, 149 N. W. 158, it was held that a lease of a saloon whereby the lessee agreed that during the term of the lease he would sell no beer on the premises except such as was sold by the lessor was not an illegal contract in restraint of trade, within the provisions of § 1747e of the Wisconsin statute, by which "every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is . . . declared illegal," the restraint of trade resulting from the agreement being partial only, and not operating to the prejudice of the public by unduly restricting competition.

In *Rex v. Gage* (1907) 13 Can. Crim. Cas. 415, and in the same case on appeal (1908) 13 Can. Crim. Cas. 428, it was held that a conspiracy "to restrain or injure trade or commerce in relation to any" article or commodity which may be a subject of trade or commerce, under Canadian Criminal Code, § 498, subsec. b, must be taken to refer to undue restraints of trade, such as malicious restraints or those not justified by any personal interest for the protection of which the trade arrangement is made; and therefore that a regulation of a grain buyers' association that its members, in purchasing wheat from producers, should pay therefor not more nor less than 1 cent per bushel below the export market price, thereby assuring a fixed profit of 1 cent per bushel on the trade done by members of the association on its own exchange, was not a violation of such statute, the profit made being a fair and reasonable one and the interests of the public not being unduly impaired thereby.

In *Weidman v. Shragge* (1912) 46 Can. S. C. 1, Ann. Cas. 1912D, 919, reversing (1910) 20 Manitoba L. R. 178, it was held that a contract between two junk and bottle dealers, to continue from the 1st of April until the 15th of December following, with a provision for an extension thereafter from month to month as mutually agreed upon, which professed to fix the maximum prices which each of the parties should pay for the several articles specified in the schedule, which prices were to be subject to revision by mutual consent, and provided that each party should make up accounts monthly showing the profit or loss made on the business done, and that the profits should be equally divided, was void as being in contravention of § 498, subsec. d, of the Criminal Code, which provides that everyone shall be guilty of an in-

dictable offense who conspires or agrees "to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of" any article or commodity. This conclusion may have been influenced

by a finding of the trial judge that parties to the agreement practically monopolized the whole trade in junk in Western Canada, so that when they ceased to compete with each other all competition was gone. E. S. O.

WISCONSIN SUPREME COURT.

STEVE PAWLAK, by Guardian ad Litem,
Appt.,
v.

CHARLES A. HAYES, Respt.

(162 Wis. 503, 156 N. W. 464.)

Master and servant — incidental negligence of independent contractor — right of action.

The acceptance by an injured employee of compensation from his employer for physician's services does not preclude him, upon discovering the malpractice of the physician, from refusing further compensation from his employer on account of such services and suing the physician for malpractice, under a statute providing that the making of a lawful claim by the employee on the employer for injuries shall operate as an assignment of a cause of action in tort which the employee may have against any other person for such injuries, and that the making of a claim against a third person shall operate as a waiver of a claim against the employer.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

(February 22, 1916.)

APPEAL by plaintiff from an order of the Circuit Court for Chippewa County sustaining a demurrer to a complaint filed to recover damages for alleged malpractice. Reversed.

Statement by Vinje, J.:

Action to recover damages for malpractice. Plaintiff alleges that on the 5th day of March, 1914, while in the employ of the John S. Owen Lumber Company, a log rolled onto him, and he sustained a fracture of the leg; that he employed the defendant to treat him for the injury, and that, by reason of the negligence and lack of skill of the defendant in the treatment given him within a couple of weeks after the injury, and subsequent thereto, the leg

was improperly set and treated, to the damage of plaintiff. The complaint further alleges that at the time of the injury both plaintiff and his employer, the John S. Owen Lumber Company, were under the provisions of the Workmen's Compensation Act, and that plaintiff made a claim against his employer under the act, and received compensation and part of his medical expenses from March 5 to about August 20, 1914; that as soon as he discovered the negligence of the defendant, he refused to accept any more compensation from his employer, and he offers to return the same or so much thereof as the court may adjudicate. The defendant entered a general demurrer to the complaint, and from an order sustaining the same, the plaintiff appealed.

Mr. A. L. Smongeski, for appellant:

Plaintiff's remedies are not inconsistent, and his election of one will not bar him from the others.

Selleck v. Janesville, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352; Bishop v. McGillis, 82 Wis. 120, 51 N. W. 1075; Sharp v. Mauston, 92 Wis. 629, 66 N. W. 903; Kraft v. Madison, 98 Wis. 252, 73 N. W. 775; Barth v. Loeffelholz, 108 Wis. 562, 84 N. W. 846; Rowell v. Smith, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773; Radman v. Haberstro, 49 Hun, 605, 17 N. Y. S. R. 497, 1 N. Y. Supp. 561; Bank of Lodi v. Washburn Electric Light & P. Co. 98 Wis. 547, 74 N. W. 363; Wells, F. & Co. v. Robinson, 13 Cal. 133; Boots v. Ferguson, 46 Hun, 129, 10 N. Y. S. R. 761; Dickson v. Patterson, 160 U. S. 584, 40 L. ed. 543, 16 Sup. Ct. Rep. 373; Young v. Hawkins, 74 Ala. 370; Equitable Co-op. Foundry Co. v. Hersee, 103 N. Y. 25, 9 N. E. 487; Bach v. Tuch, 47 Hun, 536.

Plaintiff's claim against defendant was not assigned to his employer.

McGarvey v. Independent Oil & Grease Co. 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A. 803.

Mr. Robert R. Freeman, for respondent:

By accepting compensation, plaintiff elected to adjust the matter of the accident and its results.

McGarvey v. Independent Oil & Grease Co. 156 Wis. 580, 146 N. W. 895, 5 N. C. C.

Note.—As to rights and remedies under compensation acts where injuries were caused by negligence of third person, see annotation following Peet v. Mills, L.R.A. 1916A, 360; and see also later cases, Drake v. Topeka R. Co. L.R.A.1916E, 332; Ross v. Erickson Constr. Co. L.R.A.1916F, 319; and O'Neill v. Carley Heater Co. ante, 276. L.R.A.1917A.

A. 803; *Selleck v. Janesville*, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352; *Hunt v. Boston Terminal Co.* 212 Mass. 99, 48 L.R.A.(N.S.) 116, 98 N. E. 786; *Doran v. Waterloo, C. F. & N. R. Co.* — Iowa, —, 147 N. W. 1100.

The alleged malpractice is not a separate and distinct wrong, but one of the proximate results of the accident itself for which the employer is absolutely liable; and, as a matter of fact, one for which he was in fact paying compensation at the very time plaintiff refused to further accept same.

Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247; *Selleck v. Janesville*, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352; *Stover v. Bluehill*, 51 Me. 439; *Goshen v. England*, 119 Ind. 368, 5 L.R.A. 253, 21 N. E. 977; 6 *Thomp. Neg.* § 7211; *Wieting v. Millston*, 77 Wis. 523, 46 N. W. 879; *Batton v. Public Service Corp.* 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. Rep. 855, 69 Atl. 164.

Mr. Timothy Brown also for respondent.

Vinje, J., delivered the opinion of the court:

The circuit court sustained the demurrer to the complaint on the ground that, when plaintiff filed a claim against his employer, his cause of action for the injury received and the proximate results thereof were assigned to his employer by virtue of subdivision 1 of § 2394-25, Stat., which reads as follows: "The making of a lawful claim against an employer for compensation under §§ 2394-3-2394-31, inclusive, for injury or death of his employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer may enforce in his own name the liability of such other party."

It is quite evident from the reading of this subdivision that it contemplates the existence at the same time of two remedies, either of which the employee may pursue. He may invoke the statutory remedy against his employer, or the common-law remedy against the third person who, by his negligence, caused or contributed to his injury. *McGarvey v. Independent Oil & Grease Co.* 156 Wis. 590, 146 N. W. 895, 5 N. C. C. A. 803. It is equally obvious that these two remedies must coexist in order to give the employee an election. That the statute contemplated an election is made clear by subdivision 2 of the same section, which provides that "the making of a claim by an employee against a third party for damages by reason of an accident covered L.R.A.1917A.

by §§ 2394-8-2394-31, inclusive, shall operate as a waiver of any claim for compensation against the employer."

Thus, while the statute gives the employee the option of pursuing either remedy, it deprives him of all rights under the one he does not pursue as soon as he makes his election, by assigning to the employer his cause of action against the third party if he proceeds against the employer, and by releasing the employer if he proceeds against the third party.

It does not appear that, at the time plaintiff was injured, there was any negligence by any third party, or, indeed, by anyone. This being so, plaintiff had no election to make when he filed his claim under the statute against his employer, and no cause of action passed to the latter. The employee could proceed only against his employer. There was no one else liable so far as the complaint discloses. He could not at that time be required to make an election, because the facts giving rise to an election were not then in existence, nor could they be reasonably anticipated, because malpractice is the exception, not the rule. No duty or opportunity to elect could arise until the facts creating the liability of the third person came into existence. In this case they were not known to plaintiff until about August 20th, and there is nothing to show he was negligent in not sooner ascertaining them. As soon as they came to his notice, he promptly elected to hold the third person whose alleged negligence aggravated his first injury, and thereby he waived further liability against his employer. Section 2394-25, subdiv. 2.

The making of a lawful claim against the employer eo instanti operates to assign to him any cause of action the employee may then have against a third party. *McGarvey v. Independent Oil & Grease Co.* supra. But it does not assign a cause of action then not in esse. It merely acts upon what is in existence at the time the lawful claim is made. When the negligence of a third party, to the knowledge of the employee, who exercises ordinary diligence in respect thereto, intervenes, his right to an election arises—not before then. It was therefore competent for plaintiff, when he first learned of the negligence of the defendant, to elect to hold him and release his employer, or to hold his employer under the provisions of the Compensation Act.

In a common-law action for negligence it has been held that the defendant is liable for the aggravation of the injury, caused by the malpractice of the physician called by plaintiff to treat it, where it is shown that he exercised ordinary care in the selection of the physician. *Selleck v.*

Janeville, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352. The Compensation Act requires the employer to furnish a physician, and makes him liable for the value of the physician's services for not to exceed ninety days. § 2394-9, subd. 1. This, we think, implies liability for any aggravation of the injury caused by the negligence of

the physician treating the employee during such time. Whether the employer would be liable for malpractice after the expiration of ninety days is not decided. The negligent treatment here is alleged to have begun about two weeks after the accident.

Order reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings according to law.

CALIFORNIA SUPREME COURT.
(Department No. 2.)

C. M. EASTON and Wife, Respts.,
v.

**UNITED TRADE SCHOOL CONTRACT-
ING COMPANY, Appt.**

(— Cal. —, 159 Pac. 597.)

Master and servant — automobile instructor — negligence of pupil — liability.

1. One conducting a school for instruction in automobile driving for pay is liable for injuries done to a traveler on a highway through the incompetence of a pupil whom one of his teachers intrusts with the management of a car.

For other cases, see Master and Servant, III. a, in Dig. 1-52 N. S.

Fright — injury from — liability for.

2. The fright of a woman, resulting in miscarriage, due to being thrown from the seat of the carriage in which she was riding, and her child being thrown out of the carriage by collision with an automobile, may be considered in awarding damages against the one responsible for the collision.

For other cases, see Fright, in Dig. 1-52 N. S.

Damages — amount — miscarriage.

3. \$5,000 is not excessive to award as damages for a miscarriage due to negligence.

For other cases, see Damages, III. i, 4, a, in Dig. 1-52 N. S.

Appeal — unauthorized allowance of damages — striking out.

4. A judgment in favor of a married woman for personal injuries will not be reversed for including items for medicines and attendance, which belonged to her husband, if the amount so awarded can be segregated and stricken out.

For other cases, see Appeal and Error, VII. m, 8, in Dig. 1-52 N. S.

Evidence — second miscarriage.

5. Upon the question of damages for causing a miscarriage evidence is admis-

sible that, because of the condition produced by it, a second one occurred some time afterwards.

For other cases, see Evidence, XI. g, in Dig. 1-52 N. S.

Same — competency of driver of automobile.

6. Evidence is admissible in an action to recover damages for personal injuries due to collision with an automobile as to whether or not the driver in charge of the automobile was qualified.

For other cases, see Evidence, XI. h, in Dig. 1-52 N. S.

(July 27, 1916.)

APPEAL by defendant from a judgment of the Superior Court for Los Angeles County in plaintiffs' favor in an action brought to recover damages for injuries sustained by the plaintiff wife, alleged to have been caused by the negligent driving of defendant's automobile. **Affirmed.**

The facts are stated in the opinion.

Messrs. J. E. Coberly, B. A. Finch, and Scarborough & Bowen for appellant.

Mr. Ray Howard, for respondents:

The owner is liable, provided the driver takes possession of the car with his consent. *Ingraham v. Stockamore*, 63 Misc. 114, 118 N. Y. Supp. 399.

The owner is liable where the driver's inexperience might have led the owner to anticipate that injuries would be caused.

Allen v. Bland, — Tex. Civ. App. —, 168 S. W. 35.

A member of the owner's family, driving for the pleasure of other members, is in the position of a servant of the owner, who is liable for his negligence even if not present or participating in the pleasure.

McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *Daily v. Maxwell*, 162 Mo. App. 415, 133 S. W. 351; *Stowe v. Morris*, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Dalrymple v. Covey*

Note. — As to liability of one undertaking to give instruction in driving automobile for negligent operation during instruction, see annotation following this case, post, 397.
L.R.A.1917A.

Motor Car Co. 66 Or. 533, 48 L.R.A. (N.S.) 424, 135 Pac. 91.

Henshaw, J., delivered the opinion of the court:

The action is for damages growing out of injuries sustained by plaintiff C. M. Easton's wife. Trial was had before the court without a jury, and resulted in an award and judgment for plaintiffs. The items composing this judgment were \$5,000 for her bodily injuries, \$50 for her disability and loss of society, comfort, and service to her husband, \$75 for nursing during her illness, \$25 for physician's services, and \$10 for medicines. Each of these minor items was made an element of special damage in the complaint.

The charge was that while Mary E. Easton, plaintiff, was driving a horse attached to a buggy along a street in Los Angeles, an automobile of defendant, in charge of one of defendant's agents, was negligently and carelessly driven against the buggy, inflicting the injuries complained of, which injuries will hereinafter be more specifically described. The evidence established that Mrs. Easton was riding in a buggy on Central avenue in Los Angeles city. With her was her sister-in-law, who carried on her lap one of Mrs. Easton's daughters, about five years of age, while another daughter, about eight and one half years of age, sat on a board at the feet of the women. The horse was going at a dog trot and the buggy was on the proper side of the street, as near to the curb as possible, as the ordinance of the city required.

The defendant was conducting a school for instruction, amongst other things, in the operation of automobiles. Elmer Harper, seventeen years of age, was a student in the school under payment for the privilege of tuition. D. B. Sterling was also a student in the same school, but had advanced to the point where he describes his occupation to be that of chauffeur and his employment as driving and working in the garage or workshop of the defendant, and in instructing and driving defendant's students. All of this he did under the directions of B. A. Finch, defendant's president. Upon the day of the injury, acting under these directions, Sterling took Harper in an automobile to give him lessons in driving. Sterling himself drove the car into Central avenue, and there, as the street seemed clear, he surrendered the wheel and permitted Harper to drive it. Upon Central avenue was a street car line and on its tracks a street car, proceeding in the same direction as was the buggy. The automobile, going in the same direction as the car and

buggy, approached the two from behind. The automobile, under the management of the inexperienced student, Harper, apparently sought to pass between the street car and the buggy. Harper became confused, mismanaged the automobile, and collided with both the street car and the buggy. The collision knocked one child out of the buggy, broke the buggy wheel, bent the rear axle, knocked the tire off the front wheel, forced the horse to his haunches, and delivered so severe a shock to Mrs. Easton, who was leaning against the back of the seat of the buggy, that she was knocked forward out of her seat. Mrs. Easton was at the time pregnant. About a month thereafter she suffered a miscarriage. By the medical testimony the fetus had been dead about 2 or 3 weeks, and the miscarriage was the result of the fright and the shock of the collision.

Appellant's principal argument is that there was no privity between Harper or Sterling and the defendant rendering defendant liable for the negligence of either of them. But the facts above stated would seem conclusively to dispose of this argument. The defendant, as a part of its business, employed Sterling to give Harper instructions. It paid Sterling for so doing. Sterling, in the performance of this employment, used his own judgment, which, by operation of law, became the defendant's judgment, in turning the management of the car over to Harper when and as he did. That the accident resulted from the ignorance and inexperience of Harper may not for a moment be doubted; and while, of course, Harper would be responsible for his own act in the premises, and Sterling in turn responsible, none the less the defendant, under whose directions, all of these things were done, is likewise responsible. *Minor v. Mapes*, 102 Ark. 351, 39 L.R.A. (N.S.) 214, 144 S. W. 219; *Burnham v. Central Automobile Exch.* — R. I. —, 67 Atl. 429; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619; *Wooding v. Thom*, 148 App. Div. 21, 132 N. Y. Supp. 50.

Appellant's next proposition is that Mrs. Easton received no injuries as such; that she suffered merely from fright; that fright alone, without personal injury, cannot be made the foundation of an action for damages, but that, whatever may be the rule in this respect, "plaintiff cannot recover in this action because it appears that her fright was caused by apprehension of threatened danger not to herself, but only to her child." But appellant's position requires neither a discussion of the principle nor a detailed consideration of the authorities, for the reason that the facts do not

show that plaintiff's injuries were occasioned by fright alone, nor fear of danger or injury to her child alone. True, she suffered fright and fear occasioned by the collision. True, a part of that fright and fear grew out of concern for her infant child which was thrown out of the buggy by the collision, but equally true it is that, leaning, as she was, against the back of the seat, she sustained a direct personal physical shock by the blow of the automobile against the buggy, which blow propelled her forward out of her seat, and which blow directly contributed to and aided in causing the miscarriage from which she afterwards suffered. Fright here was but a natural and direct consequence of defendant's injurious trespass, which trespass resulted in direct physical injury to Mrs. Easton. The fright was an inevitable concomitant of the trespass. This case, therefore, presents no feature in common with such cases relied upon by appellant as *Mitchell v. Rochester R. Co.* 161 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121, where plaintiff, about to get on one of the cars of the defendant, sustained fright because of the approach of another car, which fright resulted in a miscarriage; nor *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607, where the plaintiff, a married woman, sued for damages because of a miscarriage occasioned by her fright over a quarrel between the defendant and her husband, within her hearing, but out of her sight; nor *Braun v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15, where a recovery was sought against defendant because he had entered a house where plaintiff was, unannounced, and had demeaned himself improperly and in a violent and boisterous manner, causing her to become sick, sore, and disabled; nor *Miller v. Baltimore & O. S. W. R. Co.* 78 Ohio St. 309, 18 L.R.A. (N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499, where defendant was charged with having negligently shoved cars into the dwelling house of plaintiff, so that plaintiff, who was standing near by, "suffered a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health," and it was held that an act of negligence neither wilful nor malicious, causing mere fright, unaccompanied by contemporaneous physical injury, is not actionable; nor *Huston v. Freemansburg*, 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022, where the defendant borough, in excavating a street, exploded dynamite, and it was charged that the shock of the explosion so affected plaintiff's husband, who was recovering from typhoid

fever, that he died within two weeks, and the holding is simply that there can be no recovery of damage from fright or other merely mental suffering, unconnected with physical injury; nor *Chittick v. Philadelphia Rapid Transit Co.* 224 Pa. 13, 22 L.R.A. (N.S.) 1073, 73 Atl. 4, where plaintiff, sitting in her window, 200 or 300 feet distant, charged that she sustained fright and consequent injuries from the flash and explosion of an electric trolley wire. In all these cases and the like cases, fright alone was made the gravamen of the action, the physical injuries charged resulting merely from the fright. In no one of these cases, nor in any other well-adjudicated case,—and certainly not by the courts of this state,—is it held that where fright accompanies or follows a wrongful physical injury, that it is not an element of damage. To the contrary, fright under such circumstances is but one form of mental anguish, and the mental anguish as a direct reasonable outcome of the illegal physical injuries is always an element of damage. Such is the rule of decision in this state, where it is held that although mental suffering alone will not support an action for damages (and of course fright is but one form of mental suffering), yet mental suffering and mental anguish are an element of damage in aggravation thereof when they naturally ensue from the act complained of. *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320, 8 Am. Neg. Cas. 76; *Thomas v. Gates*, 126 Cal. 7, 58 Pac. 315.

And so the holding of all these cases which we have been briefly reviewing is simply to the effect, as declared by those courts, that they have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person caused by simple, actionable negligence, can sustain an action, "and the fact that no such case exists, and that no elementary writer asserts such doctrine, is a strong argument against it." *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303. While touching the nature of the injuries in the case at bar it may be added that it is very properly declared in *Warren v. Boston & M. R. Co.* 163 Mass. 484, 40 N. E. 895, that "it is a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm done consists mainly of nervous shock."

Appellant's next contention is that the award of \$5,000 is excessive. The nature of the injury has been sufficiently outlined, and its character disposes of this argument without the need of elaboration.

Appellant very justly complains that in this action for the recovery of damages for injuries occasioned to the wife the items of special damage have no place. *Matthew v. Central P. R. Co.* 63 Cal. 450; *Tell v. Gibson*, 66 Cal. 247, 5 Pac. 223; *Gomez v. Scanlan*, 155 Cal. 528, 102 Pac. 12. These minor items are damages occasioned to the husband alone and for which alone he is entitled to sue. But in this instance the court has segregated these items and elements of damage, and its total judgment of \$5,160 may therefore be reduced by striking out the special sums awarded. Thus modified, the judgment will remain in the sum of \$5,000 damages for injuries sustained by plaintiff Mary E. Easton.

Complaint is made that the court allowed evidence that Mrs. Easton suffered from a second miscarriage some months after the first miscarriage occasioned by the injury. The physician's testimony was to the effect that one miscarriage by injury and shock, and in particular where the fetus was carried for a considerable period of time dead in the womb, would create at least a tendency to cause a second miscarriage, and that in this specific case he attributed the second miscarriage to the condition of Mrs. Easton and her womb,—a condition caused by the injuries. It may

at once be said that this evidence is of doubtful weight, but it was not inadmissible, and its weight was for the jury. The hypothetical question as to the effect that shock and fright might or would have on a pregnant woman of Mrs. Easton's age and physical condition, even if objectionable, was not of such vital consequence as to demand a reversal of the case.

Finally it is said that the court erred in permitting the witness Sterling to answer the question whether Harper, who was driving the car at the time of the accident, was a qualified driver. It is said that the question was immaterial and the answer prejudicial. It was clearly material, it being evidence whether the car was under the management of a competent driver or not; and while doubtless prejudicial in the sense that it showed or tended to show that the car was not being properly managed, the injury which it may have worked to defendant's case was entirely within the purview of the law.

With a modification of the damages awarded, as above indicated, from \$5,160 to \$5,000, the judgment and order appealed from are affirmed.

We concur: Lorigan, J.; Melvin, J.

Annotation—Automobiles: liability of one undertaking to give instruction in driving automobile for negligent operation during instruction.

As to who is responsible for negligence of a chauffeur operating a leased or demonstrating car, see annotations to *Gerretson v. Rambler Garage Co.* 40 L.R.A.(N.S.) 457; *Meyers v. Tri-State Automobile Co.* 44 L.R.A.(N.S.) 113; *Forbes v. Reinman*, 51 L.R.A.(N.S.) 1164.

As to liability of automobile owner for negligence of chauffeur furnished by third person, see annotations to *Neff v. Brandeis*, 39 L.R.A.(N.S.) 933, and *Dalrymple v. Covey Motor Car Co.* 48 L.R.A.(N.S.) 424.

As to liability of owner upon the ground of dangerous agency, or of negligence in intrusting car to incompetent or negligent person, for injuries inflicted while the latter is operating the car for his own purposes, see annotations to *Neubrand v. Kraft*, L.R.A.1915D, 691, and *Walker v. Klopp*, L.R.A.1916E, 1292.

As to liability of owner for injuries by automobile while being used by a servant or third person for his own business or pleasure, see annotation to *Reilly v. Connable*, L.R.A.1916A, 954, and earlier annotation there referred to.

Notes on other closely allied questions L.R.A.1917A.

arising out of automobile accidents are dealt with in notes referred to in the Index to L.R.A. Notes, under the title, "Automobiles."

EASTON v. UNITED TRADE SCHOOL CONTRACTING Co. ante, 394, appears to be the first case to have considered the liability of a person conducting a school of instruction in automobile driving for injuries inflicted through the incompetence of a pupil in operating a car. It will be noted that the defendant there contended that no privity existed between the proprietor of the school and the teacher intrusted with the car which caused the injury, or between the proprietor and the student who was driving; but upon the facts showing that the proprietor paid the instructor for giving lessons, and that the latter turned the management of the car over to the student prior to the injury, the instructor's act in allowing the incompetent pupil to drive was held to bind the proprietor.

The question of the liability of one who conducts a school of this kind for injuries inflicted by a machine during instruction is closely allied to that of the

liability of a seller of an automobile for injuries occurring while instruction is being given a purchaser of a car, whom the seller has contracted to instruct. This question has been before the courts for decision. In some of these cases the purchaser or his agent was operating the car at the time an injury to a third person occurred, while in others the person sent to give instruction was driving when an injury resulted to occupants of the car.

The question of liability on the part of the seller or the purchaser in these cases depends upon whether the person in charge of the car at the time of its negligent operation was acting as the agent or servant of the one sought to be charged; and this in turn depends on the circumstances in each case.

In *Holmboe v. Morgan* (1914) 69 Or. 395, 138 Pac. 1084, where an action was brought against an automobile dealer and one to whom he had sold a car under a contract by which he undertook to instruct the purchaser in its operation, to recover for an injury which occurred while the purchaser was operating the car under the instruction of an employee of the dealer, the court refused to disturb the finding of the jury that the dealer was liable for the injury, and that there was no joint liability, and said: "Although the defendant Howard [the dealer] contends that Robinson [the employee] requested Morgan [the purchaser] to let him [Robinson] drive the car when they came to the crowded streets of the city, that did not relieve Robinson of the control of the machine; he was in charge of the car and was to instruct Morgan as to running it, and if he thought they were in a locality where the car should be in the hands of an expert, he should have taken control."

In *Hammons v. Setzer* (1913) 72 Wash. 550, 130 Pac. 1141, where the proprietor of a store agreed with an automobile agent that a truck and driver might be sent to the store to make deliveries as a test of the merits of an automobile for this purpose, and the man sent with the truck by the agent was instructed by the storekeeper to show one of his employees, who was to accompany him on a delivery trip, how to run the machine, and show him all about it, as he was the one who would operate it if it was purchased, it was held, in an action to recover for an injury which occurred while the truck was being operated by the storekeeper's employee on the return trip, that the question of the employee's agency for the storekeeper in operating

the truck was for the jury, although the person sent by the agent stated that the storekeeper did not instruct him to let the employee run the car.

In *Wooding v. Thom* (1911) 148 App. Div. 21, 132 N. Y. Supp. 50, affirmed in (1913) 209 N. Y. 583, 103 N. E. 1135, where the owner of an automobile sent his chauffeur with the car to demonstrate it, and he permitted an employee of a prospective purchaser to drive it, and an injury occurred while the employee was driving, the owner was held liable, since the act of the chauffeur in permitting the employee to drive was one performed in the furtherance of his employment.

As before stated, in some cases the question of the seller's liability for an injury to the purchaser while the car was being operated by the instructor furnished has been considered.

It has been held that the fact that the title to an automobile which has been sold under an agreement to furnish instructions to the purchaser has passed to the latter will not relieve the seller from liability for the negligence of the instructor which results in an injury to the purchaser, since the master is liable for the tortious acts of his servant, done while in the master's service, or in the discharge of his employment. *Buick Automobile Co. v. Weaver* (1914) — **Tex.** Civ. App. —, 163 S. W. 594. In this case, a special plea by defendant, alleging "that the accident occurred while . . . [the instructor] was testing the speed of the car at the request and under the directions of appellee," though called by the pleader a plea of assumed risk, was held to constitute in law a plea of contributory negligence, there being no relation of master and servant or contractual relation between the parties; and as the evidence tended to sustain the plea, it was held that the court properly charged the principle as to contributory negligence rather than that as to assumed risk.

The agreement in this case was merely that the seller should furnish an operator to teach the purchaser how to operate and control the automobile; there was no agreement as to the period of time the instructions should cover, and it was held that the presumption was that the instruction should continue for a reasonable time, in view of the difficulty or ease with which a person of ordinary intelligence could learn to operate an automobile.

It was also held that a direction by the seller to the person who was to give

the instructions, to instruct the purchaser in the operation of the machine on the way to his home, and to return the same day, was a private instruction by which the purchaser could not be bound, where it was not communicated to him.

And in this case, where the agency was not denied by the seller, evidence that, after reaching the purchaser's home, the instructor who had been sent by the seller, in answer to a question whether he wanted to return that night, stated that he did not, but that he had been sent there to instruct the purchaser to operate the car, and intended to remain until he taught him, and that he had the seller's consent to do so, was held not inadmissible on the ground that it tended to prove agency by the declarations of the agent, but was held admissible as tending to establish the claim that the purchaser was to be taught to operate the machine, and that the mat-

ter of time was not agreed upon between the parties, or considered by them.

In *Burnham v. Central Automobile Exch.* (1907) — R. L. —, 67 Atl. 429, where the purchaser of an automobile claimed to have received an injury while riding with a chauffeur furnished by the seller under his contract to teach the purchaser to operate it, while it was being driven by the chauffeur for the purpose of testing it, the court held that the contract fairly included the adjustment and testing of the machine until the lessons were completed, and refused to disturb a verdict against the seller, although the latter claimed that the accident was caused by a break in the machinery, due to the purchaser's previous reckless operation of the machine, and not to the chauffeur's negligence, the question of liability having been properly submitted to the jury.

J. T. W.

KANSAS SUPREME COURT.

BESSIE HIBBARD, by Next Friend,
v.

CITY OF WICHITA, Appt.

(— Kan. —, 159 Pac. 399.)

Municipal corporation—Injury in park—liability.

The maintenance of a zoölogical garden in a public park by a city is a "governmental function," and the city is not liable in damages for injuries inflicted on visitors by animals through the negligence of the city officers or agents in not properly confining the animals.

For other cases, see *Municipal Corporations*, II. g, 2, in *Dig. 1-52 N. S.*

(West, J., dissents.)

(July 8, 1916.)

APPEAL by defendant from a judgment of the District Court for Sedgwick County in plaintiff's favor in an action brought to recover damages for injuries inflicted on plaintiff by an animal in defendant's park. Reversed.

The facts are stated in the opinion.

Headnote by MARSHALL, J.

Note.—The liability of municipal corporations for injury from unsafe conditions in public parks or public grounds other than streets is considered in the notes to *Bisbing v. Asbury Park*, 33 L.R.A.(N.S.) 523, and *Bernstein v. Milwaukee*, L.R.A. 1915C, 435; and see also later cases, *Nash-L.R.A.1917A*.

Messrs. James A. Conley and Earl Blake, for appellant:

Defendant was in the exercise of governmental power in the establishment and maintenance of Central Riverside park and the zoölogical collection therein, and is not liable to private action on account of injuries resulting from the wrongful or negligent acts of its officers, employees, or servants in connection therewith.

McQuillin, Mun. Corp. § 5394; *Edson v. Olathe*, 82 Kan. 4, 36 L.R.A.(N.S.) 865, 107 Pac. 539, 81 Kan. 328, 36 L.R.A.(N.S.) 861, 105 Pac. 521; *La Clef v. Concordia*, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; *Veraguth v. Denver*, 19 Colo. App. 473, 76 Pac. 539; *Denver v. Davis*, 37 Colo. 370, 6 L.R.A.(N.S.) 1013, 119 Am. St. Rep. 293, 86 Pac. 1027, 11 Ann. Cas. 187, 20 Am. Neg. Rep. 498; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Liermann v. Milwaukee*, 132 Wis. 628, 13 L.R.A.(N.S.) 253, 113 N. W. 65; *Mill*, Mun. Corp. 5th ed. § 1645; *Bailey v. New York*, 3 Hill, 581, 38 Am. Dec. 669; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Bisbing v. Asbury Park*, 80 N. J. L. 416, 33 L.R.A.(N.S.) 523, 78 Atl. 196; *Hartford v. Maslen*, 76 Conn. 599,

ville v. Burns, L.R.A.1915D, 1108, *Akeret v. Minneapolis*, L.R.A.1915D, 1111.

Generally as to liability for injury by animals feræ nature, see notes to *Hays v. Miller*, 11 L.R.A.(N.S.) 748; *Molloy v. Starin*, 16 L.R.A.(N.S.) 445; and *Phillips v. Garner*, 52 L.R.A.(N.S.) 377.

57 Atl. 740; *Wulf v. Kansas City*, 77 Kan. 373, 94 Pac. 207; *Harper v. Topeka*, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018; *Blakeman v. Wichita*, 93 Kan. 444, L.R.A.1915C, 578, 144 Pac. 816.

Messrs. Benjamin F. Hegler, Claude C. Stanley, and Fred Stanley, for appellee:

Even though it be admitted, for the sake of the argument, that the city, in the maintenance of its park, was in the exercise of a governmental function, the duty to keep that park safe for the public was a ministerial one.

28 Cyc. 1260; *Bowden v. Kansas City*, 69 Kan. 587, 77 Pac. 573, 16 L.R.A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955, 16 Am. Neg. Rep. 339; *Parker v. Cushman*, 117 C. C. A. 71, 195 Fed. 715, 3 N. C. C. A. 92; *Jackson v. Baker*, 24 App. D. C. 100; *Hayes v. Miller*, 150 Ala. 621, 11 L.R.A.(N.S.) 748, 124 Am. St. Rep. 93, 43 So. 818; *Shaw v. McCreary*, 19 Ont. Rep. 39; *Roman v. Leavenworth*, 90 Kan. 379, 133 Pac. 551; *Schwalk v. Louisville (Columbia Finance & T. Co. v. Louisville)* 135 Ky. 570, 25 L.R.A.(N.S.) 97, 122 S. W. 860, 3 N. C. C. A. 37; *Johnson v. Chicago*, 174 Ill. App. 414, 258 Ill. 494, 46 L.R.A. (N.S.) 1167, 101 N. E. 960, Ann. Cas. 1914B, 339, 4 N. C. C. A. 40; *Gibson v. Huntington*, 38 W. Va. 177, 22 L.R.A. 561, 45 Am. St. Rep. 853, 18 S. E. 447.

Defendant was liable for the injury to plaintiff.

Moulton v. Scarborough, 71 Me. 267, 36 Am. Rep. 308.

Marshall, J., delivered the opinion of the court:

In this action the plaintiff seeks to recover damages for an injury sustained by being bitten by a coyote in the defendant's park. The plaintiff recovered judgment. The defendant appeals.

The defendant maintained a public park in which were located a number of buildings where wild animals were kept. Three coyotes were there confined in a cage constructed of heavy wire of 2-inch mesh, built upon a cement foundation, about 2 feet from the ground. Mrs. Hibbard, mother of the plaintiff, drove to this park with a neighbor, and upon her arrival there proceeded to prepare a lunch, permitting the plaintiff, a child of four years, and an eleven-year-old daughter, together with an eleven-year-old boy of the neighbor, to wander over the park and to the animal cages, some 200 or 300 feet away. After the children had gone into the zoölogical part of the park, the plaintiff wandered away from her sister and the neighbor boy,

and, with a man by the name of Tully Myers and his children, one in his arms, went up to the cage containing the coyotes. While watching these animals, and while Mr. Myers was adjusting the hat of the child in his arms, the plaintiff approached the cage and put her hand and arm on the wires of the cage. Her hand and arm were seized by one of the coyotes and scratched and bitten. One large wound on the forearm and numerous small ones were made by the claws and teeth of the coyote. Claim was filed against the city within four months and action brought, resulting in a judgment against the city for \$500.

The city sets up contributory negligence on the part of the plaintiff, of her parents, and of Mr. Myers; and contends that in the maintenance of the park and zoo it was acting in the exercise of a purely governmental function, and is not liable for the negligence of those in charge of the animals.

The question that determines the judgment that must be rendered in this case is, Was the city acting in the exercise of a purely governmental function and therefore not liable for the negligence of any of its officers or agents in the care and maintenance of the park and zoölogical garden? In *Harper v. Topeka*, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018, it is said that "the maintenance of a park by a city for the sole benefit of the public, and not for any profit or benefit to the municipal corporation, is a governmental or public function." Syl. ¶ 1.

Zoölogical gardens are commonly maintained in parks as a part thereof, under the same authority, and for the same reasons that parks are maintained. The same liability should attach to keeping a zoölogical garden as attaches to the maintenance of a park. No profit is ordinarily received from such gardens. In the present case it does not appear that the defendant city received any profit whatever from its zoölogical garden. It was kept for the pleasure and education of the entire public. Is the city liable for negligence in the manner in which the coyotes were confined and kept? In *Freeman v. Chanute*, 63 Kan. 573, 577, 66 Pac. 647, is found a quotation from Throop on Public Officers, as follows: "With respect to cities and other municipal corporations, the general rule is that the body is liable for the acts or omissions of its officers in the lawful discharge of a corporate duty, imposed by law upon the body itself; but not where the act is for the general public interest, or where the statute specifically imposes the duty upon the officer." Section 551, p. 523.

In *Harper v. Topeka*, supra, this court said: "Ordinarily, cities and other municipal corporations, in the exercise of their governmental functions are not liable in damages for any neglect, or even wrongdoing, of their officers in the discharge of such duties, unless such liability is expressly imposed upon them by law." 92 Kan. 13.

See also the cases there cited.

In *Butler v. Kansas City*, 97 Kan. 239, L.R.A.1916D, 626, 155 Pac. 12, we declared: "It is a general rule that the governmental agencies of the state are not liable in an action of tort for either nonfeasance or misfeasance." 97 Kan. 241.

This rule has been applied in actions for false imprisonment by city officers (*Peters v. Lindaborg*, 40 Kan. 654, 20 Pac. 490; *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949); and in actions for damages sustained by reason of the defective condition of the prison in which the person injured was confined, or by reason of the negligence of the officers in charge of the prison (*La Clef v. Concordia*, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; *New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426). In *Harper v. Topeka*, supra, this court held a city not liable for the death of a boy drowned by breaking through the ice while skating on a pond in a park. The city stationed no watchman and did nothing to prevent children from going on the ice at any time. In *Butler v. Kansas City*, supra, the city was held not liable for injuries sustained by an inmate of a pesthouse by a splinter from the floor penetrating his foot while he was walking from his bed to a stove to make a fire. In that case it was admitted by demurrer that the city was negligent in maintaining the floor of the room in a defective and dangerous condition.

Following these authorities, there is but one conclusion to be reached in the present case, and that is that the defendant was acting in a governmental capacity, and that it is not liable for the negligence of its officers or agents in confining the animals in the zoo.

Bowden v. Kansas City, 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, 1 Ann. Cas. 955, 16 Am. Neg. Rep. 339, is cited in support of the contention of the plaintiff. In *Harper v. Topeka*, supra, this court said that the real principle involved in *Bowden v. Kansas City*, supra, was the relation of employer and employee. There is no relation of employer and employee in the present case.

A number of states follow a principle contrary to the one that has been followed L.R.A.1917A.

In this state, so far as negligence in the maintenance of parks is concerned; while a number of other states adhere to the rule declared in this state. A collation of these authorities at this time will not serve any good purpose. The rule herein announced is firmly fixed in our jurisprudence and must be followed unless distinctly overruled.

There seems to be an inconsistency between the rule we now declare and that holding cities liable for negligence in the maintenance of its streets. In *Harper v. Topeka*, supra, after stating that cities in the exercise of their governmental functions are not liable for any neglect or wrongdoing of their officers in the discharge of such duties, unless such liability is expressly imposed by law, this court said: "An exception to the rule has been made which holds cities liable for damages resulting from defects in their highways." 92 Kan. 13.

McQuillin on Municipal Corporations, vol. 6, § 2720, page 5590, discussing the liability of cities for negligence in the maintenance of streets and sidewalks, says: "This rule is said to be founded upon an 'illogical exception' to the general rule of the common law, prohibiting actions against municipalities for negligence in the discharge of duties imposed upon them for the sole benefit of the public, and from which they derive no compensation or benefit in their corporate capacity."

The defendant city is not liable. The judgment is reversed, and the trial court is directed to enter judgment for the defendant.

Johnston, Ch. J., and Burch, Mason, Porter, and Dawson, JJ., concur.

West, J., dissenting:

The coyote cage was a most malignant and excuseless attractive nuisance. While the maintenance of a public park may be a governmental function, still, as we said in *Murphy v. Fairmount Twp.* 89 Kan. 760, 765, 133 Pac. 169, quoting from the Iowa supreme court: "The creation and maintenance of a nuisance is very clearly not a governmental function, and the authorities are practically of one voice on the subject."

The maintenance of a public park does not imply and should not include the provision of man-eating specimens of zoölogy to dine upon the children of those who visit such park. The foregoing opinion is in conflict with *Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626; that portion of the opinion in *Harper v. Topeka*, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018, found

on page 14; the doctrine of *Murphy v. Fairmount Twp.* 89 Kan. 760, 133 Pac. 169; *Roman v. Leavenworth*, 90 Kan. 379, 133 Pac. 551; and *Roman v. Leavenworth*,

95 Kan. 513, 148 Pac. 746. I am entirely satisfied with these decisions, and do not believe they should be overturned or departed from.

LOUISIANA SUPREME COURT.

LOUISIANA RAILWAY & NAVIGATION COMPANY, Appt.,
v.

BATON ROUGE BRICKYARD.

(136 La. 833, 67 So. 922.)

Damages — eminent domain — prospective value.

In expropriating property in a portion of a city which is not built up, and through which the streets have not been opened or dedicated, the valuation will be based upon the value of the property at the time of taking, and not upon a purely speculative valuation based upon the prospective value of town lots for residential purposes. If the property expropriated was in a residential section, or in close proximity to one, a different rule would be applied, although the property itself was not actually improved.

For other cases, see Damages, III. 1, 2, in Dig. 1-52 N. S.

(February 8, 1915.)

A PPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of East Baton Rouge in its favor, and from the amount of the appraisal fixed by the jury, in a proceeding to condemn certain lands belonging to defendant to be used by plaintiff as a right of way. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Wise, Randolph, Rendall & Freyer, and Laycock & Beale for appellant.

Messrs. Taylor & Porter, for appellee:

Defendant is entitled to share upon the same terms as the other adjacent landowners, and hence, when its property is taken, in order that such benefits may result, it is entitled to be compensated for the loss which it sustains, undiminished by any deduction on account of the benefit which it shares of right as a member of the community and in common with the other members.

Lewis, Em. Dom. ¶ 479; *Orleans & J. R. Co. v. Jefferson & L. P. R. Co.* 51 La.

Headnote by SOMMERVILLE, J.

Note. — For prospective value of property as element of compensation in eminent domain, see annotation following this case, post, 405.

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Ann. 1605, 26 So. 278; *Opelousas, G. & N. E. R. Co. v. Bradford*, 118 La. 506, 43 So. 79; *Yazoo & M. Valley R. Co. v. Teissier*, 134 La. 958, 64 So. 866; *United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 80, 57 L. ed. 1063, 1082, 33 Sup. Ct. Rep. 661; *Yazoo & M. Valley R. Co. v. Longview Sugar Co.* 135 La. 542, 65 So. 638; 2 Dill. Mun. Corp. 617; *Shreveport Traction Co. v. Svara*, 133 La. 900, 63 So. 396.

Sommerville, J., delivered the opinion of the court:

Plaintiff appeals from a judgment in its favor, and complains of the appraisal fixed by the jury on certain land sought to be expropriated by it in this proceeding. Defendant moves to dismiss the appeal, as it was not made returnable to, and was not filed in, this court within fifteen days, as is directed shall be done in § 1490, Rev. Stat. The trial judge erroneously made the appeal returnable under Act 106 of 1908, p. 163, which is the general statute with reference to appeals to the supreme court. That act does not repeal special statutes, or statutes fixing return days with reference to special matters. *Kerlin v. Bryce-land Lumber Co.* 134 La. 463, 64 So. 289. But appellant does not appear to have been responsible for the error, and the appeal will not therefore be dismissed.

In the case of *Ross v. Naff*, 130 La. 590, 58 So. 348, this court says: "The facts that the appellant made his application, and that the court made the order for the appeal, under a misapprehension of the law governing the matter, cannot operate to deprive the appellant of a right conferred on him by the Constitution and regulated by other statutes than that contemplated by him and the court." *Chaffe v. Heyner*, 31 La. Ann. 594; *Elder v. New Orleans*, 31 La. Ann. 500; *State v. Dellwood*, 33 La. Ann. 1229; *State v. Balize*, 38 La. Ann. 542; *State v. Phelps*, 132 La. 399, 61 So. 415.

Motion to dismiss appeal is denied.

This proceeding, brought by the Louisiana Railway & Navigation Company against the Baton Rouge Brickyard, is for the purpose of acquiring a strip of ground 25 feet wide through the property of defendant, to be used by it as a part of its branch or belt line of railroad through and around the city of Baton Rouge. The property sought

to be expropriated runs across the north-eastern portion of defendant's property situated in the city of Baton Rouge, and comprises $\frac{3}{100}$ of an acre in superficial area.

Defendant acquiesces in the demand for expropriation, but claims from the plaintiff, for the value of the property taken and for damages, \$13,300. Defendant alleges that the chief value of the property sought to be expropriated is for residence purposes; that the 25-foot strip of land herein sought to be taken from the defendant cuts or crosses the equivalent of eight city lots; that in the construction of the proposed branch line of railroad plaintiff proposes to and will make a 4-foot cut across defendant's said lots; that said lots are well and truly worth the sum and price of \$1,200 each, or \$9,600, for which damage petitioner is responsible; that in order to be reasonably safe from fire and to secure a reasonable rate on fire insurance, defendant's brick sheds will have to be cut off to a point 25 feet from the south line of plaintiff's proposed branch road, and they will have to be covered with fireproof roofing, all at a cost of \$2,000; that the building of said proposed branch road, and the making of said 4-foot cut, will inclose, cut off, and shut in a triangular piece of land belonging to defendant, and comprising three full city lots, two of which are worth \$1,200 each, and one of which is worth \$1,000; and that it will be damaged to the extent of \$1,700. There was judgment in favor of plaintiff condemning the property, and condemning plaintiff to pay \$6,000 for the property expropriated.

Plaintiff company obtained from the city council of Baton Rouge a franchise for a belt line in that city; and, in furtherance of the exercise of that franchise, it seeks to expropriate $\frac{3}{100}$ of an acre of land belonging to defendant, upon which to lay its tracks. It is proposed to extend these tracks through defendant's property, which would virtually destroy three squares, if the plot of ground was divided into squares. The tracks would cut off small triangular corners of four other supposed squares, which damage would be more than compensated by the triangular pieces remaining of the three squares first mentioned. The triangular piece of land which defendant says equals three city lots, and for which it claims \$1,700, is small, and it is located on a drainage canal. It hardly contains one lot; and it is of very little value if segregated from the other portions of ground belonging to defendant.

The court is uniformly guided by the finding of the jury of freeholders of the vicinage where the property is located L.R.A.1917A.

which is to be expropriated, in fixing the value of expropriated property and the damages resulting to the property holder from the improvement. But when the verdict is manifestly excessive, as it is in this case, it becomes necessary to amend it. The jury has here condemned plaintiff to pay about \$6,000 for less than one third of an acre located in the southwestern limits of the city of Baton Rouge, according to a city survey made in 1910. This is at the rate of \$18,000 an acre, which is an impossible price. The evidence shows that the property is high, and if streets were cut through it, it would be suitable for small and unpretentious dwellings, but that it is now used for a mercantile purpose, a brickyard, and that it lies between a drainage canal and the tracks of the Yazoo & Mississippi Valley Railroad. Streets of the city have not been extended through the property, or even dedicated; and it may be long before the property so shut in may be used for any other purpose than the one it is now used for.

In the case of *Yazoo & M. Valley R. Co. v. Longview Sugar Co.* 135 La. 542, 65 So. 638, we quote from 2 Dillon on Municipal Corporations, p. 617, as follows: "In an expropriation suit for railroad purposes, the market value of property taken, viewed both with reference to its use at the time and with reference to the usage to which it is plainly adaptable, will be considered in fixing the value of the land."

And in the case of *Yazoo & M. Valley R. Co. v. Teissier*, 134 La. 958, 64 So. 806, we quote from *United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667, as follows: "A 'strategic value' might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse as the price suited. But in a condemnation proceeding the value of the property to the government for its particular use is not a criterion. The owner must be compensated for what has been taken from him, but this is done when he is paid its fair market value for all available uses and purposes."

To the same effect are decisions in *Orleans & J. R. Co. v. Jefferson & L. P. R. Co.* 51 La. Ann. 1605, 26 So. 278; *Opelousas, G. & N. E. R. Co. v. Bradford*, 118 La. 506, 43 So. 79. See also *Lewis, Em. Dom.* ¶¶ 478 and 479. The testimony as to the value of lots in the section of the city where defendant's property is located is as contradictory as is usual in such cases. And this testimony is of little assistance to the court, for the reason that the proposition submitted in the cause is the value of a strip of ground running

through 14 acres of land belonging to defendant, which is not subdivided into lots or squares, and where there are no streets laid out or dedicated. The paper sketch submitted by defendant will doubtless not be followed if it should dedicate streets through its grounds, in view of the railroad tracks which will have been located by plaintiff at that time. And should defendant abandon its brickmaking business and offer city lots for sale, it will not offer them according to its present paper sketch.

It has been held by this court that "the criterion of value is the market value of the property at the date of the institution of the expropriation suit, in view of any use to which it may be applied and of all the uses to which it is adapted, exclusive of any increase in value given by the construction of plaintiff's railway thereon. The question before the jury was, What price would have been obtained for the property as a whole by a prudent seller in the usual course of business? The market value means the fair value of the property between one who wants to purchase and one who wants to sell, under usual and ordinary circumstances. Market value does not mean speculative value. *Orleans & J. R. Co. v. Jefferson & L. P. R. Co.* 51 La. Ann. 1616, 26 So. 278; *Louisiana R. & Nav. Co. v. Xavier Realty Co.* 115 La. 328, 39 So. 1. At the time of the institution of this suit the tract in question had not been subdivided, and the question before the jury was as to the market value as a whole, considering all the uses to which it was adapted. The value of the tract for 'town lot' purposes was one of the factors to be considered, but what the owner or purchaser might realize by a subsequent subdivision of the property and sale of lots partakes too much of the character of speculation to serve as a basis of valuation at the date of the institution of the present suit."

"So it is proper to show that property possesses a peculiar value for railroad purposes, for dock purposes, for a mill site, for a ferry, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site. It is proper to show that the property is suitable for division into village lots, and that it is valuable for that purpose, but it is not proper to show the number and value of such lots." 2 Lewis, Em. Dom. 2d ed. pp. 1054, 1055.

"In a case in Wisconsin it was held proper to show that property was suitable for division into village lots and the probable value of such lots. But this is clearly going one step too far. The probable value of village lots which do not

exist is too speculative." 2 Lewis, Em. Dom. 2d ed. p. 1058.

It is evident that the jury based their verdict on defendant's lot scheme, as nearly every witness fixed the value of these supposed lots by comparison with lots in the long established part of town. The testimony relative to the number of supposed lots and their value was objected to by counsel for plaintiff, on the ground that it had been shown and was an admitted fact that the land had not been laid off into squares and lots, and that there were no streets, etc. The objections should have been sustained. The testimony for defendant is not as to the value of the land, or of the strip to be taken by plaintiff for its tracks, but is as to the value of city lots, a purely speculative or supposed value of something not in existence.

Under somewhat similar circumstances concerning certain squares in the city of New Orleans, which were laid out and divided into lots, but through which all the streets were not actually open, and which were outside of the built-up parts of the city, we say: "This is a fair synopsis of the testimony. It shows that the land in question, though within the corporate limits and divided into squares and lots, yet lies outside of the built-up part of the city, and is available as yet only for cultivation or for holding for speculation. The lots are such only on paper, and are building lots only prospectively,—when the growth of the city shall have reached them. As building lots they have as yet only a speculative value." *New Orleans v. Manfre*, 111 La. 927, 35 So. 981.

The case must be decided upon competent evidence going to show the value of the property taken by plaintiff without regard to speculation, or to the possible abandonment by defendant of its present business enterprise, or to improvements in the way of dedication of streets, etc., which the owner may possibly make in the future. In the volume of testimony in the record, much of it being most contradictory, we find that that of Captain O. B. Steele, a witness for plaintiff, who was engaged in the real estate business, is based upon a clear appreciation and understanding of the exigencies and conditions of expropriating a right of way for a railroad through a plot of ground, and his valuation of the property will be adopted as the basis for the judgment of the court.

He says, on cross-examination:

Instead of merely paying for the area, or the superficial feet equivalent to a lot, or the number of lots taken, it [the railroad] should pay a good deal more. My

answer is this that the area being equal to two lots and the lots being worth \$400 or \$500, then I think they should pay \$1,200 to \$1,500 for this piece of property.

Q. Then you consider that these lots are worth \$400 or \$500 each?

A. No, sir; I do not say that. I said this: If they were laid off before this railroad came there, that they might sell for \$400 or \$500.

The witness further testified that the property was not and would not be desirable for residential purposes, but with the railroad there it would be good for commercial purposes. As to the cost of removing and rebuilding parts of the brick sheds on defendant's property, the testimony is

equally conflicting. It ranges from \$509 to \$2,100. C. B. Stewart, a contractor, and witness for plaintiff, testified that he would do all the work necessary, giving it in detail, for \$1,000, with bond, which figure will be adopted as a liberal estimate, as it embraces even more work than is deemed by the court to be necessary to be done. It is therefore ordered, adjudged, and decreed that there be judgment amending the judgment appealed from by reducing it to \$2,500, for the right of way sought by plaintiff in this suit, and, as thus amended, it is affirmed, at the cost of plaintiff in both courts.

Petition for rehearing denied March 22, 1915.

Annotation—Prospective value of property as element of compensation in eminent domain.

For compensation allowable in eminent domain proceedings as affected by adaptability of property for uses other than that to which it is applied by the owner, see the note to *Missouri, K. & T. R. Co. v. Roe*, 15 L.R.A.(N.S.) 679.

For special value of property for the purpose for which it is taken, as an element of compensation in condemnation proceedings, see the notes to *Sargent v. Merrimac*, 11 L.R.A.(N.S.) 996, and *McGovern v. New York*, 46 L.R.A.(N.S.) 391.

For damages in eminent domain cases as affected by loss of profits, see the notes to *Hamilton v. Pittsburg, B. & L. E. R. Co.* 51 L.R.A. 320, and *Bales v. Wichita Midland Valley R. Co.* L.R.A. 1916C, 1094.

This note is to be read in connection with the aforesaid note in 15 L.R.A.(N.S.) 679, and in a sense as complementary to it. As a practical matter it is not possible exactly to separate the cases according to the subjects of the two notes. In the earlier note the emphasis is upon the present availability of the property for new uses as affecting its present value, and in the present note, it is upon the prospective availability of the property as affecting its present value.

In eminent domain proceedings the criterion of value is the fair market value of the property.

See the note to *Missouri, K. & T. R. Co. v. Roe*, 15 L.R.A.(N.S.) 679.

Compare under Georgia Constitution, *Elbert County v. Brown* (1915) 16 Ga. App. 834, 86 S. E. 651, *infra*, "Projects of the owner." L.R.A.1917A.

When the award is placed upon the theory as to what the property will sell for at some future time, and not as to its present market value, it should be set aside. *Re Collis* (1911) 144 App. Div. 382, 129 N. Y. Supp. 214.

The leading authority on the subject of the inquiry as to the value of property in eminent domain is *Mississippi & R. River Boom Co. v. Patterson* (1878) 98 U. S. 403, 25 L. ed. 206, where, in holding that the owner of islands in a river has a right to insist upon their value or availability for boom purposes as an element of compensation when they are taken by a boom company, the court said: "The inquiry in such cases must be, What is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted? that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. . . . As a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

It is therefore the law that in esti-

inating the market value of property in eminent domain reference may be made to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

See as quoting the *Boom Co. Case*, *Little Rock & Ft. S. R. Co. v. McGehee* (1883) 41 Ark. 202; *Santa Ana v. Harlin* (1893) 99 Cal. 538, 34 Pac. 224; *Low v. Concord R. Co.* (1885) 63 N. H. 557, 3 Atl. 739.

"In determining the value of land appropriated for public purposes, the inquiry must be, What is the property worth in the market from its availability for valuable uses, both now and in the future? *Mississippi & R. River Boom Co. v. Patterson* (1878) 98 U. S. 403, 25 L. ed. 206." *Richmond, P. & C. R. Co. v. Chamblin* (1902) 100 Va. 401, 41 S. E. 750.

"Let the witnesses in direct examination state their opinion as to the market value of the property, having regard to the existing business wants of the community, or such as may be reasonably expected in the wants of the immediate future,' and support their estimates by a description of the property, giving its location, surroundings, and advantages for any particular use, if it have any. Opposing counsel should then be 'allowed to make every inquiry touching the property which one about to buy it would feel it to his interest to make,' and for the information of the jury, and to test the value of the opinion given, be permitted the widest latitude in cross-examination." *San Diego Land & Town Co. v. Neale* (1891) 88 Cal. 50, 11 L.R.A. 604, 25 Pac. 977.

In estimating the loss in value of property, it is proper to take into consideration the condition of the property at the time, its locality with respect to business, the demand for property at that time, and any increase or development thereof that might be reasonably expected in the immediate future at that time. *El Paso v. Coffin* (1905) 40 Tex. Civ. App. 54, 88 S. W. 502.

It is error to refuse to instruct the jury that "in the appraisalment of the land to be taken, they could consider the present condition of the locality as to business and demand for property, and also any increase or development thereof that could be expected in the immediate future." *Sullivan v. Missouri, K. & T. R. Co.* (1902) 29 Tex. Civ. App. 429, 68 S. W. 745.

In *Webster v. Kansas City & S. R.* L.R.A.1917A.

Co. (1893) 116 Mo. 114, 22 S. W. 474, the court overruled the objection to admitting evidence tending to prove the value of the land taken by the railroad company at that time in view of all prospective uses to which it was adapted, and to permitting witnesses to testify that, from the topography of the land in and around Kansas City, the most available outlet for railroads to the east was over this land, and that it was well suited for manufacturing purposes, and its value was thereby enhanced (citing the *Boom Co. Case*).

In *Young v. Harrison* (1855) 17 Ga. 30, cited in the *Boom Co. Case*, the court considered that where land was wanted for a bridge, its peculiar advantages must be taken into consideration, and said: "And if the effect of constructing such a bridge would be to build a large town, warehouses, etc., at or near the place, and thus attract much transportation and travel across the bridge, this, of course, would make it more valuable to its proposed owners,—would make it more to their interest to pay a higher price for the site,—that is to say, would be to increase the extent of the demand for the bridge site. In such case, it would certainly be a great hardship, not to be tolerated in a free country, if a citizen owning a piece of land of this description, whose prospective value, derived from its situation as affording facilities for a bridge site, was as much his property as was its soil for planting purposes (it may, indeed, have been purchased with reference to such value), could be compelled to part with the same, and forced to give up his property in the prospective value of the ground, and receive only its value for agricultural purposes, or its value as a bridge site on the day when it is taken, estimated by the trade and travel which would that day have passed over it if the bridge had been built. Such could not be a case of 'just compensation.' It is not difficult to see that such prospective value of a piece of ground might be its chief element of value to its owner. An owner of land peculiarly situated by reason of its proximity to some great city or great work of internal improvement may look into the future and see that it will, at some distant day, become extremely valuable by reason of its situation, and that none other can be procured for the purpose for which he anticipates that it will be needed. He desires, accordingly, to keep it, knowing that it will be a fine property for his children, if not for himself. If de-

prived of that property for public purposes, and especially for the benefit, at the same time, of a private company, can he have 'just compensation' unless reference is had to the prospective value of the land, and unless that is, to some extent at least, taken into the account?"

In some cases the expression "near future" instead of "immediate future" has been used.

Thus, in *Metropolitan Street R. Co. v. Walsh* (1906) 197 Mo. 392, 94 S. W. 860, it was held proper to instruct the jury that they may take into consideration not only the existing business wants of the community, but also such uses as may be reasonably expected in the near future (the court quoting the *Boom Co. Case*).

So, in *Currie v. Waverly & N. Y. B. R. Co.* (1890) 52 N. J. L. 381, 19 Am. St. Rep. 452, 20 Atl. 56, the court said: "The rule of law applicable to the condemnation of land to these quasi public uses is that its owner shall be given, by way of compensation for his land, its fair price for any use for which it has a commercial value of its own in the immediate present or in reasonable anticipation in the near future."

In *Re New York, L. & W. R. Co.* (1882) 27 Hun (N. Y.) 116, the court, after citing the *Boom Co. Case*, said: "The inquiry is, What are the lands worth in market from their availability for valuable uses? The compensation will be made with reference to the uses for which the lands are suitable, having regard to existing wants or such as may be reasonably expected in the near future."

In *Shenandoah Valley R. Co. v. Shepherd* (1885) 26 W. Va. 672, the court, having quoted the language of the *Boom Co. Case*, stated that it would prefer the phrase "all such as may be reasonably expected in the near future," and said: "The value of property at a remote future time is inadmissible as a basis for assessing its present value; it partakes too much of the speculative. . . . The wants of the community in the future must be in a future not so remote as not to affect the present market value."

Prospective future uses, in general.

A prospective future use may be taken into consideration so far as it bears upon the present market value of the property.

Thus, it is proper to consider—

—that property along a river is suitable for docks, although at the time of L.R.A.1917A.

the condemnation there is no present demand for docks, *Calumet River R. Co. v. Moore* (1888) 124 Ill. 329, 15 N. E. 764; *Rock Island & P. R. Co. v. Leisy Brewing Co.* (1898) 174 Ill. 547, 51 N. E. 572;

—a statute which was to take effect in three years, enabling a neighboring city to take in the land in controversy, as the provision that had been made by law for including the lands that were not within the corporate limits would have an influence upon the present market value, *Duluth & W. R. Co. v. West* (1892) 51 Minn. 163, 53 N. W. 197;

—the availability of the land to be platted as an addition to a neighboring city, now or in the immediate future, *Ohio Valley R. & Terminal Co. v. Kerth* (1891) 130 Ind. 314, 30 N. E. 298 (see also cases cited in note in 15 L.R.A. (N.S.) 679);

—that part of the land taken by a railroad for a right of way might be valuable for a ferry, where it was possible and might be probable that a change of circumstances or the development of the country might require one in the near future, *Little Rock & Ft. S. R. Co. v. McGehee* (1883) 41 Ark. 202.

In *St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* (1906) 198 Mo. 698, 96 S. W. 1011, it was held not to be erroneous as authorizing an estimate based on future possibilities, to instruct the jury that they might take into account, among other things, evidence of "the hindrance, if any, to the extension or enlargement of defendant's plant," as that related to the present value of the property.

But an award based on the inability of the owner to open streets and alleys was considered, on a condemnation for a railroad right of way, to involve contingent or speculative damages; the court saying: "Maxwell was entitled to recover the difference between the value of his premises immediately prior to and immediately following the location of the right of way. The damages ought to have been assessed by the jury as of the date of the condemnation, or the fling of the report thereof. Mere future or prospective contingencies cannot be regarded." *Ellsworth, M. N. & S. E. R. Co. v. Maxwell* (1888) 39 Kan. 651, 18 Pac. 819.

Where a town laid out a crossing across the track of a railroad, it was held that it was error for the commissioner to instruct the jury that they were simply to estimate the natural and actual direct damages sustained by the

crossing, regard being had to the use crossings were put to, and that in estimating such damages they should not consider the mere probable use in the future to which the land might be put by the railroad. The court pointed out that a distinction is to be observed between what land may be worth in the future and what it is now worth in view of the future. *Portland & R. R. Co. v. Deering* (1885) 78 Me. 61, 57 Am. Rep. 784, 2 Atl. 670 (citing the *Boom Co. Case*).

The owner of land taken by a railroad for a gravel pit could not complain where the court instructed the jury that they should allow him the full market value of the land taken for any and all uses to which said land might be put, in view and in the light of present business conditions and those that might be reasonably expected in the future, together with such damages as he might suffer to the remaining portion of his farm by reason of having the land in question taken therefrom. *Chicago, M. & St. P. R. Co. v. Mason* (1909) 23 S. D. 564, 122 N. W. 601.

Judicial statements of the rule.

In *Kansas City Southern R. Co. v. Boles* (1908) 88 Ark. 533, 115 S. W. 375, the court, while granting a new trial on the appeal of the railroad company from a judgment condemning property, said: "Counsel for appellant urge that it was error to admit testimony as to what the property was worth as prospective industrial property. The rule as established in this state is that 'the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market.'" *Little Rock Junction R. Co. v. Woodruff* (1887) 49 Ark. 381, 4 Am. St. Rep. 51, 5 S. W. 792, *supra*; *Little Rock & Ft. S. R. Co. v. McGehee* (1883) 41 Ark. 207."

Where a sanitary district took part of a railroad terminal, the court said: "It is conceded that the defendants had a right to show the use to which the property was devoted, and how it was used at the time of filing the petition, and we think it was proper to prove, as bearing on its value, the amount of business transacted, the capacity of the property for such business, and its capacity for expansion to meet the increasing demands of business. Where property, by reason of being applied to a particular use, has a particular value

to the owner, that value is to be ascertained and allowed as compensation." *Chicago Sanitary Dist. v. Pittsburgh, Ft. W. & C. R. Co.* (1905) 216 Ill. 575, 75 N. E. 248.

In *William H. Moudy Mfg. Co. v. Pennsylvania R. Co.* (1906) 215 Pa. 110, 64 Atl. 373, the court, while reversing the judgment on other grounds, in referring to an instruction which it did not think erroneous under the circumstances, said: "The value was to be determined not only by the use to which the land was then put, but by any use to which it was then adapted, or to a prospective use which at the time gave it a market value. It was, however, the present conditions, and not future possibilities, that were to be considered."

"He is entitled to the full value of his land, considered with reference to all the uses, present and prospective, which he can or has the right to make of it; but the necessity of the government cannot be made a measure of his compensation." *United States v. Seufert Bros. Co.* (1897) 78 Fed. 520.

"A demand for property in the vicinity of the property taken at the time of its taking, if it is an increasing or developing demand, may, we think, be taken in consideration as to its reasonable future results, as entering into the then condition and value of the property." *Gulf, C. & S. F. R. Co. v. Burger* (1898) — *Tex. Civ. App.* —, 45 S. W. 613.

"When a part of a tract of land is condemned under the law of eminent domain, it is proper, in estimating the damages, to consider the value of the part taken with reference to its use, or reasonable future use, in connection with and as part of the entire property, and also consider the depreciation in value of or injury to the remaining portion, by reason of the severance therefrom of the portion appropriated." *Dallas Terminal R. & Union Depot Co. v. Mosher Mfg. Co.* (1901) — *Tex. Civ. App.* —, 60 S. W. 893.

Limits of the rule.

In *Chicago & S. L. R. Co. v. Mines* (1906) 221 Ill. 448, 77 N. E. 898, it was held to be erroneous to instruct the jury that they may allow damages on the basis of what the land might reasonably be expected to be worth in the near future, particularly when evidence has been given of the rapidly increasing value of such land.

But, while reversing a judgment on other grounds on the appeal of the con-

demanding party, it was held that there was no error in overruling the appellant's objection to the question to one of its witnesses on cross-examination, "How rapid has been the increase in the price of land lying around and within 2 or 3 miles of the center of the city, during the last fifteen years?" where the witness had testified on direct examination as to the demand for land about the time of the panic of 1873 and as to the extrinsic value of the land and what the damage to it was. *Union R. Transfer & Stock-Yard Co. v. Moore* (1881) 80 Ind. 458.

In *Cedar Rapids, I. F. & N. W. R. Co. v. Ryan* (1887) 37 Minn. 38, 33 N. W. 6, the court said: "The allowance of the question put by respondent's counsel to the witness Bullis, on his cross-examination, as to whether there was a fair prospect that this land would be wanted for town lots some day, was, we think, error without prejudice. The witness had testified that the land was close to the town, and the road would run between it and the town. The eligible situation of the land, and the effect of the railroad upon it, in so far as these facts might affect the question of its present value, were proper subjects for consideration."

It was said in *Fales v. Easthampton* (1894) 162 Mass. 422, 38 N. E. 1129, that there was undoubtedly a limit to the questions that might be asked concerning the possible future use of land, and to some extent this was a matter of discretion on the part of the presiding judge.

Imaginative and speculative uses.

Purely imaginative and speculative uses are to be excluded. *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* (1897) 120 Ala. 21, 24 So. 408; *Illinois C. R. Co. v. Chicago* (1897) 169 Ill. 329, 48 N. E. 492; *Chicago & A. R. Co. v. Staley* (1906) 221 Ill. 405, 77 N. E. 437; *Louisiana R. & Nav. Co. v. Sarpy* (1910) 125 La. 388, 51 So. 433; *Burt v. Wigglesworth* (1875) 117 Mass. 302; *Emery v. Boston Terminal Co.* (1901) 178 Mass. 172, 86 Am. St. Rep. 473, 59 N. E. 763; *Re New York, L. & W. R. Co.* 33 Hun (N. Y.) 639; *Lockport v. Tonawanda Iron & Steel Co.* (1915) 166 App. Div. 962, 151 N. Y. Supp. 923; *Cole v. Ellwood Power Co.* (1907) 216 Pa. 283, 65 Atl. 678; *Norfolk & W. R. Co. v. Davis* (1905) 58 W. Va. 620, 52 S. E. 724; *Munkwitz v. Chicago, M. & St. P. R. Co.* (1885) 64 Wis. 403, 25 N. W. 438.

Thus, it is error, in estimating the L.R.A.1017A.

damages for a railroad right of way, to give compensation on the basis of the fact that the right of way would prevent the lands from being made valuable by a canal which was a matter of speculation and possibility. *Munkwitz v. Chicago, M. & St. P. R. Co.* (1885) 64 Wis. 403, 25 N. W. 438.

So it is not proper to permit the owner to answer the question, "What is the probable future use of your remaining land?" (*Fairbanks v. Fitchburg* (1872) 110 Mass. 224); nor to consider the value of the property for factory sites when it is not in demand for factory sites, although it may be in the course of time (*Louisiana R. & Nav. Co. v. Sarpy* (1910) 125 La. 388, 51 So. 433); nor to allow "testimony as to what would be the fair rental value of the land with a suitable and proper building upon it, as evidence of the present value of the land not built upon" (*Burt v. Wigglesworth* (1875) 117 Mass. 302); nor to allow recovery for the value of a leasehold as based upon the contention that it was customary for the landlord to renew the lease of the tenants (*Emery v. Boston Terminal Co.* (1901) 178 Mass. 172, 86 Am. St. Rep. 473, 59 N. E. 763); nor to show, where the city took vacant land, that the best use of it would have been to erect apartment houses at a certain price (*Re New York* (1907) 118 App. Div. 272, 103 N. Y. Supp. 441, appeal dismissed in (1907) 189 N. Y. 512, 81 N. E. 1160); nor, where compensation was to be paid by a railroad for damages to a water power, to show what uses could be made of the water power through improvements involving a considerable outlay (*Dorlan v. East Brandywine & W. R. Co.* (1864) 46 Pa. 520); nor to allow speculative damages dependent upon possible profits (*Tide Water Canal Co. v. Archer* (1838) 9 Gill. & J. (Md.) 479); nor, in estimating compensation to be paid for unopened coal lands, to show the probable amount of coal and the probable cost of mining it, etc., and probable profits (*Norfolk & W. R. Co. v. Davis* (1905) 58 W. Va. 620, 52 S. E. 724).

For damages in eminent domain cases as affected by loss of profits, see the aforesaid notes in 51 L.R.A. 320, and L.R.A.1916C, 1094.

The remote possibility that the United States government might dredge a river so as to make it navigable for large vessels could not be shown as increasing the value of the owner's land, as the words "immediate future," in the *Boom Co. Case*, advisedly used, contemplate

that the special use must be valuable, practicable, and available within a reasonable time, and it is not intended that owners of property may recover excessive damages based upon fictitious, visionary, or remote contingencies which may or may not at some indefinite time in the future increase the value of the land. *Chicago, M. & St. P. R. Co. v. Alexander* (1907) 47 *Wash.* 131, 91 *Pac.* 626.

The loss through eminent domain of a stone quarry leased subject to a royalty is to be compensated for by the actual value of the stone in place, not the prospective and speculative value of that stone when cut and sold in the market. *Cole v. Ellwood Power Co.* (1907) 216 *Pa.* 283, 65 *Atl.* 678.

"The inchoate proceedings of the city council, showing that certain improvements were contemplated to be made by the municipal authorities, which had not been made at the date of the petition, were not competent as independent evidence to show what the market value of the land was at that date." *Burt v. Wigglesworth* (1875) 117 *Mass.* 302.

Judicial statements and explanations.

"Witnesses and jurors should not be permitted to enter the realm of speculation and swell damages beyond a present cash value under fair conditions of sale, by fantastic visions as to future exigencies of growing communities." *Smith v. Com.* (1911) 210 *Mass.* 259, 96 *N. E.* 666, *Ann. Cas.* 1912C, 1236 (obiter), quoted in *Brack v. Baltimore* (1916) 128 *Md.* 430, 97 *Atl.* 548.

"The owner is not entitled to swell the damages beyond the fair market value of the land at the time it is taken, by any consideration of the chances or probability that some time in the future it may be used for some purpose to which it is adapted, unless it appears that the market value of the property is enhanced by the chances or probability." *Re Simmons* (1909) 130 *App. Div.* 350, 114 *N. Y. Supp.* 571, affirmed in (1909) 195 *N. Y.* 573, 88 *N. E.* 1132, and also affirmed under the title of *McGovern v. New York* in (1913) 229 *U. S.* 363, 57 *L. ed.* 1228, 46 *L.R.A.*(N.S.) 391, 33 *Sup. Ct. Rep.* 876.

In *Re New York, L. & W. R. Co.* (1884) 33 *Hun* (N. Y.) 639, where there was a contract between the parties, the court said and held: "The provisions of the contract that the Commissioners should take into consideration the capability of the premises and property for any use what-
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ever, and that no compensation shall be allowed for anything except their actual value, are only declaratory of the rule which the law applies to such cases and limits that compensation to the then market value for any legitimate purpose for which the property is adapted. And such estimates of value must be made on a basis reliable in view of existing conditions, and not on speculations of future developments and property relations."

In *Chicago & A. R. Co. v. Staley* (1906) 221 *Ill.* 405, 77 *N. E.* 437, it was held to be error to instruct the jury that, "in estimating the damages to adjacent land of defendant not taken, if any, you should consider the depreciation in value, if any, of the land not taken, for any present or future use to which the land may conveniently and lawfully be put, on account of the building and operation of the proposed railroad;" and . . . that the jury should fix, as compensation for land taken, 'such sum of money as the jury shall find, from all the evidence and from their view of the premises, such property so sought to be taken is fairly and reasonably worth, taking into consideration its present use and any use to which it may reasonably be put in the future.' " The court said: "These instructions, as well as other similar instructions given at the request of appellees, contain an incorrect statement of the law. Possible or imaginary uses, or a probable future use dependent on circumstances, are not elements to be taken into consideration in determining the compensation or damages to be awarded in a proceeding of this character. . . . The landowner is entitled to the highest fair cash market value of the land actually taken, for the highest and best use to which it is adapted, . . . and is also entitled to have the jury consider such use in fixing the damages to land not taken. The use, however, which may be considered by the jury must be such as affects the present market value of the land, and not such as may affect its future market value alone. The instructions last above mentioned were both erroneous and misleading, as they lacked a statement to the effect that the only future uses which could be considered were those to which the land is at present adapted and which affect the present market value of the land."

Possible division of land into building lots.

The question has been raised in a good

many cases of the propriety of showing the availability of the land as building lots, and the prices which such lots would bring, and has brought out some difference of opinion.

These cases are rather within the scope of the note in 15 L.R.A.(N.S.) 679, in which reference is made in particular to a number of cases allowing evidence of the availability of the land for building lots.

It is not intended here to deal with cases where the element of futurity is not present.

It has been held—

—that the jury are not to “take into consideration any prospective use of said land by laying out the same into town lots and blocks, but will consider the market value of said land at the time, as shown by the evidence,” *Sedalia, W. & S. R. Co. v. Abell* (1885) 18 Mo. App. 632;

—that “the mere hopes of an owner that his field may one day be built upon are not to be considered, unless the probability of such an event, in the public mind, has in fact affected the ‘fair market value’ at the time of the proceeding,” *Re New York, L. & W. R. Co.* (1882) 27 Hun (N. Y.) 151;

—that it is error to assess land for compensation at the value of building lots, for which there will be no demand in that location for many years, *New Jersey R. & Transp. Co. v. Suydam* (1839) 17 N. J. L. 25;

—that it is error, as showing the value of property farther removed from the city than other property which has been cut into building lots, to show what will be the result of the operation of cutting such property into building lots and the value of those lots, etc., as this introduces a speculative and future possibility in the case, *Schuykill River East Side R. Co. v. Stocker* (1889) 128 Pa. 253, 18 Atl. 399;

—that it is error in condemnation of farming property, to admit evidence of the value of the land in a business street of a neighboring city, *Kansas City & T. R. Co. v. Splitlog* (1890) 45 Kan. 68, 25 Pac. 202.

The same was held as to “acre” property several hundred feet away from a business street. *Kansas City & T. R. Co. v. Vickroy* (1891) 46 Kan. 248, 26 Pac. 698.

In *Everett v. Union P. R. Co.* (1882) 59 Iowa, 243, 13 N. W. 109, the court, in approving the exclusion of the inquiry as to how many residence lots were ordinarily laid off or contained in an acre, L.R.A.1917A.

and what the land in question, if so laid off, would probably sell for per lot in the market, said: “It is said a prudent owner would lay the land out in lots and then sell it. Possibly this is so, but as it had not been so laid out when appropriated, the question was what it was worth in the condition it then was, and not what its prospective value was, or what it would be if it had been laid out into city lots.”

Where land had not been in demand for residence purposes and there was no reason to suppose that it would be in the near future, evidence tending to show the nature of residences a mile away on an avenue which, if continued, would pass within a quarter of a mile of the property, was held to be erroneous, as indicating that the property was valuable for residence purposes, when it was not. *La Mont v. St. Louis, D. M. & N. R. Co.* (1883) 62 Iowa, 193, 17 N. W. 465.

In *Reiber v. Butler & P. R. Co.* (1901) 201 Pa. 49, 50 Atl. 311, the court approved an instruction to the jury stating that “the jury may take into consideration any purpose for which the land had value at the time of the entry of the railroad company,—its quantity, its location with reference to other improvements, its adaptability for particular purposes giving it value; but it would be improper to arrive at the amount of damages by estimating the number of lots into which the whole tract or any part of it might be divided, and then estimating what such lots might in the future be sold for and considering [how] the location of the road might affect the value of the lots.”

See also *LOUISIANA R. & NAV. CO. v. BATON ROUGE BRICKYARD*, ante, 402.

But see as justifying an estimate by lots, *Re Simmons* (1910) 141 App. Div. 120, 125 N. Y. Supp. 697, affirmed in (1911) 202 N. Y. 606, 96 N. E. 1130.

In *Myers v. Schuykill River East Side R. Co.* (1888) 5 Pa. Co. Ct. 634, the court said: “Another question concerns the rejection of certain plans of the plaintiff’s property, which show it as it may in the future be cut up into building lots. The plans do not represent the actual condition of the property at present. The property is what the plaintiff calls a garden, and is popularly known as a truck farm for raising vegetables for the city market. It is approachable by country roads only. There are no streets opened through it and no building lots laid out, and it is not probable that it will be used for any-

thing but a garden for many years to come, unless the railroad of the defendant shall cause it to be applied to other uses. It is plain that it is now a garden or farm only, and not a city plot; therefore plans of it should show its actual condition." It may be noted, however, that in *Ohio Valley R. & Terminal Co. v. Keith* (1891) 130 Ind. 314, 30 N. E. 298, it was held not error to admit a tentative plat when the jury were instructed that they were not to pay any attention to the division on the plat into lots and streets.

In *Daly v. Smith* (1897) 18 App. Div. 194, 45 N. Y. Supp. 785, the court said and held: "Nearly any tract of land or any farm can be cut up into lots or villa sites. The question is not whether it can be subdivided, but whether purchasers for the lots can be found, and also how speedily found. For if only small parts can be sold at intervals, and a number of years must elapse before the whole property can be disposed of, it is apparent that it would be unfair to take as the present value of the property a sum only to be realized after a long lapse of time."

See in this connection *Cedar Rapids, I. F. & N. W. R. Co. v. Ryan* (1887) 37 Minn. 38, 33 N. W. 6, supra, "Limits of the rule."

It may be advisable here to refer to one or two cases emphasizing the propriety of considering the availability of the land for building lots so far as that affects the present market value.

In *Watson v. Milwaukee & M. R. Co.* (1883) 57 Wis. 332, 15 N. W. 468, the court approved the following instruction to the jury: "What was the fair market value of the land at that time for any purpose for which it might reasonably be used in the immediate future? Not what would lots sell for in the distant future if a street were opened and lots offered for sale; nor, indeed, is the price per lot a measure of value, either in the near or the distant future;" and said: "They were, in effect, told that if the evidence satisfied them that the land was valuable for immediate use in the future as village lots, then they should consider that fact in estimating the damages, and if it did not, then they need not consider it."

In *Alexian Bros. v. Oshkosh* (1897) 95 Wis. 221, 70 N. W. 162, the court approved a charge to the jury which in part was to the effect that, "in determining the value of the land taken, they were to be governed by the fair market

value at the time it was taken, for any purpose for which it might reasonably be used in the immediate future; that if the present value was enhanced 'by reason of its adaptability to some use to which it might be put in the near future, was so situated that it might be platted into city lots, and that its present value was thereby increased, such increase was a proper ground of assessment of damages;' that 'the actual use to which it is put must also be considered with the surrounding circumstances; that you are not to include remote or speculative values, but only the value of the land when taken, with reference to its availability for any purpose to which it might reasonably be put;' that they 'should not take into consideration what it might be worth at some remote and future time, when it might be put on the market as lots, but you may consider its present value for such purposes,'" and said: "The only evidence as to the value of the land taken, tending to show what it would be worth in the 'immediate' or 'near' future, was what it would be worth more if platted into lots, which could have been readily and immediately accomplished,—at least without material delay,—than if kept as acreage property. The language 'immediate or near future' had reference to this aspect of the case, and cannot, we think, under the circumstances, be regarded as erroneous or misleading. It referred to present advantage or adaptability of the property, which might be realized with but trifling expense, and without material delay."

In this connection reference may be made to *Ohio Valley R. & Terminal Co. v. Kerth* (1891) 130 Ind. 314, 30 N. E. 298, where the court said *inter alia*: "The situation may have been such as that the natural growth of the city and the proximity of the land to it fixed its use for suburban residences in the immediate future with such certainty as to make the land of additional value on that account at the time of the appropriation, and if such were the facts the jury had a right to consider it in estimating the amount of damages."

Projects of the owner.

As a rule projects of the owner in regard to the land are too remote and speculative.

In *Los Angeles v. Kerckhoff-Cuzner Mill & Lumber Co.* (1911) 15 Cal. App. 676, 115 Pac. 654, it was held that the owner could not be allowed to show enhanced damage which he had suffered

by reason of being prevented from carrying out a particular scheme of improvement existing only in contemplation at the time of trial. The court quoted from *Santa Ana v. Harlin* (1893) 99 Cal. 538, 34 Pac. 224, cited in the note in 15 L.R.A.(N.S.) 679, among other things, the following passage: "Such proof should be limited to showing the present condition of the property and the uses to which it is adapted, and may not be extended to speculative inquiries as to possible future uses under altered circumstances, which may or may not arise."

In *Wadsworth Land Co. v. Piedmont Traction Co.* (1913) 162 N. O. 503, 78 S. E. 299, the court said: "The error was in permitting the plaintiff . . . to show that 100 acres of this property, consisting of bottom land not suited for development as a residential property, but subject to overflow, the owner intended to make into a park and beautify it, by laying off walks and building summerhouses and otherwise, and that such improvement would enhance in value the remaining portion of the property. We think this was too remote, and improperly enhanced the damages allowed. It was purely speculative, and should have been excluded."

It is not proper to take into consideration the purposes of promoters in relation to a certain tract of land through which a railroad company was condemning a right of way. *Richmond & P. Electric R. Co. v. Seaboard Air Line R. Co.* (1905) 103 Va. 399, 49 S. E. 512, where the court said: "It is the present actual value of the land with all its adaptations to general and special uses, and not its prospective or speculative or possible value based upon future expenditures and improvements that is to be considered."

It may be here noted that where evidence was permitted to be introduced for the purpose of showing the adaptability of the land for the building in the near future of an extensive warehouse and railroad yards, it was held that there was no error in declining to admit in the proofs a map or plat showing the possible contemplated future development of the property, where it was a mere plat or plan of a possible and largely imaginary development of the tract. *Sexton v. Union Stock Yard & Transit Co.* (1902) 200 Ill. 244, 65 N. E. 638.

But under the Georgia Constitution, requiring payment of "just and adequate L.R.A.1917A.

compensation" for private property taken for public use, it was held, where the county took stone which the landowner had lately hauled on his land for the purpose of building a home and outbuildings, that the owner was not restricted to market value; and that "just and adequate compensation" for property which the owner has designed for a special use, and of which he has been deprived for the public benefit without his consent, may include the cost or value of the article to the owner for the purposes for which he designed to use it." *Elbert County v. Brown* (1915) 16 Ga. App. 834, 86 S. E. 651.

Possibility of future privileges.

The possibility of acquiring privileges in the future is too remote as an element of damages. Thus, "the possibility that one seeking land by right of eminent domain may secure the right from the legislature to carry water contained in it to supply municipalities cannot be considered in fixing the compensation to be awarded for it." *Sargent v. Merrimac* (1907) 196 Mass. 171, 11 L.R.A.(N.S.) 996, 124 Am. St. Rep. 528, 81 N. E. 970.

So, where at the time of the award there was no law giving littoral proprietors any rights whatever in tide lands below ordinary high tide, and they had no valuable rights therein, it was error to include in the value of shore property prospective possibilities or rights to lands below the line of ordinary high tide. *Bellingham Bay & B. C. R. Co. v. Strand* (1892) 4 Wash. 311, 30 Pac. 144.

Testimony in relation to the value of wharf privileges on the shore of a river where the tide ebbs and flows, given for the purpose of enhancing the value of some of the land sought to be appropriated, ought not to be received, where the party claiming the compensation has no wharf franchise. *Central P. R. Co. v. Pearson* (1868) 35 Cal. 247, where the court said: "The mere fact that the party might at some future time obtain from the state a grant of a wharf franchise, if allowed to remain the owner of the land, is altogether too remote and speculative to be taken into consideration. The question for the Commissioners to ascertain and settle was the present value of the land in its then condition, and not what it would be worth if something more should be annexed to it at some future time."

While the objection was not properly raised, the court considered that it was

error in taking a lot near a railroad for railroad purposes, to give the jury to understand that the property might be more valuable in the future by reason of its location in case the railroad should extend the privilege of a track to it. *Russell v. St. Paul, M. & M. R. Co.* (1885) 33 Minn. 210, 22 N. W. 379.

See also *Emery v. Boston Terminal Co.* (1901) 178 Mass. 172, 86 Am. St. Rep. 473, 59 N. E. 763, *supra*, under "Imagination, etc., uses."

In *Langdon v. New York* (1887) 9 N. Y. S. R. 766, it was held that compensation ought not to be awarded for the mere possibility of securing a privilege or license from a city for building a platform and shed in connection with a wharf.

But in *Re New York* (1907) 117 App. Div. 553, 102 N. Y. Supp. 667, it was held that a possible right to obtain a revocable permit to build a shed on a pier marks a proper element of value.

Miscellaneous.

It may be noted that in *Kerr v. South Park Comrs.* (1885) 117 U. S. 379, 29 L. ed. 924, 6 Sup. Ct. Rep. 801, in a part of the charge which was not objected to on the appeal, the court below said: "A number of witnesses testified that the agitation of the park project, the anticipation that the legislature would authorize the appropriation of lands to establish a park in the vicinity of the present South Park, and the introduction of the bill into the legislature, which finally became a law on the — day of February, 1869, materially enhanced the value of lands embraced in the present park lines, as well as the lands adjacent thereto and in that vicinity. Any resulting benefits to the lands within the proposed park from this and other causes, such as the growth and prosperity, or the anticipated growth and prosperity, of the city of Chicago, you should take in account in determining the amount that will fairly compensate the owner."

While within the scope of the note in 15 L.R.A.(N.S.) 679, where it is cited, reference may be here made to *Montana R. Co. v. Warren* (1890) 137 U. S. 348, 34 L. ed. 681, 11 Sup. Ct. Rep. 96, affirming (1887) 6 Mont. 275, 12 Pac. 641, where it was held that a railroad company, in condemning for a right of way, cannot object that the owners of the land showed that the property sought to be condemned was a part of a mining claim and adjoined a mine of great value, and that therefore it might con-

tain part of the same vein, and the opinions of witnesses on that point were competent. The court said: "That this mining claim, which may be called 'only a prospect,' had a value fairly denominated a market value, may, as the supreme court of Montana well says, be affirmed from the fact that such 'prospects' are the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such 'prospect' has a market value; and the absence of certainty is not a matter of which the railroad company can take advantage when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the railroad company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities."

It may be noted that in *Shoemaker v. United States* (1892) 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361, a portion of the instruction to the Commissioners for taking a park for the United States in the District of Columbia, which was not objected to, stated that they were not at liberty to place a value upon these lands upon the basis of what one might be willing to buy them on time for purely speculative purposes.

In a case for the condemnation by the United States of the right of way for a boat railway, the court said that there was no testimony "legitimately tending to show a prospective demand for further rights of way, and I am of the opinion that the defendant is not entitled to anything on such account." *United States v. Taffe* (1898) 86 Fed. 830.

"Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose." *United States v. Chandler-Dunbar Water Power Co.* (1913) 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667, where the United States was condemning lands for navigation purposes.

New Orleans v. Manfre (1904) 111 La. 927, 35 So. 981, is sufficiently referred to in the principal case.

B. B. B.

NEBRASKA SUPREME COURT.

THOMAS RODEN

v.

PARIS A. WILLIAMS, Appt.

(— Neb. —, 158 N. W. 360.)

Evidence — contract — writing.

1. Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake, or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms.

For other cases, see Evidence, VI. a, in Dig. 1-52 N. S.

Fixtures — farm buildings.

2. Buildings, such as corncribs, cattle sheds, hog sheds, and other customary out-houses, situated upon a farm, are of the general class which a prospective buyer inspecting the farm would have a right to assume are part of the freehold. They are not such as to put him upon inquiry in reference thereto, even though he may then know that the farm is occupied by a tenant.

For other cases, see Fixtures, III. in Dig. 1-52 N. S.

Same — sale — removal of fixtures.

3. And where the owner of such a farm sells the same and enters into a written contract of sale thereof, without reserving such buildings, and such contract is finally consummated by the payment to him by the purchaser of the full agreed consideration for such farm, the seller will be liable to the purchaser for the value of such improvements, if owned by the tenant and removed by him without the consent of such purchaser.

For other cases, see Fixtures, III. in Dig. 1-52 N. S.

Evidence — sufficiency.

4. The verdict of a jury will not be set aside for want of evidence to support it, if there is a substantial conflict of evidence upon the issue presented.

For other cases, see Appeal and Error, VII. 1, 2, a, in Dig. 1-52 N. S.

(June 3, 1916.)

Headnotes by FAWCETT, J.

Note.—The right of a third person to remove fixtures as breach of a covenant in deed of real property is treated in a note to *Herzog v. Marx*, 35 L.R.A.(N.S.) 976.

Generally, as to agreement between landlord and tenant for removal of fixtures by latter as affecting third persons, see note to *Pabst v. Ferch*, L.R.A.1915E, 822.

The analogous question as to who must bear loss for destruction or deterioration of property before contract has been completely performed by transfer of legal title is considered in the notes to *Sewell v. Underhill*, 27 L.R.A.(N.S.) 233, and *Good v. Jarard*, 43 L.R.A.(N.S.) 383. L.R.A.1917A.

A PPEAL by defendant from a judgment of the District Court for Franklin County in plaintiff's favor in an action brought to recover damages for breach of certain conditions in a contract for the sale of land. Affirmed.

The facts are stated in the opinion.

Mr. W. C. Dorsey for appellant.

Mr. George Losey for appellee.

Fawcett, J., delivered the opinion of the court:

This action was brought in the district court for Franklin county, to recover damages which plaintiff claims to have sustained by reason of a breach of certain conditions in a contract entered into between plaintiff and defendant, for the sale by the latter to the former of a quarter section of land. Plaintiff recovered, and defendant appeals.

The evidence fairly establishes the following facts: In the fall of 1912, defendant listed the land for sale with one Myers, a real estate agent. Myers negotiated a sale of the land to plaintiff for \$9,000, and prepared a contract of sale for execution by the parties. The contract provided that the consideration should be paid, \$300 cash, \$1,000 on or before December 16th, and the balance of \$7,700 on or before March 1, 1913, "less \$2,600 mortgage at 5 per cent interest," and that plaintiff was to take the property subject to the taxes for 1912 and subsequent taxes. The contract was signed by defendant and left with his agent, Myers, for execution by plaintiff. A few hours later plaintiff called at the office of Myers, and the contract was submitted to him. He objected to assuming the taxes for 1912, and refused to sign unless there was inserted the words, "Taxes of 1912 paid." Myers said he would make such change, with the understanding that the deal would not go through, unless defendant agreed to it. Plaintiff agreed to that arrangement, and Myers then changed the contract by inserting those words. Thereupon plaintiff signed the contract and paid Myers the \$300 cash payment. Some two or three hours later in the day Myers met defendant and told him what had been done. He testifies that he told defendant that plaintiff refused to buy the place unless the taxes were paid by defendant; that defendant "looked it over and said it was all right, that he wouldn't let the taxes stop the sale, and I asked him then if it was a go, and he said, 'Yes.' Q. If I understand you, Mr. Myers, Mr. Williams agreed finally to the contract as it was amended? A. Yes, sir." Defendant admits having stated to Myers, "Well, I don't know as I would let the taxes spoil

the contract," but says that afterwards he considered the matter and, as he "had been on a deal with a man for the farm for \$10,000," and plaintiff had "jewed us down" \$600, he made up his mind that he would not stand for the taxes at all. He did, however, accept the \$300 which plaintiff had paid. The above facts present the first question to be determined, viz.: Did defendant, by what he said to Myers after Myers had changed the contract, and by the acceptance of the \$300, ratify and confirm the contract which he had signed, as changed by Myers? We agree with the jury that he did. On December 16th the parties met for the purpose of adjusting the second payment of \$1,000 provided by the contract to be paid on that date. This appears to have been the first time plaintiff and defendant had met. Defendant then insisted that plaintiff must pay the taxes for 1912 and the interest on the mortgage from the last interest payment, viz., June, 1912. The evidence is in conflict as to whether or not plaintiff agreed to that demand. It would sustain a verdict either way. The verdict for plaintiff must therefore stand.

A further controversy arose between the parties, subsequent to the execution of the written contract, with regard to certain improvements which defendant's tenant, then in possession of the farm, had placed upon it. The improvements consisted of a granary, inside of and boarded up to the corncrib; a "big" shed that was built up against the barn; a cattle shed, 16 by 14, which had been built in the cattle yard; a hog shed and a privy. The right of defendant (or his tenant) to remove these improvements must be determined by the terms of the written contract. In that contract no reservation is made by defendant of the improvements in controversy. The improvements were of a class which anyone inspecting the farm would have a right to assume were a part of the freehold. They were not such as to put a prospective purchaser upon inquiry in reference thereto, even though he knew the farm was then occupied by a tenant. They were of such a class as to impose upon the seller the duty of advising the prospective purchaser of the fact that they belonged to the tenant, and not to the freehold. It is true, the parties had some conversation in relation to the improvements at their first meeting on December 16th, which was a month after the execution of the contract. Nothing then said could release defendant from his liability for the value of the improvements if removed by him or his tenant, unless the plaintiff then agreed to release him from such liability. The evidence L.R.A.1917A.

upon this point is in conflict. The jury found for plaintiff upon sufficient evidence to sustain their finding, and it is conclusive.

The contract required the final payment to be made on or before March 1, 1913. Defendant deposited with the bank at Riverton his copy of the contract, and also a deed to the land, to be held until the final payment was made to the bank for him, when the deed was to be delivered. It is urged by defendant that when plaintiff made the final payment on February 28th, he had been told by defendant that he (defendant) would not make him a deed to the land unless he paid the 1912 taxes, and the interest on the mortgage from the last interest payment date in June, 1912; that he knew when he made such payment that the improvements in controversy had been removed by the tenant. In support of this contention defendant says that plaintiff made the final payment with full knowledge of the facts, and without duress or fraud; that he thereby acceded to the demands of the defendant, and, whether such demands were well founded or not, the final payment made by him under such circumstances was a voluntary payment and cannot be recovered back wholly or in part. We are unable to concur in defendant's view of the law applicable to the facts shown by the record. This court has settled the rule applicable to such facts. "Where a contract of sale has been consummated by writing, the presumption is that the writing contains the whole contract, and, in the absence of fraud, mistake, or ambiguity of expression in the contract itself, parol evidence is inadmissible to change or vary its terms." *Apking v. Hoefer*, 74 Neb. 325, 104 N. W. 177.

In the opinion (74 Neb. on page 328), we said: "Even if the defendant agreed orally, after the contract was executed, that the plaintiffs might have a few days after July 10th to meet the payment maturing on that date, it was a naked promise, without consideration, and could not be enforced. It follows, therefore, that the court erred in the admission of oral evidence to vary the terms of the written contract. It is clearly apparent from the written contract that time was of the essence of it, and that the failure of the plaintiffs to meet the payment maturing on the 10th day of July, 1902, gave defendant the option to forfeit the contract and declare it at an end."

That such a contract as the one involved here manifests an intention to make time of the essence of the contract is also held in *Cadwell v. Smith*, 83 Neb. 567, 120 N.

W. 130. When plaintiff appeared at the bank on February 28th to make his final payment and obtain his deed, he had only one more day remaining in which to comply with the terms of his contract as to the making of such final payment. Had he failed to make his final payment on that day or the next, defendant, by the terms of the contract, would have been released from all liability thereunder, and plaintiff would have lost his bargain, and would, probably, have had difficulty in obtaining a

return of the \$1,300 which he had paid thereon.

All of the points in controversy, above referred to, were properly submitted to the jury by the instructions of the court. The verdict returned under those instructions has sufficient evidence to support it.

Finding no reversible error in the record, the judgment of the District Court is affirmed.

Hammer, J., not sitting.

TENNESSEE SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Certiorari,
v.

MRS. SAM MARLIN.

(— Tenn. —, 186 S. W. 595.)

Master and servant — liability of carrier for act of Pullman conductor.

A railroad company is not liable for the wanton act of a Pullman conductor in forcing from the train, when it is over a trestle, a trespasser stealing a ride, where his act is not necessary to protect passengers.

For other cases, see Carriers, II. h, I, in Dig. 1-52 N. S.

(June 5, 1916.)

CERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the Circuit Court for Davidson County in plaintiff's favor in an action brought to recover damages for the alleged unlawful killing of her husband. Reversed.

The facts are stated in the opinion.

Messrs. F. M. Bass and Keeble & Seay, for plaintiff in certiorari:

As to its passengers, a railroad company is charged with the exercise of the highest degree of care, skill, and oversight to accomplish their safe transportation.

Hutchinson, Carr. 3d ed. 895; Illinois C. R. Co. v. Kuhn, 107 Tenn. 111, 64 S. W. 202; Pennsylvania Co. v. Roy, 102 U. S. 456, 26 L. ed. 144, 10 Am. Neg. Cas. 593.

As to trespassers, a railroad company owes them no duty other than not to wantonly or wilfully injure them.

Illinois C. R. Co. v. Meacham, 91 Tenn. 428, 19 S. W. 232, 6 Am. Neg. Cas. 460; Sands v. Southern R. Co. 108 Tenn. 1, 64 S. W. 478; Louisville & N. R. Co. v. Hailey, 94 Tenn. 383, 27 L.R.A. 549, 29 S. W. 367, 10 Am. Neg. Cas. 250; Mobile & O. R. Co. v.

Bogle, 101 Tenn. 40, 46 S. W. 760; White v. Nashville, C. & St. L. R. Co. 108 Tenn. 741, 70 S. W. 1030; 33 Cyc. 815.

A Pullman conductor is not the servant of the railroad company.

3 Elliott, Railroads, § 1267a; 4 Thomp. Neg. §§ 3472a, 5130; Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1.

A Pullman employee will be regarded in law as the servant of the railroad company so far as his mistreatment of a passenger is concerned.

Louisville, N. & G. S. R. Co. v. Katzenberger, 16 Lea, 386, 57 Am. Rep. 232, 1 S. W. 44; Louisville & N. R. Co. v. Ray, 101 Tenn. 10, 46 S. W. 554; St. Louis, I. M. & S. R. Co. v. Hatch, 116 Tenn. 580, 94 S. W. 671; Nashville, C. & St. L. R. Co. v. Lillie, 112 Tenn. 331, 105 Am. St. Rep. 947, 78 S. W. 1055; Pennsylvania Co. v. Roy, 102 U. S. 453, 26 L. ed. 142, 10 Am. Neg. Cas. 593; 4 Elliott, Railroads, 1621, 1640; 2 Hutchinson, Carr. § 1135.

This is not true as respects his dealings with a trespasser on the train.

4 Elliott, Railroads, § 1625; Williams v. Pullman Palace Car Co. 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, 8 Am. Neg. Cas. 303; Blake v. Kansas City Southern R. Co. 38 Tex. Civ. App. 337, 85 S. W. 430.

Messrs. A. T. Levine and W. H. Washington, for defendant in certiorari.

When the Pullman conductor undertook to comply with the rules of the railroad company by ridding the car of trespassers, he was performing a duty to its passengers, and was acting directly within the general scope of his agency as such servant.

Nashville, C. & St. L. R. Co. v. Lillie, 112 Tenn. 331, 105 Am. St. Rep. 947, 78 S. W. 1055; Louisville, N. & G. S. R. Co. v. Katzenberger, 16 Lea, 385, 57 Am. Rep. 232, 1 S. W. 44; Louisville & N. R. Co. v. Ray, 101 Tenn. 10, 46 S. W. 554; Kinsley v. Lake Shore & M. S. R. Co. 125 Mass. 54, 28 Am. Rep. 200; Thorpe v. New York C. & H. R. R. Co. 76 N. Y. 406, 32 Am. Rep. 325; Dwinelle v. New York C. & H. R.

Note.—As to liability of railroad company for acts of Pullman car employees toward trespassers, see annotation following this case, post, 420.
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R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319.

The master is liable for the wanton and wilful act of his servant within the general scope of his employment, and done with a view to a furtherance of his master's business and his master's interests.

Girvin v. New York C. & H. R. R. Co. 52 App. Div. 562, 65 N. Y. Supp. 299, 8 Am. Neg. Rep. 109; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; *Hoffman v. New York C. & H. R. R. Co.* 87 N. Y. 25, 41 Am. Rep. 337, 8 Am. Neg. Cas. 543; *Gulf, C. & S. F. R. Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495, 8 Am. Neg. Cas. 631; 7 *Labatt, Mast. & S.* § 2555; *Highland Ave. & Belt R. Co. v. Robinson*, 125 Ala. 483, 28 So. 28; *Illinois C. R. Co. v. Ross*, 31 Ill. App. 170; *Baltimore & O. R. Co. v. Strube*, 111 Md. 119, 73 Atl. 697; *Haehl v. Wabash R. Co.* 119 Mo. 325, 24 S. W. 737; *Enright v. Pittsburg Junction R. Co.* 204 Pa. 543, 54 Atl. 317, 9 Am. Neg. Rep. 364; *Stewart v. Brooklyn & C. T. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185, 8 Am. Neg. Cas. 547; *Heenrich v. Pullman Palace Car Co.* 10 Sawy. 80, 20 Fed. 100; *Barrett v. Minneapolis, St. Paul & S. Ste. M. R. Co.* 106 Minn. 51, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, 3 Am. Neg. Cas. 437; *Mann-Boudoir Car Co. v. Dupre*, 21 L.R.A. 297, 4 C. C. A. 540, 13 U. S. App. 183, 54 Fed. 646; *Bogges v. Chesapeake & O. R. Co.* 37 W. Va. 297, 23 L.R.A. 777, 16 S. E. 525, 7 Am. Neg. Cas. 134; 1 *Clark & S. Agency*, 1072-1075; *Elliott v. Louisville & N. R. Co.* 21 Ky. L. Rep. 630, 52 S. W. 833, 6 Am. Neg. Rep. 532; *Dorsey v. Kansas City, P. & G. R. Co.* 104 La. 478, 52 L.R.A. 92, 29 So. 177.

A principal is liable for the act of his agent within the general scope of his agency, regardless of previous authorization or subsequent ratification.

Union R. Co. v. Carter, 129 Tenn. 459, 166 S. W. 592, 7 N. C. C. A. 748; *Memphis Street R. Co. v. Stratton*, 131 Tenn. 620, L.R.A.1915E, 704, 176 S. W. 105.

And this rule does not exclude liability for wrongs done to one who has no contractual relation to the company.

Memphis Street R. Co. v. Stratton, *supra*.

Neill, Ch. J., delivered the opinion of the court:

This was an action brought in the circuit court of Davidson county by the defendant in error to recover damages for the alleged unlawful killing of her husband, Sam H. Marlin. At the close of the evidence of the plaintiff below, and again at the close of

all of the evidence, the plaintiff in error moved for a peremptory instruction, but this motion was denied. The case then went to the jury, who rendered a verdict against the plaintiff in error, and from the judgment rendered on that verdict, an appeal was prosecuted to the court of civil appeals, and there the judgment was affirmed. The case then came to this court under the writ of certiorari.

The only error assigned is the failure of the trial judge to sustain the motion for a peremptory instruction, and the refusal of the court of civil appeals to reverse his judgment.

There is no doubt the deceased was a trespasser, and the only evidence as to the manner of his death is the following:

Sam H. Marlin, the deceased, and his brother W. P. Marlin, being in Louisville, Kentucky, and desiring to come to Nashville, Tennessee, where the family of the former resided, and being unwilling, or financially unable, to take passage in the usual way, paid a dollar to an employee in the yards at Louisville to "square them through,"—a sum much less than the fare. Following the advice of the employee referred to, they got upon the tender, and thence upon the top of one of the coaches composing part of a passenger train bound from Louisville to Nashville. They rode on top of the train until it entered Nashville. At this stage of the journey, and at a point not very far from the depot, they climbed down from the roof of the rear coach, a Pullman sleeping car, onto its rear platform. Here they encountered the conductor of the sleeping car, who, by threatening to strike them with his metal-bound lantern, compelled them to jump off while the train was passing over a high trestle between Cherry and Cedar streets, in Nashville. This occurred about 2 o'clock in the morning. As the result of the jump, defendant in error's husband sustained injuries which caused his death within a few hours.

The act was wanton and cruel, and, though defendant in error's husband was a trespasser, pure and simple, without a shadow of right on the train, still damages should be allowed if the conductor of the sleeping car was a servant of the railroad company. The whole case therefore turns upon the decision of this question.

The written contract between the Pullman Company and the railroad company, if there was one, is not shown in the evidence. We have nothing but the testimony of two employees of the Pullman Company as to the relations of the two companies. According to this evidence, their relations were, viz.:

The Pullman Company furnished its special facilities, well known to everyone, to such of the passengers of the railway company as were willing to pay to the former company the extra charge made therefor. The Pullman conductor collected only the fare due to his company, except that when passengers came in late, and desired to retire, he took up their railway tickets, and turned them over to the railway conductor; this for the comfort of the passengers, to save the necessity of their being aroused by the railway conductor on his subsequent passage through the sleeping car. The Pullman car is manned by only two persons, a conductor and a porter. Both of these are employed and paid by the Pullman Company, receive all of their orders from it, and receive no orders from the railway company. It is the duty of these two servants of the Pullman Company to look after the comfort of such of the railway company's passengers as enter the sleeping car and pay for its accommodations. It is also their duty to protect any such passenger from insult or from assault, or other injury, offered by any person within the car, whether such aggression be offered by another passenger, or by an intruder who may enter the car. If an intruder enters, it is the duty of the Pullman conductor to ask him to withdraw; and, if he refuse, then to call the matter at once to the attention of the railway conductor, whose duty it is to remove such person. In case an assault should be attempted upon any lawful occupant of the Pullman car, and its violence or suddenness should not permit the delay required to call in the railway conductor or the train crew, it would be the duty of the Pullman servants to act at once, and, if necessary to the protection of the party assaulted, to eject the offending person from the car. But the servants of the Pullman Company have no authority to eject anyone from the train, not even an intruder upon one of its cars. Such removal can be effected only by the railway conductor, or some member of the train crew.

It may be stated that the conductor of the Pullman car, and also the train conductor, each one, denies that he ejected Sam H. Marlin, or any other person from the train on the night in question, as sworn by W. P. Marlin, the brother of the deceased, and each testifies that he never heard of the alleged occurrence until the present suit was started. However, in disposing of the motion for a peremptory instruction, this phase of the evidence cannot be considered at all, but only the evidence as previously related, tending to show liability.

Assuming, as we must when considering L.R.A.1917A.

the motion for a peremptory instruction, that the Pullman conductor forced Marlin to jump from the car, was he acting as the agent of the railway company? We are unable to perceive how such a conclusion could be reached on the facts stated. It is insisted for the defendant in error that the servants of the Pullman Company owed to the railway company the duty of protecting the passengers of the latter who were being transported in the sleeping car, and so far forth were the agents of the railway company; that the presence of an intruder on the rear platform of the Pullman at 2 o'clock in the morning was a menace to passengers; that in ejecting him from the car, and from the train, the Pullman conductor was protecting the railway company's passengers in the sleeper, and although he exceeded his authority in the method he adopted to effectuate the protection, still he was acting within the general scope of the authority to protect, and therefore his superior, or master, in the special matter, became liable for his act.

It is true that, as between the railway company and its passengers, the porter and the conductor in charge of a sleeping car are held to be the agents of the railway company of whose train the sleeping car forms a part, and responsibility for their acts, as affecting passengers, is imposed accordingly (Nashville, C. & St. L. R. Co. v. Lillie, 112 Tenn. 332, 342, 343, 105 Am. St. Rep. 947, 78 S. W. 1055; Louisville & N. R. Co. v. Ray, 101 Tenn. 1, 10, 46 S. W. 554; Louisville, N. & G. S. R. Co. v. Katzenberger, 16 Lea, 380, 57 Am. Rep. 232, 1 S. W. 44; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224, 17 Am. St. Rep. 611, 24 N. E. 319; Campbell v. Seaboard Air Line R. Co. 23 L.R.A. (N.S.) 1056, and note, 83 S. C. 448, 137 Am. St. Rep. 824, 65 S. E. 628; Denver & R. G. R. Co. v. Derry, 47 Colo. 584, 27 L.R.A.(N.S.) 761, 764, 108 Pac. 172; Gannon v. Chicago, R. I. & P. R. Co. 141 Iowa, 37, 23 L.R.A.(N.S.) 1061, 117 N. W. 966) and that it is their duty not only to refrain from injuring passengers, but to protect them (same authorities); and it is also true that a servant, acting within the general scope of his authority, makes the master responsible even though he act without instructions, or exceed his instructions (Terry v. Burford, 131 Tenn. 451, L.R.A. 1915F, 714, 175 S. W. 538; Union R. Co. v. Carter, 129 Tenn. 459, 166 S. W. 592, 7 N. C. C. A. 748; Memphis Street R. Co. v. Stratton, 131 Tenn. 620, L.R.A.1915E, 704, 176 S. W. 105; Dwinelle v. New York C. & H. R. R. Co. 120 N. Y. 117, 8 L.R.A. 224,

17 Am. St. Rep. 611, 24 N. E. 319). It is also true, in general, that a party, injured by a servant acting within the scope of his authority, need not, as a condition of liability, stand in any contractual relation to the master, but may be wholly a stranger. *Memphis Street R. Co. v. Stratton*, 131 Tenn. 620, L.R.A.1915E, 704, 176 S. W. 105. But neither the principles stated nor the authorities cited support the case sought to be made by the defendant in error. There is not a scintilla of evidence that the passengers within the sleeper or anywhere on the train were in the slightest danger, or that the Pullman conductor even purported to act on such ground. The mere fact that the two men climbed down from the top of the car, onto the rear platform, when the train was nearing the depot, could furnish no inference on which to base fear of danger. There was no threat; no offer to enter the car; no request that such entry be permitted. It was perfectly obvious to the Pullman conductor that the two men had been stealing a ride,—indeed, W. P. Marlin says he told the officer mentioned that they had boarded the train at Louisville,—and that they were climbing down from the roof preparatory to leaving the train, when it should reach the depot. In truth, W. P. Marlin says such was their purpose. So, there was nothing in fact, or in appearance even, that could call into action the duty of the Pullman conductor to protect the passengers. Therefore, if the two intruders were driven from the platform of the sleeper, and forced to jump from the moving train, in the manner testified to by W. P. Marlin, the act was one purely wanton and malicious, and performed in his personal capacity by the Pullman conductor, wholly disconnected from any agency, actual or constructive, for the railway company.

The only theory of liability showing any plausibility was that put forward by the defendant in error, which we have just considered, and found wanting in soundness. It was not possible to support the proposition that the law would impute to the em-

ployees of the Pullman Company an agency for the railway company as respects trespassers, or the relation of master and servant between them in respect of the conduct of such employees towards trespassers. *Blake v. Kansas City Southern R. Co.* 38 Tex. Civ. App. 337, 85 S. W. 430. The general relation of master and servant does not exist between such persons and a railway company hauling a Pullman car manned by Pullman employees (4 Elliott, Railroads, § 1025), but only as respects passengers. The reasons which justify the imputation of an agency or servanthood in respect of passengers wholly fail when applied to a trespasser. The railway company owes to its passengers the duty of highest care (*Nashville & C. R. Co. v. Elliott*, 1 Coldw. 611, 78 Am. Dec. 506; *East Tennessee, V. & G. R. Co. v. Mitchell*, 11 Heisk. 400, 6 Am. Neg. Cas. 444; *East Tennessee, V. & G. R. Co. v. Conner*, 15 Lea, 254, 6 Am. Neg. Cas. 450; *Dodge v. Boston & B. S. Co.* 12 Am. St. Rep. 541, 19 N. E. 373, 148 Mass. 207, 3 Am. Neg. Cas. 843, 2 L.R.A. 83, and note), while to a trespasser it owes only the duty to refrain from intentionally injuring him (*Illinois C. R. Co. v. Meacham*, 91 Tenn. 428, 19 S. W. 232, 6 Am. Neg. Cas. 460). Having assumed a contract of carriage with a passenger, it cannot escape or evade its responsibility to him by turning him over to the employees of the Pullman Company. The law forbids it, and makes its veto perfect by treating the employees of the sleeping car company as the servants of the railway company, as respects such passengers. As to trespassers, there is no contract and no duty of service, and public policy does not require the imputation of an agency.

It results that the trial court and the Court of Civil Appeals were both in error, and their judgments are reversed. The motion for a peremptory instruction should have been sustained and the suit dismissed. Doing now what should have been done, we sustain the motion, and dismiss the suit at the costs of the defendant in error.

Annotation—Liability of railroad company for acts of Pullman car employees toward trespassers.

The liability of a railroad company for acts of an employee of a sleeping or Pullman car company towards passengers is discussed in notes to *Mann-Boudoir Car Co. v. Dupre*, 21 L.R.A. 297, and *Campbell v. Seaboard Air Line R. Co.* 23 L.R.A.(N.S.) 1056.

The holding of *LOUISVILLE & N. R. Co. v. MARLIN*, ante, 417, that no liability L.R.A.1917A.

attached to the railroad company for the wanton act of a Pullman car employee in ejecting a trespasser, for, with respect to trespassers, such employees are not agents or servants of the railroad company, is supported by *Blake v. Kansas City Southern R. Co.* (1905) 38 Tex. Civ. App. 337, 85 S. W. 430, which rules likewise on similar facts.

In the latter case the court said: "A common carrier undertakes absolutely to protect its passengers from the misconduct of its own servants while engaged in performing a duty which it owes to the passenger, and, if the servant inflicts injury upon one of its passengers during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural consequences, no matter what may have been the motive which actuated the servant, and although the act was contrary to the express orders of the carrier. In the case under consideration, however, the party complaining was not a passenger of appellee, but a trespasser upon its train. To him appellee did not owe the duty of exercising that degree of care required for the protection of its passengers, but could only be held liable for a breach of that duty which every one owes to another, even a trespasser, to avoid inflicting unnecessary injury upon him. Appellant being a trespasser upon appellee's train, the reasons for the rule which authorizes persons in charge of sleeping cars to be treated in respect to their dealings with passengers as the servants of the railway company, and holding such company responsible for their acts to the same extent as if they were directly employed by the company, do not exist in his case, and such rule cannot be invoked by him. His right to maintain this action depends upon the existence of the conventional relation of master and servant between appellee and the Pullman palace car conductor, and if such relation did not exist at the time of appellant's ejection from the train, he cannot recover. That said conductor was in fact the servant of the Pullman Palace Car Company . . . , and was under the control and subject to the orders of that company, and that he was

not under the control or subject to the orders of appellee. It follows from what has been said that, in our opinion, appellee cannot be held responsible for the act of the Pullman conductor, and for that reason, if no other, the judgment of the court below should be affirmed. Having reached the conclusion that the relation of master and servant did not exist between appellee and the Pullman conductor in respect to the ejection of appellant from the train, the question whether or not said conductor, in ejecting appellant, was acting within the scope of his general authority, has been eliminated and need not be considered."

The court observed that, if mistaken in the foregoing views, and if it should be held that persons in charge of a sleeping car constituting a part of a railway company's train are the servants of such company in respect to their dealings with trespassers found on such car, then, under the evidence, it followed that the Pullman conductor who ejected appellant from the train was the joint agent of appellee and the Pullman Palace Car Company, and, upon that hypothesis, both companies would be jointly liable for the tort committed upon appellant, and the release of the Pullman Company would operate to release the appellee.

In *Williams v. Pullman Palace Car Co.* (1888) 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85, 8 Am. Neg. Cas. 302, it is stated that a railway company is responsible for injuries received by one of its passengers at the hands of a porter of a sleeping car forming part of the railway company's train, if it appears that said passenger was not a trespasser on the sleeping car. In this case the person sustaining injury at the hands of a Pullman car porter was held to be a passenger.

J. D. C.

UNITED STATES SUPREME COURT.

JOHN W. RAST, Tax Collector for Duval County, Florida, et al., Appts.,

v.

VAN DEMAN & LEWIS COMPANY et al.

(240 U. S. 342, 60 L. ed. 679, 36 Sup. Ct. Rep. 370.)

Injunction — state officers — civil or criminal proceedings.

1. The threatened enforcement by state

Note. — As to regulation and prohibition of use of trading stamps and similar devices, see annotation following this case, post, 433. 1.L.R.A.1917A.

officers through civil or criminal proceedings, of a state statute which is attacked as repugnant to the Federal Constitution, may be enjoined by a Federal court, where the statute, if exerted against complainants and their property, will produce irreparable injury.

For other cases, see Courts, IV. b; Injunction, I. i, in Dig. 1-52 N. 8.

Constitutional law — equal protection of the laws — classification — license tax.

2. There is such a difference between the selling of goods accompanied by coupons, profit sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, and the selling of goods with-

out such inducements to purchasers, that the imposition upon the former business of an additional license tax for each place in each and every county in which said business is conducted does not offend against the equal protection of the laws clause of the Federal Constitution.

For other cases, see Constitutional Law, IV. a, 5, a, in Dig. 1-52 N. S.

Commerce — state licenses — retail sales — redeemable coupons or certificates.

3. The delivery by a Florida merchant of coupons, profit-sharing certificates, or other evidence of indebtedness or liability redeemable in premiums, in connection with sales of merchandise at retail, is not interstate commerce so as to be protected against the imposition of a state license tax, although the coupons may have been inserted in the retail packages by the manufacturer or shipper outside the state, and are redeemable outside the state, either by such manufacturer or shipper, or by some other agency outside the state.

For other cases, see Commerce, IV. a. in Dig. 1-52 N. S.

Internal revenue — tobacco — redeemable coupons — state regulation of retail sales.

4. The permission, if any, granted by the amendment of the Act of July 1, 1902, § 2, to U. S. Rev. Stat. § 3394, to inclose in packages of tobacco redeemable coupons, profit-sharing certificates, etc., does not extend to retail sales of such packages within a state so as to invalidate state restrictions upon such sales.

For other cases, see Internal Revenue, in Dig. 1-52 N. S.

Constitutional law — impairing contract obligations — regulating retail sales with redeemable coupons.

5. Contract obligations are not unconstitutionally impaired by the imposition of an additional license fee upon merchants offering with merchandise bargained or sold coupons, profit-sharing certificates, or other evidence of indebtedness or liability redeemable in premiums, where the statute may be deemed to be prospective in its operation, and not to affect sales completed before its enactment.

For other cases, see Constitutional Law, IV. g, a, (1) in Dig. 1-52 N. S.

Same — due process of law — freedom of contract — license tax on sales accompanied by redeemable coupons.

6. Liberty to contract is not unconstitutionally infringed, contrary to the due process of law clause of the Federal Constitution, by a statute making merchants offering with merchandise bargained or sold any coupons, profit-sharing certificates, or other evidences of indebtedness or liability redeemable in premiums, liable to pay an additional license tax, which may be prohibitive, and, if the same are to be redeemed by someone else than the merchant offering

them, liable to pay a similar license fee for the one who is to redeem.

For other cases, see Constitutional Law, II. b, 4, b, and d, in Dig. 1-52 N. S.

Same — equal protection of the laws — excessive penalties.

7. The penalties of \$1,000 fine, or six months' imprisonment, for violations of a statute against the sale without payment of a specified license fee, of merchandise accompanied by coupons, profit-sharing certificates, or other evidences of indebtedness, or other liability redeemable in premiums, are not so severe as to intimidate against a contest of the validity of such statute, and thus deny the equal protection of the laws.

For other cases, see Constitutional Law, II. a, b, in Dig. 1-52 N. S.

(March 6, 1916.)

APPEAL by defendants from a decree of the District Court of the United States for the Southern District of Florida, granting an interlocutory injunction to restrain the threatened enforcement of a statute imposing a license fee on merchants using redeemable coupons, profit-sharing certificates, etc. Reversed.

Statement by Mr. Justice McKenna:

A statute of Florida passed in 1913, imposing licenses and other taxes, provides that merchants, druggists, and storekeepers shall pay a license tax upon the cash value of the "stock of merchandise" of \$3 for the first \$1,000 or fraction thereof, and \$1.50 for each additional \$1,000 or fraction thereof. The tax upon wholesale dealers is \$1.50 upon each \$1,000. The statute has this proviso:

Provided, further, That each and every person, firm or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a state license tax of five hundred (\$500) dollars and a county license tax of two hundred and fifty (\$250) dollars in each and every county in which said business is conducted or carried on, and if more than one place of such business shall be operated by any person, firm or corporation, a separate state and county license shall be taken out for each such place; and no person, firm or corporation shall offer with merchandise, bargained or sold as aforesaid, any coupon, profit-sharing certificate or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation than the one offering the same without paying the above license for each other person, firm or corporation who may redeem the same. The license pre-

scribed in this section shall be in addition to other licenses prescribed by this act. Any person violating any of the provisions of this section, whether acting for himself or as the agent of another, shall on conviction thereof be punished by fine not exceeding one thousand (\$1,000) dollars or by imprisonment in the county jail not exceeding six months.

"Mercantile agencies: Shall pay a license tax of one hundred (\$100) dollars in each county in which an office is established.

"Merchants using trading stamps, shall pay a license tax of two hundred and fifty (\$250) dollars for each place of business where they use such stamps.

"Merchant tailors shall pay a license tax of ten (\$10) dollars for each place of business."

This suit was instituted by appellees (Florida merchants) against appellant Rast as tax collector of Duval county, Florida, and the tax collectors of each county in the state, the different state's attorneys, county solicitors, and prosecuting attorneys of the circuits and counties of Florida. The purpose of the suit was to restrain those officers from proceeding under the statute or enforcing it. A preliminary and perpetual injunction was prayed, and that the act be declared unconstitutional, illegal and void.

The bill is very elaborate and we select from its repetitions and condense the following: It alleges the various businesses in which the complainants are engaged. The Van Deman & Lewis Company is a Florida corporation and a wholesale grocer, doing business as such and selling groceries in certain counties in the state; Harkisheimer Company is also a Florida corporation and is a retail grocer; J. S. Pinkusohn Cigar Company is a corporation organized under the laws of South Carolina and is a wholesale and retail merchant, buying and selling cigars and other tobacco products in the cities of Jacksonville and Pensacola, Florida. With these complainants were joined others, corporations and individuals, doing business in Florida.

It is alleged that complainants and each of them, in the conduct of their business, offer for sale and deal in various and numerous articles of merchandise manufactured and produced in other states than Florida by persons and corporations in those states and shipped into Florida to be sold therein, and who, for the purpose of advertising their businesses and increasing their sales, inclose in the packages in which the merchandise is put up for market and sale coupons, slips, certificates, and other profit-sharing discount or premium tokens. The L.R.A.1917A.

articles and the persons and companies producing them are enumerated.

The manner or method of disposing of and redeeming and taking up such coupons, etc., is alleged to be that the same are inclosed in packages or the wrappers thereof, or are a part of the wrappers, the packages are put into boxes, cases, or other receptacles or inclosures and shipped by the manufacturer or producer from his place of business outside of Florida to the merchants in Florida, generally to a wholesale merchant or jobber, and are received by such in Florida and sold to the retail merchants in that state. The retail merchant sells them to his customers. When the latter have accumulated a sufficient number of the coupons, etc., to entitle them to receive a premium or article or payment therefor according to some list, catalogue, or rule promulgated by the manufacturer, producer, or original shipper, they send such coupons, etc., to such manufacturer, producer, or original shipper, or, in some instances, to a company or agency in some state other than Florida, where they are redeemed or paid, or the articles which the purchasers have selected are sent to them in consideration of such coupons, etc., or for the same and a postage stamp or stamps, or a small sum of money in addition thereto. And this in accordance with the contract, agreement, or sale made to the purchasers by the manufacturer, shipper, or producer outside of the state. And it is alleged that the transactions so detailed, the manufacture without the state and shipment to wholesale merchants within the state, the sale by the latter to retail merchants, and by the latter again to customers, constitute interstate commerce.

That the form of the coupons, etc., varies, and when its identity is secured as prescribed it is evidence that each purchaser of a package has bought a definite part of some article, to be selected by him or her from a certain list, the list showing a number of valuable articles which can be paid for by a certain number of the tokens and a two-cent stamp.

In another case there is an accumulation of the tokens which are to be sent to the redemption or coupon agency or corporation and exchanged for a valuable article of merchandise to be selected by the purchaser from a list or catalogue furnished him.

Another form of coupons, etc., is where each of them is good for a certain value: for instance, one-half cent in presents or premiums, the coupons being sent from the state of Florida to another state. There are also other forms in which the coupons or tokens are to be redeemed, paid for, or

used in the purchase of other articles of merchandise or in the accumulation of premiums or the like. All of the articles are known and largely used as legitimate articles of commerce, and the transactions detailed are interstate commerce.

That divers forms of coupons, etc., in connection with the sale of merchandise, are used by the merchants of the state substantially in similar form mentioned above, and the payment or redemption is made by the Florida merchant in Florida, sometimes by the delivery of some valuable article of merchandise; sometimes by the payment of cash or the allowance of credit on account of purchases in the nature of a discount, or for or on account of a certain amount having been purchased of the merchant by the customer. The tokens are sometimes in the form of a cash register slip or memorandum.

That the methods detailed are a form of advertising and the use of such coupons, etc., induces purchasers to trade more largely with and to make more of their purchases from complainants on account of the additional inducement of such coupons, etc.; that they increase the businesses of complainants and their profits, and enable them to carry and sell stocks of goods covering the various articles of merchandise, and are of great importance and value to complainants in their several businesses; and if they are prevented from using them, their businesses will be decreased to the amount of many thousands of dollars.

That at the time of the passage of the statute, complainants had on hand large amounts and qualities of goods, and if they are prevented from selling them in the manner detailed they will be subjected to great loss and damage, will be embarrassed and injured in their businesses, and the value of their property destroyed or greatly lessened.

That the transactions and methods give an additional value to purchasers and they are substantially benefited thereby. That there is no element of gambling or chance in the transactions, and nothing in them or their methods prejudicial to the public health, safety, morals, or welfare.

That if there is a cessation of the transactions, purchasers and customers who have received tokens, but have not accumulated a sufficient number of them, will be unable to have the same redeemed or paid, or secure articles therewith. That about 500 merchants are similarly affected with complainants.

That certificates or tokens commonly called trading stamps, and so designated in the statute, are substantially like some of the tokens hereinbefore mentioned and L.R.A.1917A.

described, and when delivered by retail merchants with the various articles sold to purchasers, such purchasers are entitled to purchase or receive various valuable articles of merchandise, according to a list or catalogue, upon the presentation of the stamps to some person or company that has issued the trading stamps, and that redeems them according to the provisions of such list or catalogue.

That under the statute every person, firm, or corporation offering with merchandise any coupon, profit-sharing certificate, or other evidence of indebtedness or liability redeemable in premiums, is not only liable to pay the license tax for himself or itself, but to pay such tax for every other person, firm, or corporation who may redeem any such coupon, etc.

That such taxes are unreasonable, enormous, and prohibitive on account of the number of articles sold, and by reason of the provision requiring complainants and each and every other person in like situation to pay the license tax to the state, and it is alleged with much circumstance that, from their number and the number of the articles that each sells, each and every person would be required to pay for license tax to the state and for one county or one place of business alone \$15,000 per year, or one half that amount for six months or less time.

That as a result of the statute, if the tax be paid for only 100 persons, or persons, firms, or corporations, it would amount to \$75,000 per annum; if for 1,000 persons, or persons, firms, or corporations in Florida for one place of business, it would amount to \$750,000, and so on as to any number to be paid by and for each and every manufacturer, producer, or shipper.

That such coupons, etc., inclosed in packages of tobacco and so delivered, are authorized and rendered lawful by § 3394 of the Revised Statutes of the United States, as amended by § 10 of the act of July 24, 1897 [30 Stat. at L. 206, chap. 11], and by § 2 of the act of July 1, 1902 [32 Stat. at L. 715, chap. 1371, Comp. Stat. 1913, § 6204], of the statutes of the United States.

That the provision of § 35 (the provision quoted above) of the Florida statute and all provisions and enactments for its enforcement are in violation of the Constitution of the United States in that they violate (1) the commerce clause, (2) the due process clause of the 14th Amendment, and (3) the equal protection clause of that Amendment. There are many specifications of the particulars and it is alleged: (1) The statute discriminates between merchants in similar lines of business. (2) Between merchants who advertise in a cer-

tain manner and those who advertise in another manner. (3) The taxes are not upon the business or occupation of complainants, but upon the mere incidents of the business, and are an unreasonable and illegal interference with the method and manner of conducting the business. (4) The taxes are unreasonable, arbitrary, oppressive, discriminatory, and prohibitory for the reasons already detailed, and are far in excess of the amounts of taxes or licenses fixed or imposed when other methods of advertising or inducing custom are used, and will prevent complainants from carrying on their legitimate business. (5) They are not productive of revenue, are in excess of the profits of the businesses, and are in fact prohibitory. (6) That the methods employed by complainants in no wise affect the public health, morals, or welfare, and the imposition of the taxes is in no way a legitimate or lawful exercise of the police power of the state. (7) That the fines are so onerous, drastic, excessive, and enormous as to deter complainants in going on and doing business as they have heretofore done, and testing the validity of the statute in a court of law.

That by the statute and in § 50 thereof a violation of its provisions is made a misdemeanor, and it is provided in § 35 that, for failure to pay any of the license taxes, any person, whether acting for himself or as agent of another, may be imprisoned in the county jail, not exceeding six months.

It is further alleged that the statute impairs the obligations of the contracts entered into between complainants and their customers, in violation of clause 1, § 10, article I., of the Constitution of the United States.

That the officers of the state threaten to enforce the statute, and that the state's attorneys, county solicitors, and prosecuting attorneys of the several circuits and counties of the state are respectively empowered and authorized to prosecute in the several courts of the state, and such officers are threatening to prosecute divers of the complainants, and it is alleged that a multitude of prosecutions will be instituted, with seizures, sales, and injury to property, if a temporary restraining order be not granted. There is a prayer for such order and for a perpetual injunction.

A restraining order was issued. The defendants appeared specially and filed motions to dismiss the suit, and as grounds thereof denied the allegations and implications of the bill as to the various grounds of infringement of the Constitution of the United States charged against the statute, and set up that complainants had a complete and adequate remedy at law. That L.R.A.1917A.

the bill sought a restraint of the enforcement of a criminal statute of the state, and to enjoin an alleged threatened seizure of property in the enforcement of the alleged illegal tax, and the enforcement of the collection of a tax imposed by a statute of the state of a general and public nature.

A motion was made for an interlocutory injunction, hearing upon which was referred to three judges. Upon the hearing the injunction was ordered (214 Fed. 827), to review which this appeal has been prosecuted.

Mr. Thomas F. West, Attorney General of Florida, for appellants:

No ground for equitable interposition is shown to exist, as against the tax collectors

Florida Packing & Ice Co. v. Carney, 49 Fla. 293, 111 Am. St. Rep. 95, 38 So. 602, 51 Fla. 190, 41 So. 190; H. W. Metcalf Co. v. Martin, 54 Fla. 531, 127 Am. St. Rep. 149, 45 So. 463; Cruickshank v. Bidwell, 176 U. S. 73, 80, 44 L. ed. 377, 380, 20 Sup. Ct. Rep. 280; Cooley, Taxn. 3d ed. pp. 536, 1411, 1412; Shelton v. Platt, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; Allen v. Pullman's Palace Car Co. 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 99; Arkansas Bldg. & L. Asso. v. Madden, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119.

A statute may perform the double function of regulating the business under the police power, and of producing revenue, if authorized by the law of the state.

Harrison v. Kersey, 67 Fla. 24, 64 So. 353; Bradley v. Richmond, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; Gundling v. Chicago, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

A court of equity has no jurisdiction to restrain the prosecuting officers named, because any action taken by them, looking to the enforcement of the provisions of this statute, is a criminal proceeding, and to enjoin them is to enjoin the state from proceeding in its own courts.

Ex parte Nightingale, 12 Fla. 274; Re Sawyer, 124 U. S. 200, 211, 31 L. ed. 402, 406, 8 Sup. Ct. Rep. 482; Fitts v. McGhee, 172 U. S. 516, 531, 532, 43 L. ed. 535, 542, 543, 19 Sup. Ct. Rep. 269.

A part of the business conducted by the appellees being wholly intrastate, the enforcement of the statute cannot violate the commerce clause of the Federal Constitution.

Singer Sewing Mach. Co. v. Brickell, 233

U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493; *Browning v. Waycross*, 233 U. S. 16, 58 L. ed. 828, 34 Sup. Ct. Rep. 578; *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

The statute is not in contravention of the provisions of the 14th Amendment to the Federal Constitution.

State v. Pitney, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; *Lansburgh v. District of Columbia*, 11 App. D. C. 512; *Humes v. Ft. Smith*, 93 Fed. 857; *Wilder v. Quebec, Rap. Jud. Quebec*, 25 C. S. 128; *Otis v. Parker*, 187 U. S. 606, 609, 47 L. ed. 323, 327, 23 Sup. Ct. Rep. 168; *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, 57 L. ed. 164, 169, 33 Sup. Ct. Rep. 66; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 204, 205, 57 L. ed. 184, 188, 189, 33 Sup. Ct. Rep. 44.

There is a just basis for the classification made by this statute.

Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; *Lansburgh v. District of Columbia*, 11 App. D. C. 512; *Com. v. Reinecke* *Coal Min. Co.* 117 Ky. 885, 79 S. W. 287; *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Freund Pol. Power*, § 3; *McLean v. Arkansas*, 211 U. S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; *Bradley v. Richmond*, 227 U. S. 477, 57 L. ed. 603, 33 Sup. Ct. Rep. 318; *Ferguson v. McDonald*, 66 Fla. 496, 63 So. 915; *Afro-American Industrial & Ben. Asso. v. State*, 61 Fla. 85, 54 So. 383; *Peninsular Industrial Ins. Co. v. State*, 61 Fla. 376, 55 So. 398; *Peninsular Casualty Co. v. State*, 68 Fla. 411, 67 So. 165; *Pullman Co. v. Knott*, 235 U. S. 23, 59 L. ed. 105, 35 Sup. Ct. Rep. 2; *Citizens' Teleph. Co. v. Fuller*, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 106, 43 L. ed. 909, 913, 19 Sup. Ct. Rep. 609; *Quong Wing v. Kirkendall*, 223 U. S. 59, 56 L. ed. 350, 32 Sup. Ct. Rep. 192; *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; *Metropolis Theatre Co. v. Chicago*, 228 U. S. 61, 69, 70, 57 L. ed. 730, 733, 734, 33 Sup. Ct. Rep. 441; *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 729, 34 Sup. Ct. Rep. 364.
L.R.A.1917A.

Mr. Charles M. Cooper, for appellees:

The court below had jurisdiction of the subject-matter of the bill of complaint, of the parties, and to grant the relief prayed.

Little v. Tanner, 208 Fed. 605; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Western U. Telegr. Co. v. Andrews*, 216 U. S. 165, 167, 54 L. ed. 430, 431, 30 Sup. Ct. Rep. 286; *Ludwig v. Western U. Telegr. Co.* 216 U. S. 146, 152, 164, 54 L. ed. 423, 425, 430, 30 Sup. Ct. Rep. 280; *Dobbins v. Los Angeles*, 195 U. S. 223, 242, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; *Home Teleph. & Telegr. Co. v. Los Angeles*, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312; *Harrison v. St. Louis & S. F. R. Co.* 232 U. S. 318, 58 L. ed. 621, L.R.A. 1915F, 1187, 34 Sup. Ct. Rep. 333; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; *Mills v. Chicago*, 127 Fed. 732; *Raymond v. Chicago Union Traction Co.* 207 U. S. 20, 37, 38, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *Glucose Ref. Co. v. Chicago*, 138 Fed. 209; *Ozark-Bell Teleph. Co. v. Springfield*, 140 Fed. 666; *Hewin v. Atlanta*, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; *Bacon v. Rutland R. Co.* 232 U. S. 134, 138, 58 L. ed. 538, 539, 34 Sup. Ct. Rep. 283; *Ohio River & W. R. Co. v. Dittey*, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; *Fargo v. Hart*, 193 U. S. 490, 503, 48 L. ed. 761, 767, 24 Sup. Ct. Rep. 498; *Union P. R. Co. v. Cheyenne* (*Union P. R. Co. v. Ryan*) 113 U. S. 516, 526, 527, 28 L. ed. 1098, 1102, 5 Sup. Ct. Rep. 601; *Raymond v. Chicago Union Traction Co.* 207 U. S. 20, 37, 38, 52 L. ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Croom v. Pennington*, 59 Fla. 473, 52 So. 957; *Louisville & N. R. Co. v. Railroad Comrs.* (*Louisville & N. R. Co. v. Burr*) 63 Fla. 491, 502, 44 L.R.A.(N.S.) 189, 58 So. 543; *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 290, 291, 50 L. ed. 744, 760, 761, 26 Sup. Ct. Rep. 450; *San Francisco Gas & E. Co. v. San Francisco*, 189 Fed. 943; *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854; *Wilmington City R. Co. v. Taylor*, 198 Fed. 159; *Kankakee v. American Water Supply Co.* 118 C. C. A. 195, 199 Fed. 758; *Linton v. Denham*, 6 Fla. 533; *Carter v. Bennett*, 6 Fla. 214; *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597; *Holt v. Hillman-Sutherland Co.* 56 Fla. 801, 47 So. 934; *Carter v. Fortney*, 172 Fed. 722.

There is no just or reasonable classification upon which these license taxes are based.

Little v. Tanner, 208 Fed. 605; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150-159,

41 L. ed. 606-609, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 103, 104, 112, 113, 46 L. ed. 92, 106, 107, 109, 110, 22 Sup. Ct. Rep. 30; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Southern R. Co. v. Greene*, 216 U. S. 400, 412, 417, 418, 54 L. ed. 536, 539, 541, 542, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Seaboard Air Line R. Co. v. Simon*, 56 Fla. 545, 20 L.R.A.(N.S.) 126, 47 So. 1001, 16 Ann. Cas. 1234; *Jacksonville v. Ledwith*, 26 Fla. 165, 9 L.R.A. 69, 23 Am. St. Rep. 558, 7 So. 885.

Such pretended classification and such attempted license taxes on account of using coupons, certificates, or the like as made in this case, are unconstitutional and void.

Ex parte Hutchinson, 137 Fed. 950; *Humes v. Little Rock*, 138 Fed. 929; *Sperry & H. Co. v. Tacoma*, 190 Fed. 682; *O'Keeffe v. Somerville*, 190 Mass. 110, 112 Am. St. Rep. 316, 77 N. E. 457, 5 Ann. Cas. 684; *Opinion of Justices*, 207 Mass. 606, 94 N. E. 846; *Ex parte Drexel*, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; *People v. Gillson*, 100 N. Y. 380, 4 Am. St. Rep. 465, 17 N. E. 343; *Hewin v. Atlanta*, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 Ann. Cas. 296; *Montgomery v. Kelly*, 142 Ala. 552, 110 Am. St. Rep. 43, 38 So. 67; *Denver v. Frueauff*, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; *State v. Dalton*, 22 R. I. 77, 48 L.R.A. 776, 84 Am. St. Rep. 818, 46 Atl. 234; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; *State ex rel. Simpson v. Sperry & H. Co.* 110 Minn. 378, 30 L.R.A.(N.S.) 966, 126 N. W. 120; *Young v. Com.* 101 Va. 853, 45 S. E. 327; *Winston v. Beeson*, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N. Y. Supp. 497; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916; *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958, 6 Ann. Cas. 445; *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; *Long v. State*, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4.

The imposition of the license taxes is in no way a legitimate exercise of any police power of the state.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; *Dobbins v. Los Angeles*, 195 U. S. 224, 230, 49 L. ed. 169, 176, 25 Sup. Ct. Rep. 18; *Gulf, C. & S. F. R. Co. v. Ellis*, 105 U. S. 150-159, 41 L. ed. 666-669, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 103, 104, 112, 113, 46 L. ed. 92, 106, 107, 109, 110, 22 Sup. Ct. Rep. 30; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 L.R.A. 1917A.

Sup. Ct. Rep. 357; *Southern R. Co. v. Greene*, 216 U. S. 400, 412, 417, 418, 54 L. ed. 536, 539, 541, 542, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247.

The Florida statute violates the commerce clause of the Constitution of the United States.

Lottery Case (*Champion v. Amca*) 188 U. S. 321, 351, 354, 47 L. ed. 492, 499, 500, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; *Dozier v. Alabama*, 218 U. S. 124, 127, 128, 54 L. ed. 965-967, 28 L.R.A.(N.S.) 264, 30 Sup. Ct. Rep. 649; *Crenshaw v. Arkansas*, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. Rep. 294; *Stewart v. Michigan*, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476; *Caldwell v. North Carolina*, 187 U. S. 622, 631-633, 47 L. ed. 336, 341, 23 Sup. Ct. Rep. 229; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Brown v. Maryland*, 12 Wheat. 444, 6 L. ed. 687.

The equal protection of the laws, which, by the 14th Amendment, no estate can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 399, 38 L. ed. 1024, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

One man cannot be required to pay taxes for another, nor can his property be levied on or sold to enforce collection of taxes for another.

Brown v. Snell, 6 Fla. 741.

Fines so great and imprisonment so severe are fixed for nonpayment of such license taxes as to intimidate complainants from continuing to do business and testing the validity of such statute in a court of law, and therefore the provisions of the statute are unconstitutional.

Ex parte Young, 209 U. S. 123, 148, 52 L. ed. 714, 724, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 704; *Consolidated Gas Co. v. New York*, 157 Fed. 851.

The provisions of the statute amount to confiscation of the goods complainants have on hand with inserts of coupons, certificates, or the like.

People ex rel. McPike v. Van De Carr, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965; *People ex rel. Appel v. Zimmerman*, 102 App. Div. 103, 92 N. Y. Supp. 497.

Such license taxes, upon the face thereof, are so exorbitant, onerous, and unreasonable, as to be manifestly prohibitory and void.

Postal Tele. Cable Co. v. Taylor, 192 U. S. 64, 48 L. ed. 342, 24 Sup. Ct. Rep. 208; Humes v. Little Rock, 138 Fed. 929; Ex parte Hutchinson, 137 Fed. 949, 950.

The provisions of the statute are contrary to the provisions of the Constitution of the United States against impairing the obligation of contracts.

Humes v. Little Rock, 138 Fed. 929; Ex parte Drexel, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; Collins v. New Hampshire, 171 U. S. 30, 33, 43 L. ed. 60, 61, 18 Sup. Ct. Rep. 768.

In its virtual prohibition of tobacco-insert coupons, certificates, or the like, the Florida statute is contrary to the statutes of the United States which authorize such insertions.

McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Bettman v. Warwick, 47 C. C. A. 185, 108 Fed. 50; McCulloch v. Maryland, 4 Wheat. 436, 4 L. ed. 608.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

It was determined that the bill set forth grounds of equitable relief; that the condition of complainants' businesses and of the property engaged in them was such that the statute, if exerted against complainants and their property, would produce irreparable injury, citing *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498. We concur in this view.

Passing on the constitutional questions involved, the court was of opinion that the statute violated the 14th Amendment, and considered it unnecessary to decide whether there was an interference with interstate commerce.

It is not entirely clear upon that clause of the 14th Amendment the court rested its judgment. The equality clause was selected for special comment. After stating the limitation upon legislation and the power of classification, the court proceeds to say: "Is there a just basis for the classification attempted in this section [§ 35] of the act? Merchants, etc., all pay a tax according to the value of the stock carried by each, but if they sell goods for which coupons, etc., are given by themselves or others, then they must pay this additional tax for each place of business in each and every county in which said business is conducted or carried on. And if goods are offered for sale

with which coupons are given, redeemable by persons other than the seller, then this tax must be paid by him for each of said lines of goods.

"We can see no just basis for such classification. It is an arbitrary selection of one merchant for the imposition of a 'greater burden' than that imposed on others in the same calling and condition." [214 Fed. 833.]

But the court went farther and declared that "the use of coupons, etc., was an entirely legitimate method of advertising," and that such had been the ruling in state cases which were cited. And excluding the application of cases adduced by defendants to sustain the statute as an exercise of the police power of the state, the court said: "As before pointed out, this coupon business is legitimate, in no way affecting the health or morals of the community."

Though it is not clear, as we have said, certainly not explicit in the opinion of the court, whether it decided the due process clause as well as the equal protection clause of the 14th Amendment was violated by the statute, we may assume that the violation of both was decided. It may be that the court thought that even though the use of coupons was a legitimate method of advertising, and not affecting the health or morals of the community, it was nevertheless within the power of the state to license if the statute were free from discrimination, or it may be that the court considered that the two grounds interlocked and were dependent upon the same reasoning. However, the two grounds may be, indeed must be, taken into consideration, as they are submitted for decision.

The ground of discrimination, simply and separated from the other attacks upon the statute, does not present much difficulty. The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. Complainants are at pains to display it. The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 78, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Chicago, B. & Q. R. Co. v. McGuire*,

219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 413, 414, 58 L. ed. 1011, 1022, 1023, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; Price v. Illinois, 238 U. S. 440, 452, 59 L. ed. 1400, 1405, 35 Sup. Ct. Rep. 802.

It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. *Eubank v. Richmond*, 226 U. S. 137, 142, 57 L. ed. 156, 158, 42 L.R.A.(N.S.) 1123, 33 Sup. Ct. Rep. 70, Ann. Cas. 1914B, 192; *Sligh v. Kirkwood*, 237 U. S. 52, 59, 59 L. ed. 835, 837, 35 Sup. Ct. Rep. 501. And, we repeat, "it may make discriminations if founded on distinctions that we cannot pronounce unreasonable, and purely arbitrary." *Quong Wing v. Kirkendall*, 223 U. S. 59, 62, 56 L. ed. 350, 351, 32 Sup. Ct. Rep. 192, and the cases cited above.

Of course, an element to be considered is the authority of the legislature over the subject-matter, and this will best be examined in considering the contentions of complainants under the due process clause. Preceding that, however, are the contentions based on the commerce clause and the sanction which the Constitution gives to the integrity of contracts.

First, as pertinent to our discussion are the specific schemes at which, it is said, the statute is directed, and we adopt complainants' description of them. The first is "where the Florida merchant issues his own coupon, certificate, or cash register receipt, and himself makes payment or redemption of the same, sometimes by the delivery of some valuable article of merchandise, sometimes by the payment of cash or allowance of credit on account of purchases, being in the nature of a discount, or for or on account of a certain amount having been purchased of the merchant by the customer." In a word, it is a case where the Florida merchant issues his own coupons and redeems them.

The second is "where the manufacturer or shipper outside of the state of Florida, in some other state of the Union, inserts such coupons or certificates in packages of his goods which he ships to Florida, and the ultimate purchaser or consumer takes such coupons or certificates from such packages and returns them to such manufacturer or shipper in such state outside of Florida, who gives a premium for them and sends such premium or proceeds of redemption to such ultimate purchaser or consumer in Florida who has forwarded to him such coupons or certificates." The merchandise so shipped into Florida is kept in stock by the merchants of the state, L.R.A.1917A.

and the coupons, etc., are delivered upon the sale of the merchandise to their customers, who have them redeemed in the manner described. That is, the coupons are redeemed by the person who originally issues them; the coupons, however, to repeat, being delivered by the Florida merchant as a part of the transaction between him and the purchaser from him at retail.

The third is "where the manufacturer or shipper in a state other than Florida inserts in the packages of his goods which he ships to Florida such coupons or certificates which are taken from the packages by the ultimate purchaser or consumer in Florida and sent to some company or agency in some state of the United States outside of the state of Florida other than the manufacturer or shipper of the goods, to be redeemed or paid, and the premium or proceeds thereof is returned by such company or agency to the person in Florida who has sent such coupons or certificates." This differs from the other two cases in that a premium company or agency other than the manufacturer or shipper himself is used for the redemption or payment of the coupons or certificates. But here again the Florida merchant is a factor because it is in completion of the sale by him at retail that the coupons are delivered to the purchasers.

We are careful, by much repetition, to show the difference between the cases, to distinguish between the premium systems, and to show, as urged by counsel, that this case is not concerned with a license tax upon a trading stamp business pure and simple, a license upon companies engaged in such business being provided by another section of the statute.¹

It is well here to observe, to avoid misunderstanding, that the redemption in the first scheme is "*sometimes by the payment of cash or allowance of credit on account of purchases or for or on account of a certain amount having been purchased of the merchant by the customer.*" We are not concerned with a statute directed solely at such method of redemption or a business so confined. The Florida statute imposes its license tax on coupons, etc., "redeemable in premiums." And therefore, whether any other method of redemption—be it by giving a discount or an allowance of credit simply—would be amenable to objection, we express no opinion. In all of the schemes

¹ "Sec. 55. Trading stamp firms: Persons or firms or corporations known as trading stamp companies shall pay a state license tax of one thousand (\$1,000) dollars in each county where they transact any business."

other methods of redemption are used and are attempted to be justified.

With this comment we may say that all of the schemes have a common character,—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase,—something of value given other than it; and even as to the second and third schemes, the transactions are only executed through the purchase at retail. In other words, they are not designed for or executed through a sale of the original package of importation, but in the packages of retail and sale to the individual purchaser and consumer. This fixes their character as transactions within the state, and not as transactions in interstate commerce, and this is conceded as to the first scheme: it is true as to the second and third schemes. All of the schemes have their influence and effect within the state. Nor is such influence and effect changed or lessened by the redemption of the tokens outside of the state.

The transactions, therefore, are not in interstate commerce. The sales, as we have said, are not in the packages of that commerce; they are essentially local sales, schemes consummated by such sales, and it is upon them and on account of their effect that the statute has imposed its license tax, and not upon the shipment into the state nor their disposition in the packages of importation. Of course, there is shipment to Florida merchants, but for the disposition of the merchandise in retail trade. The schemes contemplate such disposition and are executed by it. Detach the importations from the retail sale, consider only the transportation to the state of merchandise in its original package, being sold therein in such package, and there may, indeed, be interstate commerce; but so detached and so considered the importations are left without purpose, the schemes without execution. Indeed, complainants contend for the right not only of importations in the original package containing the coupons, but the disposition of the goods and coupons through the retail merchant. This, we repeat, has no protection in the commerce clause.

Nor is the regulation of the statute prohibited by § 3394 of the Revised Statutes of the United States as amended in 1897 [30 Stat. at L. 206, chap. 11] and 1902 [32 Stat. at L. 715, chap. 1371, Comp. Stat. 1913, § 6204]. Section 3394 provides for a tax on cigars and cigarettes. By the amendment of 1897 it was forbidden to pack in, attach to, or connect with any package of tobacco or cigarettes anything but the wrappers, and it was further pro-

vided that there should not be affixed to, or branded, stamped, marked, written, or printed upon the packages or their contents any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward. This provision upset the practice of manufacturers, and was attacked on the ground that it was beyond the power of Congress under the Constitution to enact, the prohibited practice being a method of advertising. The provision was sustained. *Felsenheld v. United States*, 186 U. S. 126, 46 L. ed. 1085, 22 Sup. Ct. Rep. 740, affirming 103 Fed. 453. In 1902 the paragraph containing the provision was amended so as to forbid the inclosure or attachment to the packages of "any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in, or dependent upon the event of a lottery, nor any indecent or immoral picture, representation, print or words."

Let it be granted that this provision permitted the inclosure in the package of tobacco of tokens of the character with which this case is concerned. It goes no farther nor does it purport to go farther. It does not attempt to protect and enforce the permission to the retail sales of packages in the state. It might not legally have such effect if attempted; and such attempt will not lightly be inferred. *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784. The statute of Florida does not seek to control the interstate transportation of the packages; it controls only their sale in the state through the retail merchant, or, it may be, directly to the individual consumer for the purpose described, and in both cases for the ultimate redemption of the tokens delivered with the sale.

McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39, is not applicable. There Congress, for the effective execution of the food and drugs act, defined what the "package" of commerce should be, and necessarily any law which conflicted with it was void. In the case at bar there is no such definition. There is only permission to insert in the package whatever the manufacturer of tobacco may choose, with a single exception. There is no compulsion of use, and omission to avail of the permission has no effect upon the purpose of Congress in the enactment of the revenue laws which provide for the packing of tobacco products.

The contract clause of the Constitution is also unavailable to complainants. The statute must be held to have prospective

operation. Sales completed before its enactment are unaffected by it. We say "sales completed," and by this we mean those in which the right of redemption according to some of the schemes has accrued as distinguished from what is alleged in the bill as "the understanding and expectation" arising from one or more sales that complainants would continue to sell to such purchasers other articles so that they might be able to accumulate tokens and use them. It cannot be said that there is an obligation to continue sales or an obligation to continue purchases. Besides, as the business is subject to regulation, the contracts made in its conduct are subject to such regulation. *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265, and *New York C. & H. R. R. Co. v. Gray*, 230 U. S. 583, 60 L. ed. 451, 36 Sup. Ct. Rep. 176.

Having disposed of the other contentions of complainants, we are brought to a consideration of the question whether the statute of Florida offends the due process clause of the 14th Amendment of the Constitution. In other words, does the statute interfere with the business liberty of complainants? Is it an illegal meddling with a lawful calling and a deprivation of freedom of contract? This is the contention, and it is attempted to be supported by the assertion that the schemes detailed in the bill are but a method of advertising, and, as such, mere allurements to customers, not detrimental in any way to the public health and morals, nor obstructive of the public welfare; but are a means of enterprise, mere incidents of the businesses of complainants, and as beneficial to their customers as to them. And besides, that they are but a method of giving discount, practically in some instances a rebate upon the price, and in others an equivalent gift of some article that may attract the choice of the purchaser, the choice being free and the article of definite utility and value.

These contentions have the support of a number of cases. They are opposed by others, not merely so numerous as the supporting cases, but marking a change of opinion. Both sets of cases indicate by the statutes passed upon a persistent legislative effort against the schemes under review or some form of them, beginning in 1880 and repeated from time to time until the statute in controversy was passed in 1913.² In such differences between judicial and

legislative opinion where should the choice be? That necessarily depends upon what reasoning judicial opinion was based. We appreciate the seriousness of the situation. Regarding the number of the cases only, they constitute a body of authority from which there might well be hesitation to dissent except upon clear compulsion.

The foundation of all of them is that the schemes detailed are based on an inviolable right, that they are but the exercise of a personal liberty secured by the Constitution of the United States and distinguished from other lawful exercise of business contracts and activity by a method of advertising and lawful inducements to an increased custom, and that in them there is no element of chance or anything detrimental to the public welfare. But there may be partial or total dispute of the propositions. And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone, and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities. As to all of which not courts, but legislatures, may be the best judges, and, it may be, the conclusive judges.

This may be illustrated. A lottery of itself is not wrong, may be fairer, having less of overreaching in it, than many of the commercial transactions that the Constitution protects. All participants in it have an equal chance; there is no admonishing caveat of one against the other. And at one time it was lawful. It came to be condemned by experience of its evil influence and effects. It is trite to say that practices harmless of themselves may, from circumstances, become the source of evil or may have evil tendency. *Murphy v. California*, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A. (N.S.) 153, 32 Sup. Ct. Rep. 697.

But no refinement of reason is necessary to demonstrate the broad power of the legislature over the transactions of men. There are many lawful restrictions upon liberty of contract and business. It would be an endless task to cite cases in demonstration, and that the supplementing of the sale of one article by a token given and to be redeemed in some other article has accompaniments and effects beyond mere advertising the allegations of the bill and the argument of counsel establish. Advertising is merely identification and description, appraising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase. The matter is simple, single in purpose and motive; its consequences are well defined, there being

² It is said that twenty-three states have attempted either to prohibit or to license the selling or use of trading stamps and coupons. And there has been like legislation for the District of Columbia and the territory of Hawaii.
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nothing ulterior; it is the practice of old and familiar transactions and has sufficed for their success.

The schemes of complainants have no such directness and effect. They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a "lottery," may not be called "gaming;" it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry,—a matter of inquiry and of judgment that it is finally within the power of the legislature to make. Certainly in the first instance, and, as we have seen, its judgment is not impeached by urging against it a difference of opinion. *Chicago, B. & Q. R. Co. v. McGuire*, 210 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259, and *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612. And it is not required that we should be sure as to the precise reasons for such judgment, or that we should certainly know them or be convinced of the wisdom of the legislation. *Southwestern Oil Co. v. Texas*, 217 U. S. 114, 128, 127, 54 L. ed. 688, 694, 695, 30 Sup. Ct. Rep. 496. See also *Munn v. Illinois*, 94 U. S. 113, 132, 24 L. ed. 77, 86.

But it may be said that judicial opinion cannot be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*." *Otis v. Parker*, 187 U. S. 606, 608, 609, 47 L. ed. 323, 327, 328, 23 Sup. Ct. Rep. 108.

That case illustrated the reach of the power of government to protect or promote the general welfare. It sustained a provision of the Constitution of the state of California which made void all contracts L.R.A.1917A.

for the sale of the stock of corporations on margin or to be delivered at a future day. The practice had been common, its evil was disputed. It was attempted to be justified by argument very much like those advanced in the case at bar, but this court decided that the legislative judgment was controlling.

Even more pertinent in illustration of the power of the states as unaffected by the 14th Amendment is *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 57 L. ed. 164, 33 Sup. Ct. Rep. 66. A statute of the state was sustained which provided that anyone engaged in the manufacture, production, or distribution of any commodity in general use, who should intentionally, for the purpose of destroying the competition of any regular, established dealer, discriminate between different places by selling such commodity at a lower rate in one place than such person charged in another, after equalizing the distance from the point of production, should be guilty of a crime. Freedom of conduct was restricted by the statute, which had its incentive in trade advantages. It was the judgment of the legislature that such practice was an impediment to the public welfare. The legislative judgment was sustained against the attack, among others, that the law was an infringement of freedom of conduct and contract.

In *Keokee Consol. Coke Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288, 34 Sup. Ct. Rep. 856, the company issued scrip payable in merchandise only from its store as an advance of monthly wages in payment of labor performed. A statute of the state (West Virginia) prohibited the issue of any order for the payment of labor unless it was redeemable in money. The statute was assailed on the ground that it interfered with the freedom of contract. It will be observed that there was a consideration for the order payable in merchandise; it was a payment in advance, and hence it was asserted that the statute was an injury to the employees and employers. There were elements in the transactions of apparent advantage to both, and it would seem to have been within the liberty of both to contract upon an estimate of the value of that advantage. It was deemed an evil by the legislature and this court sustained its judgment.

In *Eric R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.(N.S.) 1097, 34 Sup. Ct. Rep. 761, a law of the state of New York required railroad companies to pay their employees semimonthly, and prohibited them from making contracts which should vary the time of payment. The law was sustained mainly upon the ground that it was an amendment of the

charter of the corporation, but the extent of the police power was adverted to and the competency of the legislature exercising that power to enact the legislation. The incentive of the legislation was the benefit which accrued to the employees by the period of payment. The public welfare was deemed to be promoted by it.

Other cases might be cited, and, it may be, of more pertinent application, which, from their number and instances, would seem to have uttered the last necessary word upon the power of the legislature to regulate conduct and contracts, and, in the exercise of the power, to classify objects, upon its conception of the public welfare, the right of review to be exerted by the courts only when the legislation is unreasonable or purely arbitrary.

Complainants allege that the license tax which the statute imposes is of prohibitory character, and assert that they are exercising inviolable rights and privileges which the excess of the tax prevents in violation of the 14th Amendment; they contend that hence the statute is invalid.

It is not certain from the allegations of the bill that the tax is of the asserted character, but granting it to be so, we have shown that the business schemes described in the bill are not protected from regula-

tion or prohibition by the Constitution of the United States. *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 409; *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; see also *Dobbins v. Los Angeles*, 195 U. S. 238, 49 L. ed. 176, 25 Sup. Ct. Rep. 18; *Murphy v. California*, 225 U. S. 623, 56 L. ed. 1229, 41 L.R.A.(N.S.) 153, 32 Sup. Ct. Rep. 697; *Postal Tele. Cable Co. v. Charleston*, 153 U. S. 699, 38 L. ed. 874, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Kehrer v. Stewart*, 197 U. S. 60, 49 L. ed. 663, 25 Sup. Ct. Rep. 403; *Hammond Packing Co. v. Montana*, 233 U. S. 331, 58 L. ed. 985, 34 Sup. Ct. Rep. 596.

The contention that the statute intimates against a contest of its legality by the severity of its penalties, and is therefore unconstitutional on that ground, within the ruling in *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, is not justified.

Order reversed and case remanded with directions to dismiss the bill.

Annotation—Regulation and prohibition of use of trading stamps and similar devices.

Earlier cases on the question of regulation and prohibition of the use of trading stamps are collected in notes to *Ex parte Drexel*, 2 L.R.A.(N.S.) 588; *Denver v. Frueauff*, 7 L.R.A.(N.S.) 1131; *District of Columbia v. Kraft*, 30 L.R.A.(N.S.) 957; and *State ex rel. Hartigan v. Sperry & H. Co.* 49 L.R.A.(N.S.) 1123.

The question of the validity of a license or tax solely on trading stamp companies, or other regulation thereof, is not exhaustively treated in the present or earlier notes on this question, although several cases involving that question are referred to.

As will be observed from a perusal of the present and earlier notes above cited, the question of the constitutionality of anti-trading-stamp legislation has been before many state and Federal courts; and, with the exception of the decisions by the Federal Supreme Court, the District of Columbia court of appeals and the Washington supreme court such legislation, at least, so far as it attempted to prohibit merchants from participating in a trading stamp scheme which did not involve the elements of chance or

uncertainty, has uniformly been held not to be a proper exercise of the police power, but an invasion of constitutional rights, especially those guaranteed by the 14th Amendment to the Constitution of the United States. The decisions by the Federal Supreme Court in *RAST v. VAN DEMAN & L. Co.* ante, 421, and in the other similar cases cited in the present note, appear to have established the validity of the class of anti-trading-stamp legislation therein considered, so far as the Federal Constitution is concerned. It is not apparent, however, that these decisions, apart from their prestige, will be controlling on the state courts in construing the provisions of the state Constitutions; or that state courts, especially those which have heretofore reached a different conclusion, will necessarily sustain anti-trading-stamp legislation which they might, were it not for the Federal Supreme Court decisions, regard as in violation of the state as well as of the Federal Constitutions.

The limitations of the decision in *RAST v. VAN DEMAN & L. Co.* should be recognized, in that the court express-

ly stated that it was not concerned with a license tax on trading stamp companies; also that it was not concerned with a statute directed solely at a method of redemption by the payment of cash or the allowance of credits on account of the purchase of a certain amount, the statute in question dealing with cases of redemption in premiums; and the court expressly stated that it expressed no opinion on whether any other method of redemption, such as the giving of a discount or an allowance simply of credit, would be objectionable. It should be observed also that the court considered the statute constitutional even though the license tax imposed might be of a prohibitory nature.

While the scheme of offering coupons, profit-sharing certificates, or other evidence of indebtedness or liability redeemable in premiums, in connection with a sale of merchandise at retail, considered in *RAST v. VAN DEMAN & L. Co.*, is somewhat different from the ordinary trading stamp scheme, its essentials, so far as legislative regulation or prohibition is concerned, appear to be the same; the same principles appear applicable in either case, and are apparently so regarded by the Federal Supreme Court in its decisions cited in this note.

Following *RAST v. VAN DEMAN & L. Co.* the Federal Supreme Court, in *Tanner v. Little* (1915) 240 U. S. 369, 60 L. ed. 691, 36 Sup. Ct. Rep. 379, reversing the decision of the Federal district court reported in (1913) 208 Fed. 605 (cited in the note in 49 L.R.A.(N.S.) 1123), held that the imposition under the Washington statute of an annual license tax of \$6,000 on merchants using stamps, tickets, or coupons redeemable in cash or merchandise, is not repugnant to the equal protection of the laws clause of the Federal Constitution, as an attempted arbitrary classification, whether such stamps are prepared or redeemed by the merchant using them or by a third party with whom the merchant has a contract for their use. It was held also that the police power of the state justified the enactment of a statute imposing such a license tax; and that the fact that the license tax imposed on merchants using stamps, tickets, or coupons, redeemable in cash or merchandise as an inducement to purchasers might be prohibitive was not a denial of due process of law.

It was held also in *Tanner v. Little* (U. S.) supra, that the statute did not unconstitutionally impair the contract obligations of merchants to whom it applied with their customers or with third

parties with whom they had contracted for the use of stamps or coupons.

The tax was held not invalid as applied to sales of packages of tobacco containing such coupons because of the permission, if any, granted by the amendment of the Act of July 1, 1902, § 2, to U. S. Rev. Stat. § 3394, Comp. Stat. 1913, § 6204, to inclose in packages of tobacco redeemable coupons, profit-sharing certificates, etc. *Tanner v. Little* (U. S.) supra.

And the lack of any definite or fixed retail market price for the premium articles, it was held, did not render invalid for indefiniteness and uncertainty the statutory provisions making the use of trading stamps or other devices enticing the holders to obtain goods for less than the retail market price a crime unless a prohibitive license fee was paid. (U. S.) Ibid.

The decision in *Tanner v. Little* (U. S.) supra, is based upon the reasoning in *RAST v. VAN DEMAN & L. Co.*; and the court in the former case, as in the latter, expressly stated that it was not concerned with consideration of a business in which coupons, etc., are issued or used, and not redeemed in merchandise; that is, where they are used as a rebate upon the price of the article, or a discount on purchases, nor with the legality of a statute which should regulate or prevent such use of the coupons, disassociated from other uses of them; the contention of the complainants being for the right to an unlimited use of what they comprehensively called the "premium system." And the court intimated that, considered purely as a method of advertising, the so-called "premium system" might, perhaps, form a sufficient ground for classification for purposes of the statute, it being said: "Let it be granted that the 'premium system' is a method of advertising; can there not be differences in advertising which may be subject to differences in legislation? Can there not be advertising at places or at times or in kind or effect subversive of public order or convenience? . . . However, a decisive answer to the questions need not be given, for we have said in *RAST v. VAN DEMAN & L. Co.* that the 'premium system' is not one of advertising merely. It has other, and, it may be, deleterious consequences."

The constitutionality of the Washington statute involved in *Tanner v. Little* (U. S.) supra, was upheld in *Pitney v. Washington* (1915) 240 U. S. 387, 60 L. ed. 703, 36 Sup. Ct. Rep. 385, affirming (1914) 80 Wash. 699, 141 Pac. 883,

the Federal Supreme Court following the two decisions by it, cited above.

The decision in the state court in *State v. Pitney* (Wash.) supra, followed an opinion of the court in an earlier appeal of the case in (1914) 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209. In the latter decision the supreme court of Washington expressly overruled its holding in *Leonard v. Bassindale* (1907) 46 Wash. 301, 89 Pac. 879 (set out in the note in 30 L.R.A.(N.S.) 957). In determining whether the statute, construed as prohibiting the use of trading stamps, violated the due process of law clause of the state or Federal Constitutions, the court said: "In determining the validity of the law, therefore, inquiry must be directed to whether its provisions come within the scope of the 'police power.' The early decisions define this power as extending to those regulations promulgated by or under the authority of the legislature which had for their object the promotion of the public health, the public morals, or the public safety. Without reviewing the evolution of the law upon this subject, as evidenced by the decisions of courts of last resort, it may be said that, whatever may be the limits by which the earlier decisions circumscribed the power, it has, in the more recent decisions, been defined to include all those regulations designed to promote the public convenience, the general welfare, the general prosperity, and extends to all great public needs, as well as regulations designed to promote the public health, the public morals, or the public safety.

. . . We think this act of the legislature falls within the scope of the police power as it is now understood and defined by the courts, and, therefore, the legislature did not exceed its power or offend against any constitutional provision, either state or Federal, in promulgating the regulations or prohibitions found in the act. This conclusion, it must be admitted, is not in harmony with the great weight of authority, numerically speaking. But many, if not most, of the decisions that have held trading stamp laws inimical to the due process of law clause found in the constitutions were decided when the police power was defined as having a more limited scope than it has at the present time."

In *Sperry & H. Co. v. Tacoma* (1912) 68 Wash. 254, L.R.A.1915B, 241, 122 Pac. 1060, it was held that an ordinance imposing a license tax upon the use in a business of trading stamps purchased

from another was not unconstitutional as to the latter, on the ground that it deprived him of his property without due process of law, impaired the obligation of his contract, or operated in restraint of trade. The court distinguished the case from *Leonard v. Bassindale* (Wash.) supra (cited in the note in 30 L.R.A.(N.S.) 957), on the ground that, in the latter case, the statute prohibited the use by merchants of trading stamps, whereas in the case before it the ordinance merely imposed a license tax.

The Oregon statute levying an excise tax of 5 per cent annually on the gross receipts of every person, firm, or corporation who shall use, or who shall furnish to any other person, firm, or corporation for use, in connection with the sale of any goods, wares, or merchandise in the state, any stamps, coupons, or tickets commonly known as trading stamps, was held unconstitutional in *Cottrell v. Sperry & H. Co.* (1915) 227 Fed. 256. The court said it was apparent that the tax levied was intended by the legislature to be of such proportions as to be inhibitive of the use of such trading stamps within the state; and the decision was based on the case of *Little v. Tanner* (1913) 208 Fed. 605 (cited in the note in 49 L.R.A.(N.S.) on page 1125, but now overruled, as above indicated).

In *United Cigar Stores Co. v. Stewart* (1916) 144 Ga. 724, 87 S. E. 1034, it was held that a statute imposing a tax upon every manufacturer of tobacco and every wholesale and retail dealer in tobacco, who redeems or offers to redeem, any tags or labels sold or given with a sale of tobacco, in the sum of \$200 for each place of business in the state where such tags or labels are redeemed, was void as in violation of a provision of the state Constitution that taxes shall be uniform upon the same class of subjects. Attention is called to the fact that this decision does not necessarily militate against the constitutionality of a statute imposing a tax on all merchants who use redeemable tags or certificates, and that, notwithstanding the validity of a statute of the latter class, a law of the kind in question might be held unconstitutional. The ground of the decision clearly appears from the following excerpt from the opinion: "In the present case the classification made in imposing the tax in question is unreasonable and arbitrary. Of course it was competent for the legislature, in framing its law for the collection of occupation or business taxes, to put tobacco deal-

ers in a class by themselves; and tobacco dealers might have been divided, without impinging upon the rule against arbitrary classification, into retail dealers and wholesale dealers, and there might have been subdivisions of these divisions, without necessarily making an arbitrary classification. But the tax under consideration is not imposed upon manufacturers and dealers in tobacco generally, or manufacturers and dealers in a specified kind of tobacco, but upon the manufacturer or dealer in tobacco who belongs to a class created by this section of the tax act; and the basis of classification here made is the redeeming or offering to redeem tags or labels sold or distributed or given with a tobacco sale, while other businesses or occupations, doing precisely the same thing for which the dealer in tobacco is taxed, are not taxed. A dealer in tobacco, as we have said, may be put into a class separate and apart from dealers in dry goods, or dealers in soda water, or dealers in hardware; the nature of the occupation of each of these affords a natural and reasonable basis for classification. But if each of the persons carrying on the business just enumerated issues and distributes and gives away, with the sales of goods carried in his particular line, tags, labels, or certificates, which the distributor of them offers to redeem, and a classification is made with respect merely to the giving away or distributing of these tags, labels, or certificates, and only one of such businesses is selected for taxation and put into a class by itself, and that class is taxed, then it seems to us that such a classification is unreasonable and arbitrary. If the tax were upon all merchants who give away redeemable tags, labels, or certificates, we might have to decide the question whether or not this would be taxing a mere incident to the business, in addition to taxing the occupation itself; and though that question is raised in the record, it is not necessary to decide it, inasmuch as we have held the tax to be void upon the ground that it is imposed upon a class arbitrarily created, without any reasonable basis therefor."

Attention is called below to several cases involving the validity of a license or tax on trading stamp companies, although, as indicated above, this question is not exhaustively treated.

As to the validity of a license tax on the business of selling trading stamps to merchants, and of redeeming such stamps in money or goods, see *Sperry & H. Co. v. Melton* (1911) 69 W. Va. 124, L.R.A.1917A.

34 L.R.A.(N.S.) 433, 71 S. E. 19; also *Sperry & H. Co. v. Owensboro* (1912) 151 Ky. 389, 151 S. W. 932, Ann. Cas. 1915A, 373, upholding the right of a municipality to impose a license tax on trading stamp companies, as against the objection that the tax constituted an illegal discrimination, but holding that the ordinance in question, levying a tax of \$300 on such companies, was, under the circumstances, void as unreasonable and prohibitive.

And in *State v. Underwood* (1916) — La. —, 71 So. 513, a statute imposing a license tax of from \$5,000 to \$10,000, depending on the gross annual receipts, on trading stamp companies, was held valid as against the contentions that it denied the equal protection of the law to such companies and deprived them of property without due process of law, within the meaning of the 14th Amendment to the Federal Constitution, that it constituted an unlawful regulation of interstate commerce (the stamps were issued in the state), and that it contravened a provision of the state Constitution, requiring equal and uniform taxation.

A municipal ordinance imposing a privilege tax of \$500 on trading stamp companies and \$250 on each merchant for engaging in the trading stamp business, and making the prosecution of such business without a license a misdemeanor, was held ultra vires and void in *Trading Stamp Co. v. Memphis* (1898) 101 Tenn. 181, 47 S. W. 136, the court taking the view that, independent of legislative authority, the municipality had no power to create new privileges and assess taxes for their exercise.

As to trading stamp contract as a monopoly, see note to *Merchants' Legal Stamp Co. v. Murphy*, L.R.A.1915D, 520. R. E. H.

WASHINGTON SUPREME COURT. (In Banc.)

STATE OF WASHINGTON EX REL.
WASHINGTON PAVING COMPANY

v.

C. W. CLAUSEN, State Auditor, et al.

(90 Wash. 450, 156 Pac. 554.)

Public Improvements — contract — secret advantage — effect.

1. That one submitting a bid for one of

Note. — As to validity of contract for material patented or held in monopoly where letting to the lowest bidder is required, see annotation following this case, post, 442.

several kinds of pavement to be used on a public highway has secured a secret, advantageous price from the owner of the patent does not render a contract let to him absolutely void.

For other cases, see Contracts, VII. b, in Dig. 1-52 N. S.

Estoppel — public contracts — secret advantage — payment of price.

2. The public, which, with knowledge that one securing a contract to lay one of several kinds of pavements upon a public highway, for which bids had been asked, and secured a secret price from the owner of the patent upon it, permits him to complete the work, is estopped to set up the invalidity of the contract to defeat liability for the contract price.

For other cases, see Estoppel, I. b, in Dig. 1-52 N. S.

(Morris, Ch. J., and Main, Fullerton, and Ellis, JJ., dissent.)

(April 1, 1916.)

PETITION for a writ of mandamus to compel defendants to pay, out of funds in the state treasury, to the credit of Pierce county, for a highway built under a contract let by said county. Writ issued.

The facts are stated in the opinion.

Messrs. Charles O. Bates. Hayden. Langhorne, & Metzger, William H. Pratt, and J. M. Head, for relator:

The contract, notwithstanding the fact that the state is a party thereto, is to be determined and adjudged by the same rules as if both parties were private persons.

State ex rel. Gillette v. Clausen, 44 Wash. 441, 87 Pac. 498; People v. Stephens, 71 N. Y. 527; Travis v. Ward, 2 Wash. 30, 25 Pac. 908; Spokane Street R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072; State ex rel. Maddaugh v. Ritter, 74 Wash. 650, 134 Pac. 492; Ettor v. Tacoma, 77 Wash. 275, 137 Pac. 820; Spokane v. Amsterdamsch Trustees Kantoor, 22 Wash. 172, 60 Pac. 141; Franklin County v. Carstens, 68 Wash. 181, 122 Pac. 099; State v. Pullman, 23 Wash. 583, 83 Am. St. Rep. 836, 63 Pac. 265; State v. Ort, 66 Wash. 130, 119 Pac. 21; State v. Heuston, 56 Wash. 268, 105 Pac. 474; State v. Hewitt Land Co. 74 Wash. 573, 134 Pac. 474; Hutchinson & S. R. Co. v. Kingman County (Hutchinson & S. R. Co. v. Fox), 48 Kan. 70, 15 L.R.A. 406, 30 Am. St. Rep. 273, 28 Pac. 1078; Muldoon v. Seattle City R. Co. 10 Wash. 311, 45 Am. St. Rep. 787, 38 Pac. 995; Commercial Electric Light & P. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592; Cerf, S. & Co. v. Wallace, 14 Wash. 249, 44 Pac. 264; 36 Cyc. 880; Patton v. Gilmer, 42 Ala. 548, 94 Am. Dec. 666; Indiana v. Milk, 11 Biss. 197, 11 Fed. 389; Huidekoper v. Douglass, L.R.A.1917A.

3 Cranch, 1, 2 L. ed. 347; Hall v. Wisconsin, 108 U. S. 5, 26 L. ed. 302; State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; Pinson v. Ivey, 1 Yerg. 339; Davis v. Gray, 16 Wall. 203, 21 L. ed. 447; Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760; Gray v. State, 72 Ind. 580; Shipley v. Terre Haute, 74 Ind. 300; Carr v. State, 127 Ind. 207, 11 L.R.A. 371, 22 Am. St. Rep. 624, 26 N. E. 778; Pugh v. Moore, 44 La. Ann. 209, 10 So. 710; Herwig v. Richardson, 44 La. Ann. 703, 11 So. 135; State ex rel. Hahn v. Young, 29 Minn. 474, 9 N. W. 737; State ex rel. State Sav. Bank v. Barrett, 25 Mont. 112, 63 Pac. 1030; Hall v. Wisconsin, 103 U. S. 5, 26 L. ed. 302; Randolph County v. Post, 98 U. S. 502, 23 L. ed. 957; Ft. Worth City Co. v. Smith Bridge Co. 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339.

Where a contract has been awarded for a public improvement the court will not interfere with its performance unless its illegality is clearly established.

Holly v. New York, 128 App. Div. 502, 112 N. Y. Supp. 797; Gage v. New York, 110 App. Div. 403, 97 N. Y. Supp. 157; Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; Ft. Worth City Co. v. Smith Bridge Co. 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339; Barber Asphalt Paving Co. v. Harrisburg, 29 L.R.A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 283; Searcy v. Yarnell, 47 Ark. 269, 1 S. W. 319; National Tube Works v. Chamberlain, 5 Dak. 54, 37 N. W. 761; East St. Louis v. East St. Louis Gaslight & Coke Co. 98 Ill. 428, 38 Am. Rep. 102; Indianapolis v. Indianapolis Gaslight & Coke Co. 66 Ind. 408; Schipper v. Aurora, 121 Ind. 154, 6 L.R.A. 319, 22 N. E. 879; Brown v. Atchison, 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 471; Hutchinson & S. R. Co. v. Kingman County (Hutchinson & S. R. Co. v. Fox) 48 Kan. 70, 15 L.R.A. 406, 30 Am. St. Rep. 273, 28 Pac. 1081; Columbus Waterworks Co. v. Columbus, 48 Kan. 99, 15 L.R.A. 360, 28 Pac. 1103; Brown v. Merrick County, 18 Neb. 355, 25 N. W. 360; Memphis Gaslight Co. v. Memphis, 93 Tenn. 618, 30 S. W. 27; London & N. Y. Land Co. v. Jellico, 103 Tenn. 322, 52 S. W. 995.

A contract cannot be held invalid because the public is the beneficiary of an agreement to reduce prices.

Stern v. Spokane, 60 Wash. 325, 111 Pac. 231; Ford v. Great Falls, 46 Mont. 292, 127 Pac. 1004.

When by statute contracts must be let to the lowest responsible bidder, such statute does not apply to contracts for patented articles, and no competition is necessary.

Re Eager, 46 N. Y. 100; Re Dugro, 50 N. Y. 513; Baird v. New York, 96 N. Y. 587; Warren Bros. Co. v. New York, 190

N. Y. 297, 83 N. E. 59; Union Pav. Co. v. Board of Contract & Supplies, 74 Misc. 646, 134 N. Y. Supp. 740; Silsby Mfg. Co. v. Allentown, 153 Pa. 319, 26 Atl. 646; Schuck v. Reading, 186 Pa. 248, 40 Atl. 310; Baltimore v. Flack, 104 Md. 107, 64 Atl. 702.

Such a statute does not prevent the use of a patented article when it appears that no other article of the kind is equally as good.

Barber Asphalt Paving Co. v. Hunt, 100 Mo. 22, 8 L.R.A. 110, 18 Am. St. Rep. 530, 13 S. W. 98; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Swift v. St. Louis, 180 Mo. 80, 79 S. W. 172; Saunders v. Iowa City, 134 Iowa, 132, 9 L.R.A. (N.S.) 392, 111 N. W. 529.

Competition required by the statute is provided when bids are called for, the law presuming that any article of commerce, whether patented or not, is for sale on the market at some reasonable price.

Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185; Atty. Gen. ex rel. Cook v. Detroit, 26 Mich. 263; Holmes v. Detroit, 120 Mich. 226, 45 L.R.A. 121, 77 Am. St. Rep. 587, 79 N. W. 200; Rhodes v. Board of Public Works, 10 Colo. App. 99, 49 Pac. 430; State v. Shawnee County, 57 Kan. 267, 45 Pac. 616; Yarnold v. Lawrence, 15 Kan. 126; Bunker v. Hutchinson, 74 Kan. 651, 87 Pac. 884; Field v. Barber Asphalt Pav. Co. 117 Fed. 925.

The competition required by statute is provided for where the patented article is placed in competition with some other article answering the same purpose.

Trapp v. Newport, 115 Ky. 840, 74 S. W. 1109; Campbell v. Southern Bitulithic Co. 32 Ky. L. Rep. 799, 106 S. W. 1189; Beazley v. Kennedy, — Tenn. —, 52 S. W. 791.

The competition required by the statute is provided for when the owner of the patented article offers to sell to any contractor who may bid upon the work as a whole at a fixed price, to be determined upon by the authority authorized to make the contract at the time bids are called for.

Tousey v. Indianapolis, 175 Ind. 295, 94 N. E. 225; Lacoste v. New Orleans, 119 La. 469, 44 So. 267; Reed v. Rockliff-Gibson Constr. Co. 25 Okla. 633, 138 Am. St. Rep. 937, 107 Pac. 168; Great Northern R. Co. v. Leavenworth, 81 Wash. 511, 142 Pac. 1155; Johns v. Pendleton, 66 Or. 182, 46 L.R.A. (N.S.) 990, 133 Pac. 817, 134 Pac. 312, Ann. Cas. 1915B. 454; Ford v. Great Falls, 46 Mont. 292, 127 Pac. 1004; Kilvington v. Superior, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; N. P. Perine Contracting & Paving Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533; Dillingham v. Spartanburg, 75 L.R.A. 1917A.

S. C. 549, 8 L.R.A. (N.S.) 412, 117 Am. St. Rep. 917, 56 S. E. 381, 9 Ann. Cas. 829; Elliott, Roads & Streets, §§ 710, 711, 712; 3 McQuillin Mun. Corp. §§ 1197, 1198, 1199.

There shall be competition where competition is possible.

Hobart v. Detroit, 17 Mich. 245, 97 Am. Dec. 185; Re Dugro, 50 N. Y. 513; Saunders v. Iowa City, 134 Iowa, 132, 9 L.R.A. (N.S.) 392, 111 N. W. 529; Great Northern R. Co. v. Leavenworth, 81 Wash. 522, 142 Pac. 1155; Johns v. Pendleton, 66 Or. 182, 46 L.R.A. (N.S.) 990, 134 Pac. 312, 133 Pac. 817, Ann. Cas. 1915B. 454; Walter A. Wood Mowing & Reaping Mach. Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A. (N.S.) 501, 55 S. E. 973, 9 Ann. Cas. 902.

Messrs. W. V. Tanner, Attorney General, Howard Waterman, Assistant Attorney General, John A. Shackelford, and Glenn Fairbrook, for defendants:

Because of the secret agreement which the relator had with Warren Brothers Company it was a party to a scheme to prevent competition, which rendered its contract void, and will prevent it from recovering on the contract.

Great Northern R. Co. v. Leavenworth, 81 Wash. 511, 142 Pac. 1155; Hobart v. Detroit, 17 Mich. 245, 97 Am. Dec. 185; Youmans v. Everett, 173 Mo. App. 671, 160 S. W. 274; Ford v. Great Falls, 46 Mont. 292, 127 Pac. 1004; Saunders v. Iowa City, 134 Iowa, 132, 9 L.R.A. (N.S.) 392, 111 N. W. 529; Temple v. Portland, 37 Or. 559, 151 Pac. 724; Kilvington v. Superior, 83 Wis. 222, 18 L.R.A. 45, 53 N. W. 487; McEwen v. Cœur D'Alene, 23 Idaho, 746, 132 Pac. 308; Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280, 7 Ann. Cas. 104; Pollock v. Kansas City, 87 Kan. 205, 42 L.R.A. (N.S.) 465, 123 Pac. 985; National Surety Co. v. Kansas City Hydraulic Press Brick Co. 73 Kan. 196, 84 Pac. 1034; Johnson v. Atlantic City, 82 N. J. L. 204, 81 Atl. 1105; Woodruff v. Welton, 70 Neb. 665, 97 N. W. 1037; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603; McMullan v. Hoffman, 174 U. S. 650, 43 L. ed. 1121, 19 Sup. Ct. Rep. 839.

Validity cannot be given to an illegal contract through any principle of estoppel.

Reed v. Johnson, 27 Wash. 42, 57 L.R.A. 404, 67 Pac. 381; Tate v. Commercial Bldg. Asso. 97 Va. 74, 55 L.R.A. 243, 75 Am. St. Rep. 770, 33 S. E. 382; Berka v. Woodward, 125 Cal. 119, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; Light v. Conover, 10 Okla. 732, 63 Pac. 966; Camp v. Bruce, 96 Va. 521, 43 L.R.A. 146, 70 Am. St. Rep. 873, 31 S. E. 901; Kelly v. Courter, 1 Okla. 277, 30 Pac. 372; Crichfield v. Bermudez Asphalt Paving Co. 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552.

Bausmau, J., delivered the opinion of the court:

This is an original proceeding in mandamus to compel payment for a highway built under a contract let by Pierce county pursuant to 3 Rem. & Bal. Code, §§ 5879-1 et seq. The plans and specifications, approved by the state highway commissioner, provided that the paving be one of twelve kinds, on all of which bids being called for, and various received, the relator became successful with one called bitulithic. Having long ago completed his work without payments, it alleges that the state highway commissioner actually though not formally accepted the work, has no just objections, and unreasonably withholds his certificate. Testimony on both sides is before us on an order of reference. The attorney general for the defendant officials urged fraud in the original bid and defects in the work.

As to the first: Even before the contract was executed one Warter, a taxpayer, commenced in Pierce county an action to enjoin the county commissioners from entering into it, alleging that the relator was getting it by fraudulently concealing a secret price from the patentees that gave him an advantage over other bidders. That action was dismissed without prejudice after a hearing.

Upon this dismissal the commissioners executed the contract, and the relator immediately went forward with it. Nevertheless, another taxpayer, one Reynolds, of Pierce county, brought, a month after Warter's dismissal, an action in Thurston county on similar allegations against this relator, the Pierce county commissioners, the state highway commissioner, and the state auditor, to prevent payment by the state. The highway commissioner and the auditor appearing through the attorney general, a preliminary injunction was granted, only to be soon rendered nugatory by this court in *State ex rel. Pierce County v. Superior Ct.* (1915) 86 Wash. 685, 151 Pac. 108, a proceeding in prohibition by the present relator. In that case we held that it was for the attorney general, and not for taxpayers, to enjoin misappropriations of state funds. In the argument here the attorney general, appearing only as *amicus curie*, asserted the right of the taxpayer to sue.

By the Warter suit alone the alleged fraud had been noised about before the contract was so much as let and the work begun; nor, under the statutory relations between the state and county officials in this work, can it be pretended that the former were less apprised than the latter. Before this work was begun, therefore, a taxpayer had failed, and the state had not used its opportunity, to prevent it. We have repeatedly held that, in its business relations

with individuals, the state must not expect more favorable treatment than is fair between men. *State ex rel. Gillette v. Clausen*, 44 Wash. 437, 441, 87 Pac. 498; *Spokane Street R. Co. v. Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *State ex rel. Mad-daugh v. Ritter*, 74 Wash. 649, 650, 134 Pac. 492; *Ettor v. Tacoma*, 77 Wash. 267, 275, 137 Pac. 820. The state, in its dealings with individuals, should be held to "resolute good faith." *Indiana v. Milk* (C. C.) 11 Biss. 197, 11 Fed. 389. We have not to do here with the question of limitation of actions, nor with laches, but with estoppel in pais; and, even where the government may not be barred by mere laches, it may be estopped in pais by such actions with individuals as make it a "question of honest dealing." Gilbert, Circuit Judge, in *United States v. Willamette Valley & C. M. Wagon-Road Co.* (C. C.) 54 Fed. 807, 811. Here we have the state in business relations. Would an individual be allowed to keep on receiving goods under a written contract in which, before any were delivered, he knew that he had been swindled in the price, and yet make no complaint until all were in his warehouse? This in effect is what the state is doing here. It daily received labor and materials from this contractor, waited until the work was completed, and then put itself in a position where, knowing the contractor cannot take out and sell these things again, it can dispute his claim. This is not a case of estoppel claimed by mere inaction of public officers. It is a case of their acting. Daily did those officials not only permit the delivery of labor and material on the public property, but see to it that it was laid to suit them. The state on its present argument was holding this contractor at a merciless disadvantage. By the agreement he was compelled to finish this work in a comparatively short time. Should he pause to see whether the state would attack the contract? He would then lose time which, if the state chose not to object, would be set up against him.

As in *Ettor v. Tacoma*, *supra*, we are of opinion that the state is estopped. But shall the contractor be relegated to quantum meruit or enjoy the contract itself? We sustain him in the latter. As for the fraud, it is not necessary in this case to pass upon that, or upon the status of a bid on patented process unaffected by waiver or estoppel. This contract was not void. Without reviewing a mass of authorities, often inharmonious and often perplexing through a loose application of the word "void" to acts not *ultra vires*, we are clear that this was only a voidable contract, subject to ratification. There was no such im-

pairment or exclusion of competition as to render this bargain absolutely void. To begin with, the board was competent to contract for this road. What it was buying was not something forbidden or outside of its powers. Now, no fraud being alleged against the board itself, we must assume that, when it invited bids for twelve kinds of pavement, one kind was as acceptable as another, and any might have been chosen. Competitive bidding there was. Nobody claims that the board was using the other eleven kinds as a blind, with secret arrangement to deal only on bitulithic. It was, then, honestly proceeding in the second step of competent authority. This is not a case of wholly leaving out an indispensable step or condition precedent, as in *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457, where the commissioners let a bridge contract without bid whatever. Between fraud in the call and fraud in the bid we must distinguish. The secret fraud of the bidder had not impaired the statutory machinery of contract, and his fraud, if any, was one which could be waived. When my vendor cheats me in the contract price or quality, I may waive that when I discover it and decide that the bargain is still a good one, accept or retain the goods, and ratify the thing. On such grounds contracts are merely voidable.

To hold this contract absolutely void, we should have to say so on the call itself, and pronounce the proceedings actually or substantially *ultra vires*. Is the including an invitation to one patented process to vitiate a call that includes fifty kinds not patented, because on the one competition is less free? In *Great Northern R. Co. v. Leavenworth*, 81 Wash. 511, 521, 142 Pac. 1155, we did not find it necessary to decide this, for there the patentee filed consent to make the process available to any successful bidder, and on the bare proposition there is great discord of authority. But whether or not a call on one alone is bad without the patentee's proffer, we are clear that, when the call in good faith includes other kinds, there is not that utter absence of legality which is called void. As a test, nobody would quickly say that the contractor here, after getting the award, could have repudiated it as binding on no one, *ultra vires*, and something on which his sureties would not have to respond. It would be going excessively far to say that this contract could not even be ratified by the state if actually a profitable one.

We do not say that to be void a contract must be either a forbidden one in terms, or one plainly beyond a public body's functions, for, even within its jurisdiction, it may leave out some step so plainly essential and

precedent to an exercise of its powers that one may say that the very persons who dealt with it knew that what they were doing was wrong. The exact line we do not purpose to draw. That is best left to instance and degree. It is enough to pronounce this contract at most but voidable.

As to the second ground, it is palpable from the record that the faults in the performance now discussed are so small as to be almost within the rule of *de minimis*. The state highway commissioner, for his part, gives no testimony against that performance. His first assistant is called instead. That officer admits that his superior had said that he had no objection to the work, which he would accept were it not for the pendency of the Thurston county injunction. Now that was soon held to be without jurisdiction. Nor can this assistant point out any defects that strike us as amounting to just complaints. He concedes, too, that to the county engineer had been left the inspection, and that that engineer was satisfied. No good reason does he give why the few things he points out to-day were not immediately complained of, that the relator might remedy them. Indeed, much that is now drawn into this controversy has to do with whether the original specifications were what they should have been,—a question surely settled by the parties in their contract.

In the most gigantic contracts between private parties the courts have never hesitated to say that the certificate of an architect or engineer was earned and would be considered as delivered when in truth it ought to have been delivered and was withheld with no good reason. There is no sound authority against applying that doctrine to municipal construction contracts. *Cook v. Harms*, 108 Ill. 151; *Slaughter v. State*, 132 Ind. 465, 31 N. E. 1112.

To conclude, in *State ex rel. Brown v. McQuade*, 36 Wash. 579, 583, 79 Pac. 270, we held that, mandamus being in this state a civil proceeding, if, from all the facts, it clearly appears that a relator would prevail in an ordinary suit after mandate to a public official, such as the highway commissioner, to act and either refuse or give his acceptance, this court would act directly upon the public official and require payment, rather than perhaps drive the relator to another suit that would be only a form, expensive to both parties, after acceptance refused upon mandate to act. In the present proceeding we are convinced that the relator's right to the highway commissioner's certificate is perfectly maintained, that he is entitled to it now, and to payment by the state in due course.

Let the writ issue requiring payment by

the respondent state auditor of whatever shall be found due upon this contract as one accepted and approved in all legal respects by the respondent highway commissioner.

Mount, Parker, and Holcomb, JJ., concur.

Chadwick, J., concurring:

It is within the powers of the public authorities to let contracts for public improvements. The contract let in this case was therefore voidable, and not void. The state, by its conduct, is estopped to deny the obligation of its contract after having notice of the things now set up against it.

I do not want to be understood as indorsing or giving a judicial approval to the manner in which the contract was let in this case. Had the case referred to as the "Warner Case" come to this court, I would have concurred in an opinion holding that the contract should not be entered into by the commissioners. Wherefore, upon the ground of estoppel, I concur in the opinion of the court.

Main, J., dissenting:

The basic error in the majority opinion is in the holding that the contract in question is voidable only, and not void. The statute, 3 Rem. & Bal. Code, § 5879-9, requires that such a contract shall be awarded to the "lowest responsible bidder," and saves the right to the board to reject any and all bids. A statute which requires that a contract shall be awarded to the "lowest responsible bidder" is equivalent in meaning to a statute which requires "competitive bidding." *Great Northern R. Co. v. Leavenworth*, 81 Wash. 511, 142 Pac. 1155.

Where a statute requires that contracts for public work shall be let upon competitive bidding, or to the lowest responsible bidder, any secret fraud practised on the part of the successful bidder or bidders which tends to avoid the competitive requirement of the statute renders the contract void, not voidable.

In 6 R. C. L. p. 813, it is said: "Though there are English and Canadian decisions to the contrary, the rule is settled in the United States that agreements which, in their necessary operation upon the action of contractors bidding for public work, tend to restrain the natural rivalry and competition of the parties, and thus produce a result disadvantageous to the public, are against public policy, and void."

See also 2 Dill. Mun. Corp. 5th ed. § 781; Editor's note to the case of *Citizens' Nat. Bank v. Mitchell*, 20 Ann. Cas. 386.

The facts that a good road may have been constructed under the contract in L.R.A.1917A.

question, and that the relator was the only person equipped to properly perform the contract, if such are the facts, have no bearing on the question. Contracts awarded in defiance of the statutory provision requiring competitive bidding are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of the contract, or the force of public policy which condemns them.

In *Conway v. Garden City Paving & Post Co.* 190 Ill. 89, 60 N. E. 82, it is said, speaking with reference to such contracts: "The test of illegality is not the result in a particular case, but the tendency of the contract if recognized as valid in the law."

In *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839, with reference to the same question, it was said: "Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of contracts of this description or the force of the public policy which condemns them."

The contract, being void, cannot be made the basis of an action. The contractor's only remedy is for the reasonable value of the work done and the materials furnished. In other words, the remedy is not upon the contract, but upon a quantum meruit. *Green v. Okanogan Co.* 60 Wash. 309, 111 Pac. 226, 114 Pac. 457.

In this case, in the proposal for bids, one kind of paving specified was "bitulithic surface material," which was a patented article. The specifications required the patentee to furnish this material to any successful bidder at a definite reasonable price per square yard. The patentee was required to file with the board what is known as a license agreement or statement that it would furnish such patented material to any successful bidder at the price named. This license agreement or statement was filed, and provided that the bitulithic surface paving mixture would be furnished to any contractor at 90 cents per square yard. The patentee at the time had a secret agreement with the relator, whereby it could acquire the bitulithic paving mixture at a cost to it of approximately 38 cents less per square yard than other contractors would be required to pay under the license agreement filed with the board. It requires no argument to show that, under the secret agreement with the patentee, the relator had a material and substantial advantage over any other contractor that might desire to bid upon that particular kind of paving.

The secret agreement which the relator had with the patentee was destructive of the competitive feature required by the statute, and rendered the contract awarded in pursuance thereof absolutely void.

The fact that a number of other kinds of pavement were called for in the proposal, and bid upon, does not alter the situation. The bitulithic pavement, being a patented article, may be used under a statute which requires competitive bidding, provided it can be acquired at a reasonable price, and is bid upon in such a way that it will be subject to the greatest amount of competition which is possible. This is the doctrine of the case of *Great Northern R. Co. v. Leavenworth*, 81 Wash. 511, 142 Pac. 1155. In that case it was held that the bid upon bitulithic paving, where the license agreement had been filed agreeing to furnish the article to any successful bidder at a reasonable price named, satisfied the statute as to the requirement for competitive bidding. But, so far as the record shows, at least, the successful bidder in that case did not have a secret agreement which provided for a price different or less than that specified in the license agreement filed, and to which all bidders had access.

In my opinion the method adopted to secure the contract in question was unfair to other bidders, injurious to the public, indefensible in morals, and renders the contract illegal and void in law. For the reasons stated, I am unable to concur in the majority opinion, and therefore dissent.

Morris, Ch. J., concurs with **Main, J.**

Fullerton, J., dissenting:

I concur with Judge Main in the conclusion that the contract between the county commissioners and the relator is void. But

if the rule be that the contract is voidable only, as held by the majority, I cannot concur in the conclusion that the state is estopped from questioning it. The facts showing the contract to be voidable developed upon the trial of the suits brought by the individuals to restrain the payments. This was the first knowledge the officers of the state had of the fraud, and from that time on they have acted consistently by refusing to recognize any right of the contractor to payment in virtue of the contract. In my opinion the majority are in error on each of the questions determined.

Ellis, J., dissenting:

An examination of the authorities cited by Judge Main convinces me that the contract here in question should be held void. The fact that it is not void as *ultra vires* of the state to make under any circumstances seems to me foreign to the issue. Neither was the contract involved in *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457. It is void for the same reason that the contract in the *Green Case* was void; namely, because there was no chance for real competitive bidding on the character of pavement for which the contract was let, and hence it contravened public policy as declared by our statute. But the state has received and retains the benefit of the work and material and should pay reasonable value therefor. In such a case, the doctrine of estoppel goes no further. On the authority of *Green v. Okanogan County*, supra, the contractor should be remitted to his recovery on a quantum meruit. This meets every consideration of "honest dealing" whether by men, municipalities, or the state. I concur with Judge Main.

Petition for rehearing denied.

Annotation—Validity of contract for material patented or held in monopoly where letting to the lowest bidder is required.

The question here raised is the subject of notes in 18 L.R.A. 45, 5 L.R.A.(N.S.) 680, and 46 L.R.A.(N.S.) 990, which are supplemented by the present note.

As pointed out in the note appended to *Johns v. Pendleton*, 46 L.R.A.(N.S.) 990, the weight of authority sustains the right to designate a patented material to be used for paving purposes if the specification is not to prevent competitive bidding, as required by statute. This is the doctrine of *Great Northern R. Co. v. Leavenworth* (1914) 81 Wash. 541, 42 Pac. 1155, declaring that where the owner of patented paving material stipulates with a city that material will be

furnished to the successful bidder without reservation, the city may contract for a street improvement which involves the use of a patented article notwithstanding the provision of the statute requiring competitive bidding as a prerequisite to such construction; and also of *Wurdeman v. Columbus* (1916) — **Neb.** —, 158 N. W. 924, declaring that where a patentee of paving material files an agreement to furnish the patented article to all bidders alike, its control by a monopoly is not prohibitive of competition as required by statute. In this case the agreement was to furnish the patented article at \$1.35 per cubic yard.

And it has been held that highway commissioners have a right to specify the material they desire to be used in repaving a highway, even though it can be furnished only by one party, provided it is readily obtainable in the market. *Mueller v. Boulevard Comrs.* (1915) 87 N. J. L. 702, 94 Atl. 84.

It is reasonably clear that a patented pavement may be required where the patentee permits all bidders to use the same upon reasonable terms and upon the same conditions. *Temple v. Portland* (1915) 77 Or. 559, 151 Pac. 724.

But where the patentee does not permit others to make use of the patented material, such material cannot be designated in exclusion of all other materials, thereby preventing all persons except the patentee from bidding for the work, and preventing the competition required by the statute. *Ibid.*

The right has been sustained to require the use of a patented pavement where the patentee permits the use of the patented article by the successful bidder at a compensation to him of \$50 per square yard, although this includes the use of certain machinery and the aid of skilled workmen furnished by the patentee. *Sherrett v. Portland* (1915)

75 Or. 449, 147 Pac. 382, following *Johns v. Pendleton* (1913) 66 Or. 182, 46 L.R.A.(N.S.) 990, 133 Pac. 817, 134 Pac. 312, Ann. Cas. 1915B, -454. And see *Meek v. Chillicothe* (1914) 181 Mo. App. 218, 167 S. W. 1139, sustaining the Missouri rule that the public authorities may require the use of a patented street paving material, or one held in monopoly, notwithstanding the statutory provision requiring competition in bidding, if, in their judgment, such material is of a quality justifying the discrimination.

So, where a certain patented pavement is designated as a top dressing, leaving the remainder of the work, the excavation, the foundation, the curbing, the gutters, catch basins, and lumber unrestricted, and the owner of the patented article offers for a fixed price to permit its use by a successful bidder, it has been held that a statute providing for competitive bidding, and prohibiting the designation of any particular style, make, or material of pavement, is not violated by such designation. *Whitmore, Rauber & Vicinus v. Edgerton* (1914) 87 Misc. 216, 149 N. Y. Supp. 508, affirmed in (1915) 167 App. Div. 960, 152 N. Y. Supp. 149. A. G. S.

WISCONSIN SUPREME COURT.

ERNST MERTON, Resp't.,
v.

GEORGE D. PUFFER, Ex'r., etc., of Timothy E. Ryan, Deceased, Appt.

(157 Wis. 576, 147 N. W. 993.)

Judgment — res judicata — effect as between attorneys.

1. A judgment in a proceeding to settle the estate of a deceased person, requiring attorneys to return fees paid them for services in the litigation, is not res judicata of the rights of the attorneys between themselves.

For other cases, see Judgment, II. c, 1, in Dig. 1-52 N. S.

Partnership — illegal fees — contribution to return.

2. A member of a partnership of attorneys who, by direction of court, returns a fee paid them for services in settling an estate, is not precluded from claiming contribution by his copartners by the fact that

Note.—As to accounting and contribution between members of partnership which is illegal or which has been engaged in illegal business, see annotation following this case, post, 446.
[L.R.A.1917A.

the settlement was held invalid under the will of testator, if they acted in good faith under a mistaken construction of the law.

For other cases, see Contribution and Indemnity, in Dig. 1-52 N. S.

Witness — transaction with person since deceased — settlement of partnership.

3. A member of a partnership is not incompetent to testify as to a settlement of the affairs with a member since deceased, if the settlement was effected by another member of the partnership.

For other cases, see Witnesses, I. c, in Dig. 1-52 N. S.

Executor and administrator — time for presenting claims — extension of time.

4. A claim of a member of a partnership of attorneys to contribution to the return of a fee illegally exacted accrues when judgment directing the return is entered, within the provisions of a statute requiring the presentation of claims against decedent's estates within the time fixed by order of court, but allowing additional time for claims which accrue or become absolute after the expiration of the time limited.

For other cases, see Executors and Administrators, IV. a, 2, in Dig. 1-52 N. S.

(June 17, 1914.)

APPEAL by the executor from a judgment of the Circuit Court for Waukesha County affirming a judgment of the County Court allowing a claim against the estate of Timothy E. Ryan, deceased. Affirmed.

Statement by Winslow, Ch. J.:

This is a claim for contribution brought by one partner against the estate of his deceased copartner. The essential facts were not disputed. Ryan, Merton, & Newbury were lawyers at Waukesha, and acted as attorneys for certain contestants in the matter of the will of the late John A. Rice; Mr. Ryan being actively in charge of the litigation. That gentleman devised and carried out an agreement by which the contest was settled, the will admitted to probate, and the estate distributed between all parties interested in a manner quite different from that provided by the will, and by which also the said firm was to receive \$7,500 for their services in the whole litigation. This agreement was given effect by both the county and circuit courts of Waukesha county, and \$5,000 was paid to the firm in August, 1907, and \$2,500 in December, 1908; each payment being distributed to the three partners in shares according to their rights in the partnership business. The firm was dissolved April 1, 1910, and a new partner, Mr. Jacobson, was taken in. Mr. Ryan died July 13, 1911. The Rice estate litigation came by appeal to this court and was decided October 12, 1912 (*Cowie v. Strohmeyer*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778), and it was held that the settlement agreement was invalid and that the sums received by the firm of Ryan, Merton, & Newbury under the agreement must be paid back to the trustee of the estate. This decision was followed by a judgment of the circuit court for Waukesha county, December 16, 1912, in accordance with its terms, and subsequently Mr. Merton, the claimant, paid to the trustee the sum of \$7,627.06, of which one half, i. e., \$3,813.53, was Mr. Ryan's share. On December 23d following, Mr. Merton presented his claim for the last-named sum against the estate of Mr. Ryan, although the time limited for presentation of claims against that estate had expired January 25, 1912. The claim was allowed in the county court and on appeal by the circuit court, and the executor appeals from such allowance.

Mr. Daniel H. Grady, for appellant:

The decision in *Cowie v. Strohmeyer*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778, was *res judicata*.

Lutien v. Kewaunee, 151 Wis. 607, 139 N. W. 312; *Strong v. Hooe*, 41 Wis. 659; L.R.A.1917A.

Ely v. Wilcox, 26 Wis. 91; *Wright v. Sperry*, 25 Wis. 617; *Rupiper v. Calloway*, 105 Wis. 4, 80 N. W. 916; *Adkins v. Loucks*, 107 Wis. 593, 83 N. W. 934; *Rice's Will*, 150 Wis. 480, 136 N. W. 956, 137 N. W. 778.

Claimant was not entitled to contribution from the estate of Timothy E. Ryan.

Blakely v. Smock, 96 Wis. 611, 71 N. W. 1052; 7 Am. & Eng. Enc. Law, 2d ed. 360; *Tolford v. Tolford*, 44 Wis. 547; *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; *Walton v. Miller*, 109 Va. 210, 132 Am. St. Rep. 915, 63 S. E. 458; *Union Stockyards Co. v. Chicago, B. & Q. R. Co.* 196 U. S. 217, 49 L. ed. 453, 25 Sup. Ct. Rep. 226, 2 Ann. Cas. 525, 17 Am. Neg. Rep. 760; *Atwater v. Manville*, 106 Wis. 64, 81 N. W. 985; *Central Trust & S. D. Co. v. Respass*, 112 Ky. 606, 56 L.R.A. 479, 99 Am. St. Rep. 317, 66 S. W. 421; *Bates, Partn.* § 121; *Todd v. Rafferty*, 30 N. J. Eq. 254; *Dunham v. Presby*, 120 Mass. 285; *Davis v. Gelhaus*, 44 Ohio St. 69, 4 N. E. 593; *Pennington v. Todd*, 47 N. J. Eq. 569, 11 L.R.A. 589, 24 Am. St. Rep. 419, 21 Atl. 297; *Gregory v. Wilson*, 36 N. J. L. 315, 13 Am. Rep. 448; *Smith v. Ayrault*, 71 Mich. 475, 1 L.R.A. 311, 39 N. W. 724; 1 *Lindley, Partn.* 377; *Flanagan v. Duncan*, 133 Pa. 373, 7 L.R.A. 412, 19 Atl. 405.

Messrs. George D. Van Dyke and M. A. Jacobson, for respondent:

Where, after dissolution, no partnership assets remaining, one partner has been compelled to pay out of his own funds a claim against the partnership, he is entitled to enforce contribution from his deceased copartner's estate without an accounting of the partnership affairs.

Wheeler v. Arnold, 30 Mich. 304; *Edwards v. Remington*, 51 Wis. 347, 8 N. W. 193; *Sullivan v. Sullivan*, 122 Wis. 326, 99 N. W. 1022; *Cookes v. Lymperis*, 178 Mich. 299, 144 N. W. 514; 30 *Cyc.* 692; 7 Am. & Eng. Enc. Law, 2d ed. 361; 15 Enc. Pl. & Pr. 1031; 2 *Bates, Partn.* § 865; *Shumaker, Partn.* 2d ed. 252; *Jackson v. Powell*, 110 Mo. App. 249, 84 S. W. 1132; 3 *Lewin, Tr.* § 347, p. 909, § 367, p. 910; 2 *Perry, Tr.* § 848; 3 *Pom. Eq. Jur.* § 1081; 6 *Pom. Eq. Jur.* § 916; *Baynard v. Woolley*, 20 Beav. 583, 52 Eng. Reprint, 729; *Payne v. Payne*, 120 Wis. 450, 109 N. W. 105.

Inasmuch as neither claimant Merton nor his partner, Ryan, was guilty of any wrongful intent, Merton is entitled to contribution from Ryan's estate.

2 *Lindley, Partn.* 770; *Story, Partn.* § 220; *Shumaker, Partn.* (1905) 2d ed. 161; 7 Am. & Eng. Enc. Law, 2d ed. 365; 25 *Harvard L. Rev.* 176; *Smith v. Ayrault*, 71 Mich. 475, 1 L.R.A. 311, 39 N. W. 724; *Edwards v. Zuck*, 171 Mich. 29, 136 N. W.

1122; *Bailey v. Bussing*, 28 Conn. 455; *Farwell v. Becker*, 129 Ill. 261, 6 L.R.A. 400, 16 Am. St. Rep. 267, 21 N. E. 792; *First Nat. Bank v. Avery Planter Co.* 69 Neb. 329, 111 Am. St. Rep. 541, 95 N. W. 622; *Torpy v. Johnson*, 43 Neb. 882, 62 N. W. 253; *Eaton & P. Co. v. Mississippi Valley Trust Co.* 123 Mo. App. 117, 100 S. W. 551; *Baynard v. Woolley*, 20 Beav. 583, 62 Eng. Reprint, 729; *Buskirk v. Sanders*, 70 W. Va. 363, 73 S. E. 937; 2 Pom. Eq. Jur. § 916.

The decision in *Cowie v. Strohmeier*, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778, is not res judicata.

Lindemann v. Rusk, 125 Wis. 210, 104 N. W. 119; *Wentworth v. Racine County*, 99 Wis. 26, 74 N. W. 551; *Rahr v. Wittmann*, 147 Wis. 203, 36 L.R.A.(N.S.) 392, 132 N. W. 1107.

Merton's claim for contribution against the Ryan estate is not barred by statute.

Logan v. Dixon, 73 Wis. 533, 41 N. W. 713; *Webster v. Lawson*, 73 Wis. 501, 41 N. W. 710; *Re Hanlin*, 133 Wis. 140, 17 L.R.A.(N.S.) 1180, 126 Am. St. Rep. 938, 113 N. W. 411; *Ernst v. Nau*, 68 Wis. 134, 23 N. W. 492; *Hardell v. Carroll*, 90 Wis. 350, 63 N. W. 275.

Winslow, Ch. J., delivered the opinion of the court:

The appellant claims that the judgment should be reversed because (1) The judgment in the case of *Cowie v. Strohmeier* is res judicata; (2) The parties were wrongdoers between whom there can be no contribution; (3) There was no competent proof of the settlement of the partnership affairs of Ryan, Merton, & Newbury; (4) The claim was barred because not filed within the time limited for general creditors to present claims against the estate.

I. The claim that the decision in the *Cowie Case* is res judicata as to the rights of the firm as between themselves is plainly untenable. No issue of this kind was raised or tried in that case, and, when it is claimed that the judgment in one case determines the rights of the parties in another case upon a different cause of action, it must appear that the questions were actually litigated and decided in the former case. *Rowell v. Smith*, 123 Wis. 510, 102 S. W. 1, 3 Ann. Cas. 773; *Rahr v. Wittmann*, 147 Wis. 195, 36 L.R.A.(N.S.) 392, 132 N. W. 1107.

II. The principle that there can be no contribution between wrongdoers is very familiar and is frequently applied. As between partners, however, the rule is subject to this important modification; viz., that a L.R.A.1917A.

claim for contribution will not be rejected unless the partnership is an illegal partnership, or unless the act relied on as the basis of the claim was not only illegal, but the illegality such that it must or ought to have been known to the partner seeking contribution to have been illegal when it was committed. 1 *Lindley, Partn.* 2d Am. ed. p. 378; *Story, Partnership*, 7th ed. § 220; *Shumaker, Partn.* pp. 249, 250.

In the present case, although this court held the settlement contract invalid, because the terms of a will could not thus be set aside, it did not hold that the firm of Ryan, Merton, & Newbury were conscious wrongdoers. They were acting honestly and in good faith, but under a mistaken conception of the law, and hence the right of contribution exists.

III. The proof of settlement of the partnership affairs was scanty, but sufficient. Mr. Merton was allowed (against objection for incompetency) to answer the direct question whether a settlement of the partnership affairs had been made. It is said that he was not competent to answer the question because his answer involved a personal transaction with a deceased person. This does not necessarily follow. It appears by other testimony in the case that Mr. Newbury was the bookkeeper and cashier of the firm; that he paid the bills and distributed the moneys received between the partners apparently with frequency. Evidently the partners intrusted the financial matters of the firm to his management implicitly, and received their shares from him as the business went along. There may easily have been settlements from time to time resulting simply from the acceptance by the partners without question of reports or statements submitted to them by Mr. Newbury. If it was desired to preserve the objection, counsel should have applied for leave to ask the witness whether the settlement was made personally with Mr. Ryan.

IV. It is true that § 3844, Statutes of Wisconsin, provides that every claim against an estate not presented for allowance within the time fixed by the order limiting the time for the presentation of claims shall be barred, but § 3860, Id. also provides that, if a claim shall accrue or become absolute at any time after the expiration of the limited time, it may be presented and proved at any time within one year after it accrues or becomes absolute. Mr. Merton's claim plainly comes within this class. He had no claim until he had paid the judgment in the *Cowie Case*, and this was long after the expiration of the time limited.

Judgment affirmed.

Annotation—Accounting and contribution between members of partnership which is illegal or which has been engaged in illegal business.

The present note is supplementary to the note to Fryer v. Harken, 23 L.R.A. (N. S.) 477.

As to right to invoke aid of court to determine rights to property accumulated in common by parties living in illicit relations, see note to Mitchell v. Fish, 36 L.R.A. (N.S.) 838.

General rule that courts will not consider illegal transactions.

Supplementing note in 23 L.R.A. (N.S.) 478.

As shown in the early note, the majority of the cases supports the rule that a court will not require an accounting of the affairs of an illegal partnership, or of the illegal transactions of a partnership, but will leave the parties in the same condition as it found them.

Thus, the surviving member of a partnership is not entitled to an accounting where the firm carried on its business of manufacturing and selling distilled spirituous liquors in violation of the state and Federal statutes, by failing to disclose the names of all persons interested in the business,—the business being carried on in the name of the decedent on account of the surviving partner's creditors,—since he must prove and rely upon the illegal contract to maintain his suit. *Vandergrift v. Vandergrift* (1910) 226 Pa. 254, 75 Atl. 365, 18 Ann. Cas. 404.

In *Kennedy v. Lonabaugh* (1911) 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133, it was held that persons who formed a partnership for the purpose of illegally acquiring public coal lands, and thereafter transferred the lands to a corporation, could not maintain an action for an accounting and a division of the proceeds realized from the transfer of the lands. The court said: "The great weight of authority condemns the doctrine of implied promise in the matter of the division of the profits of an illegal contract between the partners or joint contractors as a ground for equitable relief, and, this being a question of first impression, we are of the opinion that that doctrine ought not to find a foothold in this jurisdiction. It is a principle which controls courts of equity in the administration of justice, that he who seeks their aid must do so with clean hands,—that he cannot make his iniquitous act the basis of equitable relief. To decree a division of the profits of this contract would be in sub-

stance to enforce an illegal contract. *McMullen v. Hoffman*, supra. The lower court properly left the parties where they had placed themselves."

In *Davis v. Gelhaus* (1886) 44 Ohio St. 69, 4 N. E. 593, where a township treasurer, with the consent of his partner and in violation of a statute, mingled the public moneys with the partnership moneys, and afterward, under an agreement for dissolution, took charge of the assets for the purpose of discharging the partnership liabilities and dividing the surplus equally between the partners, and used the whole of the firm assets and part of his personal estate to return the public moneys to the township, it was held, in an action for contribution, that the court, finding the illegal transaction consummated, would not grant relief to either party against the other by way of contribution or otherwise, and that neither party had a right to recover a judgment against the other.

Exceptions where the illegal transactions are complete.

Supplementing note in 23 L.R.A. (N.S.) 479.

In *Martindale v. Shaha* (1915) — Okla. —, 151 Pac. 1019, it was held that an attorney could maintain an action against his associates for an accounting for fees received for securing a divorce for a client, who paid his associates a portion of the alimony awarded by the court, as she had contracted to do, since such action was not based upon the contract with the client, but was based upon an implied contract with the attorneys collecting the fees to account to him for his part; and it was no defense to such action to say that the contract under which the fees were collected was contrary to public policy and void. The court quoted with approval and followed the reasoning of the United States Supreme Court in *Planters' Bank v. Union Bank*, 16 Wall. (U. S.) 483, 21 L. ed. 473, which is set out in the note in 23 L.R.A. (N.S.) 480.

A partner cannot set up the liquor laws as a defense to an action for contribution, where the articles of partnership contemplated the sale of liquors, the stock on dissolution contained liquor, and the complainant was expressly authorized to pay bills covering intoxicating liquors. *McGunn v. Hanlin* (1874) 29 Mich. 476. The court said: "Although, for reasons of public policy,

the statute allows sales of liquor contrary to its provisions to be avoided, yet it does not go far enough to avoid all dealings not immediately between buyer and seller, or prevent such dealings from being included within grounds of estoppel and agency. Hanlin has no equities as against McGunn, and no legal defense whatever. He authorized him to pay money, which he has paid, and he cannot now recall the agency after the agent has performed his instructions. If the testimony were ever so clear, what debts were in whole or in part for liquor, Hanlin cannot now repudiate the payment so as to avoid refunding to McGunn."

A partner's right to an accounting is not defeated by the fact that he invested the money in the partnership for the fraudulent purpose of placing the money beyond the reach of his creditors. *Freidenbloom v. McAfee* (1914) — **Tex.** Civ. App. —, 167 S. W. 28. The court said: "In *Bates on Partnership*, vol. 1, p. 127, § 122, it is said: 'Where the business is legal, but the motives for forming the partnership are in fraud of the rights of others, and hence voidable as to them, the partners can be compelled to account to each other. As, where two persons form a firm for the purpose of hindering the creditors of one of them, this fact is no defense to a bill for settlement of the concern.' The principle as announced is applicable to the case at bar. The partnership, from the allegations of the petition, was entered into for the purpose of buying real estate in El Paso, improving, selling, and renting same, which was a legal business, and the fact that the money [was] invested by the appellant in said concern, under the authorities, would not be such a fraudulent purpose as to prevent a partition and an accounting. *Harvey v. Varney* (1867) 98 **Mass.** 118."

A partner's right to an accounting for profits realized in the sale of lands is not defeated by the fact that the partnership practised fraud in securing title to the land, where it does not appear that the partnership was entered into for any fraudulent or unlawful purpose. *Folsom v. Fernstrom* (1913) 43 **Utah**, 432, 134 Pac. 1021. The court said: "All that can be said is that the plaintiff and Fernstrom saw an opportunity of purchasing property which was regarded as having but little value, and which had been abandoned, the title clouded and uncertain, and of selling it, if they

could, at a profit. They, no doubt, purchased it upon the best possible terms; but in their dealings in such respect they dealt with those claiming an interest, not in any fiduciary or confidential relation, but at arm's length; and if in such dealings any unfair or undue advantage was had, it does not lie in the mouth of either of the defendants claiming to be members of the partnership to assert uncomplained-of grievances of the heirs in defense of a demand for an accounting and apportionment of partnership proceeds derived from partnership dealings and transactions."

Accounting at instance of innocent partner.

Supplementing note in 23 L.R.A. (N.S.) 486.

In *Spencer v. Barnes*, 25 **Cal. App.** 139, 142 Pac. 1088, it was held that an innocent member of a copartnership created for the purpose of selling mining claims was entitled to share in a profit which his copartner had realized by his misconduct in entering the employ of the purchaser. The court said: "While courts will not lend their aid to one who founds his cause upon a contract having for its purpose the doing of an illegal act, nevertheless, 'when the plaintiff is blameless, and the contract on which he stands is legal and moral, no court has ever permitted a defendant to escape responsibility because of his own misconduct.'"

In *Smith v. Ayrault* (1888) 71 **Mich.** 475, 1 L.R.A. 311, 39 N. W. 724, it was held that the claim of a partner to a contribution from his copartners cannot be defeated on the ground of illegality in the partnership transaction out of which the liability arose, unless the partnership is itself an illegal partnership, or unless the act forming the basis of the claim is not only illegal, but was committed by the partner asking contribution with knowledge or constructive notice of its illegality.

It was accordingly held in the above case that where a partnership, having unconsciously infringed a patent, was sued after the firm was wound up, and judgment recovered against some of the partners, who had notified the other partner, who was not served with process, to defend, the latter was liable to contribute in proportion to his interest in the firm, rather than in the proportion of one to the entire number of members of the firm.

In *Edwards v. Zuck* (1912) 171 **Mich.** 29, 136 N. W. 1122, it was held that a

partner who settled a claim for trespass committed by him in removing timber from land after it had been bid in by the state for delinquent taxes could charge the firm with the amount of the settlement, where he removed the timber in good faith, believing he could pay the delinquent taxes after, as well as before, cutting the timber. The court said: "In his accounting of the partnership dealings, the trial court charged defendant with one half of the amount paid by complainant to the state in settlement of the trespass. The defendant argues that this was improper, for the reason that the law does not enforce contribution between joint wrongdoers, that complainant had no title to the land, and therefore must have known that he was committing a trespass when he cut the timber. The complainant, on the other hand, protests that he cut the timber in good faith, believing he could

pay the delinquent taxes after, as well as before, cutting the timber, and that, when he learned otherwise, he settled with the trespass agent. It is the view of my associates that, as the amount paid the trespass agent was on account of a partnership matter, and the partnership fund was augmented by the fruits of the trespass, it will now be regarded as having been paid by complainant out of partnership funds."

In *Durant v. Rogers* (1877) 87 Ill. 508, it was held that a partner joining in signing an appeal bond, who was obliged to pay a judgment rendered against the managing partners for wrongfully taking the property of another, was entitled to contribution from the other members of the firm, whether they joined in the appeal or not, and that it was not necessary to prove a promise on the part of those not joining in the appeal. A. L. R.

MINNESOTA SUPREME COURT.

RE ESTATE OF CATHERINE MYLER,
Deceased.

W. D. KELLY, Exr., etc., of Catherine
Myler, Deceased, Appt.,
v.

DANIEL C. KENNEDY, Resp't.

(— Minn. —, 158 N. W. 395.)

Executor and administrator — duty to probate will.

The law does not cast upon the person nominated executor in a will the legal duty of procuring its probate, and such person, though acting in good faith, is not entitled to payment out of the fund for his services and expenses in an ultimately unsuccessful effort to probate the will against a contest by the heir upon the ground of want of testamentary capacity, though he is successful in the first instance in securing its allowance in the probate court.

For other cases, see Executors and Administrators, IV. c. 2, in Dig. 1-52 N. S.

(June 16, 1916.)

APPEAL by the executor of the will of Catherine Myler, deceased, from an order of the District Court for Ramsey County, denying his motion for a new trial in a proceeding for the allowance of his

Headnote by DIBELL, C.

Note.—The right of an executor to an allowance for attorneys' fees for services rendered in an attempt to establish or resist an attack upon a will is considered in the annotation following this case, post, 450. L.R.A.1917A.

account and for his discharge as executor. Affirmed.

The facts are stated in the opinion.

Mr. Thomas C. Daggett, for appellant:

One named as an executor in a will, and duly appointed as such by order of the probate court, has a right to incur expenses and attorneys' fees in defending the validity of such will, and judgments entered against such executor for costs in the various courts in which such litigation was conducted should be paid out of the estate which he represents.

Re *Hentges*, 86 Neb. 75, 26 L.R.A.(N.S.) 758, 124 N. W. 929; *Dodd v. Anderson*, 197 N. Y. 466, 27 L.R.A.(N.S.) 336, 90 N. E. 1137, 18 Ann. Cas. 738; 40 Cyc. pp. 1363, 1366, and notes.

In Minnesota, the statute gives the right to the executor to offer the will for probate, and he may appeal from an adverse decision.

Burmeister v. Gust, 117 Minn. 247, 135 N. W. 980.

By offering the will for probate, the executor accepted the trust. He therefore is entitled to, and has the right to, do what is necessary to see that the trust is carried out and the will established.

18 Cyc. 801.

Unless it is shown that the executor was guilty of wilful default, misconduct, or gross negligence in the management of his estate, he is entitled to his compensation.

Foster v. Gordon, 96 Minn. 142, 104 N. W. 765; *Telford v. Hendrickson*, 122 Minn. 531, 142 N. W. 200; *Brown's Will*, 32 Minn. 443, 21 N. W. 474; *Rong v. Haller*, 106

Minn. 457, 119 N. W. 405; Burmeister v. Gust, 117 Minn. 249, 135 N. W. 980; Wills v. Spraggins, 3 Gratt. 555; Shirley v. Healds, 34 N. H. 407; Empenger v. Fairley, 119 Minn. 180, 137 N. W. 1110; Watkins v. Bigelow, 96 Minn. 53, 104 N. W. 683.

Mr. Thomas F. Quinn also for appellant.

Messrs. Douglas, Kennedy, & Kennedy, for respondent:

A person named as executor in a will ultimately held invalid cannot recover from the estate the court expenses nor compensation for himself nor for his attorney in prosecuting an issue to establish it.

Andrews v. His Administrators, 7 Ohio St. 143; Kelly v. Davis, 37 Miss. 76; Brown v. Vinyard, 1 Bail. Eq. 461; Royer's Appeal, 13 Pa. 569; Mumper's Appeal, 3 Watts & S. 441; Shaw v. Moderwell, 104 Ill. 64; Moyer v. Swygart, 125 Ill. 262, 17 N. E. 450; Yerkes's Appeal, 99 Pa. 401; Re Soulard, 141 Mo. 642, 43 S. W. 617; Koppenhaffer v. Isaacs, 7 Watts, 170; Brown v. Eggleston, 53 Conn. 110, 2 Atl. 321; Re Hite, 155 Cal. 436, 21 L.R.A.(N.S.) 953, 101 Pac. 443, 17 Ann. Cas. 993; Re Smith, 165 Iowa, 614, 146 N. W. 836; St. James Orphan Asylum v. McDonald, 76 Neb. 630, 107 N. W. 979, 110 N. W. 626; McCormick v. Elsea, 107 Va. 472, 59 S. E. 411; Leavenworth v. Marshall, 19 Conn. 408; Skillman v. Lanehart, 73 N. J. Eq. 351, 67 Atl. 1034; Re Olmstead, 120 Cal. 447, 52 Pac. 804; Re Jackman, 26 Wis. 143; Page v. Williamson [1902] 87 L. T. N. S. 146, 18 Times L. R. 770; Re Blair, 49 App. Div. 417, 63 N. Y. Supp. 678; Dodd v. Anderson, 197 N. Y. 466, 27 L.R.A.(N.S.) 338, 90 N. E. 1137, 18 Ann. Cas. 738.

Dibell, C., filed the following opinion:

Appeal by W. D. Kelly, executor of the estate of Catherine Myler, from an order of the district court denying his motion for a new trial in a proceeding for the allowance of his account.

The appellant, Dr. Kelly, was named executor in the will of Catherine Myler. Mary Kennedy, an adopted daughter, was the sole heir. Katie Quirk, a niece, was the residuary devisee. The will gave \$25 to Mary Kennedy. There were no other bequests. Dr. Kelly presented the will for probate. Mary Kennedy contested upon the ground of want of testamentary capacity in the testatrix. The will was allowed in the probate court and the allowance was affirmed in the district court. On appeal there was a reversal. Kennedy v. Kelly, 119 Minn. 531, 137 N. W. 456. Upon the second trial the district court disallowed the will. Upon appeal there was an affirmation. Kennedy v. Kelly, 123 Minn. 259, 143 N. W. 726. The probate court allowed Dr. Kelly for his services and disbursements, including counsel

fees incurred in the various proceedings involved in the contest of the will. Upon appeal to the district court the claims of the executor for expenses, services, and counsel fees in connection with the contest were disallowed; but an allowance was made for services and expenses and attorneys' fees incurred in conserving the estate. Throughout Dr. Kelly acted in good faith.

Upon this appeal the question is this: Is the executor named in a will, who presents it for probate, and upon whose petition it is allowed in the probate court, it being finally disallowed on appeal, the heir contesting upon the ground of lack of testamentary capacity, entitled to payment out of the fund for services, expenses and counsel fees in his ultimately unsuccessful effort to procure probate?

The cases do not agree. In some instances a local statute or the general policy of the local law affects the result, and in others the nature of the proceeding by which the will is attacked. Sometimes a statute imposes upon the nominated executor the legal duty of procuring the probate, or the general law is construed to impose the duty. Such duty does not rest upon the executor in this state. Dr. Kelly was in possession of the will when the testatrix died. It was then his duty to deliver it to the probate court. Gen. Stat. 1913, § 7258; Rev. Laws 1905, § 3667. He owed no further affirmative legal duty. He could petition for probate, but the statute did not command him to do so. Gen. Stat. 1913, § 7266; Rev. Laws 1905, § 3675. Under the circumstances supposed, some cases take the view that the executor is not entitled to payment out of the fund. Andrews v. His Administrators, 7 Ohio St. 143; Kelly v. Davis, 37 Miss. 76; Shaw v. Moderwell, 104 Ill. 64; Re Soulard, 141 Mo. 642, 43 S. W. 617; Brown v. Eggleston, 53 Conn. 110, 2 Atl. 321. Others take the view that he is. Henderson v. Simmons, 33 Ala. 291, 70 Am. Dec. 590; Phillips v. Phillips, 81 Ky. 328; Lassiter v. Travis, 98 Tenn. 330, 39 S. W. 226; Hazard v. Engs, 14 R. I. 5. This seems to be the English doctrine. Boughton v. Knight, L. R. 3 Prob. & Div. 64, 42 L. J. Prob. N. S. 41, 28 L. T. N. S. 562. Still others hold that when the will is once allowed, the position of the executor as the legal representative under a probated will entitles him to payment out of the fund of his expenses in defending it against the attacks of contestants, though he would not have been entitled to payment had the will not been allowed in the first instance, and notwithstanding the will is disallowed in subsequent proceedings. Dodd v. Anderson, 197 N. Y. 466, 27 L.R.A.(N.S.) 338, 90

N. E. 1137, 18 Ann. Cas. 738, and cases cited; *Bratney v. Curry*, 33 Ind. 399; *Morere's Succession*, 117 La. Ann. 543, 42 So. 132; *Doan v. Herod*, 56 Ind. App. 663, 104 N. E. 385. In *Butler v. Bocock*, 160 Ill. App. 501, it is said that the executor must "defend the will in the first court where it is assailed, and he must defend the will until it is once adjudged that it is invalid." In a note to *Re Hentges*, 86 Neb. 75, 124 N. W. 929, in 26 L.R.A.(N.S.) 757, and in a note to *Dodd v. Anderson*, 197 N. Y. 466, 90 N. E. 1137, 27 L.R.A.(N.S.) 336, in 18 Ann. Cas. 738, the cases are collected and discussed. In both notes the annotators state that the majority rule favors the right of the executor, acting in good faith, to payment out of the fund for his expenses incurred in an unsuccessful effort to sustain the will. Additional cases illustrating applications of the different views are cited in 22 Century Dig. Exrs. & Adms. § 451; 9 Decm. Dig. Exrs. & Adms. § 111; 49 Century Dig. Wills, §§ 877-883; 20 Decm. Dig. Wills, §§ 404, 405. Each of the views is supported by well considered arguments.

The right to payment out of the fund is predicated largely upon the legal duty of the nominated executor to procure the probate of the will, or, in case of an appointed executor, upon his legal duty as the repre-

sentative, under an adjudicated will, to defend it. As before stated, in this state no legal duty rests upon the nominated executor to procure probate. Without entering upon a discussion of the cases, we adopt the view taken by the trial court that the executor ultimately unsuccessful, though he acts in good faith, is not entitled to payment out of the fund, and this notwithstanding the will was admitted to probate in the first instance. This view results in a rule working well in practice, and, on the whole, it is as just as any. It is more in harmony than a different one with the general policy of our law, which puts the burden of costs upon the losing litigant, and does not require the winning party to pay his own and his adversary's expenses. There is nothing opposed to this conclusion in *Rong v. Haller*, 106 Minn. 454, 119 N. W. 405, where it is held that a notice of appeal from the probate court may be served on the executor, or in *Burmeister v. Gust*, 117 Minn. 247, 135 N. W. 980, holding that an executor presenting a will for probate may appeal from an order denying it. Neither of them makes it the legal duty of the nominated executor to sustain the will, nor even indirectly involves the propriety of allowing him costs when unsuccessful.

Order affirmed.

Annotation—Right of executor to allowance for attorneys' fees for services rendered in attempt to establish or resist attack upon will.

This annotation supplements that to *Re Hentges*, 26 L.R.A.(N.S.) 757.

As indicated in the earlier annotation, some courts adopt the view that it is the duty of one named as executor to undertake the probate of the will, and hold that he is entitled to an allowance from the estate for attorneys' fees incurred in the performance of this duty, while others hold that no duty rests on one so nominated to procure the probate of the will, and that he is not entitled to counsel fees contracted by him for this purpose. Some of the cases take into consideration as an element the success or nonsuccess of the nominated executor in establishing the will, allowing attorneys' fees where the probate of the will is sustained, but denying them where it is held invalid. This element of success or nonsuccess would appear to be of importance in those jurisdictions where no duty is imposed upon the person named as executor to defend and uphold the will, since his attempt to sustain it under these circumstances is self-imposed, and in case he is unsuccessful, no authority is derived from the invalid L.R.A.1917A.

instrument, neither does any benefit accrue to the estate; while if he is successful, his authority to act as executor under the will is established, and those entitled to the estate under the will are benefited by his act in establishing the will, and should be charged with the attorneys' fees incurred by him. Where, however, it is held that the person nominated as executor owes a duty to defend and sustain the will, it would appear that his success or nonsuccess should have little bearing on his right to allowance for attorneys' fees contracted by him in good faith in the discharge of this duty.

The determination of the allowance of counsel fees to executors is, in some instances, governed by statutory provisions, and in others the allowance of the will to probate in the lower court is held to effect the right to recover attorneys' fees incurred in further attempts to sustain it. Good faith on the part of the one nominated executor is a prerequisite in all cases to his right to an allowance for such fees.

Rules in the different jurisdictions.

(Supplementing note in 26 L.R.A. (N.S.) p. 758.)

In a recent California case it was held that the test of an executor's right to have an allowance made for attorneys' fees incurred in his unsuccessful attempt to prevent the revocation of probate is whether he has acted in good faith. *Jones's Estate* (1913) 166 Cal. 147, 135 Pac. 293.

The court here took the view that it would be an abuse of discretion to hold that one named as executor had acted in good faith in seeking to establish a will which he, or those acting in his behalf, had by fraud and undue influence caused to be executed, and to allow him attorneys' fees contracted in attempting to sustain the will.

A statute in this case provided that if the probate was revoked, the costs should be paid by the one who resisted the revocation, or out of the estate, as the court should direct; and it was held that the discretion to allow costs could not properly be exercised until the final determination of the appeal by the person named as executor from the order revoking probate and denying a new trial.

And in *Re Berthol* (1912) 163 Cal. 343, 125 Pac. 750, it was held that, although the court could, under a statute giving it the right to allow expenses incurred in will contests out of the estate, when justice required, make an allowance to an unsuccessful proponent named as executor, yet no allowance could be made until the contest was finally determined on appeal.

Where, under a provision of the California Code, in order to warrant an allowance of attorneys' fees to an executor the litigation must have been such as was necessary for the executor to prosecute or defend, an executor is not entitled to an allowance of attorneys' fees incurred in sustaining the will where he was the only one beneficially interested in maintaining the will, since it was not necessary for him as executor to defend. *Re Higgins* (1910) 158 Cal. 355, 111 Pac. 8.

In a late Georgia case, *Davison v. Sibley* (1913) 140 Ga. 707, 79 S. E. 855, the court stated that, after the probate of a will in common form, that is, on the oath of one of the witnesses to the will, it would seem to be the executor's duty to offer the will for probate in solemn form when called upon to do so by heirs, and to press the probate in good faith; and that, as employment of

counsel was necessary to do this, it would be unjust to refuse to allow the executor his necessary counsel fees, even if he was unsuccessful; but further stated that if the will had not been admitted to probate in common form, and testamentary letters had not been granted, a strong argument might be made against the allowance of counsel fees to the executor for an unsuccessful attempt to probate the will. In this case, however, where the executor who had secured probate in common form had acted in bad faith in attempting to obtain probate, it was held that he was not entitled to an allowance for counsel fees incurred in unsuccessfully attempting to uphold the pretended will after heirs had required a probate in solemn form.

In an Illinois case it was held that an administrator with the will annexed succeeded to the duties of the executor, and that it was his duty as well as that of the executor to defend the will in the first court where it was assailed, and to defend it until it was once adjudged invalid; and that if he acted in good faith, and not from motives of personal interest, and was not chargeable with fraud, he was entitled to an allowance for counsel fees from the estate although the will was held invalid. *Butler v. Bocoek* (1911) 160 Ill. App. 501.

In a recent Indiana case, *Doan v. Herod* (1914) 56 Ind. App. 663, 104 N. E. 385, the view was taken that there was no obligation imposed by statute on one nominated as executor to defend the will, and where the person nominated as executor in that case had not qualified, and no letters testamentary were issued to him, he was held not to be the official representative of the estate, and an allowance from the estate for attorneys' fees for services rendered at his instance in an unsuccessful attempt to probate the will was refused, although he acted in good faith, the court holding that no benefit had inured to the beneficiaries from the services rendered. It was recognized that the powers of one named as an executor were greater at common law than under the Indiana statutes, and that a different conclusion had been reached where the executor's power was derived from the common law. This case was distinguished from *Fillinger v. Conley*, set out in the earlier annotation, on the ground that in that case the will was upheld and the services there inured to the benefit of the estate.

The rule was recently laid down in Iowa that one merely nominated executor in a paper purporting to be a will,

apart from statute owes no imperative duty to offer the will for probate, and that if he presents it for probate, he has two alternatives,—i. e., he may cast the burden of the contest upon those who are to be benefited by the probate, or may assume the burden himself; and if he does the latter, he must be deemed to have done so with knowledge that even a *de jure* executor cannot bind the estate by a contract of his own making, and that any liability which he incurs under such contract is his personal obligation until it has been allowed to him upon the judicial settlement of his accounts. *Re Smith* (1914) 165 *Iowa*, 614, 146 N. W. 836.

In the case just cited the court stated that the question of the right of one nominated as executor to an allowance for counsel fees incurred in an unsuccessful attempt to probate a will was not before them; but, in discussing the question in response to argument, said: "There is a sharp conflict in the authorities as to whether counsel fees for services rendered in undertaking to establish a will where the effort is unsuccessful may be allowed a person nominated in the will as executor. The decisions holding that such fees should be allowed proceed on the theory that one who, in good faith, offers for probate a paper purporting to be a will, acts for the benefit of the estate, and thereby becomes legally entitled to reimbursement of reasonable expenses necessarily incurred. *Lassiter v. Travis* (1897) 98 *Tenn.* 330, 39 S. W. 226; *Hazard v. Engs* (1882) 14 *B. I.* 5; *Henderson v. Simmons* (1858) 33 *Ala.* 291, 70 *Am. Dec.* 590; *Tuohy v. Hanlon* (1901) 18 *App. D. C.* 225. On the other hand, it is said that this theory is contrary to certain elementary principles underlying the administration of decedent's estates, which may be stated in the form of legal aphorisms: '(1) There can be no executor where there is no will. (2) Unless a will is admitted to probate, there can be no letters testamentary. (3) Until letters testamentary or of administration are issued upon the estate of a decedent, there is no legal representative of the estate. (4) Although a person is nominated as executor in a paper purporting to be a will, he is under no legal obligations to accept. As a will is the only source of an executor's power, the letters testamentary are the only evidence of his authority, it must follow that, when the former is never established and the latter are never issued, he who assumes to act as executor is

merely a volunteer, who has assumed the risk of having his acts repudiated by the courts of competent jurisdiction.' *Dodd v. Anderson* (1910) 197 N. Y. 466, 27 L.R.A.(N.S.) 336, 90 N. E. 1137, 18 *Ann. Cas.* 738; *Re Olmstead* (1898) 120 *Cal.* 447, 52 *Pac.* 804; *Re Hite* (1909) 155 *Cal.* 448, 101 *Pac.* 448; *Brown v. Eggleston* (1885) 53 *Conn.* 110, 2 *Atl.* 321; *Tilghman v. France* (1904) 99 *Md.* 611, 59 *Atl.* 277 (the rule there being different where the will has been proven and the executor resists the vacation of the admission to probate); *Andrews v. His Administrators* (1857) 7 *Ohio St.* 143; *Kelly v. Davis* (1859) 37 *Miss.* 76."

In the *Smith* case one named as executor presented the will for probate and employed counsel, and was joined by the devisee of the bulk of the estate, who was represented by the same counsel in successfully establishing the will. It was held that the devisee was the real party in interest, and that the attorneys' fees which had been paid by the executor might be deducted from the devisee's share.

Recently in Kentucky it has been held to be the duty of executors to use all legal and honorable means to sustain a will in all its parts, and that to this end they have authority to employ counsel and agree on the payment of reasonable counsel fees, and that their duties do not cease in the trial court where a part of the will is not sustained, but that it is their duty under such circumstances to prosecute an appeal, without regard to whom it may affect. *Baldwin v. Barber* (1912) 148 *Ky.* 370, 146 S. W. 1124, modified on other grounds in (1912) 151 *Ky.* 168, 151 S. W. 686, *Ann. Cas.* 1915A, 14.

In Louisiana it is the duty of one named as executor to probate the will, and he is entitled to an allowance for attorneys' fees incurred in attempting to uphold it, although it is finally held invalid. *Fenner v. McCan* (1897) 49 *La. Ann.* 600, 21 *So.* 768; *Girard v. Babinneau* (1866) 18 *La. Ann.* 603. And such allowance is, of course, proper where it is upheld. *Filhiol's Succession* (1909) 123 *La.* 498, 49 *So.* 138.

And where a will valid in form was presented for probate by the one named as executor, who was not a beneficiary, and duly proved and ordered to be executed, and was subsequently annulled on the ground of the testator's insanity, an allowance will be made for attorneys' fees incurred by the executor in defending the will, although he knew of the testator's mental condition, since he was

not the judge of his testamentary capacity, and it was his duty to present the will for probate. *Moreno's Succession* (1906) 117 La. 543, 42 So. 132.

And where an executor had secured the probate of a will and had defended an action by an alleged heir, attacking the validity of the will and demanding possession of the property, by asserting the validity of the will and alleging the illegitimacy of the contestant, he was held entitled to an allowance from the estate for attorneys' fees in upholding the validity of the will, but not for those incurred in litigating the contestant's legitimacy as an heir. *McNeely v. McNeely* (1898) 50 La. Ann. 823, 24 So. 338.

In *Girard v. Babineau* (La.) supra, it was held that the person named as executor was not entitled to attorneys' fees in attempting to uphold the will in a direct suit brought against him as a legatee by the heirs.

In *Re Quinn* (1914) 179 Mich. 61, 146 N. W. 297, pending the decision of a will contest, an attorney for the contestants petitioned for an allowance for attorneys' fees for counsel for contestants and also for those for the proponents, who it does not appear were executors. The decision depended upon the construction of a statute providing that in all cases that should be contested either in the probate or in the circuit court, such court might award costs to either party, in its discretion, it being contended that the word "costs" meant attorneys' fees, because there were no other statutory costs to be taxed in the probate court; but it was held that these courts were courts of record, and that, under certain other statutory provisions, fees of witnesses, etc., were provided for in courts of record, and that there were, therefore, costs properly taxable in probate courts, and that the word "costs" did not include attorneys' fees.

In Minnesota, in *RE MYLER*, ante, 448, the court took the view that there was no duty on the part of one nominated as executor to procure the probate of the supposed will, but that the only duty owed by him was performed by delivering it to the probate court; and accordingly refused the person so nominated an allowance for attorneys' fees incurred in an unsuccessful attempt to sustain the will, although he acted in good faith and was successful in the lower courts.

In New Jersey, under a statute providing that, if probate is refused, the court may order the costs and expenses L.R.A.1917A.

to be paid by the person or persons propounding the will, or out of the estate, the court may allow one named as executor counsel fees in the lower and appellate court, although he is unsuccessful in establishing the will. *Bioren v. Nesler* (1909) 76 N. J. Eq. 576, 74 Atl. 791, affirmed on other grounds in (1909) 77 N. J. Eq. 560, 78 Atl. 201.

In *Skillman v. Lanehart* (1907) 73 N. J. Eq. 351, 67 Atl. 1034, the court stated that, as the cause was one respecting the probate of a will, in which probate was refused, the lower court had power to order costs and expenses to be paid by the person propounding the will, or to be paid out of the estate, and refused to disturb an order denying the allowance of counsel fees to the unsuccessful proponents, who were named as executors and executrix in the alleged will.

In *Kayhart v. Whitehead* (1910) 77 N. J. Eq. 12, 76 Atl. 241, affirmed in (1911) 78 N. J. Eq. 580, 81 Atl. 1133, where the will which was established provided that if any of the devisees should file a caveat against the will, or aid or assist or attempt to prevent the proof of the will, all expenses of probating the will should be taken by the executor from the shares of those who filed such a caveat or attempted to prevent the proof of the will, this provision was held valid and applicable to legatees as well as devisees, and the executor was held entitled to deduct from the shares of the legatees who had attempted to prevent the probate of the will the attorneys' fees incurred during the contest.

In a late New York case, *Re Lester* (1916) 172 App. Div. 509, 158 N. Y. Supp. 763, the surrogate's court was held to have no jurisdiction to allow in the decree of probate attorneys' fees incurred by the executor in obtaining the probate of the contested will, but was held to have authority upon final accounting to make allowance for these fees and also those incurred in successfully defending an appeal which resulted in a settlement and judgment confirming the probate.

In *Re Waldron* (1911) 74 Misc. 310, 133 N. Y. Supp. 1104, under a statute providing that if an unsuccessful contestant is named as executor in a paper propounded by him in good faith as the last will of the decedent, he may, in the discretion of the surrogate, be awarded costs and all necessary disbursements and all expenses incurred in the attempt to sustain the will, it was held that an

executor who had propounded a will in good faith and secured its probate was entitled to expenses incurred in good faith in subsequently unsuccessfully contesting the probate of another instrument. This case was reversed in (1912) 152 App. Div. 909, 137 N. Y. Supp. 1147, upon a question of fact, with costs to the finally successful party, payable from the estate.

In *Re Fraser* (1914) 165 App. Div. 441, 150 N. Y. Supp. 774, where three persons named as executors of a will retained a firm of attorneys to present the will for probate, and were met by what appeared to be a serious opposition by the testator's widow, and one of the executors became dissatisfied with the manner in which the attorneys employed were carrying on the case, and, in good faith, employed another firm of attorneys, who co-operated with those first employed, and the will was finally admitted to probate without opposition, although the widow successfully resisted the issuance of letters testamentary to such executor in the surrogate court, but the issuance of such letters was allowed on appeal, the executor was held entitled to an allowance from the estate for fees paid the attorneys employed by him for assisting in the defense of the will, and also in securing the issuance of letters testamentary to him. The court said: "It is certainly the right, although perhaps not the absolute duty, of a person named in a will as executor, not only to present the will for probate, but also to insist upon the issue to himself of letters testamentary. In so doing he but carries out the expressed wish of the testator, and the legal expenses necessarily incurred in the performance of this right are a proper charge against the estate. The multiplication of attorneys is, of course, to be deprecated, and the better course undoubtedly is that all of the executors shall be represented by the same attorneys. But, when several persons have been named as executors, a certain degree of personal and individual responsibility rests upon each of them as to the manner in which any opposition to the probate of the will shall be met, and when one executor is honestly, not capriciously, dissatisfied with the method of defense adopted by the original attorney for the executors, we are not prepared to say that he may not employ an additional and independent attorney. Whether or not he shall be allowed the expense incurred in so doing must depend in each case upon his good faith, the reasonableness of his acts, and the benefits

accruing to the estate therefrom. In the present case every indication points to appellant's good faith, his action in retaining additional counsel seems to have been reasonable, and we have no doubt that, if the contest had been as bitterly carried on as there was every reason to suppose it would be, the services of the counsel retained by the appellant would have proved beneficial to the estate. As to the expense incurred in obtaining letters testamentary, that seems to be even more clearly a proper charge against the estate. Again, it tends to carry into effect the declared wish of the testator."

In *Senter v. Petheram* (1909) 64 Misc. 294, 118 N. Y. Supp. 347, it was held that it was the duty of an executor to defend an action to set aside the probate of the will, and that his reasonable attorneys' fees in successfully defending such action were allowable out of the estate on accounting, whether an allowance was made in the action attacking the will or not.

In *Re Ullman* (1909) 31 Ohio C. C. 370, an executor who was practically a trustee, and clothed with extraordinary powers in addition to the ordinary duties of executor, was held to have the right to defend an attack on the will, and, where it was sustained, was held entitled to an allowance out of the estate for reasonable counsel fees.

In a late Tennessee case, *Smith v. Haire* (1915) 133 Tenn. 343, 181 S. W. 161, it was held that an executor who, in good faith, propounds a will for probate, is entitled to his attorneys' fees whether the will is set aside or not. In that case, however, it was held that it could not be said that a beneficiary of a will procured by the fraud and undue influence of her relatives, with whose acts she was chargeable, acted in good faith in attempting, as executrix, to have the will probated, and that she should not be allowed attorneys' fees incurred in a contest in which the will was held invalid.

In Rhode Island, under a statute providing that an executor shall lodge the will for probate and record, it is his duty to do what is reasonable to establish it, and, on an appeal by the contestants from a decree admitting the will to probate, he is, when acting in good faith, entitled to his reasonable expenses in prosecuting the probate, such expenses being "necessary expenses incident to administration," for which allowance is provided by statute. *Hazard v. Engs* (1882) 14 R. I. 5. J. T. W.

MISSOURI SUPREME COURT.
(Division No. 2.)

CHARLES E. ZINN et al., Respts.,
v.

BALTHAZAR SIDLER et al., Appts.

(— Mo. —, 187 S. W. 1172.)

Covenant — restrictive — lines marked on plat.

Restrictive covenants as to building lines cannot be imposed upon lots by tracing and marking such lines on a recorded plat, if the lines are not referred to in the deeds of conveyance or the acknowledgment to the plat.

For other cases, see Covenants and Conditions, II. d, in Dig. 1-52 N. S.

(July 5, 1916.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County in plaintiffs' favor in an action brought to enjoin defendants from erecting a building on a certain lot. Reversed.

The facts are stated in the opinion.

Messrs. Cook & Gossett, Beardsley & Beardsley, and Stubenrauch & Hartz, for appellants:

The mere designation upon the plat of a subdivision of land, or addition, whether within or without a city, of a plain line or lines, and writing on the plat near or along such line or lines the words "building line," are too indefinite and indeterminate, and are not a sufficient expression of a positive and perpetual restriction upon the use of the land, to be binding as a restriction of the ordinary and usual exercise of ownership and enjoyment of land.

Kitchen v. Hawley, 150 Mo. App. 497, 131 S. W. 142; Scharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668; Test Oil Co. v. La Tourette, 19 Okla. 214, 91 Pac. 1025; McMurtry v. Phillips Invest. Co. 103 Ky. 308, 40 L.R.A. 489, 45 S. W. 96; Reformed Protestant Dutch Church v. Madison Ave. Bldg. Co. 214 N. Y. 268, L.R.A.1915F, 651, 108 N. E. 444; Van Duyn v. H. S. Chase & Co. 149 Iowa, 222, 128 N. W. 300; Jones v. Williams, 56 Wash. 588, 106 Pac. 166; Johnson v. Shelter Island Grove & Camp Meeting Asso. 122 N. Y. 330, 25 N. E. 484.

The mere drawing of a line or lines upon a plat subdividing lands, and writing on or near such line or lines the words "building line," may be taken as a suggestion or recommendation of a plan of improvement by the person so subdividing the land, and, he being otherwise silent as to his inten-

tion, it is unreasonable to suppose that he ever intended the binding perpetual restriction on use and enjoyment of the land enforced by this decree.

King v. St. Louis Union Trust Co. 226 Mo. 351, 126 S. W. 415; Duncan v. Central Pass. R. Co. 85 Ky. 525, 4 S. W. 228; Brown v. Wrightman, 5 Cal. App. 301, 90 Pac. 467.

If a building restriction in the nature of a plan of improvement is disregarded, or suffered to be disregarded, to a substantial extent, by the grantor, originator of the same, or those thereafter claiming under him, it is an abandonment of or such inconsistency concerning the same that owners of other lands are not bound by such restriction.

Compton-Hill Improv. Co. v. Towers, 158 Mo. 282, 59 S. W. 239, 192 Mo. 379, 91 S. W. 104; Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808; Hawes v. Favor, 161 Ill. 440, 43 N. E. 1076; Duncan v. Central Pass. R. Co. and Brown v. Wrightman, *supra*.

The act of plaintiffs in specifically providing in the deed made at their instance a different restriction as to this "building line" than the one now contended for is conclusive against the decree in this case.

Compton-Hill Improv. Co. v. Towers, *supra*; Scharer v. Pantler, 127 Mo. App. 433, 105 S. W. 668; 2 High, Inj. 4th ed. § 1159; Ogontz Land & Improv. Co. v. Johnson, 168 Pa. 178, 31 Atl. 1008; Bag-nall v. Davies, 140 Mass. 76, 2 N. E. 786; Sanborn v. Rice, 129 Mass. 337; Linzee v. Mixer, 101 Mass. 512; Atty. Gen. v. Algonquin Club, 153 Mass. 447, 11 L.R.A. 500, 27 N. E. 2; Reardon v. Murphy, 163 Mass. 501, 40 N. E. 854.

Messrs. Smart & Strother, Fyke & Snider, and E. E. Steele, for respondents:

The deeds under which defendants Sidler claim title to their land describe it by lot and block number on the plat of McKinney Heights. The plat itself, therefore, with all its notes, lines, descriptions, and landmarks, is as much a part of such deeds as if it had been set out in the face of the deeds themselves.

Whitehead v. Ragan, 106 Mo. 231, 17 S. W. 307; St. Louis v. Missouri P. R. Co. 114 Mo. 13, 21 S. W. 202; Campbell v. Wood, 116 Mo. 196, 22 S. W. 796; Whitehead v. Atchison, 136 Mo. 485, 37 S. W. 928; Caruthersville v. Huffman, 262 Mo. 367, 171 S. W. 323; Lindsay v. Smith, 178 Mo. App. 189, 166 S. W. 820; Simpson v. Mikelsen, 196 Ill. 575, 63 N. E. 1036; Smith v. Young, 160 Ill. 163, 43 N. E. 486.

The "building line" marked as such on the plat of McKinney Heights, with its distance from the adjacent streets plainly indicated in feet in the same manner as all

Note.—For effect of lines or other indications on recorded plat, to create an implied covenant, see annotation following this case, post, 458.
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other distances shown on the plat, is perfectly plain and unambiguous in meaning, and is a restriction upon the manner of use and improvement of the lots shown on the plat.

Simpson v. Mikkelsen, 196 Ill. 575, 63 N. E. 1036; *King v. St. Louis Union Trust Co.* 226 Mo. 351, 126 S. W. 415; *Yeomans v. Herrick*, 178 Mo. App. 274, 165 S. W. 1112; *Tallmadge v. East River Bank*, 26 N. Y. 105.

The restriction, although unlimited as to time, does not create a perpetuity, but, on the contrary, is a valid restriction which equity will enforce at the suit of any party entitled to the benefit of it.

Stevens v. Annex Realty Co. 173 Mo. 511, 73 S. W. 505; *Noel v. Hill*, 158 Mo. App. 426, 138 S. W. 364; *Tobey v. Moore*, 130 Mass. 448.

There was no abandonment of the restriction and no acquiescence by plaintiffs in its violation and no waiver of their right to insist upon its observance by defendants *Sidler* and no laches in asserting such right.

Fete v. Foerstel, 159 Mo. App. 75, 139 S. W. 820; *Compton Hill Improv. Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159; *Spahr v. Cape*, 143 Mo. App. 114, 122 S. W. 397; *St. Louis Safe Deposit & Sav. Bank v. Kennett*, 101 Mo. App. 370, 74 S. W. 474; *Morrow v. Hasselman*, 69 N. J. Eq. 612, 61 Atl. 369; *Payson v. Burnham*, 141 Mass. 547, 6 N. E. 708; *O'Gallagher v. Lockhart*, 263 Ill. 489, 52 L.R.A. (N.S.) 1044, 105 N. E. 295.

Defendants *Sidler* having erected their building in violation of the building line, pending the suit, the mandatory injunction requiring the removal of such part of it as violated the restriction was proper.

Meriwether v. Joy, 85 Mo. App. 634; *Fete v. Foerstel*, *supra*.

Walker, J., delivered the opinion of the court:

This is a suit in equity brought in the circuit court of Jackson county at Kansas City to enjoin defendants from erecting a building on a lot in McKinney Heights in said city.

A restraining order was granted and later dissolved. After its dissolution and before the trial, defendants erected a building on said lot. In September, 1912, a trial was had resulting in a judgment for plaintiffs, requiring defendants, within ninety days thereafter, to remove so much of said building as projected over the building line on the lot, and restraining defendants from erecting or maintaining a building on the lot nearer the adjacent streets than 20 feet in one instance and 15 feet in the other,—the lot being on a corner. *Jurisdic-L.R.A.1917A.*

tion to make further orders was retained to enforce compliance with the judgment then rendered. From this judgment the defendants have appealed.

In June, 1886, Marshall P. Wright owned a tract of land of 31 acres adjacent to the corporate limits of Kansas City. He laid it out in lots and blocks and streets and alleys, dedicating the latter to public use, acknowledged the plat and recorded the same, as required by the statute, designating the addition as "McKinney Heights." In 1897 it was made a part of Kansas City.

Across the lots and blocks on this plat, 20 feet from the street lines and parallel thereto,—except along St. John avenue, where the distance is 15 feet,—checked or broken lines were drawn, designated as "building lines." Defendants' lot, described as "lot 14 of block 4, McKinney Heights," against which this particular proceeding is directed, is situated on the northwest corner of Jackson and St. John avenues, the former running north and south, and the latter east and west. The lot has a frontage of 50 feet on St. John avenue.

Plaintiffs' lots are in the same block as that of defendants, also fronting on St. John avenue. Plaintiffs contend that the lines on this plat marked "building lines" are restrictions upon all persons erecting buildings upon any of these lots, and that the action of the defendants in violating same is to plaintiffs' damage and injury in that it tends to depreciate the value of their property and interferes with the uniformity of the location of buildings on said tract or addition, which was intended, and is principally used, for residential purposes.

Defendants, in opposition to this plea, contend that at the time this plat was made and recorded the land platted was outside of the corporate limits of Kansas City, and the building lines marked thereon were in no wise mentioned except by marking them on the plat; that neither the acknowledgment to the plat nor any deed conveying the lots therein designated has any reference to same, and that these lines constitute merely a suggestion to owners of property in said addition, and have no binding force or effect as a restriction; that they acquired possession of the lot against which this proceeding is directed without any knowledge of the pretended claims or demands of plaintiffs that there was a building line restriction on the property, and that they purchased the same believing it to be unrestricted and unencumbered in any manner; that the enforcement of the restriction would constitute a taking of their property without due process of law. The reply admitted that McKinney Heights,

when platted, was not in the corporate limits of any city or town, and that the defendants' title was through mesne conveyances under Wright, who platted the property, but denied all the other allegations in the answer.

In July, 1886, soon after recording the plat, Marshall P. Wright and wife conveyed the entire addition to William McKinney, describing it as follows: "All lots in McKinney Heights, being originally the L. P. Browne tract, consisting of 31 acres in the east end of the south half of the northeast quarter of section 34, township 50, range 33, Jackson county, Missouri; the plat of said McKinney Heights being recorded in Book B, page —, June 17, 1886, to which further reference is hereby made."

January 20, 1887, William McKinney and wife conveyed the addition to Thomas A. Harris, describing it as follows: "All of McKinney Heights (except certain blocks therein named), as the same is marked and designated on plat 5 in the office of the recorder of deeds for the county of Jackson, state of Missouri."

January 28, 1887, Thomas A. Harris and wife conveyed the addition to Calvert R. Hunt, describing it as follows: "All of McKinney Heights, an addition to the city of Kansas, as the same is marked and designated on the plat filed in the office of the recorder of deeds for the county of Jackson, state of Missouri (except certain lots therein named)."

At different times subsequent to the conveyance to Hunt, deeds were made to different persons to lots in this addition.

McKinney Heights was a residence district before the erection of the building by defendants, and at the time of the trial there were ninety-five buildings on the addition, including that of defendants, eighty-two of which conformed to the building lines; the remaining thirteen having been built in disregard of same. There was testimony in detail as to the conditions under which the different buildings were erected so far as concerned the builders' knowledge and observance of the building lines, tending to show, in the majority of cases, that when notified of the restriction parties complied with same. It was also shown that plaintiffs in no case expressly acquiesced in any violations of the restriction, but when notified protested against same.

A covenant as to the restricted use of the property in question is necessary to sustain the plaintiffs' contention; the creation of such a covenant may be by express words, or by reasonable implication from words employed clearly indicative of such a purpose.

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The owner, Wright, who subdivided the property and recorded a plat of same, may have had such a purpose in contemplation in designating certain lines on the plat as building lines; but this purpose was never consummated. Aside from the absence from the plat of any other reference to this proposed restriction, there is nothing in the conveyance made by him of the entire tract to indicate such a purpose. It is true the description of the property contains a reference to same as subdivided, adding, as regards the plat, "to which further reference is hereby made." The two subsequent transfers of the entire addition are no more definite, and the later transfers of particular lots, except in one instance, bear no reference to any restricted use. The excepted instance referred to is not determinative of the matter at issue; it is simply a recognition in one of the transfers of a single lot of the existence of a restriction. At best, the references in these deeds to the plat are matters of description, and, if otherwise intended, at least some definite indication of the grantor's purpose should appear, especially in the conveyance made by Wright in the first transfer of the entire property after its subdivision.

As a general proposition a plat of land shown to be correct and properly recorded becomes a part of subsequent deeds to same. *Lindsay v. Smith*, 178 Mo. App. loc. cit. 193, 166 S. W. 820. This ruling, however, has reference, unless there are other limitations, to the location or description of the property (*Ferguson v. Dent*, 8 Mo. 667; *Dryden v. Holmes*, 9 Mo. 135), and so far as our investigation has led us, a mere designated line drawn upon a map or plat of property, without more, will not suffice to create a covenant.

It has often been held that in construing plats "effect must be given to the plain meaning and intent they exhibit by their outlines as well as by their words," as in *Caruthersville v. Huffman*, 262 Mo. loc. cit. 375, 171 S. W. 323; *Whitehead v. Atchison*, 136 Mo. loc. cit. 495, 37 S. W. 928; and *St. Louis v. Missouri P. R. Co.* 114 Mo. loc. cit. 22, 21 S. W. 202. These cases and others of like character in the application of the rule have reference to the subdivision of property into lots and blocks and streets and alleys, in which the subdivision becomes fixed upon the filing of the plat in the recorder's office, the block and lot lines being designated as a measure of convenience and necessity, and the street and alley lines as defining portions of the tract dedicated by the owner to the public. Rev. Stat. 1909, §§ 10290 et seq. These are essentials of every plat; they exist as a necessary part of it, and no transfer can be made of the

property therein without express reference to such subdivisions.

A covenant, however, is not a necessary part of a plat, but is dependent for its creation on the will of the owner of the property subdivided. That will cannot, by reason of the very nature of a covenant, be declared by a designated line and nothing more. It must be expressed in words, either definitely defining the covenant or making apt reference to the designated line, thus giving formal expression to the covenantor's purpose. 13 Cyc. 713, and notes.

This conclusion is sustained by an almost unbroken line of cases, if not by express rulings, by the facts themselves showing on the face of the instruments affecting the property, either in express words or by clear implication, a purpose to create a restriction. *King v. St. Louis Union Trust Co.* 226 Mo. loc. cit. 307, 126 S. W. 416; *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668; *Hisey v. Eastminster Presby. Church*, 130 Mo. App. 566, 109 S. W. 60; *Kitchen v. Hawley*, 150 Mo. App. 497, 131 S. W. 142; *Miller v. Klein*, 177 Mo. App. 557, 160 S. W. 562; *Bolin v. Tyrol Invest. Co.* 178 Mo. App. 1, 160 S. W. 588, 164 S. W. 259.

An exception to this rule is found in *Simpson v. Mikkelsen*, 196 Ill. 575, 63 N. E. 1036, which we decline to follow in the presence, especially in our own jurisdiction, of a strong current of authority to the contrary. The reason for the ruling of the majority is evident. A restrictive covenant lessens the fee and is not favored in law. It should therefore be made manifest in no uncertain manner, and not be left entirely to implication, as in this case. It has been expressly ruled elsewhere, and is in accord with our reasoning, that a covenant not to use property except in a certain way will not be inferred from the absence of words of restriction. *Madore's Appeal*, 129 Pa. 15, 17 Atl. 804.

In the presence of the concrete facts, in the instant case, these general deductions are authorized: That to create the limitation on the fee herein contended for, a covenant must have been created; and it is not material whether it be termed an equitable easement, as in *King v. St. Louis Union Trust Co.* supra, or a servitude or a restrictive covenant. If express, it must be in writing; i. e., declared in so many words (*Fuhr v. Dean*, 26 Mo. loc. cit. 119, 69 Am. Dec. 484, 6 Mor. Min. Rep. 216; *Petty v.*

Church of Christ, 70 Ind. loc. cit. 297); if implied (and here also note the necessity of the use of words by the covenantor), the implication from the words used must be such as will clearly authorize the inference or imputation in law of the creation of the covenant. The only exception to this rule is in the case of implied covenants, classified as covenants in law, or those which the law implies or intends from the nature of the transaction, although not given form in words in the instrument containing them. Thus, in conveyances in fee containing the words, "grant, bargain, and sell," a covenant of warranty is implied. *Stoepler v. Silberberg*, 220 Mo. 258, 119 S. W. 418; *Waldermeyer v. Loebig*, 222 Mo. 540, 121 S. W. 75. Express recognition of this rule is given by our statute (Rev. Stat. 1909, § 2793); but it existed at common law (*Co. Lit.* 384b; *Rawle, Covenants*, 5); the statute, and others of like nature, being merely declaratory of same (2 *Reeves, History of English Law*, 54); and in a lease the term "demise" is held to import a covenant on the part of the lessor of right and title to make the lease, and for quiet enjoyment (*Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350).

But no such rule exists in regard to covenants carrying a restriction. These, for the reasons stated, must be defined. This has not been done; and while the tendency of the courts is to disregard restrictive covenants, we would be inclined to sustain the plaintiffs' contention if the facts showed that by so doing the intent of the original grantor would thereby be effected. But we do not so interpret the evidence. We therefore decline, on the proof alone of a designated line appearing on the plat, to read into the conveyances of the property subdivided an express restriction, the effect of which would be to limit the use of and lessen the tenure by which the owners hold these lots.

From the foregoing it follows that the judgment below should be reversed and the case remanded, with directions to the trial court to dismiss plaintiffs' action, and to enter judgment for the defendants; and it is so ordered.

All concur.

Petition for rehearing and motion to transfer to court in banc overruled, July 18, 1916.

Annotation—Effect of lines or other indications on recorded plat, to create an implied covenant.

As to oral or implied building restrictions as to parcels retained by the grant-
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or, see note to *Sprague v. Kimball*, 45 L.R.A.(N.S.) 962.

As to effect of conveyance by reference to a plat, to estop the grantor or those claiming under him to deny the existence of a street laid down thereon, see note to *Talbert v. Mason*, 14 L.R.A. (N.S.) 878.

As to effect of conveyance of lots laid down on plats, to prevent a change in the use or form of the property, see note to *Herold v. Columbia Invest. & Real Estate Co.* 14 L.R.A. (N.S.) 1067.

ZINN v. SIDLER, ante, 455, finds support in *McCloskey v. Kirk* (1914) 243 Pa. 319, 90 Atl. 73, which held that no building restriction was imposed by a dotted line on the recorded plan along which was written "15-foot building line," where the deeds made no reference to any building restriction or building line, but merely referred to the plan by describing the lots by number as recorded in the plan.

In *Bridgewater v. Ocean City R. Co.* (1901) 62 N. J. Eq. 276, 49 Atl. 801, affirmed without opinion in (1902) 63 N. J. Eq. 798, 52 Atl. 1130, it was held that a conveyance of lots according to a general scheme of land improvement announced to invite purchasers and shown on the recorded map, specifically designating part of the land as a camp ground and park and showing the remaining strip between the bay and the ocean as being open, and not divided into lots, created an implied covenant that that land should not be devoted to any other purpose, and that a grantee of a part of the open space should be restrained from erecting a passenger station thereon at the suit of purchasers of the lots. The court said that the implied covenant arose for the benefit of all the lots without regard to their locality in relation to the tract impliedly agreed to be kept as an open space. To the same effect are *Lennig v. Ocean City Asso.* (1886) 41 N. J. Eq. 606, 56 Am. Rep. 16, 7 Atl. 491; *Freeman v. Island Heights Hotel & Improv. Co.* (1909) 75 N. J. Eq. 491, 72 Atl. 974, decree modified in (1910) 77 N. J. Eq. 572, 78 Atl. 154.

In *Rowan v. Portland* (1848) 8 B. Mon. (Ky.) 232, it was held that the sale of lots according to a plat showing open squares extending to a water front, ostensibly for the benefit of the public, created an implied covenant that the land should not be devoted to any other purpose.

In *Canton Co. v. Baltimore* (1907) 106 Md. 69, 11 L.R.A. (N.S.) 129, 66 Atl. 679, 67 Atl. 274, it was held that in order to raise an implied covenant on L.R.A.1917A.

the part of a grantor of land by deed referring to a plat for description, that an open square on the plat shall remain a public park, it must be clearly shown that the plat referred to had the square designated upon it as a public park. In this case there was a mere reference in the deeds to an unpublished, unrecorded plat, on which a park or public square was shown as part of the tract on which the property was located, and it was held that this did not constitute a dedication of the square to public use where none of the land sold was bounded on the park, but was separated therefrom by streets; that it was at most a tender of dedication of land as a public park, and that such tender of dedication was defeated by adverse possession of the land by inclosures for the statutory period before any attempt was made to accept the dedication.

But in *Light v. Goddard* (1865) 11 Allen (Mass.) 5, it was held that there was no implied covenant from the sale of lots described as being marked on a plan, that any of the land on the opposite side of the street marked on the plan as "ornamental grounds" and "playgrounds" should continue to be used for such purposes, although the grantor owned the same. The court said: "The plaintiff claims under a deed which describes the lots conveyed as laid down on a plan to which reference is made. Upon inspection of this plan, it appears that these lots are carved out of a large tract of land, the whole of which is divided into numerous lots or parcels, and is fully laid down on said plan. It also appears that certain other land, which at the time of the grant in question also belonged to the grantors, and which is not immediately adjacent to the lots conveyed, but is separated therefrom by a contemplated street which forms one of the boundary lines of the lots conveyed, is designated on the plan as 'ornamental grounds' and as 'playground.' The contention of the plaintiff is that such designation on the plan referred to in the deed of lands lying in the vicinity of, but not adjacent to, the land granted, amounts to a covenant that those grounds shall forever continue to be appropriated and used for the uses and purposes so designated. We are by no means prepared to adopt as a sound rule of exposition the general proposition on which the argument for the plaintiff rests. We do not think that a mere reference to a plan in the descriptive part of a deed carries with it by necessary implication an agreement or stipulation

that the condition of land not adjacent to, but lying in the vicinity of, that granted, as shown on the plan, or the use to which it is represented on the plan to be appropriated, shall forever continue the same so far as it may be indirectly beneficial to the land included in the deed, and was within the power or control of the grantor at the time of the grant."

No covenant is implied from the sale of lots by reference to a recorded map, that the remaining land shall not be sold in lots smaller in area than that shown on the map. *Harold v. Columbia Invest. & Real Estate Co.* (1907) 72 N. J. Eq. 857, 14 L.R.A.(N.S.) 1067, 129 Am. St. Rep. 718, 67 Atl. 607, 16 Ann. Cas. 580.

Of interest in this connection is *Pierce v. Roberts* (1888) 57 Conn. 31, 17 Atl. 275, which held that one who sold lots as designated on a map referred to in the deeds, which showed a plot of ground in the center marked "park," was estopped from appropriating the park to any other purpose. It appeared that the map was shown to the purchasers and afterward recorded. The court said: "The defendants contend that, notwithstanding the defendant Wooding had knowledge of the agreement between the other defendants and the plaintiffs, yet he took a good title under his deed, because he had a right to assume that the plaintiffs had no other title than their deeds gave them, and by those deeds no

right or title whatever to the park was conveyed, and that the plaintiffs' rights under their deeds did not extend beyond the roadway which separated their respective lots from the piece on the other side designated as a 'park;' and upon this foundation the defendants objected to all parol evidence of representations made by the defendants to the plaintiffs to induce the purchase of the lots, invoking in this connection the legal principle that, when an agreement is reduced to writing, all previous negotiations resting in parol are resolved into and extinguished by the writing. They also claimed that the agreement and declarations of the defendants relative to the reservation of the land in question for a park were improperly received to show a dedication of the land for a park, because the complaint did not allege a dedication. This summarizes the principal questions which the appeal brings before this court for review. We think every position here taken, and the argument in its support, wholly untenable, being either unsound in principle or erroneous in application. In the first place, the word 'park' on the map cannot be eliminated from the deeds, but is, on the contrary, an inseparable part of those deeds, and thereby the grantors are estopped from appropriating the land in question to a use inconsistent with such designation." A. L. R.

KENTUCKY COURT OF APPEALS.

INTER-SOUTHERN LIFE INSURANCE COMPANY, Appt.,

v.

CITY OF LOUISVILLE et al.

(149 Ky. 516, 149 S. W. 875.)

Tax — situs of corporation — charter designation.

A corporation actually located in one city cannot transfer its situs for taxation to another place by designating such place as its home office in its articles of incorporation.

For other cases, see Taxes, II. in Dig. 1-52 N. S.

(September 27, 1912.)

A PPEAL by plaintiff from a judgment of the Chancery Branch, Second Division

Note. — For designation of home office by corporation as fixing situs for purposes of taxation, see annotation following this case, post, 469. L.R.A.1917A.

of the Circuit Court for Jefferson County in defendants' favor in an action brought to enjoin them from collecting city taxes on intangible personal property, assessed against plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Bennett H. Young and M. W. Rippey, for appellant:

Plaintiff having in its charter designated Prospect as the place where its principal office is located, this provision of the charter is binding upon the corporation, and, it being bound and concluded thereby, the designation must be held of equal force and effect as to and against all others dealing with it.

Covington v. Standard Oil Co. 137 Ky. 837, 127 S. W. 480; *Com. v. Southern Pacific Co.* 134 Ky. 417, 120 S. W. 311, 20 Ann. Cas. 965; *Langdon-Creasy Co. v. Owensboro Common School Dist.* 116 Ky. 562, 76 S. W. 381; *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Union S. B. Co. v. Buffalo*, 82 N. Y. 351; *Oswego Starch Factory v. Doloway*, 21 N. Y. 449; *Pelton v. Northern*

Transp. Co. 37 Ohio St. 450; 37 Cyc. 959; 2d Am. & Eng. Enc. Law, 926.

Messrs. Joseph S. Lawton and Clayton B. Blakey, for appellees:

The statement in the articles of incorporation of a domestic corporation as to the location of the principal office or place of business is not conclusive on the government for the purpose of taxation. The court can inquire into the facts and find out where its principal office or place of business is actually located in this state.

2 Cook, Corp. 6th ed. § 572, p. 1561; Clark & M. Priv. Corp. § 293(a), p. 768; Detroit Transp. Co. v. Board of Assessors, 91 Mich. 382, 51 N. W. 978; Teagan Transp. Co. v. Board of Assessors, 139 Mich. 1, 69 L.R.A. 431, 111 Am. St. Rep. 391, 102 N. W. 273; Detroit, Y. A. A. & J. R. Co. v. Detroit, 141 Mich. 5, 104 N. W. 327; Portsmouth Twp. v. Cranage S. S. Co. 148 Mich. 230, 118 Am. St. Rep. 578, 111 N. W. 749; Milwaukee S. S. Co. v. Milwaukee, 83 Wis. 590, 18 L.R.A. 353, 53 N. W. 839; Woodsum S. B. Co. v. Sunapee, 74 N. H. 495, 60 Atl. 577; Kennett v. Woodworth Mason Co. 68 N. H. 432, 39 Atl. 585; Georgia F. Ins. Co. v. Cedartown, 134 Ga. 87, 67 S. E. 410, 19 Ann. Cas. 954; Eel River R. Co. v. State, 155 Ind. 433, 57 N. E. 388.

Appellant has failed to show that the property assessed by the city has no actual situs in the city for the purpose of taxation.

Com. v. West India Oil Ref. Co. 138 Ky. 828, 36 L.R.A.(N.S.) 295, 129 S. W. 301; Com. v. R. G. Dun & Co. 126 Ky. 108, 10 L.R.A.(N.S.) 920, 102 S. W. 859; Higgins v. Com. 126 Ky. 211, 103 S. W. 306; Com. v. Kentucky Distilleries & Warehouse Co. 143 Ky. 314, 136 S. W. 1032; Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; State Assessors v. Comptoir Nat. d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109.

Winn, J., delivered the opinion of the court:

The appellant, the Inter-Southern Life Insurance Company, brought this action below to enjoin the city of Louisville and its tax collector from collecting taxes, based upon an assessment as of September, 1910, upon some \$128,000 of personal property belonging to the company. The company, under its original articles of incorporation, had denominated Louisville as its

home office, but by amendment to its articles, filed in January, 1909, it had designated the unincorporated village of Prospect, in the county of Jefferson, as its home office. The position of the company in the litigation was that these properties were taxable at Prospect; while the position of the city was that they were taxable in the city of Louisville; that the company in reality maintained its principal place of business and kept its home office there, and that the change in the articles of incorporation denominating Prospect as the home office was but a subterfuge or device to escape the payment of taxes in Louisville. Upon preparation and trial the chancellor adjudged that the city's position was correct, and dismissed the plaintiff's petition. From the judgment of dismissal this appeal is prosecuted.

The evidence developed that the company's only office at Prospect was a part of a room which the Bank of Prospect had let to the company; that the company kept no officer or clerk at Prospect; that it advertised itself as "Louisville's strong, clean, progressive company;" that all the company's records were kept in it and all accounts due the Louisville office; that, after the change of the place of business of the company as denominated in the amended articles of incorporation, the business was conducted in Louisville the same as it had been before; that the company had 10 or 12 offices, its executive office, in the Lincoln Bank Building in Louisville; that that was the largest office the company had in the country; that no books or records were kept at Prospect, save possibly the record of the stockholders' meetings; that the only business done at the office at Prospect was a stockholders' meeting there in January, 1910, and in January, 1911; that the first of these meetings, at least, was adjourned from the Prospect office to the Louisville office, where the actual business of the stockholders' meeting was done; that the company, through the channel of a separate holding corporation, the Inter-Southern Building Company, was building in Louisville a large office building, into which it was putting some \$700,000, to be known as the Inter-Southern building; and that there the business of the company was to be conducted. The company's brief before us concedes that no business of the company has been transacted at the Prospect office except the annual meetings of the stockholders, at which directors were elected. This testimony and this concession leave no doubt in the mind but that the company, in essentially all of its business transactions, and in fact, was a Louisville corporation. And the conclusion is inescapable that the de-

nomination of the small village, remote from the business center, as the home office of the company, was done for no purpose other than to have that place fixed as the situs of the company's property for taxation. The legal proposition therefore presents itself as to whether the naked statutory denomination of the village of Prospect as the home office is controlling for the purposes of taxation, or whether the truth about the matter shall prevail and the property be taxed where the company really maintains its home and transacts its business. We will first take up and discuss the general authority from the Union, which is not entirely in harmony upon the subject; and then will investigate the Kentucky cases, which are argued by the company as controlling in its favor.

Passing, then, for the time being, the Kentucky cases which have a more or less direct or remote influence upon the question, we take up first the authority of text-writers and other jurisdictions upon which the company relies. The authority first to be noticed is 37 Cyc. 959. The text runs as follows: "A corporation has its domicile for the purpose of taxation at the place where its principal business office is located; and, if the law requires the certificate of incorporation to state where such principal office shall be located, it is ordinarily conclusive on this point, and fixes the place for taxing the company's property, unless its residence has been changed pursuant to some statute, although some decisions hold that if no business is transacted at the nominal principal office except the meetings of stockholders and directors, while all the company's executive and financial business is done at another place, it is to be taxed at the latter place." It is to be noted that, under the declaration of this text, the taxing place is the place where the principal business office is located; but that in some jurisdictions the location of this principal office is fixed arbitrarily by the declaration of the corporate articles, while in other jurisdictions the ascertainment of the location of the principal place of business is an ascertainment of fact, determinable not by some fictional or arbitrary declaration of the company, but by the truth itself, ascertained by evidence as any other truth is ascertained. In support of its statement that the certificate of incorporation is ordinarily conclusive as to the location of the home office, the text cites a number of cases from New York and one from Ohio. These are the cases outside of Kentucky upon which the appellant relies here; while the declaration of the text that other jurisdictions hold that the true place of business is the taxing place is supported by cases from

Michigan, New Hampshire, and Wisconsin, which cases are relied upon by the appellees. These sundry cases will be discussed further along. The line of differentiation is made clear by the text and by the two lines of cases supporting the different theories named in the text. The appellant, of course, relies solely upon so much of the text as observes that generally the denomination of the place in the articles of incorporation is conclusive.

The appellant next depends upon the statement in 27 Am. & Eng. Enc. Law, 2d ed. 927, that, "where it is required that a certificate of incorporation must designate the place where the principal office of the company is to be located, it has been held that this establishes the residence of the corporation for the purpose of taxation." In the footnote to this text, as supporting the statement that it has been held that the statutory designation is conclusive, are cited the New York cases and the Ohio case above referred to as cited in Cyc. and supporting the appellant's side of the controversy. It is to be observed that the text in neither of the Encyclopedias named sets itself out to be any arbitrary exposition of the law, but that it does nothing more nor less than to state in the one case the conflicting theories of the different courts, and, in the other, to set out the theory of the appellant here, with no more authoritative statement than that that position has been held by the courts of New York and Ohio. The writer in the American & English Encyclopedia is particularly careful against laying down any fixed or definite rule upon the subject of the situs for taxation of the personal property of corporations. He observes that the broad propositions sometimes made by text-writers concerning the subject should be cautiously used with reference to the statutory provisions and policy of the courts of the particular jurisdictions; that it should be borne in mind that the law of taxation is purely statutory, and that the place and subjects of taxation are dependent on the statutory provisions of the particular states. We find, therefore, in the two Encyclopedias nothing of certainty as authority for or against the appellant's position.

Appellant relies upon the case of *Western Transp. Co. v. Scheu*, 19 N. Y. 408, one of the cases cited in the footnotes in Cyc. and Am. & Eng. Enc. as set out above. This case is squarely in point for the appellant. It holds that, where the statute required the designation in the organic certificate of the company's charter of the place where its principal office is to be situated, such designation in the certificate is conclusive as that of the principal office of the com-

pany; that under a statute which provided that the personal estate of every corporation should be assessed at the place of its principal office, or place for transacting the financial concerns of the company, the charter fixation of the company's principal office of necessity taxed its property at such office; and this notwithstanding the fact that practically the entire annual business, amounting to some several hundred thousand dollars, was done in Buffalo, and that it was shown by the evidence that the object of the company in designating its principal office at Tonawanda was to avoid taxation in the city of Buffalo. The court remarked that, unless the legislature intended the certificate to be conclusive, it was difficult to see any adequate motive for requiring the statement to be made; that it was in no manner essential to the existence of the corporation that the place of its principal office should be fixed, or even that it should have any such office. The writer remarked that there were obvious reasons, however, why it was expedient that corporations should be deemed to have a fixed location for certain purposes, among which was that of taxation; and that, if this question were left open to parol proof, serious difficulties and embarrassments might arise; and that to avoid such difficulties and disputes was perhaps one motive in the legislature for requiring the location to be fixed by the certificate. We agree with the observation that it is expedient that the corporation should have a fixed and definite location, not alone as regards the subject of taxation, but as regards many other matters of public dealing, of the service of process upon it, of the jurisdiction of suits against it, and the like. We likewise agree that, if the question were left open to parol proof, serious questions might arise; but serious questions arise in the majority of litigations. The fact that it is difficult and embarrassing to ascertain the truth in a litigation is no reason why the courts should be closed to an ascertainment of the truth. The legislature might well have had in mind the avoidance of difficulties in this respect by requiring the domicile of the company to be named in its charter; but it doubtless had equally well in mind that the company would designate its true office, and not a fictional one, in its charter. Certainly the legislature could not have had in mind, in enacting the New York statute, that it could be so used as to permit the company to locate its principal office at one place for the admitted purpose of avoiding taxation in another place where its business was really done. The mind of the New York court upon the subject is apparent from another observation in the opinion; where,

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in disposing of the argument by the tax collectors founded upon the improper motive of the company in designating a false place of business, it remarked that "it is no more inequitable or immoral for a corporation to do this than for an individual to do substantially the same." Certainly this line of argument is not very convincing. It does not appeal to us to say that corporations might do this inequitable or immoral thing because an individual might do so. Per contra, it seems to us that the writer might very well have said that neither a corporation nor an individual would be permitted to escape taxation by such a beating about the bush. It is, of course, important that the place where a corporation is liable to be taxed should be known. If it declares in its articles where its principal place of business is and does its business there, there is no difficulty about it; but if it declares one place as its place of business, and actually does its business at another, with the purpose of escaping taxation at its actual place of business, it should not be heard to complain that it is subjected to litigation, embarrassment, or inconvenience. The New York case is not inviting in its argument, nor to our mind sound in its conclusion.

Appellant next cites the case of *Union S. B. Co. v. Buffalo*, 82 N. Y. 351. The steamboat company here in its certificate of incorporation denominated the town of Clarkstown, New York, as the place of its principal office. There it held its annual meetings for the election of directors and officers. When the meetings were over, the rooms occupied for that purpose were deserted by the company for the rest of the year, except that the sign "The Union Steamboat Company" was left to the solitary watch of the company's principal office. The rest of the company's large business was conducted in the city of Buffalo. The city of Buffalo sought to tax the company there. The court denied the right of Buffalo to tax the corporation, remarking that it had already been decided twice against the city's views in the cases of *Western Transp. Co. v. Schen*, supra, and *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449. The opinion writer did not elaborate the argument of the cases, but rested the opinion upon them without discussion. It further remarked that it was adjudged that the purpose for which the principal office was located in Clarkstown was to avoid taxation; but that that fact had been held to be immaterial in the *Western Transportation Co. Case*. The court added: "We have nothing to do with the motive. We can deal only with the fact. If such an evil exists, another authority than ours must provide for

its correction." It seems to us the better reasoning to say that courts may concern themselves with motives in litigations of this nature. Certainly the courts can deal with the facts; and in dealing with the facts the courts should exercise themselves to find what are the facts, not from any arbitrary *ex parte* statement of the fact as set forth in the company's self-made charter, but from the facts as actually created by the company in its daily life. And, if the facts as made by the company run counter to what was said in its articles of incorporation, it is entirely within the province of the courts to ascertain the facts as they exist, and without hesitation to be governed in its decision by the true facts.

The appellant next relies upon *Pelton v. Northern Transp. Co.* 37 Ohio St. 450. The Ohio case is cited in the footnotes above set out to the *Encyclopedias*. In this case a water transportation company had denominated a village in Cuyahoga county, Ohio, as its principal place of business, though it transacted its business in reality in the city of Cleveland and kept its property there. The city of Cleveland assessed the property for taxation, whereupon the transportation company successfully defended against it. There, as here, the only business done at the suburban village was the annual stockholders' meetings and the election of officers. The statute of Ohio demanded a designation in the articles of incorporation of the place where the principal office should be located. The court remarked that the designation made in conformity to the statute was conclusive, and that the principal office was not to be determined by the amount of business done at the one place or the other. The court does not give any reason why this arbitrary fixation should in all cases be accepted as true, and especially in those cases where the corporation by its conduct makes it untrue. The opinion is based in its terms upon the New York case above commented upon of the *Western Transp. Co. v. Scheu*. The Ohio writer did remark that a natural person might change his residence for the purpose of avoiding taxation, and that was no reason why a corporation might not do the same,—a conclusion with which we entirely agree. But the writer does not remark that in the change of residence by an individual there must be an actual, and not a fictional, change. An individual certainly cannot maintain from time to time and year to year a permanent residence in one place, and by a mere declaration of his own change his taxable residence to another. The change must be an actual change, true in fact as well as in theory: and so of the corporation. We do not find it essential,

therefore, to differentiate the New York and Ohio authority upon the subject. We believe them to be unsound. No other authority from other jurisdictions is cited by the appellant than that above discussed.

We come now to the line of authority supporting the other view, cited in the footnote to *Cyc.* upon that side, and relied upon by the appellees. The first case we shall notice is that of *Teagan Transp. Co. v. Board of Assessors*, 139 Mich. 1, 69 L.R.A. 431, 111 Am. St. Rep. 391, 102 N. W. 273. In this case the articles of incorporation of the three corporations the tax liability of which was in litigation designated certain small townships or villages as the location of their general offices. No regular offices were kept at these places. There the annual stockholders' meetings were held, and in one instance there a directors' meeting was held. The business of the companies was done in Detroit. So much of the Michigan statute as it is necessary to point out provided, in substance, that the corporation's property should be assessed at the place where its office was designated to be in its articles of incorporation, provided it actually did its business there; but that, if it actually did its business at some other place, then that other place should be the taxation place. This Michigan case, therefore, is not of much value as authority in Kentucky. It did remark, however, in line with our own observation above, that individuals might determine where they would reside and corporations where they do business, but in order to make such place the places of taxation, the individuals must actually reside there and the corporation must actually do business there. The cases of *Detroit, Y. A. A. & J. R. Co. v. Detroit*, 141 Mich. 5, 104 N. W. 327, and *Portsmouth Twp. v. Cranage S. S. Co.* 148 Mich. 230, 118 Am. St. Rep. 578, 111 N. W. 749, cited by the appellees, are in line with the *Teagan Transportation Co. Case*.

The foregoing Michigan cases were written in construction of an act passed by the Michigan legislature following the declaration of the Michigan court in the case of the *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51 N. W. 978. In this latter case the corporation had by an amendment to its articles of association denominated the township of Hamtramck as its place of business, where it kept its sign, and where the stockholders' and directors' meetings were held. It appeared that its business was in reality transacted in Detroit. This city had been originally denominated as the home office of the corporation. The city took the position that the change to Hamtramck by amendment was not made in good faith, nor true in point of

fact, and that after the amendment their place of business continued to be in the city of Detroit. The statute of Michigan demanded that the articles of association should denominate the place where the general business should be located. The corporation claimed, as here, that the location of its office was a question of law, and that the articles of association were conclusive upon the point. In support of its view, it cited the three New York cases and the Ohio case. The Michigan court declined to accept the reasoning of those cases, and adopted what appears to us to be the more reasonable one. It remarked that a citizen has the right to reside in the country and do business in the city, but that such a residence must be an actual residence with relation to taxation; that one could not maintain a nominal residence in the country with an actual residence in the city, and thus avoid urban taxation; that a corporation in this respect was like an individual,—that it could not fix a nominal domicile in the country and yet maintain its actual domicile and business in the city with respect to the escaping of city taxation,—and it held the question to be open for actual determination. At this point we desire to express our concurrence with another view of the Michigan writer, wherein he remarks that this declaration and the articles of incorporation would estop the corporation to say that such place was not its residence for certain purposes, like the service of process and the like, but that where it was apparent that the sole purpose was to avoid taxation by the denomination of such an office, and its real business was done elsewhere, its property might be taxed at the real place of its business. It was following this declaration that the Michigan statute was amended as above remarked. The amendment was so framed as that these water transportation companies might by their statutory declarations actually fix some rural place as their home office and do business elsewhere; and yet have their property taxed at the rural place. The Michigan court in the case in 139 Mich. 1, *supra*, held this act to be, to the extent named, unconstitutional.

The next case cited by the appellees is that of *Milwaukee S. S. Co. v. Milwaukee*, 83 Wis. 590, 18 L.R.A. 353, 53 N. W. 839. This case is of some value to appellees, in that it discusses the question of fact as to where is and what constitutes the principal office. The statute in the Wisconsin case, however, as discussed by the court, did not require the corporation to denominate its principal office or place of business; and such a declaration in the company's charter was held to be surplusage as to its situs L.R.A.1917A.

for taxation. The Wisconsin court cited, however, the Michigan case of *Detroit Transp. Co. v. Board of Assessors*, 91 Mich. 382, 51 N. W. 978. The judge who wrote the case then commented upon the New York and Ohio cases, and said that, had the Wisconsin statute required the denomination of a principal office in the charter of incorporation, he, the judge, was not prepared to intimate that such denomination would be conclusive of the question, notwithstanding the authorities from the two states named.

The next case relied upon by the appellees is that of *Woodsum S. B. Co. v. Sunapee*, 74 N. H. 495, 69 Atl. 577. The steamboat company denominated the city of Concord as its place of business. About one half of the plaintiff's business was done in Sunapee and the rest in Newbury and New London. Sunapee taxed the boats of the plaintiff, and this litigation arose. The court remarked that the fundamental error in the steamboat company's argument was in the assumption that its place of business was determined by the declaration in its articles of agreement without regard to the fact as to where it was doing business; that the statute demanded a truthful statement, the duty to make which was not performed by the statement of an imaginary one; that it would be very likely true that the corporation would not thereafter be heard to deny its stated situs, especially if others had acted upon the statement in good faith; but that this would be far from saying that its own representation was binding upon those who were in no way parties to it. The case from 91 Mich. 382, was then cited. The court then remarked that the New York case of *Union S. B. Co. v. Buffalo* and the Ohio case of *Pelton v. Northern Transp. Co.* might be distinguished by differences between the New York and New Hampshire statutes. The court added, however, that "in so far as they hold that a corporation can locate a fictitious place of business and thereby conclude other parties, they run counter not only to the decided law of this state, but also to that of other jurisdictions."

The appellees cite and rely upon the case of *Georgia F. Ins. Co. v. Cedartown*, 134 Ga. 37, 67 S. E. 410, 19 Ann. Cas. 954, but the case is not sufficiently in point to need especial notice.

In § 572a, vol. 2, *Cook on Corporations*, 6th ed. it is said: "Where a company is really located in a city and does all its business there, but its articles of incorporation state its principal place of business as being in an adjacent town, the sole object being to evade taxation, the court will hold that for taxation purposes its principal place of

business is in such city." Clark & Marshall on Private Corporations, vol. 1, § 203a, thus state the rule: "Where a corporation, for the purpose of evading taxation, states in its articles of association or certificate of incorporation that its principal place of business is in a certain place, when in reality it is located and does its business in another place, the latter place may be treated as its place of business for the purpose of taxation."

Both appellant and appellees make some comment upon the note discussing this subject, appended to the Teagan Transportation Co. Case as reported in 139 Mich. 1, 69 L.R.A. 431, 111 Am. St. Rep. 391, 102 N. W. 273. The annotator, however, does no more than to cite the cases which we have above discussed, with others from the same jurisdictions, remarking the conflict between the New York and Ohio doctrine upon the one hand and that of Michigan and Wisconsin upon the other. We have made independent search for other direct and important authority, but without finding it. Our conclusion upon the whole matter is in line with the Michigan doctrine which permits the truth to be ascertained, and is against the New York and Ohio doctrine which arbitrarily accepts as true the corporation's self-made statement of the fact.

There are left to be discussed the Kentucky cases in order to ascertain whether they run counter to and wherein they impinge upon the conclusion we have reached from our investigation of the authority from other states. At this point it is proper to insert the distinguishing fact upon which the case turns. Mr. John H. Leathers, who was president of the company at the time of the charter amendment designating Prospect as its principal office, testified that the change was made to avoid Louisville taxation, which, as the company thought, was unequal and unjust. We have, therefore, the admitted fact that the designation of Prospect was to avoid the city taxation, the fact conceded by appellant's brief that the only business ever done at Prospect was the holding of the annual stockholder's meeting, and the fact developed by the testimony that, after the change, the company transacted its business at its general offices in Louisville just as before. These facts are significant in their bearing upon the principal Kentucky case relied upon by appellant, which we now proceed to discuss. *Covington v. Standard Oil Co.* 137 Ky. 837, 127 S. W. 480. This case had up the question of the situs for taxation of the intangible property of the Standard Oil Company of Kentucky. The record showed that the city of Louisville L.R.A.1917A.

was designated in the company's charter as its principal place of business, and that no change had ever been made in the charter designation. The effort in the action was by the city of Covington, where the company kept an office, to subject to taxation there its property of the character named. Covington proceeded upon the theory that it was in reality the principal place of the company's business. The company, however, established that it had made due return of its tax list of such property to the city of Louisville, and had duly paid the taxes thereon. Upon this state of fact it was held here that Covington had not the right to enforce the collection of taxes upon this same property. The court's opinion founded itself upon the cases of *Langdon-Creasy Co. v. Owensboro Common School Dist.* 116 Ky. 562, 76 S. W. 381, and *Wren v. Boske*, 24 Ky. L. Rep. 1780, 72 S. W. 279, the general spirit whereof was neither more nor less than that intangible property is to be taxed at the home of its owner. It was then remarked in the *Standard Oil Case* that, as the company had designated as its principal place of business in its charter the city of Louisville, that designation was conclusive, and that for fiscal purposes a corporation could have but one domicile, the place so designated in its charter under our statute. These are the Kentucky expressions which the appellant puts forward as controlling in its case. But the appellant fails to remark that the expressions used followed the significant statement by the court that there was nothing in the record tending to show any effort by the *Standard Oil Company* to avoid taxation, but only an effort to avoid being taxed twice on the same property. The spirit of the opinion must be gained from the whole opinion, and not from an isolated excerpt from it. If, said the court, there was nothing in the record tending to show that the company was seeking to avoid taxation, then its charter designation of its principal place of business was conclusive, and there for fiscal purposes must be its domicile. But the other side of the court's mind is equally clear from a fair and impartial interpretation of that case, and that is that where the company denominates in its charter not the true, but a fictional, home, for the very purpose of avoiding taxation, then the domiciliary recitation in its articles, put there for an evasive purpose, will not be conclusive in the company's favor. Such a designation, in the absence of subterfuge and evasion, should be conclusive, not so much because the company has so stated its domicile, but because the company has truthfully so stated its domicile. It should be *prima facie* always evidence in the com-

pany's favor; because it, in discharging its requisite corporate statutory duty in designating of record its principal office, naturally will, until the contrary is shown, be supposed to have stated the truth. As remarked heretofore, such a designation should be conclusive as an estoppel against it in all matters where others have acted on the faith of it; for having set out a statement as the truth, in compliance with a statutory prerequisite to its corporate life, it will not be heard to say in its own favor that its own definite declaration was not the truth. The plain intent of the opinion under consideration was to apply its rule there where there was "nothing in the record which tends to show that appellee (Standard Oil Company) is in any way seeking to avoid taxation." In the case at bar the president of the company testified without reservation that his company's purpose in designating Prospect as its home was to avoid city taxation. How, then, can it be claimed that the Standard Oil Co. Case is conclusive in this appellant's favor?

Appellant relies, also, upon the case of *Com. v. Southern Pacific Co.* 134 Ky. 417, 120 S. W. 311, 20 Ann. Cas. 965. That case did not question whether Beechmont was the true and lawful home of the Southern Pacific Company, but, accepting that point as the home, held certain property taxable there. The Southern Pacific Company did no part of its railroad business in Kentucky. The case throws no light on the question here. As of the Standard Oil Co. Case, so it is to be said of the case of *Langdon-Creasy Co. v. Owensboro Common School Dist.* 116 Ky. 562, 76 S. W. 381, that the court expressly remarked the absence of any effort to evade taxation.

Newport & C. Bridge Co. v. Woolley, 78 Ky. 523, is relied upon by appellant. In that case it is said that "a corporation cannot have two domicils or residences at the same time. It obtains a residence not by its own act, but by legal authority which fixes the requisites of residence,"—an entirely correct statement of abstract principles. Unquestionably it draws its residence, or, more properly phrased, its right to a residence, from legal authority, and it is likewise true that legal authority fixes the requisites of residence; that is, the state gives it the right of life, and fixes the requisites of formation and conduct under which the corporation's right to a residence arises. In other words, the word "domicil," as used in the quotation, *supra*, from the *Newport & C. Bridge Co.* Case, meant the state of its domicil, which is made further manifest by the fact that the point there under discussion was whether that corporation

was a Kentucky or an Ohio corporation. It is equally true, however, that a corporation can have but one domicil within the confines of any given state, though it may have many places of business, just as it may have a domicil within one state and do business in many others. Under the statute under which the appellant gained its existence, it was given the right to select and designate the place of its domicil within the state; but clearly, as indicated in the *Standard Oil Co. Case* and the *Langdon-Creasy Case*, such a domicil selected and designated by it would not be conclusive as against the taxing authority, when its declaration of domicil was made for the purpose of avoiding taxation.

This disposes of the authorities relied upon by the appellant. As remarked above, the properties of corporations generally are taxed under the same general principles which govern the taxation of the properties of individuals. As was said in the case of *Montgomery v. Lebanon*, 111 Ky. 646, 54 L.R.A. 914, 64 S. W. 509, the intention of a party to hold or acquire his domicil is always a very material fact, and is entitled to much weight in determining what is his legal domicil. But, notwithstanding this, the manifest actions and conduct of the party may be properly held to fix and determine his true domicil despite his declared intention. This is as well true of a corporation in ascertaining its proper situs for taxation as of an individual. Neither the individual nor the corporation will be permitted to conclude the taxing authorities by his or its *ex parte* declaration of domicil; but both the individual and the corporation will be held answerable and subject to taxation at the place where the facts fix his or its residence.

The observations of this court in the case of *Lebanon v. Biggers*, 117 Ky. 430, 78 S. W. 213, are illuminating in the case at bar. It is there remarked that every person must have a domicil, and that he can have but one; but that, when once established, it continues until he renounces it, and takes up another in its stead. In the case at bar the appellant had established its residence in Louisville. It afterward renounced that domicil, but it never took up another in its stead. The court quoted from *Cooley on Taxation*, vol. 1, 3d ed. p. 641, as follows: "No exact definition can be given of domicil. It depends upon no one fact or combination of circumstances; but from the whole, taken together, it must be determined in each particular case. . . . It depends upon the preponderance of evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish

the domicil in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fixed it beyond question in another."

So, in the case at bar, the company's declaration of Prospect as its domicil might be held to be a definite ascertainment of that fact, were it not for the existence of the concessions made and facts developed of an entirely conclusive character that its domicil was in fact in the city of Louisville. The general rule is that the fact of a person's being for a length of time at a particular place is *prima facie* evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence, as is well said by Lord Thurlow in *Bruce v. Bruce*, 2 Bos. & P. 229, 126 Eng. Reprint, 1251, but there is a natural distinction which arises here between natural persons and corporate artificial persons created under our statute. Of them we think it proper and just to hold that, when the statute has declared that they shall denominate a place of domicil, the place denominated should be accepted *prima facie* as the domicil. But it would be flying in the face of our sense of right to say that any person by his mere *ipse dixit* can conclude the taxing authorities as against him. To so hold would be to say that the arbitrary statement of an untruth was conclusive as against the truth. The courts are always open to the ascertainment of the truth, and it would be a sad retrogression in modern jurisprudence to permit ourselves to go back to what we consider the unwise and unfair doctrine, *supra*, declared by the courts of New York and Ohio. In reaching this conclusion we are not, as is argued for the appellant, running counter to any former declarations of this court. Happily it has not said that, where good faith was wanting or the effort was to avoid taxation, the charter designation of domicil was conclusive. The appellant, like an individual, has the entire right, if it so desires, to avoid the payment of taxes in Louisville by making its home at Prospect; but its domicil there must be a fact, and not a fiction. While it actually lives in Louisville and draws from that cosmopolitan center the various benefits which must accrue to it from the surroundings of a large city, having no other principal home or domicil, it must pay its taxes there. It must pay its taxes like an individual pays his taxes—where the home is. In this connection some comment may be made upon an argument by appellant upon which it lays much stress. It argues that many of the rich and influential merchants and business men

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of Louisville actually maintain their residence in the country, and that, therefore, their intangible personal property escapes taxation in the city. This is true, but it is true because the home of the owner is the situs of taxation of his intangible personal property. A corporation likewise is to be taxed at its home. Its home, however, cannot be ascertained like that of an individual by such considerations as the place of his eating and sleeping, rearing his family, casting his vote, and the like. The corporation's place of abode must be determined by other considerations. For purposes of taxation, its domicil is to be ascertained, not by where it eats and sleeps, because it does neither, but by the other essential attributes, customs, and habits of its daily life. We must look to these facts, its use of its charter functions and privileges, and where they are exercised, to determine its home. Where these vital acts of its existence are daily done and transacted, there is its taxing home. As above observed, all of these attributes of the appellant's life were done in Louisville; and there, therefore, is its taxation home. It is well again to remark that it may do business in many places, and yet all of its business naturally must centralize around some located nucleus.

Our position need occasion no concern to the corporate industries of our state which have selected their homes in fact, and not in theory, and there have made their taxing returns and have paid their taxes along with the common run of people. Those, upon the other hand, if others there be, which have denominated one place, a fiction, and have maintained their homes at other places as a fact, thereby avoiding taxation, can come within the law and submit themselves to taxation as other people and other corporations do. And, if the corporation believes that taxes in any given place are unjust or unequal or too onerous to be borne, it has the right of change to some other place, provided the change be actual, and not a subterfuge. No perfect taxing system has ever been devised. It is doubtful whether any ever will be devised that will prove satisfactory to the various properties, various interests, various peoples, and various corporations affected by it; but with that uncertainty and with the hardships, real or imaginary, of taxation in any given place, we are not at liberty to concern ourselves in this case.

The candor with which the officials of the appellant spoke out about its purpose and the candid admission in the brief of counsel leave no doubt in the mind that the course

taken was believed by all parties to be strictly within their legal rights. Our comments upon subterfuge, upon the one hand, and the truth, upon the other, and the like,

were necessary to make apparent the distinctions of the law.

The judgment of the trial court is affirmed, whole court sitting.

Annotation—Designation of home office by corporation as fixing situs for purposes of taxation.

The question under discussion presupposes that the property in question has a situs for taxation somewhere in the state; and the note is not concerned with cases in which the question was whether or not the property was taxable in the state at all.

Where a corporation, as required by statute, designates in its articles its principal place of business, the designation, if fairly made, fixes the situs for taxation; and this even though the corporation may have several offices at which it does considerable business. While there are a few jurisdictions which have adopted the rule that such designation by a corporation fixes conclusively the situs for purposes of taxation, the weight of authority, as well as the weight of reason, is with INTER-SOUTHERN L. INS. CO. v. LOUISVILLE, ante, 460, in holding that it is not conclusive where, for purposes of evading taxation, a place other than that where its principal business is carried on is designated.

Thus, that the place designated by a corporation in its articles of incorporation as its place of business is not conclusive against the state for the purpose of taxation, and will not be held so to be where the evident purpose of the designation is to evade taxation, was held in *Detroit Transp. Co. v. Board of Assessors* (1892) 91 Mich. 382, 51 N. W. 978.

And in *Detroit, Y. A. A. & J. R. Co. v. Detroit* (1905) 141 Mich. 5, 104 N. W. 327, it was held that the situs for taxation of the personal property of a street railroad company is the place where it actually maintains its principal business office, although in its articles of incorporation it designated another place as its principal business office, at which the stockholders and directors occasionally met. The court stated that while it might be conceded that, if the company had principal business offices in each of several townships, cities, or villages, it might, by a designation in its articles of association, elect in which of said cities or villages said property should be taxed, yet it is equally clear that such designation would be altogether ineffectual as an election unless it actual-

ly maintained a principal business office at the place designated. The court added that the company's claim that its principal business office was at the place designated could not rest upon the fact that it had a local business office there, like that maintained at every other station on its lines, nor upon the fact that the conductors and motormen deposited formal reports which were acted upon in the principal office, nor again upon the fact that the bookkeeper there made and kept the official and other books of the company.

And see *Teagan Transp. Co. v. Board of Assessors* (1905) 139 Mich. 1, 69 L.R.A. 431, 111 Am. St. Rep. 391, 102 N. W. 273 (cited in INTER-SOUTHERN L. INS. CO. v. LOUISVILLE) to the effect that the holding of annual stockholders' and directors' meetings at the place named in the articles of incorporation as the home of the corporation is not its principal business, so as to make it taxable there, where substantially all the business for which it is organized is transacted, and its funds kept at another place, under a statute providing that a corporation shall be taxable where its office is located by its charter, provided its business is actually transacted there, but that, if it shall establish its principal office in another place, then the place where it transacts its principal business shall be deemed its residence for purposes of taxation.

And on authority of *Teagan Transp. Co. v. Board of Assessors* (Mich.) supra, it was held in *Portsmouth Twp. v. Cranage S. S. Co.* (1907) 148 Mich. 230, 118 Am. St. Rep. 578, 111 N. W. 749, that the situs of the property of the corporation for the purpose of taxation was the place where their general business office was, not the place designated in the articles of incorporation, and at which in fact it kept no property.

And that the situs for the purpose of taxation is the place where its business is principally carried on, and not a place where it merely maintains an office and holds meetings of stockholders, although the latter place is designated as the principal place of business in the arti-

cles of incorporation, was held in *Woodsum S. B. Co. v. Sunapee* (1908) 74 N. H. 495, 69 Atl. 577. The court stated that the statute requiring the designation in the articles of incorporation of the principal business place demanded a truthful statement of the fact, and required the disclosure of the actual situs of the proposed business, which duty was not performed by stating an imaginary situs, and the location of the business is not changed by such an act.

So, a corporation cannot avoid municipal taxation if its actual principal office is in a town or city in the county of its incorporation, where all its business is transacted and its officers have their offices, by claiming as its principal office a place just outside the city or town, where valuable papers are kept in an iron safe and meetings of stockholders or directors are held, but where no other business is transacted and no agency is maintained, this being done with a view to nonpayment to the municipality of taxes on personal property. *Georgia F. Ins. Co. v. Cedartown* (1909) 134 Ga. 87, 67 S. E. 410, 19 Ann. Cas. 954.

It is not a paper removal which is contemplated by the statute permitting a domestic corporation to remove its principal place of business, but an actual removal; and so, where there is no other evidence of removal than the resolution of its stockholders and the certificate of its president and secretary and the filing and recording of its other papers, as required by the statute, the business still being conducted at the former designated domicile, there is no removal. *Home F. Ins. Co. v. Benton* (1913) 106 Ark. 552, 153 S. W. 830. The court stated that the records and publications specified in the statute are only prima facie, and not conclusive, evidence that the corporation has removed its domicile or place of business, and said that while it was aware that there are authorities to the effect that where the act under which the corporation is organized requires the principal place of business to be designated in the certificate or articles of association, such designation is conclusive of the domicile of the corporation for the purposes of taxation, yet it was of the opinion that the designation of the present place of business or domicile in the charter under the Arkansas statute, in the absence of a provision making such designation conclusive evidence of its domicile for purposes of taxation, should not be held to be conclusive but only prima facie evidence of such principal place of business; that

so far as the corporation itself was concerned, having made the statement, it should be bound by it as to its situs, as against anyone who may have acted upon such statement in good faith, but that it should not be binding upon the state or any others who were not parties to it.

In *Milwaukee S. S. Co. v. Milwaukee* (1892) 83 Wis. 590, 18 L.R.A. 353, 53 N. W. 839, the principal office or place of business, for the purpose of taxation under the Wisconsin statutes, of a corporation owning and employing a large number of vessels, was held to be at the office of a firm of agents, one of whom was the president and the other the secretary of the company where all the business of the company except the annual and special meetings of stockholders for the election of directors and the annual meeting of the directors to elect officers, was conducted by such agents, those elections being held at another place which was designated as the principal office in the articles of association by an unauthorized provision, the statute only requiring a statement of the name and location of such corporation.

It is to be observed as pointed out in *INTER-SOUTHERN L. INS. CO. v. LOUISVILLE*, ante, 460, that the basis of the decision in this case is the fact the statute did not require the corporation to denominate its principal office or place of business, and that such declaration in the company's charter was surplusage as to its situs for taxation. The court stated, however, that had the statute provided that the article should specify the principal office or place of business of the corporation, it was not prepared to intimate that such specification would be conclusive of the question, as such an assumption as would give a corporation the power to fix conclusively the place of its principal office or place of business falsely, in order to evade taxation at the place where its principal office or place of business actually and really is, though no other taxpayer has such a right or power. This dictum, it will be seen, brings the *Milwaukee Case* in harmony with the decision in the *LOUISVILLE CASE* and cases therein followed.

In *Covington v. Standard Oil Co.* (1910) 137 Ky. 837, 127 S. W. 480, and *Langdon-Creasy Co. v. Owensboro Common School Dist.* (1903) 116 Ky. 562, 76 S. W. 381, it was held that a corporation which paid a tax on its intangible property at the place designated in its articles of incorporation as its principal place of business cannot be taxed in any

other city in which it may have an office or may do business, under the claim that that is its principal place of business. These cases are not in conflict with *INTER-SOUTHERN L. INS. CO. v. LOUISVILLE*, and other cases which that case follows as authority, since in each of those cases there was no purpose to evade the payment of the tax, but to avoid paying a tax twice on the same property; while in the *LOUISVILLE CASE* it was expressly stated that the object in designating the place as its principal place of business was for the purpose of evading taxation at the place where it actually did business. As was stated in the *LOUISVILLE CASE*, in discussing the *Covington Case*, it is clear from a fair and impartial interpretation of that case that a domiciliary designation in its articles of incorporation, put there for evasive purposes, would not be conclusive in the corporation's favor.

The following cases are authority for the view that where it is required that the certificate of a corporation shall designate the place where the principal office of the company is to be located, this is conclusive as fixing the situs for the purpose of taxation: *Western Transp. Co. v. Scheu* (1859) 19 N. Y. 408; *Union S. B. Co. v. Buffalo* (1880) 82 N. Y. 351; *Oswego Starch Factory v. Dolloway* (1860) 21 N. Y. 449; *Chesebrough Mfg. Co. v. Coleman* (1887) 44 Hun (N. Y.) 545; *People ex rel. Knickerbocker Press v. Barker* (1895) 87 Hun, 341, 31 N. Y. Supp. 269, affirmed without opinion in (1895) 147 N. Y. 715, 42 N. E. 725; *People ex rel. Edison Electric Light Co. v. Barker* (1895) 91 Hun, 594, 36 N. Y. Supp. 844; *Cooper's Glue Factory v. McMahon* (1885) 15 Abb. N. C. (N. Y.) 314; *Pelton v. Northern Transp. Co.* (1882) 37 Ohio St. 450; *Loyd v. Lynchburg* (1912) 113 Va. 627, 75 S. E. 233.

And see also *Miner v. Fredonia* (1863) 27 N. Y. 155, and *Metcalf v. Messenger* (1864) 46 Barb. (N. Y.) 325, which hold that the residence of an individual banker, doing business under the general banking law, is, for the purpose of taxation of his banking capital, in the town or ward specified as the location of his banking office in the certificate required by the statute.

And such designation has been held to be conclusive although made for the purpose of avoiding taxation. *Western Transp. Co. v. Scheu* (N. Y.); *Union S. B. Co. v. Buffalo* (N. Y.); and *Loyd v. Lynchburg* (Va.) supra.

In the *Scheu Case* (N. Y.) supra, L.R.A.1917A.

relative to the contention that the designation of the principal place of business was for the purpose of avoiding taxation, the court said that it is no more inequitable or immoral for a corporation to do this than for an individual to do substantially the same. A person may keep his office in a city and transact business there to an unlimited amount, enjoying all the facilities and advantages which the enterprise and expenditures of the city have afforded, and yet, by residing without the city bounds, avoid all municipal taxation. When this shall be practised either by individuals or corporations to an extent which renders it a serious evil, it will be for the legislature to interfere.

And in *People ex rel. Knickerbocker Press v. Barker* (1895) 87 Hun, 341, 34 N. Y. Supp. 269, the court said: "It is urged that this rule will enable corporations to designate as their principal place of business some town in which taxes are low and remote from the real place of business of the corporation, and so substantially escape taxation. The statute requires that the certificate shall disclose the location of the principal office of the corporation, which 'shall be in the county, town, or city in which its business is principally carried on.' The statement of the location of its principal office or place of business is a condition precedent to the organization of a business corporation, and should it appear that the location of its principal office was wilfully misstated in the certificate, or in case the corporation should change its principal place of business without effecting a legal change of residence, for the purpose of evading taxation, it might present a case under § 1798 of the Code of Civil Procedure, for the attention of the attorney general."

And in the *Loyd Case* (Va.) supra, the court said the fact that the motive of the corporation in fixing its principal office in a place other than where its principal business was done was for the purpose of getting a lower rate of taxation is not material in construing the statute. That it could only deal with the facts, and if such an evil exists, another authority must provide for the correction.

But where the statute under which the corporation is organized does not require the designation of the location of the place of business or principal office of the corporation in its articles, such designation is surplusage and is binding neither upon the corporation nor upon the taxing officer. *Austen v. Hudson River Teleph. Co.* (1893) 73 Hun, 96,

25 N. Y. Supp. 916. See also *Austen v. Westchester Teleph. Co.* (1894) 8 Misc. 11, 28 N. Y. Supp. 77.

And a corporation properly taxable in a certain county waives all objection to its assessment in a different county in which it has its place of business by appearing before the taxing officer there,

applying for and obtaining a reduction of its assessment, and making and filing a statement that its principal office and place of transaction of its financial affairs is in the latter county. *Re McLean* (1893) 138 N. Y. 158, 20 L.R.A. 389, 33 N. E. 821. J. H. B.

NEW YORK COURT OF APPEALS.

NEW YORK CENTRAL & HUDSON
RIVER RAILROAD COMPANY, Appt.,
v.

CITY OF BUFFALO et al., Respts.

(218 N. Y. 259, 112 N. E. 721.)

Highway — construction of sidewalk — premises.

Railroad tracks laid in a cut in a public street, protected by a wall surmounted by a fence, are not premises within the meaning of a statute requiring the owner of premises to lay sidewalks in front thereof when directed to do so by the city.

For other cases, see Highways, III. in Dig. 1-52 N. S.

(Chase, J., dissents.)

(May 12, 1916.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of an Equity Term for Erie County in defendants' favor in an action brought to restrain them from executing a deed in pursuance of a tax sale of plaintiff's property, and to annul the tax sale and the local assessment upon which it was founded. Reversed.

The facts are stated in the opinion.

Mr. H. W. Huntington, with Messrs. Hoyt & Spratt, for appellant:

The Terrace occupation by the railroad company is a special franchise, and is exempt from local taxation for sidewalks and other local improvements, in the absence of any statute clearly authorizing the same.

Note. — Generally, as to liability of right of way and trackage of a street railway company or other railroad occupying the street, to assessment for street improvements, see note to *Seattle v. Seattle Electric Co.* 15 L.R.A.(N.S.) 487.

As to liability of railroad right of way to assessment for local improvements, see notes to *Heman Constr. Co. v. Wabash R. Co.* 12 L.R.A.(N.S.) 112; and *Georgia R. & Bkg. Co. v. Decatur*, 40 L.R.A.(N.S.) 935; and see later case, *Decatur v. Southern R. Co.* 48 L.R.A.(N.S.) 231. L.R.A.1917A.

Rochester v. Rochester R. Co. 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953, affirmed in 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; *Litchfield v. Vernon*, 41 N. Y. 123; *People ex rel. Crowell v. Lawrence*, 41 N. Y. 137; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Brewster v. Syracuse*, 19 N. Y. 116; *People ex rel. New York C. & H. R. R. Co. v. Gourley*, 198 N. Y. 486, 92 N. E. 398; *People ex rel. New York C. & H. R. R. Co. v. Woodbury*, 203 N. Y. 167, 96 N. E. 370; *People ex rel. New York O. & W. R. Co. v. State Tax Comrs.* 215 N. Y. 434, L.R.A.1916B, 1225, 109 N. E. 547; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69.

There is no provision in the city charter authorizing the taxation of the special franchise of the railroad company in the Terrace for a sidewalk improvement.

People ex rel. Davidson v. Gilon, 126 N. Y. 147, 27 N. E. 282; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004; *Sixth Ave. R. Co. v. New York*, 63 Hun, 271, 17 N. Y. Supp. 903; *New York, N. H. & H. R. Co. v. Port Chester*, 149 App. Div. 893, 134 N. Y. Supp. 883, affirmed in 210 N. Y. 600, 104 N. E. 1135; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *Smith v. Buffalo*, 159 N. Y. 427, 54 N. E. 62; *Schenectady v. Union College*, 144 N. Y. 241, 26 L.R.A. 614, 39 N. E. 67; *People ex rel. New York v. Board of Assessors*, 111 N. Y. 505, 2 L.R.A. 148, 19 N. E. 90; *New York, L. E. & W. R. Co. v. Dunkirk*, 65 Hun, 494, 20 N. Y. Supp. 596, affirmed in 143 N. Y. 659, 39 N. E. 494; *People ex rel. Cayudatta Pl. Road Co. v. Cummings*, 166 N. Y. 110, 59 N. E. 703.

The Terrace special franchise is a contract right secured by the company's charter, the consent of 1879, and the contract of 1894.

People v. O'Brien, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *New York C. & H. R. R. Co. v. New York*, 202 N. Y. 212, 95 N. E. 638; *Brooklyn C. R. Co. v. Brooklyn City R. Co.* 32 Barb. 358; *Troy v. Troy & L. R. Co.* 49 N. Y. 657; *People ex rel. Davis v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Mil-*

hau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; *New York v. Second Ave. R. Co.* 32 N. Y. 261; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330.

A contract prescribing the exclusive duties of a railroad occupying a street, and thus providing for an exemption from the taxing power, is valid, and protected by the Constitution.

People ex rel. Davidson v. Gilon, 126 N. Y. 147, 27 N. E. 282; *People ex rel. West Side Street R. Co. v. Barnard*, 110 N. Y. 548, 18 N. E. 354; *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 268, 53 N. E. 44; *People ex rel. Frontier Electric R. Co. v. North Tonawanda*, 70 Misc. 91, 128 N. Y. Supp. 186; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Piqua State Bank v. Knoop*, 16 How. 380, 14 L. ed. 981; *New Jersey v. Yard*, 95 U. S. 105, 24 L. ed. 352; *Greenwood v. Union Freight Co.* 105 U. S. 13, 26 L. ed. 961; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Duluth & I. Range R. Co. v. St. Louis County*, 179 U. S. 302, 45 L. ed. 201, 21 Sup. Ct. Rep. 124; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469.

Mr. Herbert A. Hickman, with *Mr. William S. Rann*, for respondents:

The assessment is presumed to be valid, and the burden is on the plaintiff to show conclusively that the assessment is illegal. Every fact necessary to sustain the assessment will be presumed until the contrary is proven.

People ex rel. Westchester F. Ins Co v. Davenport, 91 N. Y. 574; *People ex rel. Jamaica Water Supply Co. v. State Tax Comrs.* 196 N. Y. 29, 89 N. E. 581.

The assessment, under § 288 of the city charter, is valid against the plaintiff as owner or occupant of premises in front of which the sidewalk was laid.

People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; *Carthage v. Frederick*, 122 N. Y. 268, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *People ex rel. Davidson v. Gilon*, 126 N. Y. 147, 27 N. E. 282; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004; *Sixth Ave. R. Co. v. New York*, 63 Hun, 271, 17 N. Y. Supp. 888; *New York, N. H. & H. R. Co. v. Port Chester*, 149 App. Div. 893, 134 N. Y. Supp. 883, affirmed in 210 N. Y. 600, 104 N. E. 1135; *Buffalo v. Pratt*, 131 N. Y. 293, 15 L.R.A. 413, 27 Am. St. Rep. 592, 30 N. E. 233; *Milhau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *People ex rel. Curtis v. Rochester*, 54 N. Y. 507.

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Neither the consent of 1879 nor the grade crossing agreement of 1894 imposed an obligation upon the city of Buffalo which would be impaired by requiring the railroad company to construct this sidewalk around the open cut in the Terrace.

Palmer v. Hickory Grove Cemetery, 84 App. Div. 600, 82 N. Y. Supp. 973; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L.R.A. 687, 55 N. E. 562; *Southampton v. Jessup*, 162 N. Y. 122, 50 N. E. 538; *Rhinehart v. Redfield*, 93 App. Div. 410, 87 N. Y. Supp. 789, affirmed in 179 N. Y. 569, 72 N. E. 1150; *Rochester v. Rochester R. Co.* 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953; *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381; *Rochester R. Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; *Great Northern R. Co. v. Minnesota*, 216 U. S. 206, 221, 54 L. ed. 446, 30 Sup. Ct. Rep. 344.

In no event could the city or the grade crossing commissioners bargain away the governmental power to compel, when it became necessary, the laying of this sidewalk to afford a safe passageway for pedestrians along the line of the open cut.

Malone, F. C. & H. P. R. Co. v. Spuyten Duyvil Constr. Co. 65 Misc. 367, 121 N. Y. Supp. 656; *Brooklyn v. Nassau Electric R. Co.* 20 App. Div. 31, 46 N. Y. Supp. 651; *People ex rel. Cohoes R. Co. v. Public Service Commission*, 143 App. Div. 769, 128 N. Y. Supp. 384; *People ex rel. New York Electric Lines Co. v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820; *Buffalo East Side R. Co. v. Buffalo Street R. Co.* 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L.R.A. 454, 21 Am. St. Rep. 764, 26 N. E. 919; *Mechanicville v. Stillwater & M. Street R. Co.* 35 Misc. 513, 71 N. Y. Supp. 1102, affirmed in 67 App. Div. 628, 74 N. Y. Supp. 1149, 174 N. Y. 507, 66 N. E. 1117; *Binninger v. New York*, 177 N. Y. 199, 69 N. E. 390; *Rochester v. Rochester R. Co.* 182 N. Y. 99, 70 L.R.A. 733, 74 N. E. 953; *People ex rel. Geneva v. Geneva, W. S. F. & C. L. Traction Co.* 112 App. Div. 581, 98 N. Y. Supp. 719, affirmed in 186 N. Y. 516, 78 N. E. 1108; *New York C. & H. R. R. Co. v. New York*, 202 N. Y. 212, 95 N. E. 638; *Buffalo v. Delaware, L. & W. R. Co.* 136 App. Div. 274, 120 N. Y. Supp. 1081, affirmed in 204 N. Y. 562, 97 N. E. 1103; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175.

The objection that this assessment is void because it was not limited to the

tracks in the cut, but was laid against those in the cut and connecting tracks, is not well taken.

O'Reilly v. Kingston, 114 N. Y. 439, 21 N. E. 1004; *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841; *Brennan v. Buffalo*, 162 N. Y. 491, 57 N. E. 81; *Re Manhattan R. Co.* 102 N. Y. 301, 6 N. E. 590; *People ex rel. Littman v. Wells*, 91 App. Div. 172, 86 N. Y. Supp. 309; *Re Deering*, 93 N. Y. 361; *Cooley*, Taxn. 3d ed. p. 1410; *People v. Hagadorn*, 104 N. Y. 516, 10 N. E. 891; *Saranac Land & Timber Co. v. Roberts*, 195 N. Y. 303, 88 N. E. 753.

Willard Bartlett, Ch. J., delivered the opinion of the court:

The plaintiff's railroad tracks run through an open cut 15 feet deep in a street known as the Terrace, in the city of Buffalo. This cut is protected by stone walls along the edge thereof 3 feet high, surmounted by an iron fence of equal height, erected in the first instance by the railroad company, and subsequently maintained by the city. On October 24, 1904, the common council of Buffalo adopted a resolution which was duly approved by the mayor, directing the commissioner of public works to cause the New York Central & Hudson River Railroad Company to be notified to construct a concrete sidewalk along the open cut in the Terrace within ten days, and, if not done in that time, to cause the same to be done, and the expense to be assessed upon the property benefited.

The notice was given, the railroad company did not comply with its requirements, the city constructed the concrete sidewalk, and the cost of the work was assessed against the tracks of the plaintiff in the Terrace and in some other streets. Upon this appeal we are concerned only with the validity of the assessment upon the tracks in the Terrace.

The authority for the assessment is supposed to be found in § 288 of the charter of the city of Buffalo, as amended in 1901. Laws of 1901, chap. 228. That section makes it the duty of "the owner or occupant of any premises in the city," whenever such work shall be ordered by a resolution of the common council, "to lay and relay sidewalks in front of such premises," and at all times to keep and maintain the same in good order and repair. "In case any such work shall not be done within the time specified in such notice, . . . said commissioner of public works may cause such work to be done, and the expense thereof shall be a charge and lien upon such premises." The same section also requires that the assessment therein provided for shall be L.R.A.1917A.

laid "upon the lands and premises in front of which the work is done, according to the lineal frontage."

In the present case the plaintiff railroad company has been treated as the owner or occupant of premises within the meaning of this statutory provision, because of its ownership of the tracks which run along the bottom of the open cut in the Terrace.

We are of opinion that the action of the special term and the appellate division is based upon a misapplication of the charter provision which is not warranted by the language thereof. The plain import of § 288 of the Buffalo charter, so far as the laying down of a new sidewalk is concerned, is that the common council may impose this obligation only upon the owners or occupants of property who actually own or possess land fronting upon the street in which the new sidewalk is to be constructed. It seems to us a forced and wholly unwarrantable interpretation of the term "premises" to apply it to railroad tracks, which merely constitute the tangible part of a railroad company's special franchise to occupy a city street. Ownership of the street is not in the railroad company; nor does the railroad company exclusively occupy any portion thereof except that which lies directly under the rails. These tracks do not seem to us to be premises within the true meaning and purport of the statute; yet it is these tracks, and these alone, which are the subject of the assessment in question here. The provision is applicable to cases of the ordinary owner or occupant of land on the side of a public street in front of whose land a new sidewalk is to be constructed, and not at all to the grantee of a special franchise enjoying simply an easement in the middle of the street.

The requirement that the assessment shall be laid upon the land and premises in front of which the work is done according to the lineal frontage further confirms the view that such a condition of things as exists in the present case does not fall within the scope of the charter provision. Railroad tracks cannot fairly be said to have any "frontage." The learned judge who heard the case at special term declared that the railroad company was the exclusive occupant of the lands bounded by the retaining wall of the cut, and that this piece of real estate constituted definite premises, accurately described; but the mere fact that it is not convenient for the public to travel through that part of the Terrace occupied by the cut does not make the railroad company the exclusive occupant thereof in a legal sense and as a matter of right. As we have pointed out, the assessment in question

is not laid upon any land in the cut, but applies solely to the tracks of the railroad company. This expressly appears in the findings.

For these reasons, without passing upon any of the other questions in the case, we have reached the conclusion that the tracks of the plaintiff could not lawfully be assessed for the expense of constructing the so-called sidewalks along the open cut in the Terrace.

It follows that the judgment, so far as appealed from, should be reversed, with costs, and that judgment should be rendered in favor of the plaintiff in accordance with the prayer of the complaint.

Hiscock, Cufideback, Hogan, Cardozo, and Pound, JJ., concur.

Chase, J., dissents.

ARKANSAS SUPREME COURT.

SECURITY MUTUAL LIFE INSURANCE COMPANY, Appt.,

v.

J. F. LITTLE et al.

(119 Ark. 498, 178 S. W. 418.)

Insurance — illegal contract — recovery of premiums.

Directors of a school district who insure the lives of residents of the district to secure bonds issued by the district, and give their notes for the premiums, are not, when compelled to pay the notes to an indorsee after the policies are declared void for absence of insurable interest, entitled to recover the premiums from the insurer, since the contract being against public policy, the courts will leave the parties where it finds them.

For other cases, see *Insurance*, III. h, in Dig. 1-53 N. S.

(June 28, 1915.)

APPEAL by defendant from a judgment of the Circuit Court for Benton County in plaintiffs' favor in an action brought to recover the amount paid by them as premiums on certain insurance policies. Reversed.

The facts are stated in the opinion.

Messrs. Fowler & Ivie, for appellant:

Courts will not aid either party to a contract when the consideration for same is an illegal transaction.

Martin v. Hodge, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694; Burks v. Harris, 91 Ark. 205, 23 L.R.A. (N.S.) 626, 134 Am. St. Rep. 67, 120 S. W. 979, 18 Ann. Cas. 566; Wood v. Stewart, 81 Ark. 41, 98 S. W. 711; Roller v. Murray, 112 Va. 380, 38 L.R.A. (N.S.) 1202, 72 S. E. 665, 27 Ann. Cas. 1088; Chapman v. Haley, 117 Ky. 1004, 80 S. W. 190, 4 Ann. Cas. 712; 9 Cyc. 546; Edwards v. Randle, 63 Ark. 318, 36 L.R.A. 174, 58 Am. St. Rep. 108, 38 S. W. 343.

Where one voluntarily makes a payment

Note. — As to illegality of policy for lack of insurable interest as affecting right to recover back premiums paid, see annotation following this case, post, 477. L.R.A.1917A.

upon a claim with knowledge of the facts, or under such circumstances that he is affected with such knowledge, he cannot recover back such payment upon the ground that the asserted claim was unenforceable, or illegal and void.

Blackburn v. Texarkana Gas & E. Co. 102 Ark. 152, 143 S. W. 588; Vick v. Shinn, 49 Ark. 70, 4 Am. St. Rep. 26, 4 S. W. 60; Crenshaw v. Collier, 70 Ark. 5, 65 S. W. 709; Larrimer v. Murphy, 72 Ark. 552, 82 S. W. 168; Ritchie v. Bluff City Lumber Co. 86 Ark. 175, 110 S. W. 591; Maryland Casualty Co. v. Little Rock R. & Electric Co. 92 Ark. 306, 122 S. W. 994.

Messrs. Dick Rice and Jeff Rice, for appellees:

Plaintiffs had the right to recover these insurance premiums.

Ball v. Fulton County, 31 Ark. 379; Arkansas Nat. Bank v. Martin, 110 Ark. 578, 163 S. W. 795; Tate v. Commercial Bldg. Assn. 97 Va. 74, 45 L.R.A. 243, 75 Am. St. Rep. 770, 33 S. E. 382; Metropolitan L. Ins. Co. v. Felix, 73 Ohio St. 46, 75 N. E. 941, 4 Ann. Cas. 121; McRae v. Warmack, 98 Ark. 52, 33 L.R.A. (N.S.) 949, 135 S. W. 807; American Mut. L. Ins. Co. v. Bertram, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258; Waller v. Northern Assur. Co. 64 Iowa, 101, 19 N. W. 865.

The compulsory payment of the judgment is not a voluntary payment.

Vick v. Shinn, 49 Ark. 70, 4 Am. St. Rep. 26, 4 S. W. 60; 27 Cyc. 866; Metropolitan L. Ins. Co. v. Bowser, 20 Ind. App. 557, 50 N. E. 86; Waller v. Northern Assur. Co. 64 Iowa, 101, 19 N. W. 865.

Smith, J., delivered the opinion of the court:

This cause was tried in the court below upon an agreed statement of facts from which it appears that on and prior to April 7, 1913, the appellees, who were the plaintiffs below, were the school directors for the special school district of Rogers, Benton county, and, in order to provide means for the payment of bonds in the sum of \$35,000, issued by said district, they took out 18 policies of life insurance upon the lives of

young men residing in that district for the aggregate sum of \$35,000. The amount of the first year's premium on all of said policies was \$1,674.20, and it was agreed at the time of the issuance of these policies that, if the district did not have the money with which to pay these premiums, the agent of the life insurance company would accept the note of said district for the premium, indorsed by appellees; that the policies were issued and the appellees signed two notes for the total amount of the premiums, each bearing interest at the rate of 10 per cent per annum from date until paid, and delivered them to the agent in payment of said premium. The agreed statement of facts further recited that the agent indorsed and sold said notes before maturity to the Arkansas National Bank, of Fayetteville, and, as the agent for the insurance company, received the face of the notes, a large part of which was paid to the defendant company; that thereafter the bank was informed by appellees' attorney that said policies were void, and the bank immediately made a written demand upon said insurance company for the return of said money, which the company refused to pay, and thereupon the bank instituted suit on said notes against appellees and the insurance agent, and recovered judgment on said notes against appellees and the agent for the face of the notes, with the accrued interest; that said insurance policies were held by the supreme court to be illegal, null, and void as contrary to public policy in the case of *Little v. Arkansas Nat. Bank*, 105 Ark. 281, 152 S. W. 281, for the reason that said school district and appellees had no insurable interest in the lives of the young men on whose lives said policies were issued; that appellees had been compelled to pay, and have paid, the amount of said judgment, with all costs. Appellees now sue to recover this amount. It appears from the opinion of this court in the case of *Little v. Arkansas Nat. Bank*, 113 Ark. 72, 167 S. W. 75, that appellees resisted the payment of these notes, and finally paid them only after an adjudication by this court of their liability to the bank for the reason stated in the opinion in that case. Appellees recovered judgment in the court below for the entire amount paid by them, and this appeal questions their right to maintain this suit.

The former opinions in this case have decided that the notes out of which this litigation arose were void as between the parties thereto because they were based upon a consideration which was held to be in contravention of public policy; and the suit to recover this money necessarily involves an inquiry into the circumstances under which it was paid. In the case of *Martin v. L.R.A.1917A.*

Hodge, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694, this court said: "The test to determine whether a plaintiff is entitled to recover in an action like this, or not, is his ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends on a transaction which is *malum in se* or prohibited by legislative enactment, and that transaction must necessarily be proved to make out his case, there can be no recovery."

See also *Brooks v. State*, 91 Ark. 505, 121 S. W. 740; *Wood v. Stewart*, 81 Ark. 48, 98 S. W. 711.

Appellees insist that they are not seeking to enforce any right growing out of the contracts of insurance. But we think this is the effect of their action. They cannot recover here without showing circumstances under which the money was paid, and, when this is done, it appears that the litigation is bottomed upon a contract which was illegal because it was contrary to public policy.

In the case of *Edwards v. Randle*, 63 Ark. 318, 36 L.R.A. 174, 58 Am. St. Rep. 108, 38 S. W. 343, a contract was made for the sale of the fixtures of a postoffice, in which the vendor, who was the postmaster, agreed to resign his office and recommend the appointment of the vendee as his successor. The purchase price of the fixtures was paid, but there was a subsequent refusal on the part of the vendor to perform, whereupon the vendee sued to recover the money paid by him under this contract. In that case it was held that the contract was void because its subject-matter was contrary to public policy, and in holding that the vendee had no right to maintain the suit it was said: "This court cannot lend its aid to either party in respect to any claim or thing involved in such a contract."

The case of *Roller v. Murray*, 112 Va. 780, 38 L.R.A. (N.S.) 1202, 72 S. E. 665, is annotated in *Ann. Cas.* 1913B, 1088, where an extensive case note is found, citing many authorities on this subject. That was a case in which an attorney sued for services performed under a contract which had been held to be champertous and void because it was an agreement by an attorney to undertake to carry on litigation at his own risk, or without costs to his client, for a share of the recovery. Discussing the general principles involved in the right to maintain such a suit, it was said: "On the other hand, it is also well settled, as a general rule, that, where the contract is illegal, because contrary to positive law or against public policy, an action cannot be maintained either to enforce it directly or to recover the value of services rendered under it, or money paid on it."

Continuing, the court quoted from 9 Cyc. 546, as follows: "The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it or give damages for a breach of it, or set it aside at the suit of the other; or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, when the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement. . . . Money paid under an agreement which is executed, whether as the consideration or in performance of the promise, cannot be recovered back where the parties are in *pari delicto*, and goods delivered or lands conveyed under an illegal agreement are subject to the same rule."

We further quote from that case as follows: "Pollock, in his work on Contracts (Wald's ed.), after stating the general rule that money or property paid or delivered under an unlawful agreement cannot be recovered back, says that 'the principle proper in this class of cases is that persons who have entered into dealings forbidden by law must not expect any assistance from the law, save so far as the simple refusal to enforce such an agreement is unavoidably beneficial to the party sued upon it. As it is sometimes expressed, the court is neutral between the parties.'"

Accepting the view of the law that the courts should not lend their aid to any party to a contract which is void as against public policy, either by enforcing its provisions, on the one hand, or by permitting the recovery of money paid in the performance of its conditions, on the other, we must hold that this suit cannot be maintained, and the judgment of the court below will therefore be reversed, and the cause will be dismissed.

Annotation—Illegality of policy for lack of insurable interest as affecting right to recover back premiums paid.

As to right to recover premiums paid on life of adult, insured without his consent, see note to *Martin v. McAllister*, 56 L.R.A. 586.

As to right of insured to return of premium where policy is void or voidable because of misrepresentations on his part, see annotation to *Metropolitan L. Ins. Co. v. Freedman*, 32 L.R.A. (N.S.) 298.

Other aspects of the general subject as to the right to return of premiums are treated in notes cited in the Index to L.R.A. Notes, under the title, "Insurance," subtitles, "Premiums; assessments," "Return of; recovery back."

Life insurance.

The present note covers only the right to a return of the premium where there was an entire want of insurable interest, and does not go into the right to recover *pro tanto* where there was a partial failure of interest.

The well-settled rule that the law will not aid either party to an illegal contract, but will leave them where it finds them, was applied in *SECURITY MUT. L. INS. CO. v. LITTLE*, ante, 475, where the court refused directors of a school district, who insured the lives of residents of the district to secure bonds issued by the district, and gave their notes for the premium, the aid of the court to recover the amount of the premiums from L.R.A.1917A.

the insurer, although they had been compelled to pay the notes to an indorsee after the policies had been declared void because of want of insurable interest.

In accord with this case, where no fraud is shown on the part of the insurer's representative, and the plaintiff was not deceived as to the facts, but voluntarily took out a policy on a life in which he had no insurable interest, he is generally held to be in *pari delicto* with the insurer, and therefore not entitled to the aid of the courts to recover back premiums paid.

Thus, in the following cases, where the policies were voluntarily taken by the applicant without an insurable interest in the life attempted to be insured, and there was no fraud on the part of the insurers' agent, a recovery was denied, the parties being in *pari delicto*: *Hall v. Prudential Ins. Co.* (1911) 72 Misc. 525, 130 N. Y. Supp. 355, affirmed in (1912) 148 App. Div. 934, 133 N. Y. Supp. 1125 (action for money had and received); *Elson v. Crooks* (1911) 106 L. T. N. S. (Eng.) 462; *Evanson v. Crooks* (1911) 106 L. T. N. S. (Eng.) 264, 28 Times L. R. 123 (recovery sought on the theory of money had and received, and also on the theory that the consideration had failed); *Phillips v. Royal London Mut. Ins. Co.* (1911) 105 L. T. N. S. (Eng.) 136; *Harse*

v. Pearl Life Assur. Co. [1904] 1 K. B. (Eng.) 558, 3 B. R. C. 832, 73 L. J. K. B. N. S. 373, 52 Week. Rep. 457, 90 L. T. N. S. 245, 20 Times L. R. 264.

A fortiori there can be no recovery if plaintiff deceived the insurer on this point. Thus, there can be no recovery of premiums after the cancelation of a policy which was obtained by a fraudulent representation on the part of the plaintiff that he was acting as the agent of the person whose life was to be insured, in whose life he in fact had no insurable interest. Howard v. Refuge Friendly Soc. (1886) 54 L. T. N. S. (Eng.) 644.

And one who had no insurable interest in the life attempted to be insured, and who took a policy in the latter's name without his knowledge, and paid the premiums in reliance on the statement of the insurer's agent that she could recover the amount of the insurance or the premiums would be repaid, is in *pari delicto*, and neither she nor the one in whose name the insurance was effected can maintain a suit for the recovery of the premiums paid. McDermott v. Prudential Ins. Co. (1893) 7 Kulp (Pa.) 246.

And where one obtaining a policy on the life of another knew that he had no insurable interest, and that such an interest was necessary to the validity of the policy, and also that, under the statute, the consent of the one whose life was to be insured must be obtained, no recovery of premiums paid can be had by him, and the fact that the insurer was also aware of the facts does not alter the conclusion, since the parties are in *pari delicto*. Work v. American Mut. L. Ins. Co. (1903) 31 Ind. App. 153, 67 N. E. 458.

Where a complaint does not show that the parties are not in *pari delicto*, and, so far as appears, the applicant for insurance on a life in which he had no insurable interest made his application voluntarily, and without any fraud on the part of the insurer's representatives, no cause of action for a return of the premium is set forth, although it is alleged that subsequently to the issuance of the policy an increased assessment was paid in accordance with the insurer's demand, and also that the plaintiff believed the policy to be valid. American Mut. L. Ins. Co. v. Mead (1906) 39 Ind. App. 215, 79 N. E. 526. It was further held in the case last cited that no cause warranting a recovery was stated by a paragraph which merely alleged that the insurer solicited the plaintiff to take a

policy on the life in which he had no insurable interest, and represented that it was valid, and that plaintiff believed it to be so, and secured the policy, since the allegations disclosed nothing beyond a representation as to the legal effect of the proposed contract, concerning the facts of which both parties had knowledge.

And where a policy contained a provision that, if material statements of the applicant were untrue, it should be void and the premiums forfeited, it was held that there could be no recovery of premiums paid, although a card containing statements purporting to show that the applicant had an insurable interest in the life was filled up by the insurer's agent, there being no finding by the jury that the applicant, who had no insurable interest in the life attempted to be insured, was induced by the fraud of the insurer's representative to sign the statement without knowledge of its terms, and no finding that the applicant had acted innocently. Howarth v. Pioneer Life Assur. Co. (1912) 107 L. T. N. S. (Eng.) 155.

The view was also taken in this case that, apart from the above provision of the policy, the plaintiff, being *prima facie* in *pari delicto* with the defendant, could not recover where she had failed to establish that she was not a party to the fraud which had been practised by the agent.

In Brophy v. North American Life Assur. Co. (1902) 32 Can. S. C. 261, where one, under an agreement with another in whose life he had no insurable interest, took out a policy on the latter's life without disclosing the facts to the insurer it was held, in an action by the insurer to cancel the policy, that the person who thus obtained the policy was not entitled to a decree for the return of the premium, the court holding that the maxim "*in pari delicto melior est causa possidentis*" was inapplicable, since there was no delictum on the part of the insurer, but that the rule that governed the case was "*cessat quidem condictio, quum turpiter datur.*" remarking that the law was not so irrational as to make the *causa possidentis* less favorable when a party is not *particeps criminis* than when he is as guilty as the other party. The same result was also reached in *Knights & Ladies of Honor v. Burke* (1890) 4 Tex. App. Civ. Cas. (Willson) 234, 15 S. W. 45.

In *Lewis v. Phenix Mut. L. Ins. Co.* (1872) 39 Conn. 100, where, after the

cancellation of a policy, an action was instituted for the recovery of premiums paid, and it was shown that the policy was obtained by the plaintiff through the collusion of the defendant's agent by an application falsely stating that the plaintiff had an insurable interest in the life attempted to be insured, without an examination of or knowledge by the person whose life was to be covered, and it also appeared that, without the insurer's knowledge, the agent undertook to advance the premiums and take the policy off the plaintiff's hands if requested to do so within three years, and that by his agreement with the plaintiff the agent was to receive a certain part of the benefit in case the person whose life was insured died within three years, there was held to have been a fraud perpetrated upon the insurer, and the plaintiff, who had knowledge of the facts, was held chargeable therewith, and a recovery was denied him, although he did not actually participate in the fraudulent intent, and was ignorant of the legal effect of the transaction; and it was held that he was estopped to claim that the policy was never operative because of the want of insurable interest.

The fraud or misrepresentations of the insurer's representatives, however, may warrant a recovery of premiums.

Thus, where the insurer's agent fraudulently represented to the plaintiff that the policy issued, which was on a life in which the plaintiff had no insurable interest, was valid, and the plaintiff relied and acted upon this statement, it was held that he might recover the premiums. *British Workman & G. Assur. Co. v. Cunliffe* (1902) 18 Times L. R. (Eng.) 425, affirmed in (1902) 18 Times L. R. 502. This case was distinguished in *Phillips v. Royal London Mut. Ins. Co.* (1911) 105 L. T. N. S. (Eng.) 136, from *Harse v. Pearl Life Assur. Co.* [1904] 1 K. B. (Eng.) 558, 3 B. R. C. 832, 73 L. J. K. B. N. S. 373, 52 Week. Rep. 457, 90 L. T. N. S. 245, 20 Times L. R. 264, upon the ground that in the last case the agent's representations were not fraudulent, while in the *Cunliffe* Case they were.

And it has been held that the parties were not in *pari delicto*, and that a recovery of the premiums paid could be had where the plaintiff took an assignment of a policy without knowledge of the fact that it was void because the one to whom it had been issued had no insurable interest in the life attempted

to be insured, and because the consent of the person on whose life it was issued had not been obtained, it appearing that the insurer's agent and vice president had informed the plaintiff that the policy and assignment were valid, the court stating that the mistake could fairly be regarded as one of fact as well as of law. *American Mut. L. Ins. Co. v. Bertram* (1904) 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258.

Marine insurance.

A recovery of the premium paid on a marine policy has been denied on the ground that the parties were in *pari delicto* where the applicant had no insurable interest in the property attempted to be insured. *Lowry v. Bourdieu* (1780) 2 Dougl. K. B. 469, 99 Eng. Reprint, 299, 14 Eng. Rul. Cas. 533.

And it has been held that one who had no insurable interest in a ship, because of a defect in his title, could not recover the premium paid after the ship had reached port and the risk had been determined. *M'Culloch v. Royal Exch. Assur. Co.* (1813) 3 Campb. (Eng.) 406, 14 Revised Rep. 765.

A recovery of the premium paid, however, was allowed in *Mellen v. National Ins. Co.* (1829) 1 Hall (N. Y.) 500, where the insurer had borne no risks because the plaintiff had no insurable interest in the freight purported to be covered by the policy.

And one who, at the time he applied for insurance on a vessel, informed the agent that he did not know on whose account the vessel had been bought, and who received a policy for his own account or that of others named, has been held entitled to recover the premiums which he paid, where it was shown that he did not have an insurable interest in the vessel, or authority to take out insurance for other persons, so that no risk attached under the policy issued. *Steinbach v. Rhinelander* (1802) 3 Johns. Cas. (N. Y.) 269.

And one who had no insurable interest in a vessel because of its seizure before war was declared may recover the premium, in the absence of fraud on his part. *Routh v. Thompson* (1809) 11 East, 428, 103 Eng. Reprint, 1069, 10 Revised Rep. 539.

And where goods which one attempts to insure are shipped in such a way that he has no insurable interest in them, he may recover the premium paid on a policy taken out with the expectation that the goods would be shipped to him. *Toppan v. Atkinson* (1807) 2 Mass. 305.

It has been held in an action to recover back premiums on the ground that the person obtaining the policy had no insurable interest in the vessel which was attempted to be insured, that the vessel's register in the name of persons

other than the one obtaining the policy was not prima facie evidence that the latter was not her owner. *Sharp v. United Ins. Co.* (1817) 14 Johns. (N. Y.) 201. J. T. W.

MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE
v.
HOWARD M. LATHAM.

(— Me. —, 98 Atl. 578.)

Constitutional law — requiring milk dealers to pay bills.

A statute requiring, under penalty, dealers in milk to pay for their purchases of that commodity twice a month, is unconstitutional class legislation.

For other cases, see Constitutional Law, II. a, 4, a, in Dig. 1-52 N. S.

(September 9, 1916.)

EXCEPTIONS by respondent to the overruling of his demurrer to an indictment charging him with violation of a statute requiring milk dealers to pay for purchases semimonthly. Sustained.

The facts are stated in the opinion.

Mr. Jacob H. Berman, for the State:

Chapter 32 of the Laws of 1915 is not unconstitutional class legislation.

Austin v. State, 10 Mo. 591; *People ex rel. Mechamcus v. Warden*, 144 N. Y. 529, 27 L.R.A. 718, 39 N. E. 686; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Willis v. Standard Oil Co.* 50 Minn. 290, 52 N. W. 652; *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419, 13 Atl. 585; *People v. Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People v. Eddy*, 59 Hun, 615, 35 N. Y. S. R. 146, 12 N. Y. Supp. 628; *Glover v. Board of Flour Inspectors*, 48 Fed. 348; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; *Ritchie v. Boynton*, 114 Mass. 431; *Durgin v. Dyer*, 68 Me. 143; *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537; *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *Munn v. Illinois*, 94 U. S. 114, 24 L. ed. 77; *Mobile v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441;

Note.—The validity and effect of statute regulating time of payment of wages is discussed in the note to *Erie R. Co. v. Williams*, 51 L.R.A. (N.S.) 1097, and the earlier notes there referred to. No case except *STATE v. LATHAM* has been found involving the validity of a statute prescribing time of payment of obligations other than those to employees.
L.R.A.1917A.

Maury v. Com. 92 Va. 310, 23 S. E. 757; *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860; *Drehman v. Stifle*, 8 Wall. 595, 19 L. ed. 508; *Hess v. Johnson*, 3 W. Va. 645; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Com. v. Farren*, 9 Allen, 4; *Polinsky v. People*, 73 N. Y. 65; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; *Re Opinion of Justices (Re House Bill No. 1230)* 163 Mass. 589, 28 L.R.A. 344, 40 N. E. 713, *Hancock v. Yaden*, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; *Re Eight Hour Law*, 21 Colo. 29, 39 Pac. 328; *Bachelor v. Bickford*, 62 Me. 526; *Com. v. Hamilton Mfg. Co.* 120 Mass. 383; *State v. Bornstein*, 107 Me. 260, 78 Atl. 281.

Messrs. W. K. Neal and A. E. Neal for respondent.

Savage, Ch. J., delivered the opinion of the court:

The respondent stands indicted for a violation of chapter 32 of the Public Laws of 1915, and the case comes to this court on exceptions to the overruling of his demurrer to the indictment.

The statute in question reads as follows: "Every person, firm or corporation purchasing cream or milk for the purposes of reselling or manufacturing the same into other products, shall pay the producer, unless otherwise provided for by written contract, semimonthly; payment to be made on the first day of each and every month for all cream or milk received prior to the fifteenth day of the preceding month, and payment to be made on the fifteenth day of each and every month for all cream or milk received prior to the first day of the same month. Whoever violates the provisions of this act shall be punished by a fine of not less than \$10 nor more than \$50."

The indictment before us is clearly demurrable for want of sufficiently definite allegations of the time and place of the commission of the alleged offense. But the respondent has not made that point. The ground of demurrer relied upon is that the statute upon which the indictment is based is unconstitutional, in that it denies "the equal protection of the laws," which is guar-

anted by the 14th Amendment to the Federal Constitution. The answer of the state is that the statute is the legitimate, constitutional exercise of the police power of the state, which is its inherent power to establish regulations to promote the public health, safety, morals, peace, comfort, and welfare (*Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113), and that the 14th Amendment does not impair the police power of the state.

That the 14th Amendment was not designed to interfere with the proper exercise of the police power by the state was held in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. And the doctrine has been reaffirmed since in many cases, both in the Federal and in the state courts. It is settled doctrine. *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; *State v. Mitchell*, 97 Me. 66, 94 Am. St. Rep. 481, 53 Atl. 887; *State v. Leavitt*, 105 Me. 76, 26 L.R.A.(N.S.) 799, 72 Atl. 875.

The statute in question, when analyzed, appears to be designed to compel purchasers of a particular product intended for a particular use, to pay their purchase debts at particular times on pain of criminal prosecution, punishment by fine, and, of course, imprisonment for thirty days, if the fine is not paid. Rev. Stat. chap. 136, § 12. Whether such a statute, designed to aid in the collection of mere civil obligations by the use of the strong arm of the criminal law, is within the proper exercise of the police power, is at least questionable. Certainly it is not, unless the regulation intended be for the promotion of the public health, safety, morals, comfort, or welfare. As was said by the court in *Wyeth v. Board of Health* (*Wyeth v. Thomas*) 200 Mass. 474, 23 L.R.A.(N.S.) 147, 128 Am. St. Rep. 439, 86 N. E. 925. "No other interference of the public to the detriment of an individual is permissible."

But, passing this point without further discussion, we come to a consideration of the 14th Amendment as applied to this statute. The Amendment forbids the state to "deny to any person within its jurisdiction the equal protection of the laws." It forbids what is called "class legislation." Its meaning and effect, as it relates to the question now before us, have been fully discussed in the recent cases of *State v. Mitchell* and *State v. Leavitt*, *supra*, and the discussion need not be repeated. In a word, discrimination as to legal rights and duties is forbidden. All men under the same conditions have the same rights. Diversity in legislation to meet diversities in conditions is permissible. But if legislative regulations for different localities, classes, and

conditions differ, in order to be valid, "these differentiations or classifications must be reasonable and based upon real differences in the situation, condition, or tendencies of things. Arbitrary classification of such matters is forbidden by the Constitution. If there be no real difference between the localities or business or occupation or property, the state cannot make one in order to favor some persons over others." *State v. Mitchell*, *supra*; *Pearsons v. Portland*, 69 Me. 278, 31 Am. Rep. 276; *State v. Furbush*, 72 Me. 493; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stockyards Co.* (*Cotting v. Godard*) 183 U. S. 79, 40 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

This statute does not apply to all classes of debtors, but to one class. It does not apply to all debts incurred by purchase of products, but to one class of debts. It requires semimonthly payment for milk or cream of a producer, but not for any other product bought of a producer. It requires the purchaser of milk who is a middleman or manufacturer of milk products to pay, but does not require him to pay who buys for other purposes. It gives the milk producer a strong club to aid in the collection of debts which is not given to other creditors. It subjects a class of debtors to liability of criminal prosecution to which other classes of debtors are not subjected. Such discrimination, unless based upon some real differences in condition or situation or necessities concerning the public health, welfare, and so forth, offend against "the equal protection of the laws" clause of the Federal Constitution, and the statutes which make them are invalid.

In what way does compulsory payments of the purchase price to producers of milk tend to promote the public health, safety, morals, or welfare? What reasonable ground of discrimination is there between producers of milk and producers of hay or of potatoes or of oats, in the matter of payment for products? What real difference, so far as public health and welfare are concerned, is there between producers and other vendors? Why should not the middleman be protected as well as the producer? If the producer of milk can properly be aided in this way in the enforcement of his claims, why, with equal reason, may not the man who sells it to the consumer? Why

may not grocerymen and dealers in dry goods be given this aid in collecting their bills? Again, to go back to the text, what real difference is there which entitled the milk producer who sells to purchasers for resale or manufacture to protection, while he who sells to others is not protected? Why should one who purchases for resale or manufacture be prosecuted and fined for nonpayment, while he who purchases for any other purpose is not? We are unable to find satisfactory answers to these questions. The arguments suggest none. We are constrained to the conclusion that there are none which can relieve this statute of its constitutional infirmity. It is class

legislation. Its discriminations are not based upon any real difference in situation or condition. We feel compelled to hold that it conflicts with fundamental laws, and is therefore of no effect.

We may add that our attention has been called to a class of cases in which some courts have sustained the constitutionality of statutes requiring corporations to pay their employees weekly or semimonthly. We allude to this merely to say that the cases are not, in our judgment, analogous to the one at bar.

Exceptions sustained.

Demurrer sustained.

Indictment quashed.

NEW YORK COURT OF APPEALS.

CHARLES HUDSON, Appt.,
v.

GLENS FALLS INSURANCE COMPANY,
Respnt.

(218 N. Y. 133, 112 N. E. 728.)

Insurance — insurable interest — farm products — tenant's share.

1. One working a farm under contract for a share of the hay produced beyond the amount necessary to winter the owner's stock has an insurable interest not only in such surplus, but in the amount necessary for the stock, although the title is to remain in the owner of the farm until the division is made.

For other cases, see Insurance, II. a, in Dig. 1-52 N. S.

Rescission — settlement under insurance policy.

2. One without business experience who settles his claim under a fire insurance policy upon a misrepresentation of the adjuster as to his want of insurable interest in part of the property may rescind the settlement and recover the amount due under the policy.

For other cases, see Compromise and Settlement, in Dig. 1-52 N. S.

(May 2, 1916.)

PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Special Term for Jefferson County in plaintiff's favor upon the report of a referee, in an action brought to rescind a contract adjusting and settling plaintiff's claim on a policy of fire insurance. Reversed.

The facts are stated in the opinion.

Note. — As to insurable interest in crops, see annotation following this case, post, 485. L.R.A.1917A.

Mr. John Conboy, with Mr. William D. Morrow, for appellant:

The defendant is estopped from asserting that the policy on the hay was void.

Robbins v. Springfield F. & M. Ins. Co. 149 N. Y. 477, 44 N. E. 159; Skinner v. Norman, 165 N. Y. 565, 80 Am. St. Rep. 776, 59 N. E. 309; Draper v. Oswego County Fire Relief Assn. 190 N. Y. 12, 82 N. E. 755; Haight v. Continental Ins. Co. 92 N. Y. 51; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80; Forward v. Continental Ins. Co. 142 N. Y. 382, 25 L.R.A. 637, 37 N. E. 615.

The plaintiff had an insurable interest in all the property destroyed by the fire.

Reynolds v. Reynolds, 48 Hun, 144; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Crosby v. Woleben, 149 App. Div. 337, 134 N. Y. Supp. 328; Rice v. Peters, 128 App. Div. 776, 113 N. Y. Supp. 40; Unglish v. Marvin, 128 N. Y. 385, 28 N. E. 634; Harvey v. Cherry, 76 N. Y. 436; Cross v. National F. Ins. Co. 132 N. Y. 133, 30 N. E. 390; Berry v. American Cent. Ins. Co. 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; Rohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451; Nugent v. Rensselaer County Mut. F. Ins. Co. 106 App. Div. 308, 94 N. Y. Supp. 605; Riggs v. Commercial Mut. Ins. Co. 125 N. Y. 7, 10 L.R.A. 684, 21 Am. St. Rep. 716, 25 N. E. 1058; Buffalo Steam Engine Works v. Sun Mut. Ins. Co. 17 N. Y. 401; Sturm v. Atlantic Mut. Ins. Co. 63 N. Y. 77; Johnson v. Crofoot, 53 Barb. 574; Colville v. Miles, 127 N. Y. 159, 12 L.R.A. 848, 24 Am. St. Rep. 433, 27 N. E. 809; Hawkins v. Giles, 45 Hun, 318; Betsinger v. Schuyler, 46 Hun, 349; Leadbetter v. Leadbetter, 125 N. Y. 290, 21 Am. St. Rep. 738, 26 N. E. 265.

Defendant was guilty of fraud and misrepresentation in the settlement

Berry v. American Cent. Ins. Co. 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; Haviland v. Willets, 141 N. Y. 35, 35 N. E. 958; Pom. Eq. Jur. § 847; Ilicks v. Grimley, 213 N. Y. 447, 107 N. E. 1037.

Mr. Virgil K. Kellogg, for respondent:

The plaintiff had no insurable interest in the 70 tons of hay for which he was not paid.

Cross v. National F. Ins. Co. 132 N. Y. 133, 30 N. E. 39; Colville v. Miles, 127 N. Y. 159, 12 L.R.A. 848, 24 Am. St. Rep. 433, 27 N. E. 809; Johnson v. Crofoot, 53 Barb. 574; Hawkins v. Giles, 45 Hun, 318; Bet-singer v. Schuyler, 46 Hun, 349.

The plaintiff was not obligated to the Douglas estate to replace of the hay burned sufficient to winter out the stock or any part of it.

Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Kein v. Tupper, 52 N. Y. 550; Lorillard v. Clyde, 142 N. Y. 456, 24 L.R.A. 113, 37 N. E. 489; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; 24 Cyc. 1474; Rawlins v. Bush, 80 Ga. 588, 5 S. E. 634; Caruthers v. Williams, 58 Mo. App. 100.

There was an accord and satisfaction of an unliquidated claim.

1 Cyc. 334; Lestienne v. Ernst, 5 App. Div. 373, 39 N. Y. Supp. 199; Nassoio v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 715; Bandman v. Finn, 185 N. Y. 508, 12 L.R.A.(N.S.) 1134, 78 N. E. 175; Walsh v. New York C. & H. R. R. Co. 204 N. Y. 58, 37 L.R.A.(N.S.) 1137, 97 N. E. 408; Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106, 19 Ann. Cas. 771.

An accord and satisfaction of an unliquidated claim will not be set aside without positive proof of fraud.

Shaffer v. Cowden, 88 Md. 394, 41 Atl. 786; Stafford v. Bacon, 1 Hill, 532, 37 Am. Dec. 366.

Knowledge or notice, to amount to waiver, must be conferred upon or acquired by the insurance company's agent in the course of his employment.

Robbins v. Springfield F. & M. Ins. Co. 149 N. Y. 477, 44 N. E. 159; Berry v. American Cent. Ins. Co. 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; Van Schoick v. Niagara F. Ins. Co. 68 N. Y. 434; Forward v. Continental Ins. Co. 142 N. Y. 383, 25 L.R.A. 637, 37 N. E. 615; Whited v. Germania F. Ins. Co. 76 N. Y. 415, 32 Am. Rep. 330.

Cuddeback, J., delivered the opinion of the court:

The action was brought to rescind a contract whereby the parties adjusted and set L.R.A.1917A.

tled a claim of the plaintiff on a policy of fire insurance.

The plaintiff was working a farm on shares. His contract with the owner of the farm provided for keeping thereon fifty cows, the property of the farm owner, and six horses to be furnished by the plaintiff for doing the farm work. The cows and horses were to be fed on the hay produced on the farm before a division thereof between the parties was made. The contract began on January 1, 1912, and was to continue for one year. The plaintiff was to leave on the farm at the expiration of his contract a sufficient quantity of hay to feed the cows, and also to feed six horses, until the time came in the spring when they could be turned out to grass. The contract also contained a provision that the title to all crops raised on the farm during the continuance of the contract, and the products of the dairy, should be in the owner of the farm as security for the performance of the contract by the plaintiff until he had fully performed, and then a division between the parties should be made.

On May 8th following the date of the agreement, the plaintiff procured from the defendant's agents a policy of fire insurance, in the standard form of this state, insuring his horses, wagons, and farm implements. On the 5th day of August, after the crop of hay had been gathered, the plaintiff, by a rider attached to the same policy, procured further insurance from the defendant's agents on the hay and other products of the farm.

The referee found upon sufficient evidence, and the finding was not disturbed by the appellate division, that when the last insurance was procured the defendant's agents were informed that the hay which was insured was held by the plaintiff under the terms of the aforesaid contract between the plaintiff and the owner of the farm as to the title of the latter to the farm produce. On August 26th the barn in which the hay was stored and its contents were totally destroyed by fire. The controversy here is over the loss on the hay.

A few days after the fire the defendant's adjuster visited the farm for the purpose of adjusting the plaintiff's loss, and, as the referee found upon sufficient evidence, the adjuster informed the plaintiff that the policy as to the hay at least was void, because the plaintiff was not the owner thereof when it was insured, and that his only interest was in the surplus that would remain after the stock on the farm had been turned out to

grass according to the contract. The referee's finding in that respect has not been disturbed by the appellate division. No controversy arose between the plaintiff and the defendant's adjuster over losses on the other property covered by the policy of insurance.

The appellate division, in reversing the judgment in favor of the plaintiff, struck out the finding by the referee that the statement made by the adjuster at the time of the settlement was a misrepresentation of both law and fact, but, as has been already said, the court did not disturb the specific finding of the referee as to what the adjuster did say. The appellate division further held that the plaintiff "had no insurable interest in that part of the hay destroyed which was necessary to winter out the stock."

I think the appellate division was in error in both the propositions which it decided, and that the statement made by the adjuster to the plaintiff at the time of the settlement was a material misrepresentation, and also that the plaintiff did have an insurable interest in the hay. The fact as found by the referee that the defendant's agents who issued the policy were informed of the provisions of the contract between the plaintiff and the owner of the farm regarding the title to the farm products is sufficient to validate the insurance, notwithstanding the qualified ownership of the plaintiff which the contract disclosed. *Robbins v. Springfield F. & M. Ins. Co.* 149 N. Y. 477, 44 N. E. 159; *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776; 39 N. E. 309, *Haight v. Continental Ins. Co.* 92 N. Y. 51. The policy of insurance was not therefore issued upon any misunderstanding as to the ownership of the hay.

The plaintiff had an insurable interest in all the hay destroyed, including that "which was necessary to winter out the stock." The court at the appellate division apparently did not deny that the plaintiff had an insurable interest in so much of the hay as was necessary to feed the cows and his horses prior to the expiration of the contract on January 1, 1913. Whether any part of the hay would then remain was perhaps uncertain, but the plaintiff was in possession of all the hay, and he could hold it against all the world, except the owner of the farm. Furthermore, he could insure the hay for his own protection and for the protection of the owner of the farm, and in case of loss he could collect the whole amount of the insurance moneys and account to the farm owner for his part thereof, if L.R.A.1917A.

there was any part which belonged to him. The defendant's agents, as has been said, had full knowledge of the extent of the plaintiff's interest in the hay. Under all these circumstances the plaintiff had the right to take out the policy. *Waring v. Indemnity F. Ins. Co.* 45 N. Y. 606, 611, 6 Am. Rep. 146. In that case the court said: "It is laid down in broad terms that one may, in his own name, insure the property of another for the benefit of the owner without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adoption of it, even after a loss has occurred."

The court further said, with regard to persons taking out such insurance, that they may "recover of the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property."

The general rule is that under a contract to work a farm on shares the parties become tenants in common of the crops. *Reynolds v. Reynolds*, 48 Hun, 142. That would be the case here but for the provision in the contract that the title to the crops should be in the owner of the farm as security for the faithful performance of the contract by the plaintiff until he had fully performed the same. These provisions amounted to a mortgage given by the plaintiff to the owner of the farm on the hay produced. The plaintiff, under well-settled rules, had an insurable interest in the hay notwithstanding the title in the owner of the farm. *Berry v. American Cent. Ins. Co.* 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254; *Nugent v. Rensselaer County Mut. F. Ins. Co.* 106 App. Div. 308, 94 N. Y. Supp. 605.

It appears plainly enough that the misrepresentations made by the adjuster to the plaintiff after the loss that the insurance on the hay was void misled the latter to his injury. *Berry v. American Cent. Ins. Co.* supra, resembles in many respects the case under consideration. The court there said: "The plaintiff was a man of little business experience, although he had education enough to understand the transaction and read the papers which he signed, and he made the settlement voluntarily, without any coercion upon him, but relied upon the representation as to the law governing his case, which the defendant falsely made to him. There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there

was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss, and by falsely representing that under the law applicable to the case the policy was void, when, in fact, it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject, and to surrender to it his claim."

See also *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958; *Greene v. Smith*, 160 N. Y. 533, 55 N. E. 210; 2 Pom. Eq. Jur. 2d ed. § 847.

The court here found that the plaintiff was a young man twenty-six years of age of

quite limited business experience, and that he believed and relied upon the false statements of the defendant's adjuster that the policy was void as to the hay, and that he was thus induced to accept, and did accept, the offer for a lesser amount than the loss sustained. The case is within the principle laid down in *Berry v. American Cent. Ins. Co. supra*.

The conclusion is that the judgment of the Appellate Division should be reversed, with costs, and the judgment entered upon the report of the referee should be reinstated.

Willard Bartlett, Ch. J., and Hiscock, Chase, Hogan, Cardozo, and Pound, JJ., concur.

Annotation—Insurance; insurable interest in crops.

As to insurable interest of tenant in leased property, see annotation to *Getchell Mercantile & Mfrs. Mut. F. Ins. Co.* 42 L.R.A.(N.S.) 135.

The decision in *HUDSON v. GLENS FALLS INS. CO.* ante, 482, that one working a farm under a contract for a share of the hay produced beyond the amount necessary to winter the owner's stock, has an insurable interest not only in such surplus, but also in the amount necessary for the stock, although the title is to remain in the owner of the farm until a division is made, is of considerable importance in view of the scarcity of authority relating to the question of insurable interest in crops. But one other case dealing with this question has been disclosed.

In *Heald v. Builders' Mut. F. Ins. Co.* (1872) 111 Mass. 38, a lease of a farm provided "the lessees agree that they will carefully tend and fodder the stock kept on said premises with the hay and other fodder which shall grow or be raised on said premises, and that they will not sell, dispose of, or carry away, or suffer to be carried away, from said farm any of the hay or fodder of any kind, or any of the manure which shall be made on said premises, except by written agreement of the lessors." It was held that one who, with knowledge of the terms of the lease, took a bill of sale from the lessees of hay and straw raised by them, and took possession of such property, had no insurable interest therein, it being admitted that the lessors never agreed in writing to the execution of the bill of sale. The court said: "The principal part of the stock on the farm

was the property of the lessors. The plaintiff knew of this provision in the lease, and the bill of sale to him was made without the written agreement of the lessors. Whatever remote interest the tenants had in the produce of the farm, they had no property in it which they could dispose of by sale. The lessors had the right to reserve the crops, or any interest in them, in advance. It was in the nature of a reservation of rent. . . . It is not simply an agreement or covenant that none of the productions named should be carried away, for breach of which they would be liable in damages; but it was an agreement that it should not be sold. It was a limitation on the title, which was to remain in the landlord subject to the tenants' right to use it in the cultivation of the farm. It is an evasion to say that the interest which the tenants had in the possession and use of the property, and in the profits which might accrue from its use upon the farm, passed by the bill of sale to the plaintiffs, and was an insurable interest. This would defeat the plain words of the agreement, one purpose of which, no doubt, was to avoid conflicting claims of other parties, which might arise under a sale. . . . Nor is it a valid objection that these productions of the farm were not in existence at the time the contract for the appropriation of them was made. The subject-matter of the agreement existed potentially, and was subject to the disposition thus made in advance by the owners of the land."

J. T. W.

OHIO SUPREME COURT.

GIOVANNI PAGANO, Admr., etc., of Vincenzo Basile, Deceased, Plff. in Err.,
v.

NICOLA CERRI, Italian Consular Agent in and for Northern Ohio.

(93 Ohio St. 345, 112 N. E. 1037.)

Consul — right to administration.

1. Where a subject of the Kingdom of Italy dies intestate in this state, leaving a widow and two minor children residents and subjects of the Kingdom of Italy, the Italian consul is not entitled to the prior, paramount, and exclusive right of administration, but is eligible to such appointment under the 4th subdivision of § 10617, General Code, subject to the exercise of the discretion of the probate court of such county. *For other cases, see Executors and Administrators, I. in Dig. 1-52 N. S.*

Treaty — construction — rights of consul.

2. Article 14 of the Treaty of 1911 between the United States of America and the Kingdom of Sweden provides: "In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul, vice consul general, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul general, consul, vice consul general, or vice consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate."

Article 17 of the Treaty between the United States and Italy provides: "The respective consuls general, consuls, vice consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attachés, shall enjoy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation." Held:

(a) These provisions are to be construed as investing the consuls of the Kingdom of Italy with the same rights, privileges, and prerogatives as those of the Kingdom of Sweden, and thereby they are made eligible to act as administrators when no competent person having rights under subdivisions 1, 2, and 3 of § 10617, General Code, applies.

Headnotes by the COURT.

Note. — As to jurisdiction and power of consul to administer estates, see notes to *Telfsen v. Fee*, 45 L.R.A. 496, and *Re Ghio*, 37 L.R.A.(N.S.) 549; and see later case, *Re D'Adamo*, L.R.A.1915D, 373. L.R.A.1917A.

(b) The provisions under consideration are not to be construed as conferring prior and paramount rights to such consuls as to permanent administration upon the estates of their fellow countrymen dying intestate in Ohio, and thereby superseding and supplanting the provisions of § 10617, General Code of Ohio.

For other cases, see Executors and Administrators, I. in Dig. 1-52 N. S.

(Newman, J., dissents, and Donahue, J., dissents in part.)

(January 25, 1916.)

ERROR to the Court of Appeals for Trumbull County to review a judgment reversing judgments of the Probate and Common Pleas Courts overruling a motion for the removal of the administrator of the estate of Vincenzo Basile, deceased. Reversed.

Statement by the Court:

A motion filed in the probate court by one Dr. Nicola Cerri, Italian consular agent, seeking the removal of Giovanni Pagano, administrator of the estate of Vincenzo Basile, was overruled, and a like decision was rendered by the court of common pleas on appeal, whereupon error was prosecuted to the court of appeals, which reversed both the probate and common pleas courts, and the administrator filed his motion in the supreme court asking that the court of appeals be directed to certify its record to the supreme court. The motion was granted and the record certified.

Mr. Dominic F. Rendinell, for plaintiff in error:

The Italian consular agent is not entitled to invoke, under the terms of article 17 of the Treaty of 1878 between the United States and Italy, whatever privileges may be accorded to Swedish consular officers by virtue of article 14 of the Treaty of 1911 between the United States and Sweden.

6 Ops. Atty. Gen. 148; Devlin, *Treaties*, § 132; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 387, 8 Sup. Ct. Rep. 456; *Bartram v. Robertson*, 122 U. S. 116, 30 L. ed. 1118, 7 Sup. Ct. Rep. 1115; *Lanfear v. Ritchie*, 9 La. Ann. 90; *Rocca v. Thompson*, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207.

The Italian consular agent, by virtue of article 14 of the Swedish Treaty with the United States, does not have the prior, paramount, and exclusive right of administration upon the estates of Italian citizens dying intestate in this country.

Re Ghio, 157 Cal. 552, 37 L.R.A.(N.S.) 549, 137 Am. St. Rep. 145, 108 Pac. 516, 223 U. S. 334, 56 L. ed. 459, 32 Sup. Ct.

Rep. 207; Austro-Hungarian Consul v. Westphal, 120 Minn. 122, 139 N. W. 300; Re D'Adamo, 212 N. Y. 214, L.R.A.1915D, 373, 106 N. E. 81; Aspinwall v. Queens Proctor, 2 Curt. 241; Whitney v. Robertson, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; Wolf v. Lake Erie & W. R. Co. 55 Ohio St. 517, 36 L.R.A. 812, 45 N. E. 708.

The Federal government, by means of its treaty-making power, has no power to enter into treaties with foreign countries with respect to administration of estates.

Frederickson v. Louisiana, 23 How. 445, 16 L. ed. 577; Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Re Ah Lung, 18 Fed. 28; Hauenstein v. Lynham, 100 U. S. 490, 25 L. ed. 630.

Mr. F. R. Hahn also for plaintiff in error.

Messrs. Harry F. Payer and John Rufalo, for defendant in error:

The Law of Nations and the treaty provisions confer upon the duly accredited consular representative the paramount right of administering the estates of his fellow countrymen dying within his jurisdiction.

Rocca v. Thompson, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207; Devlin, Treaty-Making Power, § 202; Carpigiani v. Hall, 172 Ala. 287, 55 So. 248, Ann. Cas. 1913D, 651; Re Lohrasciano, 38 Misc. 415, 77 N. Y. Supp. 1040; Re Tartaglio, 12 Misc. 245, 33 N. Y. Supp. 1121; Re Fattosini, 33 Misc. 18, 67 N. Y. Supp. 1119; Re Davenport, 43 Misc. 573, 89 N. Y. Supp. 537; Re Wyman, 191 Mass. 276, 77 N. E. 379; Rabasse's Succession, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 So. 867; Re Silveti, 66 Misc. 394, 122 N. Y. Supp. 400; Re Scutella, 145 App. Div. 156, 129 N. Y. Supp. 20.

There being no provision for a public administrator in Ohio, the treaty rights of consuls can be recognized without striking down any statute.

Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628.

Treaties are supreme, and supersede state laws.

Ibid.; Re Tibureio Parrott, 6 Sawy. 349; 1 Fed. 481; State v. Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431, 4 Am. Crim. Rep. 203; Ware v. Hylton, 3 Dall. 236, 1 L. ed. 584.

The treaties are within the treaty-making power.

Re Wyman, 191 Mass. 276, 77 N. E. 379; Devlin, Treaty-Making Power, pp. 178, 179; Rabasse's Succession, 47 La. Ann. 1452, 49 Am. St. Rep. 433, 17 So. 867.

Nichols, Ch. J., delivered the opinion of the court:

Vincenzo Basile, an Italian subject, born L.R.A.1917A.

in the province of Messina, died intestate November 9, 1913, in Trumbull county, Ohio. He left no heirs in the United States, but did leave surviving him, as his only heirs at law and next of kin, a widow and two minor children, all of whom were at the time of the death of Basile residents of the Kingdom of Italy and subjects of that nation. The estate of decedent consisted solely of an unliquidated claim for damages for his wrongful death. Dr. Nicola Cerri is now, and has been continuously since 1900, the duly qualified recognized, and acting consular officer for the Kingdom of Italy in and for Northern Ohio, his jurisdiction as such extending to and including Trumbull county. Dr. Cerri, although likewise an Italian subject, is and has been since 1900 a resident of Cleveland, Ohio. On November 26, 1913, Giovanni Pagano was appointed administrator of the estate of the decedent by the probate court of Trumbull county. Shortly thereafter, Dr. Cerri, such consular agent, filed a motion in the Trumbull county probate court seeking the removal of the administrator so appointed, on the ground that the appointment had been made in contravention of the general Law of Nations, and particularly of articles 9, 16, and 17 of the Consular Convention of 1878 (20 Stat. at L. 725) between the United States of America and the Kingdom of Italy, and of the rights, privileges, and immunities accruing to the said consular agent thereunder by virtue of article 10 of the Treaty of 1859 (Feb. 4, 1859, 12 Stat. at L. 1091) between the United States of America and Paraguay, and article 14 of the Treaty of 1911 (37 Stat. at L. 1479) between the United States of America and the Kingdom of Sweden. In January, 1914, said probate court overruled the motion. Appeal was taken to the court of common pleas by the consular agent. Decision was again had in favor of the administrator so appointed and against Dr. Cerri, the consular agent. Error was thereupon prosecuted to the court of appeals, which court reversed both the probate and common pleas courts, and its mandate was issued to the probate court of Trumbull county directing it to sustain the motion to revoke the letters of administration to Pagano and to appoint Dr. Cerri, such consular agent, as administrator of decedent, Basile. The administrator so deposed filed his motion in the supreme court asking that the court of appeals of such county be directed to certify its record to this court, on the ground that the case was one of great general interest. The motion was granted, and the record was accordingly certified.

This case relates wholly to the administration of the estates of aliens dying in-

testate in Ohio. It is asserted by Dr. Cerri that, by virtue of his office as consular agent for the Kingdom of Italy, he is invested with the sole, exclusive, and paramount right to be appointed as administrator of the estates of all subjects of Italy dying in Northern Ohio who may die intestate. His claim is that the probate court is without discretion in the premises, and amounts in effect to supplanting the provisions of § 10617, General Code of Ohio, wherein preference is given, first, to the husband or widow; second, to the next of kin; third, to creditors; and, fourth, to such persons as the court deems fit, in the discretion of the probate court having jurisdiction.

The claim thus asserted would seem by the mere statement of it to be a most extraordinary one, yet it is not without some substantial basis for its support. This basis is to be found in the provisions of article 17 of the Treaty between Italy and the United States and article 14 of the Treaty between Sweden and the United States. Article 17, known as the most favored nation clause, appears in all modern treaties between the United States and the other great powers, and is as follows: "Art. 17. The respective consuls general, consuls, vice consuls and consular agents, as likewise the consular chancellors, secretaries, clerks or attachés, shall enjoy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

Article 14 of the Swedish Treaty provides: "In the event of any citizens of either of the two contracting parties dying without will or testament, in the territory of the other contracting party, the consul general, consul, vice consul general, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul general, consul, vice consul general, or vice consul, shall, so far as the laws of each country will permit and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, moreover, have the right to be appointed as administrator of such estate."

While the provisions of article 14 of the Swedish Treaty were not incorporated in the Italian Treaty of 1878, yet it is vigorously claimed that by the terms of article 17 of the Italian Treaty the consuls of that country are entitled to the same rights, privileges, and prerogatives granted the Swedish consuls, just as fully indeed as if L.R.A.1917A.

article 14 had been inserted in the Italian Treaty.

This proposition is not free from doubt. In fact, the Supreme Court of the United States, in the case of *Rocca v. Thompson*, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207, raises a question as to the soundness of the claim; the ninth proposition of the syllabus reading: "Quære: Whether the most favored nation clause included in the Treaty with Italy of 1878 carries the provisions of the Argentine Treaty of 1853 in regard to the administration by consuls of the estate of deceased nationals."

This court, however, in its consideration of the instant case, will assume that the consuls of Italy, by reason of the "most favored nation" rule, are like beneficiaries with the Swedish consuls of all the rights and privileges conferred by article 14 of the Swedish Treaty.

Covenants and agreements among the civilized nations of the earth, commonly called treaties, are the most sacred engagements of which we can conceive. Not only are the honor and good faith of the nation put to the test, but any deliberate infraction of treaty obligations leads inevitably to the arbitrament of arms. The courts of the land, therefore, by every rule of reason, are chargeable with the duty of fairly and carefully considering questions arising under the treaty engagements entered into by the national government with foreign powers. Such engagements should be interpreted in a broad and liberal spirit, for certainly here hairsplitting distinctions have no shadow of excuse for their existence. However, at the very threshold of the case we are met with a distinct challenge as to the power of the national government, in the exercise of its treaty-making function, to invest the consul of any foreign nation with the sole, prior, and paramount right to administer upon the estates of their deceased fellow countrymen, anything in the laws of the several states of the Union to the contrary notwithstanding.

There is no Federal holding to the effect that the national government can constitutionally exercise any such sweeping power; indeed, within the last four years, the Supreme Court of the United States itself questions the right of the Federal government to enter into any such engagement with a foreign power. See *Rocca v. Thompson*, supra. While this is a question of power rather than policy, yet we feel that public policy, whether looked at from a national or a state standpoint, would forbid the exercise of such a power.

Shaw, J., of the supreme court of California, in the case of *Re Ghio*, 157 Cal. 352, 557, 37 L.R.A.(N.S.) 549, 137 Am. St.

Rep. 145, 108 Pac. 516, says: "It is also of grave importance because its solution in favor of the appellant necessarily ascribes to the Federal government the intent, by means of its treaty-making power, to materially abridge the autonomy of the several states and to interfere with and direct the state tribunals in proceedings affecting private property within their jurisdictions. It is obvious that such intent is not to be lightly imputed to the Federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it or necessarily implies it."

The Constitution of the United States does reserve to the exclusive domain of the Executive and the United States Senate the treaty-making power, yet this grant to the Federal government and the denial to the several states has its limitations of power. A treaty duly ratified has no more binding force than an act of Congress generally, and as to its subject-matter clearly it cannot overstep the limitations of the Federal Constitution. It would manifestly be beyond the power of the United States government to provide by treaty with Italy that subjects of Italy residents of Ohio should be entitled to exemption from execution for debts for an amount in excess of that granted citizens of Ohio, or to provide that such subjects should be entitled to obtain a divorce on the ground of desertion or wilful absence for one year; whereas, to other citizens the right was limited to absence for three years.

The administration of the estates of the deceased inhabitants of a state is peculiarly a state and not a Federal matter, and many of our most distinguished Secretaries of State for the United States have always recognized it as a state affair. It is clearly to be seen that in the making of the Swedish Treaty full recognition was given to this fact, and the government at Washington limited the rights and prerogatives granted consuls of Sweden and of all other countries, and bound itself to vouch for only such rights and privileges as the laws of each country would permit; the meaning of the word "country" being, so far as it applied to the United States, "the states of such country." Substantially similar language is to be found in every treaty entered into between our own government and every foreign country, the form of the limitation varying, sometimes reading, "so far as the laws of each country will permit;" at other times reading, "conformably with the laws of the country." But in no instance can there be found a case where the government of the United States binds itself by treaty to confer any such exclu-

sive right of administration independent of the state-law conformity limitation. Such a uniform construction of its own limitation of power by the Federal government, existing for so long a period of time, is certainly tantamount to a declaration that the several states have, under the 10th Amendment to the Federal Constitution, the reserved right to regulate the matter of the administration of the estates of aliens dying intestate within their jurisdictions as a strictly domestic concern.

The second proposition of the syllabus in *Rocca v. Thompson*, supra, reads: "There is no Federal probate law, but right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law."

This does not hold, of course, that Congress might not enact a probate law applicable to the administration of the estates of deceased aliens, but, taken with the *quære* which immediately follows the proposition just quoted, it suggests the existence of a substantial doubt in the minds of the judges of the Union's highest tribunal; the court saying: "*Quære*: Whether it is within the treaty-making power of the national government to provide by treaty with foreign nations for administration of property of foreigners dying within a state, and to commit such administration to consuls of the nation to which deceased owed allegiance."

This court, however, will not undertake to decide this phase of the case. It certainly would be much more appropriate for the Supreme Court of the United States to determine the limitation of the Federal government as to its treaty-making power, and, in view of the construction given the language of the Swedish Treaty of 1911 by the court of appeals of the seventh district of Ohio, it would seem that it is imperative that the Supreme Court of the United States give to the courts of the several states the proper construction it feels should be given this language, and at the same time define the limitation of power on the part of the Federal government, if any there be, in this respect.

This court, in the instant case, has reached a conclusion different from that of the court of appeals in construing the Swedish Treaty. It feels that the Federal government, in entering into this engagement, has not sought to give to foreign consuls the sole, prior, and paramount right of administration, as asserted by the defendant in error. We hold that the Federal government has had due regard for the rights of the several states, and has not accorded any privileges to foreign consuls in conflict with the laws of all or any of the

several states of the Union. The claim that these superior and paramount rights have been accorded foreign consuls rests wholly on the last clause of article 14 of the Swedish Treaty, reading, "and, moreover, have the right to be appointed as administrator of such estate." If this clause stood as an independent paragraph of the treaty, there would be available a good and valid argument to the effect that the Federal government had assumed to ignore or set aside the laws of the several states on the subject of the administration of estates, and had granted to foreign consuls a prior and paramount right and privilege denied to any of our own citizens. But this clause, under no sensible rule of construction, can be isolated from the context of article 14, but must be read with it, and its true meaning and intent thus ascertained. Taking the article as an entirety, it is readily to be ascertained that the right of a foreign consul to take charge of the property of the deceased pending the appointment of an administrator is subject to a positive limitation in the express language of the treaty. It can only be done "so far as the laws of each country [state] will permit."

Now this is mere custodianship,—preservation only,—not administration. It cannot approach in importance to the matter of administration, settlement, and distribution. It is temporary in its nature; implies the exercise of dominion only for the purpose of safe-keeping. It is unthinkable that our national government would surround this limited privilege or grant of power to a foreign consul with the safeguard of conformity to state laws, and in the same article and in the very next expression grant the far greater power of complete administration without restriction or limitation of any kind whatever. We cannot in reason attribute any such course of conduct to the President and the Senate of the United States. Whether the limitation in the first instance be induced by a sense of want of power, or be it merely a matter of policy, the same wisdom that would suggest the limitation laid down as to custodianship would operate to require the identical limitation as to permanent and final administration. Indeed, many more potent arguments could readily be advanced in support of the wisdom of imposing the limitation in the latter case than in the former.

But quite apart from such line of reasoning, it appears clear to us that a proper grammatical construction of article 14 in its entirety will support the position that the clause, "and, moreover, have the right to be appointed as administrator of such estate," is to be modified by the qualifying phrase, "so far as the laws of each country

will permit." The word "moreover" is defined as meaning "in addition thereto," "also," "furthermore," "likewise." It certainly will not constitute an act of grammatical violence to hold that the "moreover" clause is to be modified by the "so far as the laws will permit" clause.

The "consul general, consul, vice consul-general, or vice consul" is the compound subject of the sentence and directly the subject of both "shall take" and "shall have." These officers, it is written, "shall take charge" of the decedent's effects and "shall have the right to administer." The punctuation of the article is such that the subject in each instance is expressed and is in no part of the article to be supplied or understood. If it had been the clear intention to limit the "right to administer" in the same set terms as the "right to take charge," as we think it was, it certainly would have been a grammatical solecism to have repeated after the word "moreover" the clause, "so far as the laws of the country will permit," and the failure so to do cannot therefore be urged as an argument in favor of another and different construction. It is to be supposed that in the framing of a treaty the high contracting parties bring to the task of its preparation their most eminent linguists and scholars, men who measure every phrase and scrutinize every word.

Much importance is attached by defendant in error to the employment of the word "moreover," as if the choice of this term indicated an independent grant of power, entirely disassociated from all that had gone before. The contrary appears to us to be the more reasonable construction, and we are altogether convinced that the term was used in the sense of its meaning of "also" or "likewise." With this meaning given the term "moreover," its relative importance passes out, and we have the treaty reading, "and, likewise, have the right to be appointed as administrator of such estate." This construction is in harmony with the oft-time expressed views of our high officials whose duty it is to put into proper language the tentative draft of a contemplated treaty. It is in harmony with the proper respect that our Federal officers have manifested for the reserved rights guaranteed to the several states by the national Constitution. It is likewise in harmony with the uniform practice of the national government for the full period of its existence. Any other construction would work a departure from the established and well-settled policy of more than a century.

We therefore hold that the right of the Italian consul to administer on the estate of Vincenzo Basile, as vested in him by the

Treaty with Sweden, is not such as to supplant the administration statutes of Ohio. This right is subject to the limitations and provisions of the Ohio statutes relating to the administration of estates. The probate court is not divested of its discretion in the premises. It may select Dr. Cerri, or it may reject him. It may well be the proper thing—the wise thing in many, if not most, instances—to select the consular agent, especially where the range of selection is limited to the class mentioned in the 4th paragraph of § 10617, General Code; but this must be left to the wisdom of the appointing power.

Counsel for defendant in error place great dependence on the observations of Justice Day in the *Rocca Case*, 223 U. S. 317, 56 L. ed. 453, 32 Sup. Ct. Rep. 207, the claim being made that in the course of this opinion in that case the learned justice undertook to construe the language of the clause of the Swedish Treaty under consideration, and in so doing gave it the construction contended for by defendant in error.

In the course of his opinion in that case, at page 332 of 223 U. S., Justice Day said: "Had it been the intention to commit the administration of estates of citizens of one country dying in another exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as . . . in the Convention between the United States and Sweden, proclaimed March 20, 1911, it is provided:" Then follows article 14 of the Swedish Treaty.

This construction, however, cannot be employed as binding authority of the courts of the several states, for the very good reason that the eminent jurist made use of the Swedish Treaty merely as an illustration. It was not in the case then under consideration, for the still better reason that the rights of the respective parties accrued in 1908; whereas, the Swedish Treaty was not ratified until 1911.

The views that this court here express are supported by the recent decision of the supreme court of Minnesota in the case of *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139 N. W. 300, and by decision of the court of appeals of New York, *Re D'Adamo*, 212 N. Y. 214, L.R.A.1915D, 373, 106 N. E. 81; the first-cited case having been decided December 27, 1912, and the latter July 14, 1914, both after the decision of the Supreme Court of the United States in the *Rocca Case*, *supra*, which bore date of February 19, 1912.

The judgment of the Court of Appeals of Trumbull County is therefore reversed, and L.R.A.1917A.

that of the Probate Court of same county is affirmed.

Johnson, Wanamaker, Jones, and Matthias, JJ., concur.

Newman, J., dissents.

Donahue, J., dissenting:

I concur in the holding of the majority of this court that the consul general, consuls, vice consul general, and vice consuls of the Kingdom of Italy are entitled to the benefit and provisions of article 14 of the Convention between the United States and the Kingdom of Sweden of the date of March 20, 1911, and that by the provisions of this article such consuls have the right to administer the estates of citizens of Italy dying intestate within the state of Ohio, in so far as the laws of this state will permit; but I do not concur in the holding of the majority of this court that this right to be appointed as such administrator is subject to the discretion of the probate court.

This provision of our convention with Sweden does not provide that the consul is merely eligible to appointment, or that he may be appointed at the discretion of the probate court; but it does provide in express terms that he shall have the right to be appointed as administrator of such estates, and this right to appointment is modified and qualified only by the further provision in the treaty that the rights granted therein shall obtain to the extent that "the laws of each country will permit."

Paragraphs 1, 2, and 3 of § 10617, General Code, grant to the husband or widow of the deceased, the next of kin, or the principal creditor, if there be any competent and willing to undertake the trust, a prior right, in the order named, to be appointed administrator of the estate of an intestate resident of the state of Ohio at the time of his death. To this extent only the laws of Ohio do not permit the operation of the provision of the Treaty with Sweden granting to consuls the right to be appointed as administrator of such estate.

Where there is no husband or widow of the deceased or next of kin or principal creditor, or other person entitled by the laws of this state to such administration, then the provisions of the treaty obtain, and the right of the consul to administer upon such estates becomes absolute, paramount, and prior to that of all other persons who may be appointed by the probate court, in its discretion, under the provisions of ¶ 4 of § 10617, General Code.

GEORGIA SUPREME COURT.

MARY G. SMITH, Plff. in Err.,

v.

WILLIE REED.

(— Ga. —, 89 S. E. 815.)

Marriage — removal of impediment — effect.

1. If a man who had a living wife undivorced entered into a ceremonial marriage with another woman, who was not shown to have known of the former marriage, and they cohabited as man and wife for many years, and continued so to do after the death of the first wife, they will be considered thereafter as lawfully married.

For other cases, see Marriage, III. b, 2, in Dig. 1-52 N. 8.

Appeal — grounds for reversal.

2. None of the other grounds of the motion for a new trial required a reversal.

For other cases, see Appeal and Error, VII. m, in Dig. 1-52 N. 8.

(August 22, 1916.)

ERROR to the Superior Court for Polk County to review a judgment in favor of caveatrix in a proceeding for letters of administration upon the estate of William H. Williams, deceased. Affirmed.

Statement by LUMPKIN, J.:

Mrs. Mary G. Smith filed an application to the court of ordinary of Polk county for letters of administration on the estate of William H. Williams, deceased. A caveat was filed by Mrs. Willie Reed, who alleged that she was the daughter and sole heir of the decedent, and that there was no debt and no need of administration. The case was carried to the superior court by appeal. The evidence on behalf of the applicant tended to show, in brief, the following facts: William H. Williams (who the witnesses generally referred to as William Williams) formerly lived in Wales. He married Ellen Jones in 1850, and the applicant was their daughter. He came to America, and was soon followed by his wife, about 1803. He left his wife and daughter in New York in 1865 or 1866, and went away. One witness testified that he left a place in Vermont about 1867. He was later heard from in Rockmart, Polk county, Georgia, and communications with him were had at that place, and he was seen

Headnotes by LUMPKIN, J.

Note. — For inference or presumption of marriage from continued cohabitation following removal of an original impediment to marriage, see notes to Chamberlain v. Chamberlain, 3 L.R.A. (N.S.) 244, and People v. Shaw, L.R.A.1915E, 91. L.R.A.1917A.

there, where he was living. He had a little girl with him at that place, who apparently was the caveatrix. On cross-examination of some of the witnesses for the plaintiff it was brought out that Williams and Jones were very common names in Wales, and a witness stated that he knew many persons there named William Williams. It also appeared that several years after Williams left his wife she married another man. She died in 1890.

The evidence on behalf of the caveatrix was in brief as follows: The William H. Williams, who was the father of the caveatrix, was a Welshman; but two witnesses testified that he lived in Rockmart prior to 1860. In 1871 he married a widow, and the caveatrix was their child. They lived together as husband and wife for twenty or thirty years. She died in 1907, and he in 1911, leaving his daughter (the caveatrix), whom he recognized as such, surviving him.

The jury found for the caveatrix. The applicant moved for a new trial. It was denied, and she excepted.

Messrs. Bunn & Trawick and Green, Tilson, & McKinney, for plaintiff in error:

When a marriage is once proven, the law presumes that it continues until its dissolution is shown by death or divorce.

Clark v. Cassidy, 62 Ga. 408; Wilson v. Allen, 108 Ga. 275, 33 S. E. 975.

When a ceremony of marriage has been proven, it cannot be overcome by evidence of marriage by repute.

Jenkins v. Jenkins, 83 Ga. 287, 20 Am. St. Rep. 316, 9 S. E. 541; Norman v. Goode, 113 Ga. 121, 38 S. E. 317; Charleston & W. C. R. Co. v. Thompson, 13 Ga. App. 528, 80 S. E. 1097; Brown v. State, 16 Ga. App. 603, 85 S. E. 951.

In order to render the marriage license between Williams and the Holcomb woman admissible in evidence, it must first have been proven that a divorce had been obtained by Williams or his wife, Ellen.

Clark v. Cassidy and Wilson v. Allen, supra; State v. Eggleston, 45 Or. 346, 77 Pac. 738; People v. Stokes, 71 Cal. 263, 12 Pac. 71, 8 Am. Crim. Rep. 14; Rhode Island Hospital Trust Co. v. Thorndike, 24 R. I. 114, 52 Atl. 873; Moore v. Moore, 102 Tenn. 148, 58 S. W. 778; Goodwin v. Goodwin, 113 Iowa, 319, 85 N. W. 31; Re Hamilton, 76 Hun, 202, 27 N. Y. Supp. 813; Ellis v. Ellis, 58 Iowa, 720, 13 N. W. 65; Gilman v. Sheets, 78 Iowa, 499, 43 N. W. 299; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Jones v. Jones, 48 Md. 391, 30 Am. Rep. 466; Arnold v. Keil, 81 Ill. App. 237; Stoutenborough v. Ram-

mel, 123 Ill. App. 487; Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942; Turner v. Williams, 202 Mass. 500, 24 L.R.A.(N.S.) 1199, 132 Am. St. Rep. 511, 89 N. E. 110.

The marriage to the Holcomb woman was void; and the illicit relation existing between the parties could have been rendered valid only by a ceremony of marriage entered into between the parties after the death of Ellen Williams.

Collins v. Voorhees, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054; Cram v. Burnham, 5 Me. 213, 17 Am. Dec. 218; McCombs v. State, 50 Tex. Crim. Rep. 490, 9 L.R.A.(N.S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72, 99 S. W. 1017; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; Spencer v. Pollock, 83 Wis. 215, 17 L.R.A. 848, 53 N. W. 490; Rose v. Rose, 67 Mich. 619, 35 N. W. 802; Foster v. Hawley, 8 Hun, 68.

In civil suits, parties are generally relieved from the onus of proving identity, as it is a fact generally more easy to disprove than to establish.

Mullery v. Hamilton, 71 Ga. 720, 51 Am. Rep. 288.

Messrs. I. F. Mundy and W. W. Mundy for defendant in error.

Lampkin, J., delivered the opinion of the court:

1. The court charged the jury, in substance, that if Williams married the mother of the applicant in 1859, and the applicant was the child of that marriage, but if in 1871 or 1873 he entered into a ceremonial marriage with the mother of the caveatrix, and continued to live with her as his wife until and after the death of the first wife, the second wife became his legal wife, and their child, born before the death of the first wife, thus became legitimate, and would share in the distribution of the estate with the child of the first marriage. There was no evidence to indicate that the second wife had any knowledge of the existence of the first. It was contended on behalf of the plaintiff in error that this charge was erroneous, and that the correct rule was that if Williams had a living wife when he entered into a ceremonial marriage with the mother of the caveatrix, the attempted marriage was void, and his living with her was an illicit relation, and so continued even after the death of the first wife and until a formal ceremony of marriage should be performed after that event. The evi-

dence showed that the caveatrix was recognized by her father, and he lived with her; and, while the charge did not mention that fact, or any question as to want of knowledge of the impediment by the mother of the caveatrix, no point was made on that ground either in the assignments of error or in the brief; and, in view of the nature of the issue and general charge, this will not require a reversal. Civil Code 1010, §§ 3012, 3026.

There is some conflict in the authorities on this subject. A leading case, holding that, where a marriage was originally illegal, subsequent cohabitation after the impediment had been removed would not suffice to show a lawful marriage, is that of Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Am. St. Rep. 404, 19 Atl. 172, and see dissenting opinion of Garrison, J., in 47 N. J. Eq. 315, 14 L.R.A. 366, 20 Atl. 676; Collins v. Voorhees, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054. But in the later case of Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 3 L.R.A.(N.S.) 244, 111 Am. St. Rep. 658, 62 Atl. 680, 6 Ann. Cas. 483, it was held that, when a man and woman intend to marry and live together as husband and wife, but their intent is frustrated by the existence of some unknown impediment, when the impediment is removed, and it is shown that the same intent continues, their relations are lawful. The unknown impediment referred to in that case was that the woman had a living husband whom she and the second man to whom she was married supposed to be dead. We cannot concur in the reasoning in the first cited case. If a man and woman begin to cohabit, not as man and wife, but as a meretricious cohabitation, their continued cohabitation will be presumed to continue on the same basis, unless something is shown to the contrary. But where a man and woman enter into a ceremonial marriage, thus openly declaring their intention to be husband and wife, and live together, the marriage may be void because of some impediment, and the cohabitation may not be legal; but if the impediment is removed, and the matrimonial cohabitation continues, it is to be presumed that the intent to be husband and wife, expressed in the ceremonial marriage, continues, unless the contrary appears, and the continued cohabitation after the removal of the impediment is to be considered as under such an intent and declaration rather than with an unlawful intent. At least, a renewed consent might be inferred. In Campbell v. Campbell, L. R. 1 H. L. 182,

Lord Wesbury said: "You must infer the consent to have been given at the first moment when you find the parties able to enter into the contract."

In *De Thoren v. Atty. Gen.* L. R. 1 App. Cas. 686, where there was a ceremony of marriage, invalid because of an impediment, though this was unknown to the parties, and a continued matrimonial cohabitation after the removal of the impediment, it was declared: "When a matrimonial ceremony took place in Scotland, the parties being ignorant of an impediment, afterwards removed, and when, believing themselves to be validly married, they lived together continuously for years as husband and wife and were regarded as such by all who knew them, the marriage was held to have been established by the force of habit and repute, without any proof of mutual consent by verbal declaration. It must be inferred that the matrimonial consent was interchanged as soon as the parties were enabled, by the removal of the impediment, to enter into the contract. . . . The ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent."

In 1 Andrews's Am. Law, § 486, p. 627, it is said: "Where the inception is illegal or illicit, the ordinary presumption of continuance applies until there is a change in the circumstances: but a very slight change will be seized hold of in order to presume the marriage. Where an actual ceremony or an actual contract per verba de presenti is shown, the burden of proof is upon the party attacking the marriage to show its invalidity, and every presumption will be indulged to uphold it." *Flanagan v. Flanagan*, 122 Mich. 386, 81 N. W. 258; *Schuchart v. Schuchart*, 61 Kan. 597, 50 L.R.A. 180, 78 Am. St. Rep. 342, 60 Pac. 311; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742; *North v. North*, 1 Barb. Ch. 241, 43 Am. Dec. 778; *Donnelly v. Donnelly*, 8 B. Mon. 113, 117.

See also cases gathered in the note to *Chamberlain v. Chamberlain*, 3 L.R.A. (N.S.) 244, supra.

In this state it has been held that where two persons entered into a ceremonial marriage and cohabited as husband and wife, although the marriage was invalid because one of them was under the age at which a valid marriage could be contracted, yet if they continued to cohabit as man and wife after he arrived at the age when they could lawfully marry, their relation was that of

husband and wife. *Smith v. Smith*, 84 Ga. 440, 446, 8 L.R.A. 362, 11 S. E. 496. True, the impediment there was of a different character, but the ceremonial marriage was invalid. There is nothing in *Drawdy v. Hesters*, 130 Ga. 161, 15 L.R.A. (N.S.) 190, 60 S. E. 451, conflicting with the ruling here made; but the two decisions harmonize, and the former cites approvingly Andrews's American Law, referred to above.

In the present case, even if Williams knew that his first wife was living at the time of the second marriage, but the second woman whom he married ceremonially did not know of it, and, after the death of the first wife, they continued their matrimonial cohabitation, why should an unlawful, rather than a lawful, intent be attributed to the parties after the removal of the impediment? The declaration of intent to be husband and wife should be treated as continuing, nothing to the contrary appearing; and the continued cohabitation under such circumstances should be considered as lawful rather than unlawful. *Flanagan v. Flanagan*, 122 Mich. 386, 81 N. W. 258, supra.

It was also urged that there had been an agreement by counsel trying the case that the only issue was as to the identity of the father of the applicant and caveatrix, and that the charge stated above should not have been given. It also appears that there was some discussion as to the legitimacy of the caveatrix. If she were illegitimate, she would have no status as a caveatrix. The court appears to have been correcting any possible misapprehension which might arise on the subject in the minds of the jury. He charged several times that if the William H. Williams who died in Rockmart in 1911 was the father of the applicant for administration, she would be entitled to a verdict in her favor. We do not think that the jury could have been misled by the charge. The controlling question of fact in the case was whether the father of the applicant and of the caveatrix was the same person. The greater weight of the evidence seemed to indicate that he was the same man. But there was some evidence to the contrary. The jury found against that contention, and we cannot say that there was not sufficient evidence to sustain their verdict.

2. None of the grounds of the motion for a new trial require a reversal.

Judgment affirmed.

All the Justices concur.

MONTANA SUPREME COURT.

GEORGE H. HILL, Appt.,
v.

WILLIAM C. RAE, State Treasurer of the
State of Montana, Resp't.

(— Mont. —, 158 Pac. 826.)

Party — action to enjoin waste of public money.

1. A citizen and taxpayer of a state may maintain an action to restrain public officials from putting into force an unconstitutional statute which will require the expenditure of large sums of public money.

For other cases, see Parties, I. a, 4, in Dig. 1-52 N. S.

Constitutional law — class legislation — department of farm loans.

2. A statute creating a department to aid agriculturists in securing loans on their real estate is not unconstitutional as class legislation, or a denial of the equal protection of the laws, although its benefits are limited to agriculturists, and to the members of that class only who can furnish real estate security.

For other cases, see Constitutional Law, II. a, 1, in Dig. 1-52 N. S.

Same — appropriation — duration.

3. A statute making an appropriation for a longer time than the Constitution allows is not void ab initio, but the Constitution merely establishes an automatic limit to the duration of the appropriation.

For other cases, see Appropriations, in Dig. 1-52 N. S.

Same — appropriation — separate bill.

4. The incorporation into a bill for a specific purpose of an appropriation to carry it into effect does not violate a constitutional provision that appropriations shall be made by separate bills, each embracing but one subject.

For other cases, see Appropriations, in Dig. 1-52 N. S.

Appropriation — to guarantee interest on farm loans — validity.

5. An appropriation to guarantee payment of interest on farm loans is within the operation of constitutional provisions forbidding appropriations for industrial purposes not under the absolute control of

the state, and forbidding the loan of state credit in aid of any individual.

For other cases, see Public Moneys, III. a, in Dig. 1-52 N. S.

Statutes — invalid in part — effect.

6. The mere invalidity of an appropriation to guarantee payment of interest in a statute establishing a department for farm loans does not destroy the entire act.

For other cases, see Statutes, I. c, 2, b, in Dig. 1-52 N. S.

Tax — exemption — mortgages — validity.

7. There is no unconstitutional inequality in the exemption of mortgages from taxation if the evidences of debts secured thereby are taxed.

For other cases, see Constitutional Law, II. a, 4, in Dig. 1-52 N. S.

Mortgage — recording fee — exemption from payment — validity.

8. The exemption from the payment of recording fees of holders of mortgages issued under a farm loan scheme, when such fees are required of other mortgages, is invalid discrimination.

For other cases, see Constitutional Law, II. a, 4, in Dig. 1-52 N. S.

Statute — invalid in part — effect.

9. The invalidity of a provision in a statute establishing a department of farm loans which exempts the mortgagees from paying recording fees does not nullify the entire act.

For other cases, see Statutes, II. c, 2, b, in Dig. 1-52 N. S.

Injunction — against execution of statute — invalid provisions.

10. A taxpayer cannot enjoin the execution of a statute attempting to establish a department of farm loans because the bonds contain an illegal provision for the guaranteeing of interest by the state, and an illegal provision is made for exemption of the mortgagees from payment of recording fees.

For other cases, see Parties, I. a, 4, in Dig. 1-52 N. S.

(June 2, 1916.)

A PPEAL by plaintiff from a judgment of the District Court for Lewis and Clark County sustaining a demurrer to, and dis-

Note.—No other case has been found which deals with the constitutionality of statutes designed to assist agriculturists or other classes of persons in securing loans, other than statutes for the relief of persons in distress.

In this connection, see the cases *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *State ex rel. Griffith v. Osawkee Twp.* 14 Kan. 418, 19 Am. Rep. 99; and *State v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33, which are set out in note to *Davies v. State*, 7 L.R.A. (N.S.) 1196, treating of the validity of statutes providing for governmental assistance of individual members of certain L.R.A.1917A.

classes of unfortunate or afflicted persons.

The right to use public funds to relieve persons not entirely without means of their own is the subject of a note to *Coffeen v. Preble*, 27 L.R.A. (N.S.) 1079.

The right of a citizen or taxpayer to enjoin waste or unlawful expenditure of state funds is treated in the note to *Sutton v. Buie*, L.R.A.1915D, 178; and see notes on collateral questions there referred to.

Generally as to the constitutionality of mortgage registration tax, including the question of uniformity, see annotation following *Wheeler v. Weightman*, L.R.A.1916A, 865.

missing, a suit to enjoin defendant, as state treasurer, from issuing, negotiating, or selling certain bonds pursuant to the Farm Loan Act. Affirmed.

The facts are stated in the opinion.

Messrs. Wight & Pew, for appellant:

Plaintiff had the right to maintain the action.

(*Chumaseo v. Potts*, 2 Mont. 242; *State ex rel. Buck v. Ravalli County*, 21 Mont. 473, 54 Pac. 939.

The Farm Loan Act is void as an arbitrary classification.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *State v. Cudahy Packing Co.* 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833, 8 Ann. Cas. 717.

The legislature by the Farm Loan Act has attempted to loan the credit and the money of the state of Montana, and the services of the state officers, to the beneficiaries under the act, without compensation, which is prohibited by the Constitution.

State ex rel. Griffith v. Osawkee Twp. 14 Kan. 418, 19 Am. Rep. 99; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Re Relief Bills*, 21 Colo. 62, 39 Pac. 1089; *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 70 L.R.A. 450, 81 Pac. 450, 6 Ann. Cas. 298; *Atkinson v. Ada County*, 18 Idaho, 282, 28 L.R.A.(N.S.) 412, 108 Pac. 1046; *Fox v. Mohawk & H. R. Humane Soc.* 165 N. Y. 517, 51 L.R.A. 681, 80 Am. St. Rep. 767, 59 N. E. 353; *Pally v. Colgan*, 97 Cal. 251, 18 L.R.A. 744, 31 Pac. 1133.

Messrs. J. B. Poindexter, Attorney General, W. H. Poorman and C. S. Wagner, Assistant Attorneys General, for respondent.

Sanner, J., delivered the opinion of the court:

The plaintiff, alleging his status as citizen and taxpayer of Lewis and Clark county, Montana, brought this suit to enjoin the defendant, as state treasurer, from issuing, negotiating, or selling certain bonds pursuant to the provisions of chapter 28, Laws of 1915, commonly called the Farm Loan Act. Claim to the relief sought is based upon the contention that the act is unconstitutional, and that, in connection with the proposed issue, negotiation, and sale of bonds thereunder, the defendant has expended, and, unless restrained, will expend, large sums of money belonging to the state. The defendant demurred, questioning the plaintiff's main contention, his right to maintain the suit, and the power of the court to hear it. The demurrer was sustained, not, however, on either of the L.R.A.1917A.

technical grounds assigned, and the plaintiff, refusing to plead further, suffered judgment of dismissal to be entered. This appeal is from that judgment.

1. The defendant again insists that the court had no jurisdiction to hear this suit, and the plaintiff none to maintain it,—the former because "an injunction cannot be granted . . . to prevent the execution of a public statute, by officers of the law, for the public benefit" (Rev. Codes, § 6121); the latter because it does not appear that the plaintiff will suffer any other or different injury than the taxpayers of the state in general. The assumption that the Farm Loan Act or its execution is for the public benefit begs the whole question; while the plaintiff's right as citizen and taxpayer to maintain such a suit as this is settled by a long line of decisions in this state, extending from *Chumaseo v. Potts*, 2 Mont. 242, to *Poe v. Sheridan County*, 52 Mont. 666, 157 Pac. 185.

2. In its general scope and purpose the Farm Loan Act is assailed as obnoxious class legislation or a denial of the equal protection of the laws, contrary to the 14th Amendment to the national Constitution. Whether this is so or not depends on what the act designs to do, how it designs to do it, and what may be its effect upon those without as well as those within its scope. It may be analyzed as: (1) Creating a department of farm loans, for which the state treasurer is the commissioner or head, the several county treasurers are local representatives, the attorney general is the legal adviser, the state examiner is the auditor, and the several county attorneys are, as such, required to render legal service; (2) imposing upon that department the duty to formulate and receive applications for loans on nonurban property, to require and pass upon proof of title, productive value, and other facts pertinent to the security offered, to formulate all mortgages given to secure such loans and be named as mortgagee therein, to formulate, issue, and offer for sale the bonds intended as evidence of such loans, to collect all payments as they become due, and to pay the bonds as they mature according to the scheme set forth; (3) prescribing the character of property which shall be accepted as security and how it shall be held as such, the general nature of the bonds, the rate of interest they shall bear, how they shall mature, where they shall be payable, the manner in which payments shall be taken up, and the means to be employed in caring for cases of default; (4) appropriating \$25,000 out of the state treasury, of which \$5,000 is to be used for administra-

tive purposes, but to be recouped, so far as may be, by taking one-eighth of each payment required of the mortgagors, and \$20,000 to serve as a guaranty fund to assure the prompt payment of maturing bonds, with interest, and to be recouped by the proceeds of foreclosures against defaulting debtors, or, if necessary, by assessments upon nondefaulting owners whose mortgages are security for the same series of bonds; and (5) exempting from recording fees and from taxation the mortgages given to secure such loans. In short, for reasons not declared in the act itself, it designs to assist agriculturists in securing loans on their real estate by and through the activities of a public department, aided to greater or less extent by public funds, and thus to confer upon that particular class certain privileges not as yet enjoyed by any other.

In the application of the 14th Amendment to the Constitution of the United States no distinction is to be observed between the effect of privileges conferred and the effect of burdens imposed. A privilege conferred upon one class is a discrimination in favor of that class and against all others not similarly endowed, as a burden upon one class is a discrimination against it and in favor of all others not similarly afflicted. But a discrimination is not necessarily unlawful merely because it is a discrimination. Indeed, the greater part of all legislation is discriminatory either in the extent to which it operates, the manner in which it applies, or the objects sought to be attained by it; and we are commanded by the highest judicial authority of the land to "be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights." *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. A privilege or a burden is or not a denial of the equal protection of the laws, according to whether the discrimination relates to a matter upon which classification is legally permissible, and, if so, whether the classification is a reasonable one.

That classification is permissible, because, in the essential nature of things and in any due appreciation of equality in the operation of the law, it is necessary in legislation for purposes of revenue, or in the application of the police power, strictly so-called, or in legislation designed to in-

crease the industries of the state, develop its resources, or add to its wealth and prosperity, is abundantly settled by judicial decision as well as by the course of legislation. To cover the entire field of this subject is impossible within any reasonable limits. Suffice it to say that by the Supreme Court of the United States, construing this very amendment, classifications have been sustained based upon differences in the amount of legacies, differences between corporations, differences between land dependent on its use for agricultural and other purposes, differences between fire insurance and other insurance, differences in the character of work, differences between hiring persons to labor in the state and hiring persons to labor out of the state, differences between sugar refineries, based entirely on whether the sugar refined was purchased or produced by the refiner, as well as various other differences too numerous to mention. *Magoun v. Illinois Trust & Sav. Bank*, 176 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633; *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, and cases cited in these decisions.

In *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, Mr. Justice Field, speaking for the court, said: "Neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits,—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not fur-

nish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions."

In *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284, a state statute was under consideration which authorized certain cities to annex lands adjoining the city limits, but provided that "nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation," and the court upheld the distinction, declaring that it was justified by the principle of the cases cited above: "That principle leaves to the state the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in the lands actually used for agriculture."

In *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, a state statute imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses, but exempting from its operation "planters and farmers grinding and refining their own sugar and molasses," was sustained with the remark that "the discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

So, too, legislative activity having for its avowed purpose the encouragement of this or that particular industry deemed of importance to the state has been prolific of results. We need not go beyond the boundaries of our own commonwealth for instances which now form part and parcel of our very political and economic life. We cite the state board of stock commissioners, the state board of sheep commissioners, and the live stock sanitary board, specifically charged with the supervision and protection of the stock interests of the state, together with the considerable mass of legislation enacted to foster this industry: the state board of horticulture, with the laws for the prevention and eradication of insect pests and plant diseases, distinctly held by this court to be a valid exercise of the power vested in the state to promote the general welfare (*Colvill v. Fox*, 51 Mont. 72, L.R.A.1915F, 894, 149 Pac. 496); the bureau of agriculture and publicity and the bureau of labor and industry, whose functions are to further, in certain ways, "the agricultural, commercial, mining, manufacturing, and labor interests of the state;"

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the state fair; our extensive code of labor statutes, including the regulations for mining, and the laws for the compensation of injured workmen; the state board of poultry husbandry; the maintenance of experiment stations, substations, and county agriculturists; our provisions for the organization of irrigation and drain districts; and, in part, the institution and maintenance of the Agricultural College and the School of Mines themselves. In the face of all that has been said and done in this connection, it is too late to claim that the mere selection of a given industry or pursuit for favorable consideration by the state is a denial to others of the equal protection of the law.

Plaintiff urges as decisive against the act that in *State v. Cudahy Packing Co.* 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833, 8 Ann. Cas. 717, this court, following the decision of the national Supreme Court in *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, held an anti-trust law of this state to be invalid as a denial of the equal protection of the laws because, though forbidding persons, corporations, and associations generally from combining to fix prices, regulate production, or create restrictions in trade, it exempted from its operation "persons engaged in horticulture or agriculture with a view of enhancing the price of their products." This idea underlying both these decisions is that if, in the large design to protect the public from extortion, combinations to control prices should be forbidden, all should be, because, with reference to that design, no legitimate distinction can be made among them. This is apparent from the fact in the *Connolly Case* that the court, reasserting the right of the states to classify, insists that classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." It does not follow, however, that the object in respect to which the classification is made must commend itself to "certain preconceived and deeply rooted notions of lawyers" (*Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 204, 119 Pac. 554, 1 N. C. C. A. 720), or that the classification must always depend "on scientific or marked differences in things or persons or their relations; it suffices if it is practical, and is not reviewable unless palpably arbitrary" (*Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 43 L. ed. 552, 19 Sup. Ct. Rep. 281).

The question, then, is whether, within the lines thus drawn, the selection of agriculturists for the particular form of consideration here accorded can be justified. We

think it can, bearing in mind that with the accuracy or wisdom of the legislative view we may not concern ourselves. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 102, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 302, 20 Sup. Ct. Rep. 284; *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272. It is a matter sufficiently notorious to charge the court with judicial knowledge that, according to the Federal census of 1910, approximately one third of our productive population is engaged in agriculture. From time immemorial it has been fully realized that the economic relations of that pursuit to all other forms of human activity are of the first importance; other things, other occupations, may be dispensed with at more or less cost to society, but without agriculture, civilization itself must fail. For several years last past there has been growing the conviction, based to some extent on government investigations and reports, that farmers requiring money to carry on and extend their operations are subjected to disadvantages which, not altogether necessary and not suffered by other classes, seriously hamper, if they do not imperil, the progress and welfare of agriculture. The rectification of this condition has engaged and is engaging the attention of Congress as well as the attention of several of the states. At the general election of 1914 the people of this state undertook to aid in the solution of the problem by means of the initiative, authorizing farm loans to be made out of the school funds, and the governor, in his annual message to the fourteenth legislative assembly, directing notice to certain constitutional objections which had been raised against such use of school funds, urged the subject of farm loans upon the legislative mind. In the light of these circumstances it is impossible to avoid the conclusion that the subject appeared to be one "held by the strong and preponderant opinion to be greatly and immediately necessary to the public welfare" (*Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487), and that, whether wisely or not, the legislature, in enacting the law in question, did believe that it was legislating to develop the resources of the state and to add to its prosperity. It is not our province to assert that this was a mistaken belief.

It is urged, however, that the act is unequal even as respects the agricultural class, L.R.A.1917A.

because farmers who have only chattel security and farmers who have no security cannot avail themselves of its provisions. This argument mistakes the purpose of the act; for it surely is not sound criticism that such purpose was not to further improvidence nor to furnish a panacea for all the financial ills to which the farmer, like the most of us, is heir. The legislative view undoubtedly was that the capital necessary to enlarge and develop our productive area could best be acquired by individual long-time loans at a moderate rate of interest. But to every lender, particularly to the makers of such loans, assurance of repayment with interest is a commanding factor; and the act cannot be condemned because it does not attempt the impracticable task of procuring long-time loans at moderate interest on chattel security or on no security at all. In our opinion, the act is general so far as it goes, because the conditions of security exacted by it are adapted to the character of loans which its aid is offered to obtain, and because such aid is open to all who comply with these conditions. We see nothing in the general scope and purpose of the act which constitutes a denial of the equal protection of the laws.

3. Because of the appropriation it contains, the act is further assailed as contrary to §§ 33 and 34 of article 5, § 12 of article 12, and § 1 of article 13 of our state Constitution.

Conceding that the appropriation is not limited in terms as to time, it is our opinion that the provision in § 12, art. 12, forbidding appropriations for a longer term than two years, operates as an automatic limit, so that the appropriation, if otherwise valid, would expire at the end of that time, rather than to void it ab initio.

Nor do we think there was any violation of § 33, art. 5, which provides that appropriations, other than for the ordinary expenses of the legislative, executive, and judicial departments of the state, interest on the public debt, and for public schools, "shall be made by separate bills, each embracing but one subject." Counsel for appellant construes this to mean that appropriations for a special purpose shall in all cases be made by a bill containing nothing but the appropriation itself. Where the appropriation constitutes the entire purpose in view, this is doubtless correct; but it is not correct if the appropriation is a mere incident to a larger, but still single, subject of legislation. There is no violation of this provision where the legislature establishes a bureau or commission, and appropriates

funds for its inauguration or to carry out the objects for which it was created.

"No appropriation shall be made," says § 35 of article 5, "for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state," and, says § 1 of article 13, "neither the state, nor any county, city, town, municipality, nor other subdivision of the state shall ever give or loan its credit in aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation." The appropriation in this act has two defined purposes, viz.: \$5,000 to set in motion the department created by the act, to which extent it cannot be assailed as contravening the provisions quoted, and \$20,000 to serve as a guaranty fund to assure lenders that the interest on maturing bonds will be promptly met, whether the mortgagors have made their payments or not. Manifestly this sum of \$20,000 is both an appropriation and a credit assurance; for it is no longer available as a part of the public funds, and it is set apart as a guaranty fund to be drawn upon to make good pro tempore the defaults of mortgagors. It will not suffice to say that, the general purposes of the act being to foster agriculture, and thus to promote the public welfare, such purpose is a public one; in the broad sense considered above it is so, and so likewise are all the purposes mentioned in § 35 of article 5; yet money for them may not be appropriated unless the specific objects are under the absolute control of the state. The ultimate purpose of the Farm Loan Act comes fairly within the term "industrial," as used in § 35 of article 5; but it is not, so far as the use of this fund is concerned, under the absolute control of the state, for the obvious reason that the state cannot direct the conduct or judgment of mortgagors in the handling of their property, nor anticipate or prevent the cases of default which are to be the occasion for such use. Nor does the fact that the fund is to be recouped as used save it from the ban of the Constitution, because, whether used or not, it stands as an appropriation and an assurance for the benefit of the individuals who may become lenders under the act. *Re Relief Bills*, 21 Colo. 62, 39 Pac. 1089; *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 617, 51 L.R.A. 681, 80 Am. St. Rep. 767, 50 N. E. 353.

It does not follow, however, that the act itself must fail. There is nothing to indicate that any part of this \$20,000 has ever been used, or that its presence in the act was the inducement to its passage. A statute solemnly enacted is not to be over-

thrown by anything short of positive conviction of its illegality, and it is not destroyed in toto because of an improper provision, unless such provision is necessary to the integrity of the statute or was the inducement to its enactment. It is perfectly clear that this act can be carried out without the unlawful provision, while it is pure speculation whether the loss of the unlawful appropriation will in the slightest degree affect its serviceability.

4. The last and final assault upon the act is based upon the provision exempting from taxation and recording fees the mortgages to be given pursuant to its terms. So far as the exemption from taxation is concerned, the act creates no real distinction between these and other mortgages. Mortgages are not now taxed save as the notes, bonds, or other choses in action secured by them are taxed; and it is so here. The bonds are to be taxed, and, because they are to be taxed, the mortgages are not.

It is not difficult to understand the theory upon which the exemption from recording fees was made. By the terms of the act the mortgages are to run to the commissioner of farm loans, and the state may clearly exempt itself and its officers from paying such fees. It happens, however, that the commissioner of farm loans is only a nominal mortgagee, made so for convenience, the real mortgagees being the holders of the bonds secured by the mortgages. It is the contemplation of our law, whatever may be the commercial custom, that recording fees are to be paid by those whose interests are protected by recordation,—in case of mortgage, the mortgagee. It is never legally a charge against the mortgagor, and exemption from it is not for his benefit. This exemption, therefore, furthers the interests neither of the farmer—the mortgagor—nor of the state; but, being for the sole benefit of the lender, the discrimination between him and all other mortgagees is not justified by any such relation to the encouragement of agriculture or any public purpose as would warrant the upholding of the exemption. It must be said again, however, that the act itself is not involved in the condemnation of this provision, because it is not so interwoven with the texture of the act, so indispensable to the purposes or operation of the act, as to compel the view that without the provision the act would not have been passed.

The bonds proposed to be issued, as shown by a form copy attached to the complaint, contain various references to the \$20,000 appropriation as a guaranty fund; and it follows from the above discussion that they ought not, as a matter of fair dealing, to be

issued in that form, because there is no such appropriation, legally speaking. Of this, however, the plaintiff cannot complain, since, whether these references remain in the bonds or not, they can have no force or effect prejudicial to him. Nor can he be affected by the invalid exemption from recording fees, because the several county re-

corders are responsible for their collection. He was therefore not entitled to the injunction sought, and the judgment appealed from was correct. It is accordingly affirmed.

Brantly, Ch. J., and Holloway, J., concur.

NORTH DAKOTA SUPREME COURT.

JAMES SOULES et. al., Doing Business under the Name of Soules & Butler, Respts.,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Appt.

(34 N. D. 7, 157 N. W. 828.)

Water — drain way — obstruction.

1. Both under the civil-law rule as to surface waters and under the so-called common-law or common-enemy rule, a natural drain way must be kept open to carry the water into the streams, and the lower estate is subject to a natural servitude for that purpose.

For other cases, see *Waters*, II. g, in *Dig.* 1-52 N. S.

Same — watercourse — drain way.

2. Proof that a drain or ditch receives the surface water of a drainage area of some 168 acres, is several feet in depth, has a well-defined channel, and, though it has grass growing at the sides, has a space at the bottom which is worn away by the water to a breadth of 3 or 4 feet, and that such drain or ditch serves to convey the waters of the area into a river or stream, will justify the jury in holding that such drain or ditch is a natural drain way or drainage channel, and this though there is no evidence that the water ran in the same at all times, but merely that the drain or ditch served to convey the melting snows and surface waters.

For other cases, see *Evidence*, XII. e, in *Dig.* 1-52 N. S.

Same — obstruction — pass way.

3. It is the duty of a lower landowner who builds a structure across a natural drain way to provide for the natural passage through such obstruction of all of the water which may be reasonably anticipated to drain therein, and this is a continuing duty. For other cases, see *Waters*, II. d, in *Dig.* 1-52 N. S.

Headnotes by BRUCE, J.

Note. — For right of owner of lower tenement as against the rights of the upper landowner to obstruct surface water in a natural drainage channel, see annotation following this case, post, 517.

The admissibility of evidence of condition before and after accident, of property whose L.R.A.1917A.

Evidence — burden of proof — unprecedented storm.

4. Where there is evidence which tends to show that a drain way is a natural drain way, and that it has been obstructed by a lower landowner, and that such obstruction occasioned the flooding of and injuries to the property of an upper landowner, the burden of proof is upon the defendant or lower landowner, when sued for such damages, to prove that the storm which occasioned the flood was unprecedented; that it could not have been reasonably anticipated, and need not have been provided against.

For other cases, see *Evidence*, II. h, 1, in *Dig.* 1-52 N. S.

Same — sufficiency.

5. Evidence examined and held not to be such as to justify a holding, as a matter of law, that the storm in question was so unprecedented that it should not have been anticipated, but rather that the fact was one for the jury to pass upon.

For other cases, see *Trial*, II. c, 8, e, in *Dig.* 1-52 N. S.

Definition — flood.

6. Extraordinary or unprecedented floods are floods which are of such unusual occurrence that they could not have been foreseen by men of ordinary experience and prudence. Ordinary floods are those, the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen.

For other cases, see *Waters*, II. d, in *Dig.* 1-52 N. S.

Evidence — flood — what considered.

7. In passing upon what is or what is not an extraordinary flood, or whether it should have been anticipated and provided against, the question to be decided is: "Considering the rains of the past, the topographical and climatic conditions of the region and the nature of the drainage basin as to the perviousness of the soil, the presence or absence of trees or herbage which would tend to increase or prevent the rapid running off of the water, would or should a reasonably prudent man have foreseen the danger and provided against it?"

For other cases, see *Waters*, II. d, in *Dig.* 1-52 N. S.

defects are alleged to have caused the injury, is treated in the notes to *Alcott v. Public Service Corp.* 32 L.R.A.(N.S.) 1084.

Generally as to liability for damages by overflow, see *Index to L.R.A. Notes*, under the title, "Waters," subtitle, "Embankment; obstruction; overflow."

Trial — Instruction — obstructing channel.

8. An instruction in an action against a railway company for negligence in obstructing a natural channel, and thereby damaging plaintiff's goods, that, "if you believe that plaintiffs are entitled to recover as heretofore instructed, then it is your duty to determine the amount of damages sustained by reason of the flooding of these premises, and they are entitled to make matters whole," is sufficiently definite as to the measure of damages, in the absence of any requested instruction upon the subject. *For other cases, see Trial, III. c, 2, in Dig. 1-52 N. S.*

Witness — value of goods — competency.

9. One is sufficiently qualified to testify as to the value of a stock of hardware and to the injury to it by flood and its depreciation in value who is shown to have worked in a hardware store for at least seven years, to have been manager of such store during such time, and to have had charge of the buying of goods and the fixing of prices at which they should be re-sold, and to have been in charge of such goods since the damage was done.

For other cases, see Evidence, VII. f, in Dig. 1-52 N. S.

Evidence — obstruction of drain — bridge.

10. Where a railway company is sought to be held liable for damages by flooding occasioned by an insufficient culvert, it is not error to allow in evidence proof of the fact that, prior to the construction of the culvert, a pile bridge was maintained across the drain in question. Such evidence tends not merely to show the nature of the drain way, its necessity for the carrying away of the surface water which ran therein, but the fact as to whether the drain way was a natural channel or not.

For other cases, see Evidence, XI. h, in Dig. 1-52 N. S.

Same — cost of culvert.

11. It is not error in an action against a railway company for failure to maintain an adequate culvert to allow proof that such culvert could have been provided at a reasonable cost.

For other cases, see Evidence, XI. h, in Dig. 1-52 N. S.

Same — flooding other property.

12. Where a railway company is sued for obstructing a natural drain way and not providing sufficient culverts for carrying off the water, it is not error to allow proof that premises near those of the plaintiffs were flooded in the past, as such evidence tends to show the nature of the drainage district, the course of the water, and generally the necessity of providing for a sufficient outlet for the same.

For other cases, see Evidence, XI. h, in Dig. 1-52 N. S.

Appeal — exclusion of cumulative evidence.

13. The extent to which cumulative evi-

dence may be introduced is largely within the discretion of the trial court, and, where there is much evidence in the record as to the nature of a downpour of rain, a case will not be reversed merely because a trial court has excluded evidence that the flood occasioned no injury to premises in a different hollow or drainage basin, although such hollow or drainage basin was close to the one in question.

For other cases, see Appeal and Error, VII. i, 4, in Dig. 1-52 N. S.

Same — Instructions — how considered.

14. The charge to a jury must be taken as a whole, and, where such charge as a whole clearly presents the issues of a case, mere technical defects in portions thereof are not grounds for a reversal of the judgment.

For other cases, see Appeal and Error, VII. m, 4, in Dig. 1-52 N. S.

Evidence — sufficiency of drain.

15. The conclusiveness of expert evidence depends largely upon the similarity of the data or formula upon which it is based; and proof of the adequacy of a drain for a certain area and that a culvert was constructed in accordance with prescribed formula which were computed on areas of a certain size is not conclusive as to the adequacy of such culvert, unless it is shown that the topography of the drainage areas are similar: it being clear that the flowage even from the same downpour would be much greater in a given time in a hilly basin than on an almost level plain.

For other cases, see Evidence, XII. a, in Dig. 1-52 N. S.

(January 28, 1916.)

APPEAL by defendant from a judgment of the District Court for Stark County in plaintiffs' favor, in an action brought to recover damages for the flooding of plaintiffs' stock of goods, alleged to have been caused by defendant's negligence. Affirmed.

Statement by Bruce, J.:

This is an action to recover damages for the flooding of the plaintiffs' stock of goods which were contained in a retail hardware store in the city of Dickinson, North Dakota. The complaint alleges that the defendant company "on July 28th, and for a long time prior thereto, owned, operated, and maintained a right of way for its railroad extending in an easterly and westerly direction in the city of Dickinson; that upon said right of way on said date, and for a long time prior thereto, the defendant maintained a high grade or embankment of earth rising several feet above the surrounding surface of the land; that said grade or embankment extended in a generally easterly and westerly direction through the city of Dickinson; that said

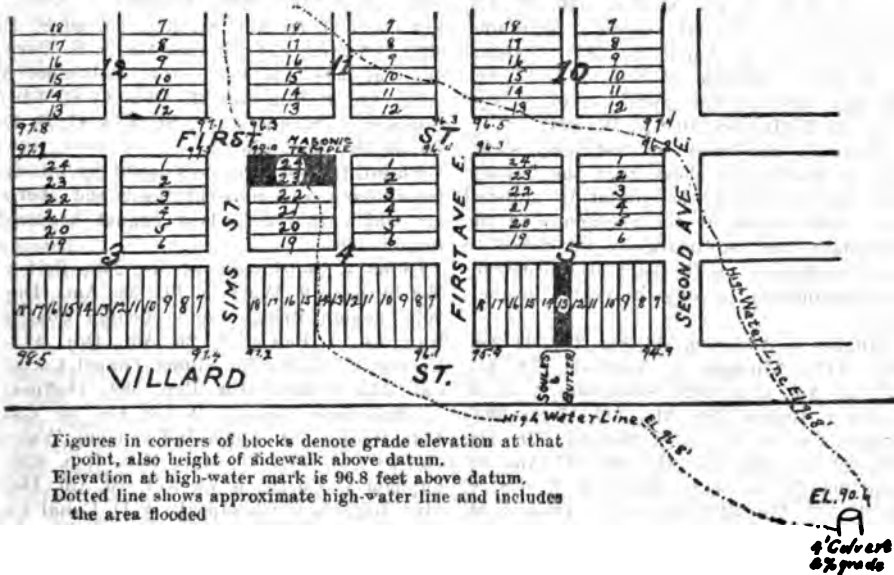
grade or embankment crosses a natural watercourse between the freight depot and the passenger depot of the defendant company in such city; that said watercourse has a well-defined bed and banks, and a stream of water flowing through said watercourse; that said watercourse and bed thereof is the natural drainage for surface and storm waters for a large part of the city of Dickinson and surrounding territory, and drains the surface and storm water from a large area; that the premises of the plaintiffs, hereinbefore described, are in the basin drained by said watercourse; that the defendant company, in constructing said embankment through the city of Dickinson and across said watercourse and channel of drainage, unnecessarily, carelessly, and negligently entirely filled up and destroyed said watercourse and channel of drainage, and in the place and stead thereof put through its embankment part way a small, crooked open ditch, and the other part of the way a small iron culvert connecting with said ditch, which said ditch and culvert were entirely insufficient in size and fall to carry off the waters of said watercourse or storm waters of said drainage area or basin in times of rain, and were so carelessly and negligently constructed and maintained that it entirely failed to carry off said waters; that because of the negligent construction and

maintenance of said embankment, the negligent construction and maintenance of said ditch and culvert, and the lack of size, fall, and capacity of said ditch and culvert, on July 28, 1914, storm waters dammed up against said embankment and flowed over and upon the hereinbefore described premises of the plaintiffs; that on July 28, 1914, and for a long time prior thereto, the defendant had notice and knowledge of the fact that said embankment entirely destroyed said drainage channel, and that said ditch and culvert were insufficient to carry off the waters of said drainage basin and channel in times of rain."

The answer of the defendant was in all respects a general denial, but contained the added allegation and defense that "defendant alleges the fact to be that the damage and injury suffered by the plaintiffs herein were occasioned and caused by an unusual and unprecedented storm and flood which occurred in the city of Dickinson and vicinity on or about the 28th day of July, 1914, and said damage was not in any manner caused through any negligence on the part of the defendant railway company."

A verdict was rendered in favor of the plaintiff for the sum of \$2,500, and from the judgment entered therein, this appeal has been taken.

Plat of part of the city of Dickinson, showing area flooded July 28, 1914.



Messrs. Watson & Young and E. T. Conny, for appellant:

If any waters were obstructed by defendant and thrown back on the property of plaintiffs, they were mere storm or surface waters, and defendant cannot be held liable for any damage caused by said waters.

30 Am. & Eng. Enc. Law, 330, 332; Walker v. New Mexico & S. P. R. Co. 163 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Hagge v. Kansas City Southern R. Co. 104 Fed. 391; Chadeayne v. Robinson, 55 Conn. 345, 3 Am. St. Rep. 55, 11 Atl. 592; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625; Morrissey v. Chicago, B. & Q. R. Co. 38 Neb. 406, 56 N. W. 946, 57 N. W. 522; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Bowsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Edwards v. Charlotte, C. & A. R. Co. 39 S. C. 472, 22 L.R.A. 246, 39 Am. St. Rep. 746, 18 S. E. 58; Cass v. Dicks, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 1, 37 N. W. 717; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Brown v. Winona & S. W. R. Co. 53 Minn. 259, 39 Am. St. Rep. 603, 55 N. W. 123; Baltzger v. Carolina Midland R. Co. 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358; O'Connor v. Fond du Lac, A. & P. R. Co. 52 Wis. 526, 38 Am. Rep. 753, 9 N. W. 287; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 243; Missouri P. R. Co. v. Renfro, 52 Kan. 237, 39 Am. St. Rep. 344, 34 Pac. 802; Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894.

There is absolutely no testimony showing, or tending to show, that the damage and injury which the plaintiffs suffered here were caused by the negligence of the defendant, and no testimony is offered to show negligence on the part of the defendant proximately causing the injury in question.

Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Savannah, A. & M. R. Co. v. Buford, 106 Ala. 303, 17 So. 395; Alabama G. S. R. Co. v. Shahan, 116 Ala. 302, 22 So. 509, 115 Ala. 181, 67 Am. St. Rep. 20, 22 So. 449; Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33; Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279; Philadelphia, W. & B. R. Co. v. Davis, 68 Md. 281, 6 Am. St. Rep. 440, 11 Atl. 822; Sullens v. Chicago, R. I. & P. R. Co. 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; Harrison v. Great Northern R. Co. 3 Hurlst. & C. 236, 33 L. J. Exch. N. S. 266, 10 Jur. N. L.R.A. 1917A.

S. 902, 10 L. T. N. S. 621, 12 Week. Rep. 1081, 25 Eng. Rul. Cas. 411; Central of Georgia R. Co. v. Keyton, 148 Ala. 675, 41 So. 918; Matteson v. New York C. & H. R. R. Co. 40 Pa. Super. Ct. 234; Pittsburgh, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; American Locomotive Co. v. Hoffman, 105 Va. 343, 6 L.R.A.(N.S.) 252, 54 S. E. 25, 8 Ann. Cas. 773; Illinois C. R. Co. v. Bethel, 11 Ill. App. 17; Dorman v. Ames, 12 Minn. 451, Gil. 347; Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 23, 37 N. W. 717; Fredericks v. Pennsylvania R. Co. 225 Pa. 23, 73 Atl. 965; Karchner v. Pennsylvania R. Co. 218 Pa. 309, 67 Atl. 644; Oakley Mills Mfg. Co. v. Neese, 54 Ga. 459; Texas & P. R. Co. v. Padgett, 14 Tex. Civ. App. 435, 37 S. W. 92; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1012; Sheldon v. Hudson River R. Co. 29 Barb. 228; Longabaugh v. Virginia City & T. R. Co. 9 Nev. 296; Smith v. Hannibal & St. J. R. Co. 37 Mo. 295; Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L.R.A. 509, 53 N. W. 970; Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481; White v. Chicago, M. & St. P. R. Co. 1 S. D. 330, 9 L.R.A. 824, 47 N. W. 146; Balding v. Andrews, 12 N. D. 277, 93 N. W. 305, 14 Am. Neg. Rep. 615; Scherer v. Schlager, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Andrews v. Kinsel, 114 Ga. 390, 88 Am. St. Rep. 25, 40 S. E. 300; Schwartz v. California Gas & E. Corp. 163 Cal. 398, 125 Pac. 1044; Baltimore & O. R. Co. v. Simpson, 31 Ohio C. C. 349; Coleman v. Kansas City, St. J. & C. B. R. Co. 36 Mo. App. 476.

Plaintiffs' loss was occasioned by an extraordinary and unusual flood and storm for which this defendant cannot be held responsible.

China v. Southwick, 12 Me. 238; Bell v. McClintock, 9 Watts, 119, 34 Am. Dec. 507; Lehigh Bridge Co. v. Lehigh Coal & Nav. Co. 4 Rawle, 9, 26 Am. Dec. 111; Everett v. Hydraulic Flume Tunnel Co. 23 Cal. 225, 4 Mor. Min. Rep. 589; Hoffman v. Tuolumne County Water Co. 10 Cal. 413; Wolf v. St. Louis Independent Water Co. 10 Cal. 541, 10 Mor. Min. Rep. 636; Lapham v. Curtis, 5 Vt. 371, 26 Am. Dec. 310; Higgins v. Chesapeake & D. Canal Co. 3 Harr. (Del.) 411; Morris Canal & Bkg. Co. v. Ryerson, 27 N. J. L. 457; Tenney v. Miner's Ditch Co. 7 Cal. 335, 11 Mor. Min. Rep. 31; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Mor. Min. Rep. 612; Shrewsbury v. Smith, 12 Cush. 177; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 22, 37 N. W. 717; Chicago, R. I. & P. R.

Co. v. Buel, 76 Neb. 420, 107 N. W. 591; Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33; Baltimore & O. R. Co. v. Sulphur Springs Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529; Price v. Oregon R. & Nav. Co. 47 Or. 350, 83 Pac. 843; Nashville & C. R. Co. v. David, 6 Heisk. 261, 19 Am. Rep. 594; American Locomotive Co. v. Hoffman, 105 Va. 343, 6 L.R.A.(N.S.) 252, 54 S. E. 25, 8 Ann. Cas. 773; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007; Egan v. Central Vermont R. Co. 81 Vt. 141, 16 L.R.A.(N.S.) 928, 130 Am. St. Rep. 1031, 69 Atl. 732; Greiner v. Alfred Struck Co. 161 Ky. 793, 171 S. W. 405; Palmyra v. Waverly Woolen Co. 102 Me. 317, 66 Atl. 646; Grand Valley Irrig. Co. v. Pitzer, 14 Colo. App. 123, 59 Pac. 420; Albers v. Chicago, B. & Q. R. Co. 95 Neb. 506, 145 N. W. 1013; Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; Kansas City, P. & G. R. Co. v. Williams, 3 Ind. Terr. 352, 58 S. W. 570; Mulligan v. Pennsylvania R. Co. 225 Pa. 76, 73 Atl. 1058; Vyse v. Chicago, B. & Q. R. Co. 126 Iowa, 90, 101 N. W. 796; Bristol Hydraulic Co. v. Boyer, 67 Ind. 236; Siegfried v. South Bethlehem, 27 Pa. Super. Ct. 456; Taylor v. Canton Twp. 30 Pa. Super. Ct. 306; Lyon v. Chicago, M. & St. P. R. Co. 45 Mont. 33, 121 Pac. 888; Karchner v. Pennsylvania R. Co. 218 Pa. 309, 67 Atl. 644; Etna Mill & Elevator Co. v. Atchison, T. & S. F. R. Co. 89 Kan. 38, 130 Pac. 686; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007.

Failure of the court to instruct the jury as to the measure of damages, i. e., how they were to ascertain the damage, and what they had the right to consider, is fatal. And this is error regardless of whether or not such instruction was requested.

2 Thomp. Trials, § 2188; Citizens' Street R. Co. v. Burke, 98 Tenn. 650, 40 S. W. 1085, 2 Am. Neg. Rep. 459; Houston & T. C. R. Co. v. Buchanan, 38 Tex. Civ. App. 165, 84 S. W. 1073; Central of Georgia R. Co. v. Hughes, 127 Ga. 593, 56 S. E. 770; Western Maryland R. Co. v. Martin, 110 Md. 554, 73 Atl. 267; Jageriskey v. Detroit United R. Co. 163 Mich. 631, 128 N. W. 726; Burns v. Pennsylvania R. Co. 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 11; Otis Elevator Co. v. Flanders Realty Co. 244 Pa. 186, 90 Atl. 624; Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Wilkinson v. North East, 215 Pa. 486, 64 Atl. 734; Qnanah, A. & P. R. Co. v. Galloway, — Tex. Civ. App. —, 154 S. W. 653; Himes v. Kiehl, 154 Pa. 190, 25 Atl. 632; Kansas City, M. & O. R. v. Worsham, — L.R.A.1917A.

Tex. Civ. App. —, 149 S. W. 755; Hazelwood v. Pennybacker, — Tex. Civ. App. —, 50 S. W. 199; Moore v. Booker, 4 N. D. 543, 62 N. W. 607; McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

Messrs. T. F. Murtha, Thomas H. Pugh, and J. W. Sturgeon, for respondents:

Under the civil law and the English common law, the rule is that the natural drain ways must be kept open to carry the water into the streams, and that the lower estate is subject to a natural servitude for that purpose.

3 Farnham, Waters, chap. 29, p. 2555.

A railroad company cannot, in construction of its roadbed, negligently obstruct a ravine through which surface water is accustomed to find an outlet, by failing to place a proper culvert therein, and cast such water back upon the land of upper proprietors.

Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884; Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755; Jungblum v. Minneapolis, N. U. & S. W. R. Co. 70 Minn. 153, 72 N. W. 971; Blunck v. Chicago & N. W. R. Co. — Iowa, —, 115 N. W. 1013; Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263; Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213; 3 Farnham, Waters, pp. 2334-2709; Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 56 L.R.A. 341, 88 N. W. 508; Tretter v. Chicago G. W. R. Co. 147 Iowa, 375, 126 N. W. 339; Sanguinetti v. Polk, 136 Cal. 466, 80 Am. St. Rep. 169, 69 Pac. 98; Launstein v. Launstein, 150 Mich. 524, 121 Am. St. Rep. 635, 114 N. W. 383; Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163; Fordham v. Northern P. R. Co. 30 Mont. 421, 66 L.R.A. 556, 104 Am. St. Rep. 729, 76 Pac. 1040; Chicago, R. I. & P. R. Co. v. Lynch, 163 Iowa, 283, 143 N. W. 1083; Feldkamp v. Ernst, 177 Mich. 550, 143 N. W. 887; Iske v. Missouri P. R. Co. 94 Neb. 9, 142 N. W. 671; Johnson v. Marcum, 152 Ky. 629, 153 S. W. 959; Thompson v. Mobile, I. & K. C. R. Co. 104 Miss. 651, 61 So. 596; Tranbarger v. Chicago & A. R. Co. 250 Mo. 40, 156 S. W. 694; Anheuser-Busch Brewing Assn. v. Peterson, 41 Neb. 897, 60 N. W. 373; Roe v. Howard County, 75 Neb. 448, 5 L.R.A.(N.S.) 831, 106 N. W. 587; Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811; Parizek v. Hinek, 144 Iowa, 563, 128 N. W. 180; Alabama G. S. R. Co. v. Prouty, 149 Ala. 71, 43 So. 352; Gillham v. Madison County R. Co. 49 Ill. 484, 95 Am. Dec. 627; Foley v. Godchaux, 48 La. Ann. 466, 19 So. 247; Willis v. White, 150 N. C. 199, 134 Am. St. Rep. 900, 63 S. E. 492; Blue v. Wentz, 54 Ohio St. 247,

42 N. E. 493; *Glass v. Fritz*, 148 Pa. 324, 23 Atl. 1050; *Lawton v. South Bound R. Co.* 61 S. C. 548, 39 S. E. 752; *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 238, 36 Am. Rep. 480; *Texas Trunk R. Co. v. Elam*, 1 Tex. App. Civ. Cas. (White & W.) 203; 40 Cyc. 639-643; *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595; *Barstow Irrig. Co. v. Black*, 39 Tex. Civ. App. 80, 86 S. W. 1036; *McFadden v. Missouri, K. & T. R. Co.* 41 Tex. Civ. App. 350, 92 S. W. 989; *Shaw v. Sebastopol*, 159 Cal. 623, 115 Pac. 213; *Flesner v. Steinbruck*, 89 Neb. 129, 34 L.R.A.(N.S.) 1055, 130 N. W. 1040; *Trenton v. Rucker*, 162 Mich. 19, 34 L.R.A.(N.S.) 569, 127 N. W. 39; *Kelly v. Kansas City Southern R. Co.* 92 Ark. 465, 123 S. W. 664; *Jonesboro, L. C. & E. R. Co. v. Cable*, 89 Ark. 518, 117 S. W. 550; *McGehee v. Tidewater R. Co.* 108 Va. 508, 62 S. E. 356; *Perrine v. Pennsylvania R. Co.* 71 N. J. L. 644, 62 Atl. 702.

Building the embankment and culvert in the most approved manner does not excuse the defendant for insufficient flowage.

Tremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263; *Houghtaling v. Chicago G. W. R. Co.* 117 Iowa, 540, 91 N. W. 811.

The question of whether the storm was one that might reasonably have been expected and guarded against was for the jury.

Wilson v. Boise City, 20 Idaho, 133, 36 L.R.A.(N.S.) 1158, 117 Pac. 115, 1 N. C. C. A. 203; *Blunck v. Chicago & N. W. R. Co.* — Iowa, —, 115 N. W. 1013; *Chicago, R. I. & P. R. Co. v. Shaw*, 63 Neb. 380, 56 L.R.A. 341, 88 N. W. 508; *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.* 79 Neb. 854, 13 L.R.A.(N.S.) 542, 113 N. W. 535.

Bruce, J., delivered the opinion of the court:

It is not, we believe, contended in this case that the flooding of the plaintiffs' premises in question was occasioned by the obstruction of a flowing stream, but rather by the obstruction of a natural watercourse which served as a natural drainage for surface and storm waters, and which, on the occasion in question, was flooded by a heavy rainstorm which occurred on the night of July 28, 1914, and in the early morning of July 29, 1914. "Under the common-law rule which exists in many jurisdictions, surface water is regarded as a common enemy, and every landed proprietor has the right, as a general proposition, to take any measures necessary for the protection L.R.A.1917A.

of his property from its ravages, even if in doing so he prevents its entrance upon his land and throws it back upon a coterminal proprietor. The damage resulting in such case is regarded as *damnum absque injuria*, affording no cause of action."

See 30 Am. & Eng. Enc. Law, 2d ed. 330; *Walker v. New Mexico & S. P. R. Co.* 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 421. "Under the rule of the civil law, . . . the right to drain surface waters is governed by the law of nature, as between the owners of adjacent lands, and the lower proprietor is bound to receive the surface waters which naturally flow from the land above, and cannot do anything to prevent such flow which will cast it back upon the land above." 30 Am. & Eng. Enc. Law, 2d ed. 326; *Shahan v. Alabama G. S. R. Co.* 115 Ala. 181, 67 Am. St. Rep. 20, 22 So. 449; *Gillham v. Madison County R. Co.* 49 Ill. 484, 93 Am. Dec. 627; *Alton & U. A. Horse R. & Carrying Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509.

See also discussions in *Hannah v. St. Paul, M. & M. R. Co.* 5 Dak. 1, 37 N. W. 717, and *Carroll v. Rye Twp.* 13 N. D. 458, 101 N. W. 894.

In North Dakota we have not as yet committed ourselves to either rule, as a choice has not as yet been necessary in any of the cases argued, and the court has naturally hesitated in foreclosing a question whose determination should depend upon considerations of public expediency and necessity and be considered in the light of the peculiar topography and climatic conditions of the state, and to whose wise solutions every day brings more light and the results of a larger body of accumulated experience. The question, though, has been incidentally presented and discussed. See *Hannah v. St. Paul, M. & M. R. Co.* and *Carroll v. Rye Twp.* supra.

Nor is it necessary to adopt either rule in the case which is before us, as we are convinced that there is in the record, and that there was properly submitted to the jury, evidence which tends to show that the swale, depression, or whatever it may have been in the case before us, was a "natural drain way." If it was a natural drain way, it is immaterial whether the so-called common-enemy or the civil-law rule as to surface waters prevail in North Dakota, as both "under the civil-law and the English common . . . [enemy theories] the rule is that the natural drain ways must be kept open to carry the water into the streams, and that the lower estate is subject to a natural servitude for that purpose." 3 Farnham, Waters, p. 2535.

The building of the plaintiffs faced south on Villard street. Villard street runs east

and west and a block or so north of and parallel to the railroad tracks. There is evidence in the record tending to show that the ditch or ravine which runs from Villard street to the railroad track, and which empties through the culvert of the railway company and underneath its tracks, had been in existence for some thirty years, and, although only extending a short distance north of Villard street, and some three or four blocks north of the railroad track, served as a natural runway or drain for a larger natural drainage basin of some 160 acres which extended to the northeast. There is also evidence which tends to show that this ditch has now, and for a long time prior to the flood in controversy had, a well-defined channel, and that, though grass grew at its sides, that grass had at its bottom been worn away to a breadth of 3 or 4 feet by the running waters. It is true that there is no evidence or pretense that the water ran in this ditch all of the time, or even usually ran in this ditch, but there is evidence that it ran therein whenever there were heavy rains and when the snow melted in the spring. Such being the case, it is clear that the ditch or ravine, though not a stream, was nevertheless a natural drain way which drained a more or less extended area of land or drainage basin into the Heart river. It is clear also that, though the railway company had the right to build an embankment across it, it nevertheless owed the duty to the landowners in the drainage basin to do so in such a manner that the water which could be reasonably anticipated to flow therein and to be drained thereby could be as well accommodated as before the construction of its improvements. This is true under both the civil-law and the so-called common-enemy theory of surface waters. See Farnham on Waters, vol. 3, p. 2555. "In all broken country," says this author (page 2571), "there are gullies, ravines, or swales which in many cases, when the land was covered with woods, formed the beds of flowing streams which gradually dried up as the woods were cleared away, but which are natural drains in which water runs in every time of heavy rain. In case one of these drains is stopped the natural result is to pond the water above the point of stoppage, and compel it to find another outlet, or to stand until it is absorbed or evaporates. This is a distinct injury to the upper owner without any corresponding benefit to the lower one, and it should not be permitted to be done."

This is undoubtedly the prevailing rule, in America, as is both the civil-law and the common-enemy rule, though not a few writers and courts have confused the terms

"common enemy" with the term "common law," and have imagined that what is termed "the common-enemy theory," and which relates merely to what are, strictly speaking, surface waters and waters which do not flow in defined channels, applied at the common law generally to all non-navigable waters.

The reason for what may be termed the prevailing American rule, and which we here adopt in North Dakota, is well stated by Mr. Farnham on page 2599, vol. 3, of his excellent work on Waters & Water Rights. "The question of the right to obstruct a natural drainage channel," he says, "has been needlessly complicated with the further question whether or not a watercourse existed. The rules with respect to watercourses form a distinct class by themselves, and were formulated to conserve the interests of the riparian owners. On the other hand, the question of drainage involves, not only the welfare of the individual landowner, but also that of the community in so far as its healthfulness and prosperity depend upon relieving land of stagnant water and improving its productiveness. Before man owed any parcel of land nature had impressed upon it certain characteristics. So far as these can be changed without interfering with the use or enjoyment of neighboring property, they may be changed at will. But, so far as one parcel has been subjected by nature to a servitude in favor of an adjoining parcel, the enjoyment of which will be materially injured by destroying the servitude, it would seem that the rule by which a purchaser of property is bound by its condition when he acquires title would prevent the destruction of such servitude. In order to be within the operation of this rule, . . . the great weight of authority is in favor of the proposition that a lower proprietor cannot place any obstruction in an obvious drainage channel which has been formed by nature and carries the water from a higher to a lower estate. Some courts have reached the same result by holding that channels formed by surface water might be watercourses, and have applied to them the rule governing the obstruction of such courses, and in some cases there is no doubt that channels which now carry merely surface water were once living streams. When the country was covered with forest, so that the ground was more nearly saturated with water, springs came to the surface and fed streams which flowed more or less constantly down these channels, but as the land was cleared and brought under cultivation the springs gradually lost their strength, and finally disappeared, so that the channels which for-

merly carried the streams flowing from them now receive only the water which comes from surface drainage. But there is no reason why, if the rule of watercourses rather than that of drainage is to be applied, it should not be applied to this class of channels. That these drainage channels cannot be obstructed is supported by the great weight of authority. It is the rule in England, Canada, Ireland, Alabama, California, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Vermont, and West Virginia. And in Arkansas no obstruction to the flow of surface water is permissible if it can be avoided by reasonable care and expense. To reach their conclusions some of the courts above named have attempted to show that the channels in which the water was running were watercourses, but they were not watercourses within the rule governing riparian rights; and the attempt to demonstrate the existence of a watercourse was made necessary by the disastrous effects which would attend the opposite holding. In fact, when surface water has united to form a stream, the effect of damming it back is temporarily as bad as the damming back of a watercourse, and the similarity in the effect absolutely demands the application of the same rule to each. And in order to do so the courts which have not perceived the full meaning of the civil-law rule as to drainage have attempted the makeshift of bringing the particular stream within the rule governing the stoppage of watercourses by showing that they were, in fact, such, whereas the only similarity was in the result of stopping a present flow. Practically all of the courts admit that there may be a flow of surface water of such magnitude that it cannot be stopped: but natural drainage channels are allowed to be closed by the Supreme Court of the United States when the question comes before it as a common-law question, and by the courts of Indiana, Kansas, Maine, Massachusetts, Missouri, New York, South Carolina and Washington. The Kansas court has intimated that, if the channel approaches the nature of a watercourse, there is no right to dam it up. And in Missouri a statute has been passed giving the right to cast water into natural depressions which act as drains. Of the other courts above referred to the Supreme Court of the United States and the courts of South Carolina and Washington placed their rulings expressly upon the ground that the common law had been adopted by statute, and that therefore there was a

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right to dam back the water. But, it having been demonstrated in a preceding section that, by the common law, there is no right to dam back the water which is flowing in a definite channel, those decisions are based upon a misconception, and should have been the other way. Some courts have not yet expressed themselves upon this question, and some appear to be in a class by themselves, so that they are not properly included in either list. Among these is the Wisconsin court. The rule which obtains in that state, as well as the course of decision in Minnesota, is treated in a separate section. This conflict in opinion arises in most cases out of a failure to understand the civil-law rule, and in attempting to determine drainage rights by the rules applicable to watercourses. As has been seen, the civil-law rule is merely that, when the water has its course regulated from one ground to another—that is, when it has taken a definite course in a definite channel—it cannot be stopped up. Practically all the courts, except the Supreme Court of the United States and the courts of Indiana, New York, Missouri, Wisconsin, and the lower courts of New Jersey, agree in this rule, but in applying it they differ somewhat in their conclusions: the difference depending largely upon how far each court has embraced the idea that a watercourse must, in fact, exist before the rule can be applied. As will be seen in the succeeding sections, there is no right anywhere to the continued flow of water which has not taken a definite course, but which spreads out over the surface of the ground. And, if the courts would recognize the fact that the right to the flow of the water which has taken a definite course is a rule of drainage, and not of watercourses, most of the difficulty which they have experienced would disappear. The rule of drainage applies if the water has taken a definite course, although the flow is not strong enough to cut the sod or form a trench in the soil; it is enough that a natural depression forms a channel for the stream."

See also *Quinn v. Chicago*, M. & St. P. R. Co. 23 S. D. 126, 120 N. W. 884, and note thereto in 22 L.R.A.(N.S.) 789; *Chicago, R. I. & P. R. Co. v. Groves*, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755.

Again in *Jungblum v. Minneapolis*, N. U. & S. W. R. Co. 70 Minn. 153, 72 N. W. 970, which seemingly overruled the prior decisions of that tribunal, the supreme court of Minnesota said: "There was evidence given on the trial on behalf of the plaintiff tending to show that this depression was the usual and natural course or channel along which the surface water was

accustomed to flow, before the roadbed was constructed, for a mile or two east of the roadbed, and that the channel bears marks of water having flowed through it. Whether this depression is a natural watercourse, within the strict definition of the term, we need not determine; for the evidence justifies a finding that it was the usual and natural channel for surface water, and offered a reasonable way for the defendant by the construction of a culvert to dispose of the surface water without injury to any landowner. The trial court submitted this question to the jury in these words: 'If the jury finds from the evidence that the defendant might reasonably have constructed a culvert through its roadbed, and thereby have conveyed the water in question through its natural and usual channel from its right of way, without injury to any other landowner, and that it neglected to do so, but that it unnecessarily or unreasonably drained the water upon the plaintiff's land, to the plaintiff's injury, then the plaintiff is entitled to recover.'

Being, then, a natural drain way, it was the duty of the defendant railway company to accommodate itself to and to provide for the undisturbed passage through it of all of the water which was or might be reasonably anticipated to drain therein, and this duty was a continuing duty. See *State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co.* 28 N. D. 621, 150 N. W. 463. The question to be determined is whether there is competent evidence in the record and which was properly submitted to the jury which tended to show that this duty had not been complied with and that the damage to the plaintiffs' and respondents' property was occasioned by this non-compliance, or whether, as contended by defendant and appellant, the uncontradicted evidence showed that the culvert was in every way adequate for all flowage that could or should have been anticipated, and that the flooding of plaintiffs' premises was either occasioned by an extraordinary downpour or cloudburst which it was not the duty of the defendant to anticipate, or by the blocking of the channel by a floating sidewalk or some other obstruction which it was not the duty of the defendant to guard against or to anticipate. We are satisfied that there was such evidence, and the trouble with defendant's defense is that, it once being established that the flooding of plaintiffs' premises was occasioned by the inability of the culvert to carry off the water, and of this we hardly think defendant will contend that there is not at least some evidence, the burden is upon it, and not on the plaintiffs, to show that the storm was so unusual and extraor-

dinary that it need not have been anticipated.

Even if we admit that the evidence of plaintiffs' witnesses as to the fact that in the past there had been downpours of equal violence is open to the objection that it was not given by scientific men and based upon scientific data, and that it must have been to a greater or lesser extent an expression of opinion merely, still defendant's nonscientific testimony was open to the same objection, and was equally unreliable. The fact remains that what little scientific data defendant did furnish was absolutely inconclusive and could well have been repudiated by the jury. The defendant, in short, attempted to show, and no doubt did show, by the testimony of the superintendent of the weather bureau, that 4.03 inches of rain fell from 1 o'clock in the morning until 10 o'clock in the forenoon. It also showed that the weather bureau was first established at Dickinson in 1892, and that the largest quantity of rain that had ever fallen in any twenty-four hour period since that time was on May 22, 1903, when 2.6 inches fell: that the average annual precipitation in this vicinity was 15.4 inches, and that the average rainfall per twenty-four hour period in the last ten years was .21 of an inch, without counting the days it did not rain. The trouble with this evidence is that there are no records of the precipitation during any hour or series of hours during any of the years mentioned, but only the rainfall during twenty-four hour periods, and it may very well have been that, though the rainfall in 1914 during a twenty-four hour period was very much greater than that of any twenty-four hour period in the past, in the past there had been during certain hours and for limited times much greater downpours. This is made perfectly clear by the testimony of the superintendent of the weather bureau to the effect that, about two years before the trial, there had been a downpour of 1½ inches of rain in a period of only fifteen minutes. It is also worthy of notice and a fact that could well have been considered by the jury that, although it was admitted that official and scientific records were taken at the weather bureau at 6 o'clock in the morning, and although there was testimony to the effect that the flood had begun to abate after that time, in so far, at least, as plaintiff's property was concerned, no attempt whatever was made to introduce these records in evidence, and the defendant, instead, merely relied for his scientific data on the remembrance of the witness Waldron as to the observations he had made four hours later and at 10 o'clock in the morning. Even

if his remembrance and observations were correct, he testified merely as to the record of a nine-hour rainfall. The testimony of the witnesses Leonberger and Butler would lead us to believe, or at any rate the jury was justified in believing from this testimony, that the flood was at its height, as far as the storm was concerned, at about 3:30 in the morning, while the witness White testified for the defendant that there was an extra heavy rainstorm at 6 o'clock. It is also clear that records which were made at 6:30 A.[®]M. could easily have been obtained, as the weather bureau was only 2 miles from the city of Dickinson, where the trial was held.

We hardly see, therefore, that the defendant has met the burden of proof, that is, of showing the extraordinary nature of the storm and that the same could not have been anticipated.

We do not agree with its counsel, at any rate in this Western country, that the fierceness and intensity of a storm must be determined by the amount of rain which falls in any given twenty-four hour period, or with his conclusion that because in the past no such volume of rain had fallen in any twenty-four hour period as fell in the twenty-four hour period and prior to 6:30 o'clock in the evening of July 28, 1914, that there had not been prior to such times as equally violent storms or downpours extending over lesser periods, and it is a matter of common knowledge that it is the cloudburst or sudden downpour that taxes the requirements of drains and sewers.

As far as the severity of the storm is concerned and its unusual character Nelson G. Lawrence testified for the defendant that he had lived in Dickinson since 1883; that he remembered the storm of July 28, 1914; that he got up at about 1 o'clock; that the water covered the streets; that it was the worst storm that he had ever known since he had been there. He, however, testified on cross-examination that he could remember nothing whatever of the storms of 1912 or 1909. He also testified that storms in the vicinity were usually of short duration.

Oliver Whaley testified that he had lived in Dickinson since January 1, 1911; that he got up in the neighborhood of 1 o'clock; that the water covered the sidewalks on Second avenue; that there was a recession of water about daylight, he thought; that there were three periods of severity between 1 and 7 o'clock; that it was an unusually severe rainstorm; that he had never seen one that would compare with it for severity for the same length of time; that the storms were generally of short dura-

tion; that this storm was severe and of long duration; that he observed the storm between 1 and 8 o'clock. He, however, testified that in the past he had often seen the waters cover the crossings and come up on the sidewalk on the south side of his house, and this had been so during the last year, the water extending a distance of 10 or 12 feet north and about the same distance east on a low corner; that on the morning of the storm when he went down town the crown or the center of the street was in view. The gutters were full of water; perhaps 10 feet of the center of the road was visible immediately in front of his residence and to the east of Second street.

The witness Bert A. Condit testified that he was a civil engineer; that the drainage area of the district was 168 acres; that the elevation in the center of Villard street was 99.75 feet, and the elevation of the property line and the sidewalk in front of plaintiffs' store was 99.55 feet; that the elevation taken 15 feet to the west of the building was the same as in front of the store; that, on account of the fact that the lot was somewhat lower than the center of the street, the water coming down that street, if the gutter was overflowed, would cover the lots.

The witness F. J. Taylor testified that the tracks were constructed according to the most approved method; that the 48-inch pipe which extended under the track was sufficient to take care of a rainfall of 3 inches per hour; that with a rainfall of 3 inches per hour there would be a run-off of 123 cubic feet per second; and that the culvert in question would carry off 177 cubic feet per second. (See testimony given before.)

The witness Waldron also testified:

That he thought the precipitation for July 26, 1914, was 1.16 inches; that he could not say accurately, but he thought it rained two or three hours.

Q. Well, then, you do not know of your own knowledge how long a time it rained?

A. It could not have been much more than that. It commenced to rain at 1 or 2 o'clock in the afternoon. An observation was taken at 6.

Q. Were you out of town during the 28th?

A. Part of the time.

Q. What part of the time?

A. I got here on delayed No. 1, about 10 o'clock in the morning.

Q. About 10 o'clock.

A. No; it was earlier than that; about 9 o'clock, or a little after 9.

Q. So that you weren't here during the early morning hours?

A. No, sir.

Q. From 12 to between 9 and 10?

A. No.

Q. Were you here during the 27th, the day preceding?

A. No; I wasn't; a part of the day I was.

Q. When did you leave?

A. I left on No. 8 in the morning. The train was on time.

The witness Kittleson testified that he had been in the country for seven years; that he got up on the morning of the 28th at about 1 o'clock and watched the rain; that he characterized the rain as compared to other rains as equal; that he would not testify that he had seen a rain of this amount and extending over this period of time in this country before; and in answer to the question on cross-examination: "You mean to testify, don't you, Mr. Kittleson that you have seen rains where the rain came down just as heavy at one time? Is that what you want to testify? You don't mean to testify that you have seen a rain of this amount and extending over this period of time? A. No, sir."

He specified that he had seen a similar rain and as heavy a downfall about July 11, 1912.

The witness Hughes testified that he had lived in Dickinson for nine years last past; that he observed the rain; that he had seen other rains where there was as much rainfall in the same length of time, on two occasions, anyway; one in the summer of 1912—July, he thought; he did not measure the amount of rain that fell on these occasions; that he judged by the amount of water that was on the ground, but the storm in July 1911, lasted about half an hour.

There is also evidence that the ditch or natural drain way before it enters into the culvert was about 2 or 3 feet at the bottom and 6 or 7 feet at the top, and that, if the water was level, and there was 1½ feet of water at the property line in front of Soules & Butler's store, there would be a little better than 2 feet of water over the top of the culvert. Assuming this to be true, it is perfectly clear that, if the original pile bridge had been maintained, or the culvert had approximated the size and volume of the original drain or ditch, the water might very well have all been carried off. These facts were, at any rate, for the jury to pass upon, and we cannot say from the record that they were not right in holding that it was the lack of capacity in the culvert to carry off the

water that was the proximate cause of the damage, or that similar downfalls of rain had not occurred in the past.

We have carefully examined the cases which are cited by counsel for appellant on the question of the proof and as to what constitutes unprecedented storms, but are merely convinced by them that, in the case at bar, the matter was one for the jury to pass upon. All that the cases of *Pittsburg, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. 445, 94 Am. Dec. 98, and *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529, held was that it was error to instruct the jury that the fact that in the one case the three storms and in the other the two storms which occasioned the damage occurred in rapid sequence rendered them usual, and not unprecedented, and with these holdings we can take no exception, as the courts in both cases expressly stated that the matters in controversy were for the jurors themselves to consider and to pass upon. In the case of *Greiner v. Alfred Struck Co.* 161 Ky. 793, 171 S. W. 405, the court held that the proof conclusively showed that the storm, which had lasted for two days, was so unusual or extraordinary that it could not have been guarded against by ordinary prudence. In it, however, although the witness testified that there had been as great a flood in a previous year, this evidence was not only disputed by the records of the weather bureau, but the witness himself admitted that in the preceding year the water course did not overflow its banks, so that there was no reason for the defendant to anticipate that it would do so on this particular occasion. In the case at bar there is evidence which tends to show that on previous occasions there had been other floods, though not as extensive, in which the culvert had been insufficient.

All that the other cases cited by counsel for appellant do is to emphasize and repeat in various forms the general and well-established propositions that a railway company is not liable for damages occasioned by unprecedented storms; that, even if a sewer is defective, the defendant cannot be held liable unless that defect is the real and producing cause of the injury; and that, even though there is negligence on the part of the defendant, if the act of God is so overwhelming as, of its own strength, to produce the injury, the defendant cannot be made responsible; that it is not the duty of the defendant to prepare against unprecedented storms; and that, where it appears that the storm is unprecedented, the burden of proof is upon the plaintiff to show that the damage would

not have resulted except for defendant's negligence.

We may concede each and all of these propositions; yet that concession would not justify a reversal in the case which is before us. The cases cited by counsel themselves show that the burden of proof is upon the defendant to prove the unprecedented nature of the storm. See *Memphis & C. R. Co. v. Reeves*, 10 Wall. 189, 19 L. ed. 912. And on this question there was a clear conflict in the evidence which left it for the jury. On the question of negligence and the adequacy of the culvert there was also a conflict, and this was also a question for the jury. Almost all of the cases cited by counsel pass upon instructions which took these matters from the jury. None of them seem to cover a case such as that before us, where the jury was properly instructed, and where there is a serious question as to whether the railway company has met the burden of proof of showing the unprecedented nature of the storm. The term "extraordinary floods" has been defined, as meaning: "Such floods as are of such unusual occurrence as could not have been foreseen by men of ordinary experience and ordinary prudence. Ordinary floods are those the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen." *Gulf, C. & S. F. R. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535; 3 Words & Phrases, 2628.

The question to be decided was: Considering the rains of the past, the topography and climatic conditions of the region, and the nature of the drainage basin, the fact that in the past heavy downpours had occurred, and on one instance 1½ inches of rain had fallen in only fifteen minutes of time, the baked and arid nature of the district, its absence of trees or anything that would prevent water from rapidly running off, would and should a reasonably prudent man have foreseen the danger and provided against it? We cannot say that the proof was so conclusively in the negative that the question became one of law merely, which had to be decided in favor of the defendant, and that it was not one which was properly submitted to the jury.

Nor can we say that the proof otherwise shows that the culvert was sufficient, and that the flooding of the property of plaintiffs was, in fact, occasioned by the fact that the property was situated in a depression and lower than the street, and not by the smallness of the culvert. There is evidence, it is true, that the center of Villard avenue and in front of plaintiffs' property was some .21 of a foot above the property line of plaintiffs; and that the

water coming down the street would, if the gutters were overflowed, flow upon plaintiffs' property. It is to be remembered, however, that west of plaintiffs' property was Second avenue east, east of their property was first avenue east, and east of First avenue east Sims street; that north of their property were First and Second streets. It was shown that there was a fall from the intersection of First avenue east and Villard avenue of some .6 of a foot to the block towards the east, and that there was no point in the street that was higher than First avenue and Villard avenue; that the intersection of first avenue and First street is .9 of a foot higher than Sims street; that along First avenue there is a large ditch about 2 feet below the curb line of the sidewalk; that the water at the time of the flood came above the property line of Soules & Butler's about 11 inches. There is also evidence that, from a short distance east of plaintiffs' property, clear on the east side of Second avenue east, which is about .2 of a foot lower than plaintiffs' property line, most of the water coming down from the north—that is, coming down First avenue east and Sims street—does not travel straight down to Villard avenue, but turns east on First street and goes over to Second avenue east, and then south, so that the bulk of the water from the territory west of Soules & Butler's would flow along First street until it struck the street east of the lumber yard, then down and across the street, and out through the culvert.

Nor can we say that the proof is by any means conclusive that the sewer was blocked by the culvert crossing, and that this was an obstruction for which the city, and not the railway company, would be responsible. Such obstruction, indeed, might possibly have existed, but the evidence seems to show that such was not the fact.

On this question the witness Hughes testified positively that he saw the culvert at 5 o'clock in the morning, and that he saw one of the plank crossings that was used to cover the culvert between the streets about 2 feet above the culvert and 2 feet back in an indent; that at the time there was too much water to see the culvert itself; that the plank or culvert crossing that he saw was slanting up against the bank, and that the water was holding it there.

Q. You could not see whether that portion was over the mouth of the culvert?

A. I couldn't see how it could lay over the culvert in the position it was laying. It was laying on a slant.

Exception is taken to the instruction to

the jury that, "if you believe that the plaintiffs are entitled to recover as heretofore instructed, then it is your duty to determine the amount of damages sustained by reason of the flooding of these premises, and they are entitled to make matters whole. If you find in favor of the plaintiffs, then they are entitled to recover such damages as they have reasonably suffered by reason of the negligence of the defendant to provide a suitable and sufficient culvert to take care of the water that naturally through its natural course would drain through that territory."

It is claimed that the above quotation comprises all the instructions to the jury on the measure of damages, and that no requests for instructions on the measure of damages were in this case submitted to the trial court by either plaintiffs or defendant. "It is our contention, however," says counsel for the defendant in his brief, "that the failure of the court to instruct the jury as to the measure of damages in this case—i. e., how they were to ascertain the damage and what they had the right to consider—is fatal. And we contend this is error, regardless of whether or not such instruction was requested."

Defendant and appellant contends that:

"The rule in civil cases is that, where there is an established rule of law as to the measure of damages applicable to a particular case, the judge ought to inform the jury what the rule really is, and that a failure to do so is a ground for a new trial. So important is this rule that, although nondirection is in general no ground for a new trial in civil cases, unless a proper instruction is requested and refused yet the failure to instruct the jury as to the rule of damages has been held ground for a new trial, even where the specific instruction was not asked."

"A reading of the authorities above cited," counsel also says, "will show how logical the conclusion is. We had the right to expect that the court would give to the jury some little instruction on the measure of damages, the law of the case with reference to the damages, and did not have to take chances, because the failure to request instructions, that he would give the jury free rein, and let them do just as they pleased in determining the amount of plaintiffs' damage, or what they would be entitled to do 'make matters whole.' Our complaint is that the jury should have been instructed as to how they could determine the amount of damages, if any, the plaintiffs were entitled to. And there is testimony in the record in regard to certain damage plaintiffs suffered, and there

was no proof to show the amount of that damage."

There appears to be no merit in this objection. Almost identically the same instruction was given in the case of *Quinn v. Chicago, M. & St. P. R. Co.* 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884, where the court held that, in the absence of any requested instruction on the subject, the measure of damages was sufficiently defined.

The next specification of error is that the court erred in allowing a certain witness to testify as to the value of the property injured and its depreciation in value on account of such injury; it being contended that he was not properly qualified to so testify. We think, however, that there is no merit in this objection. The witness had worked in a hardware store for at least seven and one half years. He was manager of the hardware store of the plaintiffs, and had been such for some time. During such time he had done all the buying for the firm, and, when new goods were received by them for sale, marked the new prices on them. He had been with the stock of goods all of the time, both before and after the flood. If such a man is not competent to testify as to the value of goods, either new or damaged, we do not know who would be. This, we must remember, is not such a case as that which was passed upon by us in *Fisher v. Smith*, 32 N. D. 595, 156 N. W. 242, and where the witness testified positively that he did not know the value of secondhand goods and was hardly in a position to know such value.

The next specification of error relates to the admission in evidence of testimony in regard to the nature of a bridge which had formerly been constructed by the railway company over the swale or ravine, and which testimony, it is claimed, was not relevant or material, and did not tend to prove any issue in the case, and also to allowing evidence as to whether it would have cost any large sum to have constructed larger culverts; also whether it would have been a difficult engineering feat to do so. Counsel for defendant argues that "the above specifications, it will be noted, relate to testimony introduced by plaintiffs, both direct and on cross-examination, relating to the fact that some time ago the defendant had maintained a trestle bridge where the culvert in question now is; that the trestle bridge was 14 or 16 feet wide, and always took care of the waters that came down; that it would not cost a great deal to put a few extra culverts under the track, and they could be put in without a great deal of difficulty. We submit that the court erred grievously in letting such

testimony as this go in over our objection, and that it was very prejudicial. The question at issue here is whether or not the culvert we had under the track on July 28, 1914, was adequate, and the size of a culvert kept there before, or the size of a trestle bridge kept there before, or the fact that such bridge was maintained there, or the fact that more culverts could be put in without much expense or without much trouble, was entirely immaterial and wholly collateral to the issue. And these points were touched upon and emphasized for the sole purpose of prejudicing the jury and giving plaintiffs something to argue to the jury. They went to the jury with the argument that, if we had kept the trestle bridge, or put in a few more culverts at a few dollars' cost, these plaintiffs would not have suffered this great loss. This is an attempt to prove negligence by collateral matters, and every court in the land has said this is not permissible."

We can see no merit in this objection. One of the immediate elements of the case was whether the swale or ravine was a natural drain way, whether it drained the area in question, the amount of water which ran therein, and the topography generally of the locality. The fact that a trestle bridge had been constructed over the ravine and was necessarily constructed had much to do with proving this fact. *Houghtaling v. Chicago G. W. R. Co.* 117 Iowa, 540, 91 N. W. 811; *Quinn v. Chicago, M. & St. P. R. Co.* 23 S. D. 126, 22 L.R.A. (N.S.) 789, 120 N. W. 884. Although this evidence might have been improperly used in the argument, we do not find that any objection was made to that argument while it was being made, or that any instructions were asked thereon by the defendant. If every misuse of testimony which is made upon the argument can be made a ground for reversal when no objection is made thereto upon the trial and no instruction asked thereon, but few verdicts would stand.

As far as the cost of the culverts is concerned, we do not consider this testimony at all irrelevant. It all goes to show whether or not the defendant was guilty of negligence in not providing proper preventives against heavy downpours. Surely one should not be allowed to complain when sued for the failure to provide sufficient culverts because proof is introduced, which he is at liberty to repudiate, that those culverts could have been easily furnished.

Counsel for defendant and appellant also objects to the admission of testimony that the premises of the plaintiffs were flooded prior to July 28, 1914. We can see no error in the admission of this testimony. L.R.A. 1917A.

It all went to show the necessity for a sufficient culvert, and, although some of it relates to a period before the particular culvert was constructed, it none the less tends to prove that fact as well as the course of the flow of the water from the drainage district.

Objection is also made to the action of the court in sustaining plaintiffs' objection as follows:

Q. Do you remember whether or not that cistern was flooded by the surface waters on that day?

Counsel for plaintiffs; I object to that on the ground that it is entirely immaterial, unless it is shown to be in this drainage basin or some way connected with it.

The court: Objection sustained.

And the question:

You may now tell us whether or not this cistern was flooded by surface waters on the 28th day of July, 1914?

Counsel for plaintiffs: Objected to on the ground that it is wholly immaterial, and the comparison would be of no benefit to the jury.

The court: Objection sustained.

This testimony was rejected by the trial court apparently on the theory that it was not competent because the reservoir in question was located in a different basin than the one in question; that is to say, located in a different hollow, although it was shown that the basins were topographically nearly the same. We are inclined to think that there is some merit in this objection. There must be some limits, however, to the proof in every case, and the evidence was merely cumulative, and all that it could possibly tend to show was the action of the water in the vicinity and the character of the storm. We can hardly reverse the judgment on this account.

Error is predicated on certain portions of the instructions in which the jury were told that "every owner of land may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of negligence in the manner of execution, will not be liable for an adjoining property. In other words, the railroad company has a right to fill a grade as it is done and established by the evidence in this case, provided no damage results to the adjoining property by reason of such establishing of such grade."

And: "The court instructs you as a matter of law that, if the railroad company fills a grade over and across any natural drainage way, it is the duty of the railroad company to provide suitable and sufficient

means for taking care of the water along such drainage way."

Also: "Now, you must determine whether or not in the construction of this grade and the culvert providing for the care of surface water,—whether or not the company was negligent and failed to do something that an ordinary prudent man would not have done under the same or similar circumstances."

And: "Gentlemen, the plaintiffs must establish that the defendant was negligent in establishing that grade and providing an insufficient culvert to take care of the ordinary drainage water under ordinary circumstances, and, second, that the culvert was not obstructed, and, third, that it was not an extraordinary freshet, and, if you find those facts, then your verdict must be in favor of the plaintiff, and then determine the amount of damage suffered, if any, by reason of the flooding of these premises and the injury to their property by reason of such flooding, but, if you believe that the defendant is not guilty of any negligence in the construction of his right of way and culvert in question, and you believe that the damages was the result of an extraordinary freshet, then your verdict must be in favor of the defendant."

It is also claimed that the court erred in its instruction to the jury "in that they did not cover the law of the case necessary so that the jury can intelligently decide the issues before them, and the said instructions are ambiguous and well calculated to mislead the jury." It is also claimed that "the court erred in that the instructions given did not fully cover the issues in the case, the court wholly failing to instruct, or not sufficiently instructing, on the following issues: (1) Upon the issue as to whether or not the swale or ravine in question here was a natural watercourse, no definition of a natural watercourse having been given them so they could determine this question intelligently; (2) upon the question of the measure of damages, no instruction whatsoever having been given the jury as to what constituted the measure of damages, if any, plaintiffs had suffered, having been given."

We find no merit in these objections. As far as the natural watercourse is concerned, we are satisfied that the evidence is so conclusive that the court would have been justified in peremptorily instructing the jury that the swale or ravine was a natural watercourse.

As far as the other alleged errors are concerned, including the one in which the court says: "In other words, the railroad company has a right to fill a grade as it is done and established by the evidence in L.R.A.1917A.

this case, provided no damage results to the adjoining property by reason of such establishing of such grade," we do not believe that any prejudice was occasioned. The offending words were preceded by the instruction that the court "instructs you that every owner of land may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of negligence in the manner of execution, will not be liable for an adjoining property," and were followed by the words:

"The court instructs you as a matter of law that, if a railway company fills a grade over and across any natural drainage way, it is the duty of the railway company to provide suitable and sufficient means for taking care of the water along such drainage way. Now, in this particular case the gist of the action is to determine whether or not, in the construction of the right of way and establishing the culvert in question, the company, the defendant in this action, was negligent in such construction. If the company is negligent, the verdict must be for the defendant. Negligence, as that term is used in this charge, means the failure to exercise ordinary care. Negligence consists in doing something which a person of ordinary prudence and care would not do or would not have omitted to do under like or similar circumstances. Now, you must determine whether or not in the construction of this grade and the culvert providing for the care of the surface water,—whether or not the company was negligent and failed to do something that an ordinarily prudent man would not have done under the same or similar circumstances. Now, in order to determine whether or not this defendant was negligent, it will be necessary to determine from the evidence the size of the culvert and take into consideration the drainage area and all the circumstances surrounding as to whether or not such culvert would under ordinary circumstances take care of the water of an ordinary rain storm and without injury to the adjoining landowners. If you believe from the evidence, and it is required to be established, that the proximate cause of the injury to these plaintiffs was the result of this negligence of the defendant: if you believe from the evidence that the culvert was capable and sufficient to take care of the water during this storm, and that by reason of the same being interfered with by an obstacle over the mouth of the culvert that the water was prevented from escaping through the culvert, the defendant company is not liable for injuries resulting by the obstruction of the mouth

of the culvert, and, if that contributed and was the cause of the injury sustained by reason of the obstruction of the culvert, then the defendant company is not liable for what may have resulted to the plaintiffs by reason of that fact. Now, the next question to be determined is whether or not in the storm that occurred on July 28, 1914, at which time the plaintiffs are alleged to have suffered the injuries complained of, such storm was an extraordinary freshet. If you believe from the evidence that the storm of July 28th was an extraordinary freshet, then the company is not responsible for injuries sustained, it being contemplated under the law that it was an act of God, and the defendant cannot be held responsible, and the burden is thrown on the defendant to establish this fact by a fair preponderance of the evidence, and, as before indicated, we mean by a fair preponderance of the evidence a greater weight of the evidence; that the defendant must establish that it was, in fact, an extraordinary freshet. In that connection the jury are instructed that the burden then, as indicated, is upon the defendant to prove by a fair preponderance of the evidence that this was an act of God, and was an extraordinary freshet, and was the entire cause of the plaintiffs' loss, which, if so, would in itself establish the absence of negligence on the part of the defendant company, and, if the defendant proves by a fair preponderance of the evidence that this was an extraordinary freshet, then that shows that the defendant is free from negligence and is entitled to a verdict. Gentlemen, the plaintiffs must establish that the defendant was negligent in establishing that grade and providing an insufficient culvert to take care of the ordinary drainage water under the ordinary circumstances, and, second, that the culvert was not obstructed, and, third, that it was not an extraordinary freshet, and, if you find those facts, then your verdict must be in favor of the plaintiffs, and then determine the amount of damage suffered, if any, by reason of the flooding of these premises and the injury to their property by reason of such flooding, but if you believe that the defendant is not guilty of any negligence in the construction of his right of way and culvert in question, and you believe that the damages was the result of an extraordinary freshet, then your verdict must be in favor of the defendant."

We do not very well see how these instructions could have been very much clearer. They made it absolutely clear to the jury that the railway company could L.R.A.1917A.

only be held liable if guilty of negligence, and that the test of that negligence was the care of an ordinarily prudent man in similar circumstances. They made it clear that the defendant could only be held liable in case the storm was not unprecedented or extraordinary. The court clearly stated that "if you believe from the evidence that the storm of July 28th was an extraordinary freshet, then the company is not responsible for the injury sustained."

In addition to this a special question was submitted to the jury on this very proposition. The instructions must be taken as a whole, and not in isolated sections, and the jury must be presumed to have been composed of intelligent men. Taken as a whole, the instructions were, in many respects, more favorable to the defendant than the law would warrant.

Nor can we hold, as a matter of law, with the contention of counsel for appellant that "negligence was clearly disproved by their proof that the railroad tracks, embankments, etc., were constructed in the ordinary and usual manner and in the most approved manner known to railroad engineers, and that the 40-inch pipe which extended under the track and constituted the culvert was sufficient to take care of the ordinary and usual rainfall in the drainage basin; in other words, that from a rainfall of 3 inches per hour there would be a run-off of 320 cubic feet per second, and that the capacity of the culvert was 177 cubic feet per second."

This testimony was, in fact, given, but the witness admitted that his computation as to the run-off from the drainage area was figured from a general formula merely; that it was based on soil in a dry condition when some of the water would be taken up by seepage and on the presumption of ordinary street roads, and not roads which were hard and impervious to water. He specifically stated that he did not know without computing how many cubic feet of water would fall upon 168 acres of land if there was a rainfall of 3 inches of water per hour. This evidence would, of course, be conclusive if there was any proof of the amount of rain which actually fell during the hours in which the damage was done, and which actually fell during any similar period in the storms of the past, and that the areas from which the formula was taken were similar in topography and as to soil to that under consideration in the case at bar. It must be clear, however, that no general formula can be made to apply in such cases, as the drainage through a pipe or culvert from a drainage basin in a level district such as the Red river valley would

be entirely different from the drainage of a hilly basin such as that to be found at Dickinson. We believe that the case was properly submitted to the jury.

The judgment of the District Court is affirmed.

A petition for rehearing having been filed, the following Per Curiam response was handed down on April 26, 1916:

After listening to a reargument in the above case, the court still adhere to the opinion above expressed.

Annotation—Right of owner of lower tenement as against the rights of the upper landowner to obstruct surface water in a natural drainage channel.

This note is supplementary to the note to *Quinn v. Chicago, M. & St. P. R. Co.* 22 L.R.A.(N.S.) 789, and contains only the cases decided later. The scope of the note is carefully stated in the earlier note, which also contains a comprehensive discussion of the principles which underlie the cases here cited, and refers to several notes on analogous questions. The note there referred to, appended to *Manteufel v. Wetzel*, 19 L.R.A.(N.S.) 167, on the right to hasten the flow along a natural drain way, has been supplemented by the note appended to *Trigg v. Timmerman*, L.R.A.1916F, 424.

On the question of liability of municipal corporation for damming back surface water by the grading of a street, see note to *Hume v. Des Moines*, 29 L.R.A.(N.S.) 126.

The following cases, either in name or at least in effect, profess adherence to the civil-law doctrine, and hold or recognize that, as against the rights of the upper proprietor, the owner of the servient estate cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression; *Collins v. Louisville & N. R. Co.* (1912) 176 Ala. 174, 57 So. 833 (the rule is here recognized, but not applied); *McCary v. McLendon* (1915) — Ala. —, 70 So. 715; *Jonesboro, L. C. & E. R. Co. v. Cable* (1909) 89 Ark. 518, 117 S. W. 550; *Kelly v. Kansas City Southern R. Co.* (1909) 92 Ark. 465, 123 S. W. 664; *Tretter v. Chicago G. W. R. Co.* (1910) 147 Iowa, 375, 140 Am. St. Rep. 304, 126 N. W. 339; *Illinois C. R. Co. v. Doss* (1914) 159 Ky. 57, 166 S. W. 785; *Skinner v. Great Northern R. Co.* (1915) 129 Minn. 113, 151 N. W. 968; *Feesner v. Steinbrack* (1911) 89 Neb. 129, 34 L.R.A.(N.S.) 1055, 130 N. W. 1040; *Miller v. Marriott* (1915) — Okla. —, 149 Pac. 1164; *McLeod v. Spencer* (1916) — Okla. —, 159 Pac. 326; *Miller v. Eastern R. & Lumber Co.* (1915) 84 Wash. 31, 146 Pac. 171.

So it has been held that the servient tenant is liable to the owner of the dominant estate for injury to the latter; L.R.A.1917A.

—where a railroad company dumped several carloads of earth into a waterway beneath a bridge in its road, thus obstructing the flow of surface water that collected into a regular course, and casting it back upon plaintiff's land, injuring his crops, *Tretter v. Chicago G. W. R. Co.* (1910) 147 Iowa, 375, 140 Am. St. Rep. 304, 126 N. W. 339;

—where a railroad company permitted its culverts to fill up with sand and debris, damming back the water of a small stream, and causing damage to the crops upon land drained by the stream, *Illinois C. R. Co. v. Doss* (1914) 159 Ky. 57, 166 S. W. 785;

—where an embankment with a culvert through it was constructed in such manner as to interfere with the natural flow of water, damming it back upon the land from which it flowed, *Skinner v. Great Northern R. Co.* (1915) 129 Minn. 113, 151 N. W. 968;

—where the servient tenant constructed dikes to stop the flow of water that had been flowing from time immemorial in a natural watercourse from the dominant estate, although the owner of the latter estate had made some artificial ditches across his land in the interest of good husbandry, without materially increasing the amount of water that flowed in the course, *Flesner v. Steinbrack* (1911) 89 Neb. 129, 34 L.R.A.(N.S.) 1055, 130 N. W. 1040;

—where a stream was accustomed to overflow its banks at a particular point in time of flood, and the overflow waters followed a well-defined course across the lands of the plaintiff and the lands of the defendant, and the latter erected a dam on his land so as to pond the water on plaintiff's land and prevent it from coming upon his own, *Miller v. Marriott* (1915) — Okla. —, 149 Pac. 1164;

—where the surface water flowing in a well-defined course at places spreads out over level ground so as to form merely a swamp, if it continues to flow by gravitation through to better-defined courses that form an outlet, and the lower proprietor dams up the courses, casting the water

back upon the upper proprietor, *Miller v. Eastern R. & Lumber Co.* (1915) 84 Wash. 31, 146 Pac. 171.

In *McLeod v. Spencer* (1916) — Okla. —, 159 Pac. 326, the court cites and follows *Miller v. Marriott* (Okla.) *supra*.

The fact that the owner of land grants a right of way to a railroad company does not preclude him from recovering damages from the company for the flooding of his land by the obstruction of a natural watercourse in the building of the road, so that the water is cast back upon his land. *Kelly v. Kansas City Southern R. Co.* (1909) 92 Ark. 465, 123 S. W. 664.

In *Kroeger v. Twin Buttes R. Co.* (1911) 13 Ariz. 348, 114 Pac. 553, Ann. Cas. 1913E, 1229, the court recognized as the common-law rule the proposition that the servient tenement must not obstruct the flow of water from the dominant estate, if it is flowing in a well-defined channel or watercourse, so as to cast it back upon the dominant estate; but, on rehearing in (1912) 14 Ariz. 269, 127 Pac. 735, Ann. Cas. 1914A, 1289, the case was finally decided upon the theory that the water did not come from plaintiff's land, but from other land, and was cast upon plaintiff's land by the embankment of the defendant railroad company; hence the defendant would be liable. It will be seen that the case as finally disposed of is not within the scope of the present note, which does not include cases where the water cast back is mere surface water, nor does it include cases where the water came from other land than that of the plaintiff.

In *Cox v. Deverick* (1916) 272 Ill. 46, 111 N. E. 560, the court points out that at common law the owner of the servient estate is not permitted to obstruct the flow of water in a natural channel coming from the dominant estate, so as to throw it back, to the injury of the latter, and argues that the improvement of the ditch or natural channel through which the water flowed by the parties or former owners of the land, and the enlargement of the right of the dominant tenant by statute, do not take away from the dominant tenant these rights, but rather tend to strengthen them.

In *Trumbo v. Pratt* (1910) 148 Iowa, 195, 126 N. W. 1122, the court apparently recognizes the principle that the owner of the servient tenement has no right to obstruct a regular watercourse, by which water from the dominant estate is held back from his land, but it was held that he does have the right to maintain a water gate to collect the rubbish that

comes from the land of the dominant tenant and prevent it from passing through his own land. In this case the owners of both the dominant and the servient tenements had dug ditches through the natural depression to facilitate the passage of the water, but the case was decided upon the principle already mentioned. It was also held in the case that the dominant proprietor was estopped from objecting to the maintenance of a water gate, upon the ground that he had slept upon his rights.

In *Schlader v. Strever* (1912) 158 Iowa, 61, 138 N. W. 1105, the court recognizes the principle that the owner of the servient tenement is not permitted to obstruct the flow of water from the dominant estate in a natural watercourse and throw it back upon the dominant estate, but the facts in the case were such that it was unnecessary to base the decision upon this principle.

The owner of a village lot has no right to close a passageway across it through which surface water flowed from a drain constructed by the village, if the construction of the drain brought no more water than had been accustomed to flow in the channel from time immemorial. *Trenton v. Rucker* (1910) 162 Mich. 19, 34 L.R.A.(N.S.) 569, 127 N. W. 39.

In *Walther v. Cape Girardeau* (1912) 166 Mo. App. 467, 149 S. W. 36, the rule that the servient tenement must not obstruct the natural watercourse through which water is flowing from the dominant estate, and cast the water back, to the injury of the dominant estate, was recognized but not applied, for the reason that the facts did not bring the case within the rule.

In *Thompson v. Mobile, J. & K. C. R. Co.* (1913) 104 Miss. 651, 61 So. 596, it was held that a railroad company is liable to property owners along its road for injuries caused by its obstruction of water that flows in a natural course, and the reasonableness of the obstruction is not material; so, in case it has, by its embankment, cast the water back upon the land from which it has come, it is error for the trial court to instruct the jury that "the defendant is only required to so maintain the said road as constructed across the said valley as not unreasonably or unnecessarily to interfere with the passage of the water in natural watercourses."

The court, in *Mapes v. Bolton* (1911) 89 Neb. 816, 132 N. W. 386, applied the rule that an owner of land may not obstruct the flow of water in a natural watercourse so as to cast it back upon the

land from which it comes, but it appears to qualify the rule so that the liability might depend upon the unreasonableness of the obstruction. The court said: "There is no proof that it was necessary, in the exercise of good husbandry or for the purpose of protecting the defendant's

premises, to prevent the ditch water from flowing eastward in the first draw, and it is plain that a sufficient way was not provided from the first draw southward for the combined waters that will flow in the draw and down the ditch from the north."

J. W. M.

NORTH DAKOTA SUPREME COURT.

MINNESOTA MUTUAL LIFE INSURANCE COMPANY, Respt.,

v.

TAGUS STATE BANK, Appt.

(34 N. D. 566, 158 N. W. 1063.)

Bank — misappropriation by officers — liability.

1. Defendant bank collected two notes for plaintiff, and placed the proceeds on deposit with itself, issuing therefor its cashier's checks for \$1,802 to plaintiff, but held them in its bank undelivered. Its cashier, John J. Brugman, appropriated to use of himself and the president of the bank a like amount of money from said bank. The president of said bank, W. J. Brugman, knew all these facts and participated in appropriating part of the money, part of it going to take up his own overdraft with his bank. It is stipulated that previous to this transaction the stockholders and directors of defendant bank believed the cashier "to be an honest and upright officer." The bank refuses to pay plaintiff the money it so appropriated, and denies liability under the claim that it received said moneys as a special deposit and was obliged to use only ordinary care in the keeping and transmission thereof, and that while so doing, and without its negligence, its officers, whom it believed to be honest, misappropriated the special deposit to their use, and for which it should not be held responsible. Held, the act of these officials was the act of the bank.

For other cases, see *Banks*, III. b, in Dig. 1-52 N. S.

Same — collections — special deposit.

2. The funds were not on special deposit. For other cases, see *Banks*, IV. a, 1, in Dig. 1-52 N. S.

Same — relation to depositor.

3. The funds were on general deposit with it, and therefrom arose the relation of debtor and creditor between plaintiff and defendant.

For other cases, see *Banks*, IV. a, 1, in Dig. 1-52 N. S.

Headnotes by Goss, J.

Note.—As to liability of bank for misappropriation of collections by its officers or employees, see annotation following this case, post, 522.
L.R.A.1917A.

Evidence — presumption of negligence.

4. Though it be assumed that this was a special deposit, yet the loss thereof presumes negligence by defendant, and places it under the burden of affirmatively proving that it was not negligent, if it would escape liability; and, not making such proof, it must respond in judgment.

For other cases, see *Evidence*, II. h, 1, f, in Dig. 1-52 N. S.

(August 2, 1916.)

APPEAL by defendant from a judgment of the District Court for Ward County in plaintiff's favor in an action for money had and received by defendant for plaintiff's use and benefit. Affirmed.

The facts are stated in the opinion.

Messrs. Palda & Aaker and I. M. Oseth, for appellant:

Money collected for another and held by the collecting bank for transmission or subject to the further instructions of the owner is in the nature of a special deposit, giving rise merely to the relation of bailor and bailee.

Cutler v. American Exch. Nat. Bank, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21; Re Johnson, 103 Mich. 109, 61 N. W. 352; Wallace v. Stone, 107 Mich. 190, 65 N. W. 113; Continental Nat. Bank v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; Commercial Nat. Bank v. Armstrong, 39 Fed. 684; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; Minneapolis Sash & Door Co. v. Metropolitan Bank, 77 Am. St. Rep. 609, note; Bailie v. Augusta Sav. Bank, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717; Prescott v. Leonard, 32 Kan. 142, 4 Pac. 172; Re State Bank, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336; Griffin v. Chase, 36 Neb. 328, 54 N. W. 572; National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49; Aiken v. Jones, 93 Tenn. 353, 25 L.R.A. 523, 42 Am. St. Rep. 921, 27 S. W. 669; Beal v. Somerville, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; 3 R. C. L. 522; Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Reprint, 107; Cheshire v. Bailey, 1 Ann. Cas. 94, note.

The fund was not converted by the defendant.

Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477, 7 So. 601; McKeon v. Citizens' R. Co. 42 Mo. 79, 4 Am. Neg. Cas. 471; Jackson v. St. Louis, I. M. & S. R. Co. 87 Mo. 422, 56 Am. Rep. 460.

Defendant's liability can be predicated only upon culpable neglect or lack of ordinary care.

Claffin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Lamb v. Western R. Corp. 7 Allen, 98; Kafka v. Levensohn, 18 Misc. 202, 41 N. Y. Supp. 368; Rothoser v. Cosel, 39 Misc. 337, 79 N. Y. Supp. 855; Foster v. Essex Bank, 17 Mass. 479, 1 Am. Neg. Cas. 502, 9 Am. Dec. 168; Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; Scott v. National Bank, 72 Pa. 471, 13 Am. Rep. 711; Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831; First Nat. Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49; Ray v. Bank of Kentucky, 10 Bush, 344.

Messrs. Bradford & Nash, E. R. Sinkler, and Butler & Mitchell, for respondent:

When the notes were collected and payment thereof received by the defendant bank, and the funds so collected by the bank mingled with the general assets and funds of the bank, the relationship of the plaintiff and respondent with the defendant and appellant became purely one of debtor and creditor.

1 Morse, Banks & Bkg. § 248; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 778, 86 N. W. 21; Cutler v. American Exch. Nat. Bank, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710.

Goss, J., delivered the opinion of the court:

This case was tried upon these stipulated facts:

"It is stipulated by and between the parties to this action that on October 13, 1913, and all times mentioned in the complaint and answer in this litigation, the plaintiff was a foreign corporation authorized to do business in the state of North Dakota, and the defendant was and is a domestic banking corporation organized under the laws of the state of North Dakota. That on or about October 13, 1913, the Minnesota Mutual Life Insurance Company did send to the Tagus State Bank for collection two notes as follows: One note against O. J. Ness for \$800 and interest; one note against Jno. J. Leon, for \$900 and interest, the two notes amounting to \$1,802. That the said notes were secured by real estate mortgages on lands in the vicinity of Blaisdell, then owned by O. J. Ness.

"It is further stipulated that on or about L.R.A.1917A.

December 31, 1913, the said O. J. Ness paid to the Blaisdell State Bank, of Blaisdell, North Dakota, the sum of \$1,802 for the purpose of taking up said notes and mortgages above referred to, with instructions to send said moneys to the Tagus State Bank for such purpose; that thereafter, and on December 31st, the Blaisdell State Bank did issue its cashier's checks for the sum of \$1,802, which are marked 'Exhibit A No. 1605,' and 'Exhibit B No. 1604,' and which were sent to the Tagus State Bank with instructions that the same were for payment of the above-mentioned two loans; that the Tagus State Bank thereafter, and between the 14th day of January and the 17th day of January, 1914, cashed such check for \$1,802, and did make out and hold in its possession cashier's certificates in the sum of \$1,802, being the certificates numbered 3479, marked 'Exhibit C,' and No. 3482, marked 'Exhibit D;' that on the cashier's check register on which said Exhibits C and D are recorded, there is a notation marked 'Ole. J. Ness,' under Exhibit C No. 3479, and the words 'Jno. J. Leon, loan,' under Exhibit D, which said checks were made payable to the Minnesota Mutual Life Insurance Company; that thereafter, and on or about January 24, 1913, John J. Brugman, who was then the cashier of said bank, did cash such certificate without indorsement by the Minnesota Mutual Life Insurance Company or any other indorsement, and did appropriate said moneys to his own use; that none of said sums have been paid by the Tagus State Bank to the Minnesota Mutual Life Insurance Company, to the Blaisdell State Bank, or to Ole. J. Ness, or to John J. Leon; that John J. Brugman was the cashier of the Tagus State Bank during all the times mentioned in this stipulation; that prior to the payment of the Leon and Ness notes, the same were sent by the defendant to the Blaisdell State Bank for collection, without knowledge or authority on the part of the Minnesota Mutual Life Insurance Company that the same had been done: that on or about July or August, 1914, the Tagus State Bank did get said note from the Blaisdell State Bank, and returned the same to the Minnesota Mutual Life Insurance Company, being the same notes which were sent to the Tagus State Bank for collection; that no satisfaction of the mortgages securing the notes herein mentioned was ever made by the plaintiff, or sent to the defendant, or requested by the defendant, but that the Blaisdell State Bank did demand such satisfaction from the Tagus State Bank; that subsequent to February 1, 1914, the plaintiff has repeatedly demanded payment of the said \$1,802 and interest from the Tagus State Bank; that

John J. Brugman, cashier, of the Tagus State Bank, took the cashier's checks Exhibits C and D and used the amounts which they represented to take up his own and his brother's checks which came in from outside banks, and that no entry was made on the books of the transaction taking up said check with these cashier's checks marked 'Exhibit B' and 'Exhibit E;' that prior to this transaction John J. Brugman, of the said Tagus State Bank, was believed by the public and the stockholders and the directors of the defendant to be an honest and upright officer, and so conducted himself so far as anyone knew, but that all such transactions were made and done with the knowledge and consent of W. J. Brugman, the president of said bank, who also participated in a portion of the money converted on the cashing of said Exhibits C and D."

Upon these facts judgment was ordered for plaintiff for \$2,000.81 and costs. Defendant bank appeals.

Appellant's basis for denial of liability is in its claim that the collection made became in law but a special deposit in said bank, giving rise to the relation of bailor and bailee, and that the bank is not liable for the embezzlement of such special deposit by its supposed honest officials, its cashier, done with the connivance of its president.

Decision of any question that would arise under a bailment is without the case, because the facts stipulated show that no deposit was made with defendant's bank. It had authority to collect, and procured collection of, these notes. It reduced to cash the checks sent it by its collecting agent, the Blaisdell Bank. In possession of the funds it became charged with a duty to remit said amount, less commissions for its services. It placed these funds on deposit with itself. This is shown by the issuance of its two cashier's checks which are equivalent to its draft on its general funds, and negatives to the mind of anyone familiar with banking usage any possible contention that these funds were placed on special deposit. The issuance of cashier's checks, necessarily drawn generally against its cash, evidenced that the other side of its bookkeeping transactions had taken place; viz., that the sums had been deposited in its cash as general deposit subject to check. The purpose of the transaction was to swell its deposits temporarily, and that it might retain the funds until its cashier's checks returned for collection. Otherwise it would have drawn its draft on its correspondent bank and credited its cash with the sums deposited. In either event the effect is the same, except that by its system of cashier's checks it retained the money temporarily, pending return of its checks for collection. In L.R.A.1917A.

either case no relation other than that of debtor and creditor would be created. *Citizens' State Bank v. Iverson*, 30 N. D. 497, 153 N. W. 440. The bank did not agree to transmit the identical money received. In fact it received in all probability no coin or specific cash, but only its equivalent in credit on its books, or those also of its correspondent bank elsewhere. Its obligation to plaintiff was to transmit to it the same amount of money that it received, less its commissions for services in collecting and remitting. No particular coin or currency was in contemplation of this business transaction to be transmitted, nor even dealt with or considered. Hence no special deposit was made, nor can such theory change the ordinary debtor and creditor relation that arose under the stipulated facts. Note to *Morse, Banks & Bkg.* vol. 1, § 248; *Plano Mfg. Co. v. Auld*, 14 S. D. 512, 86 Am. St. Rep. 778, 86 N. W. 21; *Cutler v. American Exch. Nat. Bank*, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710.

There is no substantial conflict in the theory of the law as to when deposits are general or special. But in the application of the theory under the peculiar facts of each case there is far from harmony in the decisions. Much of the discord arises from the change in relations of the parties pending the transactions, and where rights of others intervene or are to be considered. Much of the law cited by appellants was declared in suits brought by claimants against receivers of defunct banks. It is here of no concern whether this plaintiff could follow this deposit in the hands of a receiver had this bank failed before remitting. Plaintiff asserts no such right, being content to treat this transaction exactly as the bank treated it, viz., as a general deposit against which it drew its checks in plaintiff's favor. Whether the bank alone could, in that way, make plaintiff a general depositor, or against its wishes, so as to bar it from following its deposit as a trust fund or special deposit with plaintiff, deny the passing of any title thereto to its collecting agent, the bank, is not the question before us. The situation here is simple, and is merely whether the defendant, after creating by its act a general deposit and the relation of debtor and creditor with plaintiff, may then claim, after its cashier and president have by their trickery and dishonesty embezzled its funds to an amount equal to what plaintiff has so deposited, that a special deposit was made, in order to found a claim thereon that its officers have embezzled a special deposit, and not its own general funds. This sums up the contention made by defendant. No authorities can be found to support such

a claim. It cannot be allowed to thus defeat its liability.

But defendant asks, "If the misappropriation was not the act of the bank, how can it be held liable?" The act of the bank upon which its liability rests was receiving these funds in due course of ordinary banking for transmission and then making a general deposit of them as it did. What happened subsequent to this could not release it from liability. Hence it is no concern of plaintiff that defendant's officials embezzled its general funds afterward. Nor does it release the bank from liability.

The note in 86 Am. St. Rep. at page 786, covers this situation by the following: "In the absence of such general agreement, however [an agreement to transmit funds received as a special deposit] 'the custom of bankers to credit customers with the proceeds of paper left for collection when the paper has been collected is universally recognized; and customers and bankers are presumed to contract and deal together in view of this usage. The law, therefore, authorizes the banker to credit the customer with the proceeds in lieu of making a specific delivery; and the necessary effect of an authorized credit is to create the relation of debtor and creditor between them from the time when the credit is given.' First Nat. Bank v. Bank of Monroe (C. C.) 33 Fed. 408. From this it follows that the bank takes title to the proceeds of a check or draft deposited with it for collection immediately upon crediting the depositor with the amount of such proceeds. In this connection the rights of a bank are different from and greater than those of other attorneys or agents, as is pointed out in Tinkham v. Heyworth, 31 Ill. 519. The bank occupies the position of an agent for collection until the proceeds are actually received and credited, whereupon it takes title thereto, and the relation of debtor and creditor takes the place of that of principal and agent" (citing many cases).

See also notes in 39 L.R.A.(N.S.) 847, 16 L.R.A. 516, and 32 L.R.A. 769, citing much authority, and 3 R. C. L. pages 632 et seq., where authorities are cited and explained. This was a general deposit made with it. This difference between the implied powers of a bank through custom and business convenience was the basic principle recognized and held controlling by this

court in Schafer v. Olson, 24 N. D. 546, 43 L.R.A.(N.S.) 762, 139 N. W. 983, Ann. Cas. 1915C, 653. And to that extent that case is authority here. See also the decision in State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140.

But assume this was a special deposit. It is stipulated that the president had knowledge of the misuse. There is no showing or fact stipulated to show that the president was considered and known as honest or otherwise. The contrary is the presumption. "From the loss of the property [the special deposit] actionable negligence is presumed." 3 R. C. L. 559. From the facts stipulated it affirmatively appears that the bank or its directors were negligent in the selection of its managing head, and should be held liable on that ground, even accepting its claim that these funds were in fact and law a special deposit. Gray v. Merriam, 148 Ill. 179, 32 L.R.A. 769, 39 Am. St. Rep. 172, 1 Am. Neg. Cas. 478, 35 N. E. 810. "And the banker must prove the exercise of the degree of care required of him by the decisions in the jurisdiction in which the loss occurred, and in which his liability is sought to be enforced," or respond in liability for even a special deposit. 3 R. C. L. 559, 560. The bank cashier embezzled this money with the knowledge of the bank, with imputed notice to the directors, the bank itself, of what was done, and which makes it the act of the bank and estops it from questioning its liability. "Knowledge of a bank teller relative to the collection of money and the ownership of notes left with him for collection must be imputed to the bank, and notice to him is notice to the bank." 3 R. C. L. 475; McCarty v. Kepreta, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 992, Ann. Cas. 1915A, 834. The stipulation shows these funds went to cover the personal overdraft on the bank of its managing officers. Knowledge of this fact is imputed to the bank. The acts of its cashier and president in turning these funds over to the bank to repay their shortage with the bank estops the bank to claim otherwise than that it has plaintiff's funds. Citizens' State Bank v. Iverson, 30 N. D. 497, 153 N. W. 449. It has no defense against this suit. Judgment is affirmed.

Christianson, J., concurs in the result.

Annotation—Liability of bank for misappropriation of collections by its officers or employees.

As to damages for negligence in collecting check, see note to Jefferson County Sav. Bank v. Hendrix, 1 L.R.A. (N.S.) 246.

As to bank to which paper is sent for L.R.A.1917A.

collection at request of obligor, as agent of obligor or holder, see note to Virginia-Carolina Chemical Co. v. Steen, 34 L.R.A.(N.S.) 734.

As to imputation of knowledge of

bank officer to bank where officers are personally interested, see notes to *Lilly v. Hamilton Bank*, 29 L.R.A.(N.S.) 558, and *First Nat. Bank v. Burns*, 49 L.R.A.(N.S.) 764.

As to the measure of care required of a bank in keeping special deposits, see note to *Gray v. Merriam*, 32 L.R.A. 769. And as to when a bank deposit is special, see notes to *Mutual Acci. Asso. v. Jacobs*, 16 L.R.A. 516, and *Fogg v. Tyler*, 39 L.R.A.(N.S.) 847.

As to duty of bank as to payment of money held as bailee, see note to *People's Nat. Bank v. Wheeler*, 21 L.R.A.(N.S.) 816. And generally as to liability of bailee for wrongful appropriation by his servant of thing bailed, see note to *Taylor v. Downey*, 29 L.R.A. 92.

The present question is limited to the liability of a bank for local collections misappropriated by an officer or employee, that phase of the general question involving the liability of a bank taking commercial paper for collection for default of its correspondent having been treated in the extensive annotation to *Brown v. People's Bank*, 52 L.R.A.(N.S.) 608.

Upon the present question the rule would seem to be that if an officer or employee of a bank receives money to satisfy an evidence of indebtedness lodged with his bank for collection in his official capacity as agent of the bank, the liability of the bank becomes fixed and cannot be affected by a subsequent misappropriation of the sum by the officer or employee. This in substance was the rule laid down in *MINNESOTA MUT. L. INS. CO. v. TAGUS STATE BANK*, ante, 519.

So, in the early case of *Concord v. Concord Bank* (1844) 16 N. H. 26, where an acting cashier received money deposited to pay a note lodged in his bank for collection, but misapplied the money, it was held that the bank was liable therefor to the depositor of the note, the court maintaining that the liability of the bank depended upon whether the money was received by the cashier as agent of the bank or upon his individual responsibility, and not upon the fact of the misapplication of it after its reception. In this connection it was said: "It was immaterial to the plaintiffs, and cannot affect their right to recover, that the agent of the defendants, after having received the money in the usual course of business at the bank, as their agent, and for the benefit and use of the plaintiffs, misapplied the money. His acts were the acts of the defend-

ants, while acting as their agent and within the scope of his authority, and any misapplication by him was a misapplication by the bank itself, of which they can hardly be heard to complain. Indeed, so far as concerns the transactions and dealings of corporations with others,—inasmuch as they act and can act only through the agency of individuals,—their agents are in effect the representatives of the corporations. . . .

The liability of the bank must depend upon the character in which the money was received by Kent; whether as the agent of the bank or upon his individual responsibility, and not upon the fact of misapplication of it after its reception."

And further support for this rule is found in *City Nat. Bank v. Martin* (1888) 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507, wherein it was held that a bank whose teller collected a note for a depositor, appropriated the money to his own use by depositing it in his name, and died a defaulter to the bank, was liable to the owner of the note, even though the collection thereof was not within the scope of the defaulting teller's authority, he having, because of former dealings, apparently been vested with such authority. This decision was upon the ground that the knowledge of the officer in regard to the collection of the money and its ownership must be imputed to the bank, and that, having held the teller out to the world as worthy of confidence, it could not profit by the fraud that he was thereby enabled to perpetrate.

And again in *Hromaha v. First Nat. Bank* (1912) 50 Pa. Super. Ct. 466, where a bank, to secure the patronage of foreigners, established a department in charge of an employee who was able to converse with such people in their own language, and who was authorized to collect moneys from foreign lands, it was held that the bank was liable to a non-English speaking foreigner who had turned over to such employee his evidence of ownership of a fund in a foreign bank for collection of the money, where the money was in fact collected and paid over to the local bank through the offices of the foreign exchange clerk and was subsequently embezzled by such employee through fraudulent combination with a confederate, the court maintaining that the undertaking of the employee in the foreign department was the undertaking of the bank, and that, as the bank had held such employee out as having authority to act in matters of the character

under consideration, it was its duty to see that the undertaking was faithfully carried out.

And liability for collections made by a bank and misappropriated by its officer cannot be avoided upon the theory that the collection, when made, becomes in law but a special deposit, as to which the bank is obliged to use only ordinary care in the keeping and transmission thereof, there being no agreement to transmit the identical money received, and the bank having placed the proceeds on deposit with itself and issued, but not delivered, its cashier's checks to the

plaintiff. *MINNESOTA MUT. L. INS. CO. v. TAGUS STATE BANK*, ante, 519.

And even assuming that the money received in satisfaction of evidences of indebtedness lodged with a bank for collection does constitute a special deposit, the loss thereof by the bank, as by misappropriation by its officers, presumes negligence upon the part of the bank, and places upon it the burden of affirmatively proving that it was not negligent, if it would escape liability; and not making such proof, it must respond in damages. (*N. D.*) *Ibid.* G. J. C.

WEST VIRGINIA SUPREME COURT OF APPEALS.

T. WILBUR HENNEN

v.

THOMAS A. DEVENY, Appt.

(71 W. Va. 629, 77 S. E. 142.)

Easement — air space — covenant in deed.

1. B., the owner of a large lot, conveyed a portion of it, 40x70 feet, to certain named trustees of the Methodist Episcopal Church, in trust for a place of worship for the use of the members of said church, and covenanted "that no building shall be erected on any part of the land surrounding the above-described granted church lot within 10 feet of said church lot." Held, that said covenant created a perpetual easement in said 10-foot strip of ground in favor of the church lot, for the purpose of light and air. *For other cases, see Easements, II. a, in Dig. 1-52 N. S.*

Same — change of use — effect.

2. That said easement passed by a conveyance of the church lot, and was not extinguished by the conversion of the church building into a business house. *For other cases, see Easements, IV. in Dig. 1-52 N. S.*

Injunction — interference with easement.

3. That so long as the easement is useful to the dominant estate, the owner thereof may enjoin its infringement as a private nuisance. *For other cases, see Injunction, I. c, in Dig. 1-52 N. S.*

(Poffenbarger, P., and Miller, J., dissent.)

(January 21, 1913.)

Headnotes by WILLIAMS, J.

Note. — For change in character or use of dominant tenement as affecting easement, see annotation following this case, post, 528.
L.R.A.1917A.

APPPEAL by defendant from a decree of the Circuit Court for Marion County enjoining him from erecting a building on his lot within 10 feet of the line of plaintiff's lot. Affirmed.

The facts are stated in the opinion.

Messrs. William S. Haymond and A. F. Peddicord, for appellant:

The easement or right was only temporary, and ceased and became extinguished when the said church lot and church house thereon ceased to be used for church and religious purposes.

Hahn v. Baker Lodge, 21 Or. 30, 13 L.R.A. 158, 28 Am. St. Rep. 723, 27 Pac. 166; *Washb. Easements*, 589, 590, 654, 657. There is no express grant in the deed or in the covenant of any right or easement in said 10 feet for light, air, or anything else.

Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629; *Cunningham v. Dorsey*, 3 W. Va. 293; *Standiford v. Goudy*, 6 W. Va. 364.

Equity will not enforce covenants restricting use of real estate, if, since the conveyance was made, the general conditions and surroundings of the property have been so changed otherwise than by the act of the covenantor, as to render the enforcement of the covenant inequitable and burdensome to him, and defeat the purpose of the restriction.

Robinson v. Edgell, 57 W. Va. 157, 49 S. E. 1027; *Brewster, Conveyancing*, §§ 226, 229; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691; *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 476, 30 N. E. 741; *Tardy v. Creasy*, 81 Va. 553, 59 Am. Rep. 676; 1 Story, Eq. Jur. 10th ed. § 750; *Willard v. Tayloe*, 8 Wall. 557, 19 L. ed. 501; *Davis v. Hone*, 2 Sch. & Lef. 350, 9 Revised Rep. 89; *Bailly v. De Crespigny*, L. R. 4 Q. B. 180, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 404, 15 Eng. Rul. Cas. 739; *Clarke v. Rochester*, L. & N. F. R. Co. 18

Barb. 350; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 387; *Peters v. Delaplaine*, 49 N. Y. 362; *Margraf v. Muir*, 57 N. Y. 155; *Mathews v. Terwilliger*, 3 Barb. 51; *Radcliffe v. Warrington*, 12 Ves. Jr. 331, 33 Eng. Reprint, 125.

Messrs. Showalter & Frame for appellee.

Williams, J., delivered the opinion of the court:

The circuit court of Marion county perpetually enjoined defendant from erecting a building on his lot within 10 feet of the line of plaintiff's lot, holding that plaintiff had an easement upon said strip of ground; and defendant has appealed.

In the year 1857, James Burns, being the owner of a lot of ground in the town of Fairmont, conveyed to certain named trustees of the Methodist Episcopal Church 40x70 feet of it, fronting on Adams street, and covenanted with said trustees, "and their successors in office, that no building shall be erected on any part of the land surrounding the above-described granted church lot, within 10 feet of said church lot." By proper proceedings had in court, a decree was made authorizing said trustees to sell and convey the church lot and building; and, pursuant thereto, they sold and conveyed it to plaintiff by deed dated February 10, 1911. They also expressly conveyed "all such rights, franchises, or easements vested in said first parties (the grantors) in and to that certain space of 10 feet situate immediately adjacent to the said church lot." A few months after he had granted the church lot, Burns granted to the "Fairmont Male and Female Seminary," a corporation, the adjacent lot, and excepted from the latter deed "that part of said lot, and the privileges thereto annexed, which the said James Burns and wife have this day conveyed to the trustees of the Methodist Episcopal Church of the United States of America." By a number of mesne conveyances, that lot has passed to the defendant; the immediate deed to him being made in 1895.

Did the covenant by Burns with the trustees of the church create an easement in the 10-foot strip of land adjacent to the church lot, which became appurtenant to it? In other words, was the covenant real, or only in gross? Defendant's counsel contend that it is personal with the trustees and their successors in office, and is limited in duration to such time only as the lot is used for church purposes. But there is no such limitation in the language of the covenant, nor are there any words in any other part of the deed indicating a purpose to so limit it; and the well-established rule is L.R.A.1917A.

that, if the covenant benefits the land to which it relates and enhances its value, the easement created by it becomes appurtenant to the land, and passes with it. *Lydick v. Baltimore & O. R. Co.* 17 W. Va. 427; *Washb. Real Prop.* § 1205.

If the language of a covenant is unambiguous, and its meaning is not restricted by any other terms or provisions in the deed, its character—i. e., whether real and running with the land, or only in gross—is to be determined from the language of the covenant alone. It is only when the intention is doubtful that the courts can resort to technical rules of construction to ascertain it. *Killian v. Harshaw*, 29 N. C. (7 Ired. L.) 497. The words of the covenant are the primary source from which the intention must be gathered. 8 Am. & Eng. Enc. Law, 2d ed. 86. There is nothing in the language of Burns's deed to the trustees of the church which, in the slightest degree, indicates a purpose to limit the duration of the easement. The covenant was intended to give light and air, not only to the church building then on the lot, but also to any other building, needing light and air, that might be erected in its place. *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400. It created an easement in 10 feet of the adjoining lot for the benefit of the church lot. It is an incorporeal hereditament, appurtenant to the church lot, and passed by the deed of the trustees to plaintiff. But, to make assurance doubly sure, plaintiff had an express assignment of the easement inserted in the deed. Notwithstanding it is entitled to little, if any, weight in determining the legal question involved, yet it is proper to mention the fact, as showing want of equity in defendant's contention, and that is, that in every one of the numerous deeds forming defendant's chain of title, from Burns down to himself, and there were eight or ten of them, it is expressly stated that "no building shall be erected on any part of said land hereby conveyed within 10 feet of the lot of the Methodist Episcopal Church, without the consent of the legally constituted authorities of the said church." The last clause of this restriction does not signify any purpose to make the covenant a personal one, because an owner of the dominant estate may at any time release any right appurtenant thereto.

Presumably defendant paid no more for his lot than it was worth, subject to the easement. He can therefore claim no equities in aid of the legal right. The open space was evidently intended to furnish light and air, as no other use, apparently, could be made of the strip of ground by the owner of the dominant estate. Light

and air are as essential to the enjoyment of a dwelling or business house as they are for the use of a church building, and perhaps more so, for the reason that church buildings are usually occupied for a short time only, and between long intervals, while a dwelling house is occupied continuously, and a business house during the business hours of every work day.

Plaintiff alleges that he is converting the church building into a business house, and "that he desires to preserve the windows in said building, in the present location, and to preserve all his present rights as to light and air." This averment, which is admitted in defendant's answer, shows clearly that the space for light and air is beneficial to plaintiff's lot. If it appeared that the open space was no longer useful to the dominant lot, or that the owner of it had abandoned his right to the easement, as, for instance, by erecting a building without any openings in the wall toward the open space, equity would, no doubt, refuse to enforce the covenant. But the very reverse of an intention to abandon is here shown; and it appears that the easement is still beneficial to the lot, notwithstanding the change of its use. There is no doubt of plaintiff's right to compel defendant to obey the covenant.

A similar case to this is *Salisbury v. Andrews*, 128 Mass. 336. There two tenants in common of a large lot laid it out into building lots, with an open court between them; later, in deed of release and partition between them, it was agreed that the court should always be left open for a passageway, or court, for the common use and benefit of the lots. Many years thereafter, a subsequent owner of some of the lots commenced to build a bridge, or passageway, across the court, about 17 feet above the ground, connecting two of the buildings. The owners of the other lots, fronting on the court, brought a suit to enjoin him from erecting the bridge, and prayed for the removal of so much of it as had already been built. The defendant answered and denied that plaintiffs had any right to the court, except the right of way over it, and denied that this right of way was or would be obstructed by the bridge. But the court held that the easement was intended as well for light and air for the benefit of each and all of the lots as for right of way, although the former purpose was not expressly named. It also held that such right was an appurtenance which passed with the respective lots, and that the erection of the bridge was an infringement of such right, and constituted a private nuisance, giving plaintiffs the right to have it abated.

Phoenix Ins. Co. v. Continental Ins. Co. supra, is another case in point supporting the view which we have herein expressed. L.R.A.1917A.

There one Howland was the common source of title. He conveyed a lot adjoining one retained by himself, on which had been erected a building. His grantee covenanted not to erect any building on a strip of ground, 8x35 feet, adjoining the line of the lot retained by grantor, and also agreed that, if he should violate the covenant, he would pay the grantor, his heirs, executors, and assigns, the sum of \$1,500 as liquidated damages. By successive conveyances, titles to the two lots passed, respectively, to the parties litigant; and the question presented in the case was whether the owner of the servient lot had the right to discharge the covenant by paying the \$1,500. The court held that the option to discharge the covenant belonged only to the owner of the dominant estate, and that he, not agreeing to accept it and release the easement, had a right to enforce the covenant against the owner of the servient lot. In its opinion, at page 407 of 87 N. Y., the court says: "But passing from the consideration of the language of the covenant alone, and construing it, in connection with the circumstances, the conclusion is, we think, irresistible that the prime motive of the covenant was to secure the space in question, in perpetuity, as an open area, for supplying light and air to Montague Hall (then standing on the unconveyed land of the grantor), or to any subsequent building which might be erected in its place. The building known as Montague Hall was four stories high on Court street, and three stories high in rear. The northerly wall abutted on the strip of land in question, and in the part of the wall adjacent to the strip were windows which supplied light and air to the three rear stories of the building, and for which there was no other provision. The premises were valuable, and likely to become more so. The court was clearly justified in finding that it was the intention of the parties, by the covenant in question, to secure in permanence the very condition of things covenanted for; viz., an open space adjoining, and for the benefit of, the unconveyed premises of the grantor. It is not reasonable to suppose that it was intended that the covenantor might at his election break the covenant on payment of the stipulated damages."

Brew v. Van Deman, 6 Heisk. 433, is also a case very similar to the one in hand. In that case it appears that one Kaylor had conveyed to plaintiff a lot on Market street in Chattanooga, one line of which lot ran from Market street 80 feet to the postoffice building, and paralleled the line of grantor's lot, leaving a strip of 10 feet between them. The grantor covenanted "to leave open forever, for the public convenience and the use of the lot therein conveyed, it being one of

the adjoining lots, the walk, 10 feet in width, leading from . . . [said] street to the entrance of the postoffice building." Plaintiff had erected a large, brick building upon his lot, having doors and windows opening upon this walk or passageway to the postoffice building. Van Deman and Dowling purchased of Kaylor the other lot, erected a building along the line of it, bordering on said passageway, and were about to erect a balcony in front of their building, overhanging the passageway, and were also about to erect a stairway on the outside of their building, leading to the balcony. The court held that plaintiff and the public had a right to the unobstructed use of said passageway, for its entire width, length, and height, and enjoined defendant from erecting the balcony and stairway.

In *Herrick v. Marshall*, 66 Me. 435, the same question was decided. There, it appears, one Murray owned two lots. He had built a house and lived in one of them; and in March, 1873, he conveyed it to the plaintiff. In 1864 he had conveyed to one Smith the adjoining lot, and put in the deed to Smith the restriction: "That no building hereafter erected on the above lot shall be erected within 10 feet of the easterly line of the said Murray's house lot." The Smith lot came to be the property of defendant. It also appears that neither the plaintiff nor the defendant had any actual knowledge of the restriction put upon the use of the Smith lot, until after defendant had partly completed a building upon his lot, which came within 2 feet of plaintiff's line, notwithstanding the restriction was noted in the various deeds by which they had acquired title. That was an action on the case to recover damages for the infringement of an easement, and the court held that he was entitled to recover. The agreement was held to create an easement on the lot, which Murray first granted, in favor of the lot which he retained, and the benefit to the one, as well as the burden to the other, passed with the respective lots.

We find no error in the decree appealed from, and it will be affirmed.

Miller, J., dissenting.

Poffenbarger, P., dissenting:

I am unable to concur in the opinion of a majority of the court or the resultant decision, and would reverse the decree, dissolve the injunction, and dismiss the bill.

In the situation of the parties, the surrounding circumstances, as disclosed by the deeds and extrinsic evidence, there is a strong indication of the purpose of these restrictive covenants. A new church had already been erected on the lot conveyed to the trustees; and there are peculiar and L.R.A.1917A.

special reasons for vacant space around a church or place of worship not applicable to business or residential property. Public and quasi public buildings, other than hostels, are rarely connected with other buildings; but business houses are nearly always so connected, and residences often immediately adjoin others, as well as business structures. Hence there was a special reason or purpose, almost universally recognized in like or similar situations, for the insertion of these covenants; and their insertion, for the accomplishment of that purpose, impliedly negatives intent thereby to subserve or accomplish others. Separation from the noises and other incidents of occupations for residential and business purposes, and unusual amounts of light and air, are essential to congregations assembled for worship, schools, courts, and similar bodies. The property benefited by the restrictive covenant was, at the time of the conveyance, dedicated to church purposes. No doubt there were several windows in the side of the building next to the residue of the lot, and possibly in the rear. In width, the church was coextensive with the lot on which it stood, leaving no room for light in case of the erection of a structure on the adjacent lot covering it to the division line. The lot was conveyed to the trustees and "their successors in office forever in trust for a house or place of worship." Presumptively both grantor and grantees contemplated permanent or long-continued occupation for such purposes. The covenant is not expressly made in favor of assignees of the grantees. Though this omission was not essential to pass title to them, it is a circumstance bearing on the question of intent. The circumstances, all considered, indicate purpose and intent to prevent the erection of any buildings on the 10-foot strip adjacent to the church lot, as a means of securing to the congregation, using the property for church purpose, privacy and freedom from molestation or interruption, and sufficient light and air. The assumption of the deed, by its terms of permanency in the use of the property for worship, implies intent to protect it in the manner provided by the covenants while used for that particular purpose, and impliedly negatives intent to give such protection in the event of an alteration or diversion of the property to purely private purposes. As that use has ceased, the covenant has, according to the true intent and purpose of the parties, ceased also. The reason for its insertion in the deed no longer exists.

The interpretation of covenants such as this falls under the general rules applicable to contracts, the object of which is ascertainment of the true intent and meaning

of the parties. It was optional with the parties to this covenant to annex it generally to the church lot for all of its purposes, and thus make it a covenant running with the land into the hands of subsequent purchasers, or make it special, for the better effectuation of a certain purpose. In the one case, the appellee would have the benefit of it; and, in the other, it would be a covenant operative only in favor of persons holding the church lot and using it for religious worship. Nothing in the deed says the covenant shall operate after the cessation of the use of the church as a place of worship. As to whether it shall or shall not, the covenant is silent, except by way of implication arising from its general terms. This implication, however, is met and opposed by another arising from the failure to secure the benefit of the covenant to the assigns of the grantees. In view of this, the general situation and purpose, indicating intent to give the covenant a limited operation, must control.

In my opinion, the plaintiff's case fails for another reason. The altered condition of the property renders it impossible any longer to make this covenant accomplish the purpose for which it was intended. Obviously, it was put in for the protection and promotion of religious worship. Its presence there for that purpose argues that it would not have been put in the deed had the property been sold for other purposes. That use having ceased, the covenant would no longer operate according to its intent and spirit. The enforcement thereof would impose upon the defendant a burden wholly disproportionate to the benefit resulting to the plaintiff. Under such circumstances, courts of equity, in the exercise of their discretion, refuse to enforce covenants restricting the use of property, and leave it to the courts of law to give redress for the breach, if any, in the form of damages. *Robinson v. Edgell*, 57 W. Va. 157, 49 S. E. 1027; *Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Page v. Murray*, 40 N. J. Eq. 331, 19 Atl. 11; *Amerman v. Deane*, 132 N. Y. 355, 28 Am. St. Rep. 584, 30 N. E. 741; *Robertson v. Old Colony R. Co.* 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650. Both the interpretation of

the covenant, limiting its benefit to the use of the property for church purposes, and my opinion that a court of equity will not enforce it under the circumstances, even though it run with the land, are sustained by the application of the rule of strict construction in the interpretation of such covenants, because restriction of the use of private property is opposed to general public policy. 11 Cyc. 1077.

The authorities cited in the majority opinion do not seem to be applicable. In *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400, the building on the part of the property made the dominant estate by the covenant was a private building, likely used for ordinary business purposes, though the opinion fails to indicate its use or character at the date of the conveyance. Had the circumstances indicated a special purpose, as they do here, they would probably have been mentioned in the opinion. In *Salisbury v. Andrews*, 128 Mass. 336, the covenant provided a court and driveway for adjacent property, without reference to its use, though it seems to have been residence property at the time, and to have remained such. *Brew v. Van Deman*, 6 Heisk. 433, involved a covenant to keep a strip of land "open forever for the public convenience and the use of the adjoining lots." *Herrick v. Marshall*, 66 Me. 435, involved an easement for the benefit of a residence, and the character of the property remained unchanged. Thus the mere statement of the facts in these cases shows their inapplicability here as precedents.

The Massachusetts case relied upon states the rule of interpretation of such covenants, as I understand and apply it. The court said: "Where the language used is of doubtful import, and where the precise purpose and intent of the parties is not expressly defined in words, the facts and circumstances surrounding the transaction, 'such as the actual condition and situation of the land, buildings, passages, water-courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense in which particular words were probably used by the parties, especially in matters of description,' are always proper to be considered."

Annotation—Change in character or use of dominant tenement as affecting easement.

I. Easements created by grant, reservation, or covenant:

a. General grant, reservation, or covenant, 529.

b. Grant, reservation, or covenant for specific purpose, 531.

II. Easements created by will, 531.

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III. Easements created by prescription, 532.

IV. Easements created by necessity, 534.

V. Easements created by statute, 535.

VI. Easements created by award under inclosure acts, 536.

The question—which at some points approaches closely that now under consideration—whether the rights conferred by grant of an unrestricted easement are limited to a reasonable use is considered in the note to *Chapman v. Newmarket Mfg. Co.* 15 L.R.A. (N.S.) 292.

Other questions, more or less analogous, are cited in the Index to L.R.A. Notes, under the title, "Easements."

I. Easements created by grant, reservation, or covenant.

a. General grant, reservation, or covenant.

It is practically the universal rule that where an easement is created by a general grant, reservation, or covenant, not containing language limiting it to any particular use of the land to which it is made appurtenant, it is not affected by any reasonable change in the uses to which such land is put. This is on the theory that, the parties having had opportunity to limit the uses for which the easement was created, and having failed to do so, it must be presumed that they intended to make no such limitation.

Rights of way.

Where the language used in reserving a right of way is of general character, without limitation or restriction, it is broad enough to include "any reasonable use to which the dominant estate may be devoted, due consideration being given to the obvious purposes which the parties had in view in establishing the way." *Randall v. Grant* (1911) 210 Mass. 302, 96 N. E. 672. In this case the change in the use of the dominant tenement from garden and grass land to a sand pit was held not to deprive it of the right of the use of the way, the court adding that the use of the way for hauling sand for six years prior to bringing the action, without objection from the owner of the servient tenement, "would further indicate that the use now complained of was intended by the grant."

So, where an unlimited right of way is reserved in a deed appurtenant to land used for agricultural purposes only, but having upon it a ledge of rock available for quarrying, the use of the way for the hauling of such rock is not improper. "The reservation of the way contained no expression limiting the use to carrying the annual crops from the land, or to agricultural purposes merely. It was a reservation of a right of way in general terms, and the construction L.R.A.1917A.

of the grant must be broad enough to include any reasonable use to which the land might be devoted. The defendant might carry from the land over the granted way not only the products of the soil, but wood and stones, and whatever was naturally upon it." *Abbott v. Butler* (1879) 59 N. H. 317.

And where a general right of way across the tracks of a railroad is created by grant, the fact that the land ceases to be used as farming land and becomes a part of a trotting park in no way affects the use by the dominant tenement of the right of way. *Parsons v. New York, N. H. & H. R. Co.* (1913) 216 Mass. 269, 103 N. E. 693. The court says: "The contention of the defendant that the way was confined to farming uses, and was limited to the purposes for which originally it was designed, is unsound. The grant was of a general right of way. It is only where a right of way is acquired by prescription, or is narrowed by the terms of the grant to definite purposes, that the extent of the easement is restricted. Where the easement arises by grant, and not by prescription, and is not limited in its scope by the terms of the grant, it is available for the reasonable uses to which the dominant estate may be devoted."

In *D. M. Goodwillie Co. v. Commonwealth Electric Co.* (1909) 241 Ill. 42, 89 N. E. 272, an action involving the use of a switch track by the owners of property to which the use of such track had been made appurtenant by unrestricted covenant, it is held, obiter, that the change in the use of the property from a lumberyard to a power plant for the generation of electricity was reasonable, and imposed no greater burden than was intended when the agreement was entered into. However, in this case a portion of the power plant was built on nondominant land, and for that reason the use of the switch was held excessive.

And it is held in *White v. Grand Hotel* [1913] 1 Ch. (Eng.) 113, 82 L. J. Ch. N. S. 57, 107 L. T. N. S. 695, 57 Sol. Jo. 58, Ann. Cas. 1914C, 472, that a right of way to a dwelling house, granted for general purposes, is not affected by the dwelling being turned into an hotel. In this case there was no documentary evidence of the terms of the grant, and the question whether there was any express restriction or limitation was in dispute. It seems that no such limitation was proved.

A grant, in connection with a grant of land, of "the free use and privilege

of a road . . . the same to remain an open road forever," does not limit the use of such road to the farming purposes to which the dominant tenement is at the time being put, but creates a right of way on behalf of the dominant tenement available "for any purpose to which it may from time to time be legitimately applied." *Gunson v. Healy* (1882) 100 Pa. 42. In this case the owner of the dominant tenement had erected wharves on the canal frontage of his land, and was using his land and the right of way for the landing and hauling of coal, lime, etc.

Where a right to use an alley is granted "as an easement for ingress and egress . . . and for no other purpose," the limitation does not have the effect of limiting the use to which the dominant tenement may be put; and the conversion of the dwelling house originally upon the land into a stable for the accommodation of farmers' horses is a proper use of the alley. *Arnold v. Fee* (1896) 148 N. Y. 214, 42 N. E. 588. "In the general language in which the easement was granted," says the court, "we find no limitation upon the use of the way, in so far as it is for ingress and egress. The easement cannot be extinguished by changes in the uses and occupancy of the defendant's property, by reason of which the passageway may be more frequently used by foot passengers, as well as by horses and vehicles."

And, on the authority of the preceding case, it is said, in *Gillespie v. Weinberg* (1896) 148 N. Y. 238, 42 N. E. 676, a case involving a reservation of a right to use an alleyway for the purpose of passing and repassing: "We think the alley may be used for the passage of teams and vehicles as well as for foot passengers, so far as is necessary to reasonable and proper use and enjoyment of the defendants' premises, although their uses and occupancy may have been changed." The facts given do not make known what change had been made in the use of the premises.

However, it is held in *Delahoussaye v. Landry* (1848) 3 La. Ann. 549, that where an act of sale of a tract of uncultivated land, made at a time when the cultivation of sugar was unknown in that part of the state, established a servitude in favor of the purchaser upon an adjoining tract "to take wood for use in his habitation on the land," the purchaser will not be permitted, upon converting the land into a sugar plantation, to take wood from the adjoining tract L.R.A.1917A.

for the purpose of making his sugar. This was on the ground that such a use of the dominant tenement was not in the contemplation of the parties when the deed was made.

See *Wilson v. Ford* (1911) 148 App. Div. 307, 133 N. Y. Supp. 33, *infra*, subd. I. b.

Light, air, and space.

An easement created by a covenant by the grantee in a deed, who agrees not to build upon the land conveyed so as to obstruct the light and air coming across it to the windows in the grantor's residence, is held, in *O'Conner v. Bauer* (1908) 127 App. Div. 854, 111 N. Y. Supp. 869, affirmed without opinion in (1910) 199 N. Y. 583, 93 N. E. 1126, not to be destroyed by the change of the properties from residential to business properties. In this case the house on the dominant tenement still remained, but it was connected with a new building erected on the premises, and the whole was used as a hotel. The court mentions the fact, but does not put particular emphasis upon it, that the owners of the premises still made their home in the hotel. The real reason for the decision seems to be contained in the following sentence from its opinion: "There is nothing in the covenant itself which expressly limits its effect to a specific use to which the building is to be devoted, and I think no such limitation can be implied."

And see *HENNEN v. DEVENY*, ante, 524, where an easement for light and air granted the trustees of a church at the time of the conveyance to them of the dominant tenement was held, on the grounds of the general terms in which the easement was granted, not to be affected by the conversion of the church building into a business block.

Drains.

Where the owner of two tracts of land, who had made a drain from the one to cattle sheds on the other, for the purpose of supplying them with water, conveyed the second tract, together with all "waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever," the owner of such tract was held, in *Watts v. Kelson* (1870) 40 L. J. Ch. N. S. (Eng.) 126, L. R. 6 Ch. 166, 24 L. T. N. S. 209, 19 Week. Rep. 338, to have the right to the use of the water even though the cattle sheds were torn down and cottages erected in their places.

So, in *Flint v. Bacon* (1878) 13 Hun

(N. Y.) 454, an action involving an easement in a drain, created by a general grant of appurtenances in a deed by the owner of the servient tenement to the purchaser of the dominant tenement, it is held that the right to the enjoyment of such easement is not affected by changing the building on the dominant tenement from a warehouse to an office building, and thus increasing the number of water-closets from four to seventeen.

b. Grant, reservation, or covenant for specific purpose.

Where the parties to an instrument granting, reserving, or covenanting for an easement specifically state the uses or purposes for which it is created, it is, of course, limited to such uses, and cannot be enlarged by any change in the use or character of the dominant tenement.

Thus it has been held that the reservation in a deed to a railroad for a pass way over such road "for farming purposes" creates no right to use the pass way for any other purpose; and where a smelting company becomes lessee of the dominant tenement and erects buildings thereon, the right to the pass way is not available to it in the changed use of the land. *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.* (1913) 215 Mass. 381, 102 N. E. 625.

So, where the grantor of land reserves "a right of way and passage over said close . . . to the stable and loft over the same and the space opening under the said loft and then used as a woodhouse," it is held, in *Allan v. Gomme*, [1840] 11 Ad. & El. 759, 113 Eng. Reprint, 602, that such way may not be used for passing to a cottage erected on the site of the woodhouse. "Suppose," says the court, "that this piece of ground, instead of being a small quantity, had been a field of many acres, and that Browne [owner of dominant tenement] had sold off the part above mentioned to the plaintiff, reserving to himself this right of way to the land, calling it a field then in pasture, or in corn, and had subsequently filled the land with small cottages, or had built a factory, or established gas works: it surely never could be contended that it was the meaning of either of the parties to the deed that there should be a right of way over the yard to those buildings."

Where several owners of adjoining lots, who have entered into mutual cove-

nants limiting forever the use of such lots to residence purposes, agree to make use of one of such lots which they own in common as a passageway for the use of all the lots, it is held in *Wilson v. Ford* (1911) 148 App. Div. 307, 133 N. Y. Supp. 33, that the use of the alley is intended to be limited as a way to private residences and stables, and cannot be used for business purposes in connection with one of the lots upon which a business block has been erected after the building restrictions have been removed. In this case the decision is based partly upon the language of the contract, which provided that the lot owners should use it as a passageway "for themselves, their servants or other deputy, either on foot or with horses, carriages or otherwise to and from their respective lots, aforesaid and to and from the stables built and to be built for private use on their said respective lots." The decision of the appellate division in this case was reversed by the court of appeals (1913) 209 N. Y. 186, 102 N. E. 614, without passing upon the question whether the agreement authorized the use of the alley in connection with a business building, the court merely remarking that covenants of the character contained in the agreement have been refused enforcement in equity where, by reason of a changed condition, it would be inequitable to enforce them.

In *Rackliff v. Rackliff* (1902) 96 Me. 261, 52 Atl. 839, where a sawmill had subsequently been erected on the site of a tannery, it is held that the clause in the deed to the property granting certain water rights to the purchaser of the tannery "for the use of all tanning purposes" is not a measure of power, but a limitation of use.

However in *Kretz v. Fireproof Storage Co.* (1914) 127 Minn. 304, 149 N. W. 648, 955, a right of way reserved in a deed "to and from said opera house" is held to be available in connection with the dominant tenement after it has become a storage warehouse. This is on the ground that "the use of the pass way was not restricted to such time as the dominant tenement should be used as an opera house, but that it is available in connection with any proper use of the dominant tenement."

II. Easements created by will.

Where an easement not existing prior to the testator's death is created by will in general terms not limiting the extent of its use, it would seem that the rule

applying in the case of easements created by grant, reservation, or covenant would apply. That is, the easement would be affected only where there should be an unreasonable change in the uses to which the dominant tenement should be put. As in the case of easements created by grant and the like, the reason for this would be that, the testator having had opportunity to limit the uses for which the easement was created, and having failed to do so, it should be presumed that he had intended to make no such limitation.

However, in *Smith v. Margerum* (1898) 21 Pa. Co. Ct. 209, an action involving an easement created by will in the water of a well, in which the court neglects to designate the alleged change in the use or character of the dominant tenement, it is said: "The owner of an easement who so improves the dominant estate as to necessarily enhance the burden upon the servient estate, to its injury, and without the consent of the owner thereof, will extinguish the easement. . . . We do not find that the plaintiff has so improved the lot devised . . . as to result in an extinguishment of the right to use water from the well on the lot owned by the defendant, but we do find that there is testimony sufficient to raise that question and to so far cast doubt upon the plaintiff's right as to justify the court in refusing the mandatory injunction prayed for."

Where a testator who has, during his lifetime, burdened one parcel of his estate for the benefit of a second parcel, bequeaths the two parcels to different persons, and, without specifically defining the extent of the easement, indicates that the devisee of the second parcel is to have the benefit of such easement, the effect of a change in the character or use of such parcel upon the existence of the easement must be determined by the extent of the easement, as contemplated by the testator. (Generally, as to easements created by severance of tract of land with apparent benefit existing, see notes to *Rollo v. Nelson*, 26 L.R.A. (N.S.) 315, and *Duvall v. Ridout*, L.R.A. 1915C, 345.)

Milner's Safe Co. v. Great Northern & City R. Co. [1907] 1 Ch. (Eng.) 208, 75 L. J. Ch. N. S. 807, 95 L. T. N. S. 321, involves a passageway constructed by a testator for the benefit of several pieces of property, which properties he devised "with their appurtenances," without making any express grants of rights in the passageway to any of his

devisees. Each of the houses occupying the land at the time of the devise was partly dwelling and partly warehouse. The action arose as the result of the attempt of the owners of one of the properties, who had built a railroad station thereon, to use the passageway as a thoroughfare for passengers. The court held the right appurtenant to the station property not to be exercisable for station purposes, on the ground that such a use was not only "not contemplated by the grantor, but it could not possibly have been within his contemplation."

So, where a testator who had built a private way across his land, which he intended for use in connection with all his property, devised the portion of such property used as a homestead to his wife, describing it as the "homestead as now inclosed," the wife was held, in *Gorton-Pew Fisheries Co. v. Tolman* (1912) 210 Mass. 402, 38 L.R.A. (N.S.) 882, 97 N. E. 54, to have acquired an easement of passage over the way which was not limited to domestic purposes; and subsequent purchasers of the homestead property were held to have an easement therein for use in connection with the theater which they had erected thereon.

III. Easements created by prescription.

The very nature of an easement by prescription would indicate that it is limited to the character or use of the property as it existed at the time when the easement was acquired. An exception to this general rule has been made, however, where the change in the character or use of the dominant tenement results merely in a change in the degree, and not in the kind, of use to which the easement is subjected.

Rights of way.

Where a road acquired by prescription had been used only for agricultural purposes, it was held in *Wimbledon & P. Commons Conservators v. Dixon* (1875) L. R. 1 Ch. Div. 362, 10 Eng. Rul. Cas. 164, that, upon the division of the dominant tenement into building lots, the way could not be used for the carting of materials for the construction of houses thereon, or for the use of the persons who occupy such houses. And it was held that the use of the way for carrying building materials for the enlargement of the original farmhouse and the rebuilding of a cottage on the land was not sufficient proof to extend the rights beyond those for farming purposes. "I am satisfied," says James,

L. J., "that the true principle is the principle . . . that you cannot, from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed."

A right of way from one lot across another, gained while the whole tract was wild and uncultivated, and used only for the purpose of taking wood from the dominant tenement, cannot be made subject to use as a way for all purposes after the dominant tenement has been cultivated and occupied by dwellings. *Atwater v. Bodfish* (1858) 11 Gray (Mass.) 150.

And it is held in *Bradburn v. Morris* (1876) L. R. 3 Ch. Div. (Eng.) 812, that a right of way by prescription to a field used only for agricultural purposes may not be used for mineral purposes, to which that field is subsequently devoted.

See *Ballard v. Dyson* (1808) 1 Taunt. 279, 127 Eng. Reprint, 841, 9 Revised Rep. 749, involving a right of way to a building formerly used as a stable, but since used as a slaughterhouse, where it was held that, no proof of the actual terms of the grant of the easement being adduced, evidence of a prescriptive right of way for all manner of carriages did not necessarily imply a right of way for all manner of cattle.

And see *Williams v. James* (1867) L. R. 2 C. P. (Eng.) 577, where, in holding that the stacking of hay was a proper use for a field, Willes, J., says: "Where a way [like this] has to be proved by user, you cannot extend the purposes for which the way may be used, or for which it might be reasonably inferred that parties would have intended it to be used. The land in this case was a field in the country, and apparently only used for rustic purposes. . . . The right of way can only be used for the field in its ordinary use as a field."

However, in *Sloan v. Holliday* (1874) 30 L. T. N. S. (Eng.) 757, where the owner of the dominant tenement had acquired a right of way by prescription across the yard at the back of his dwelling to his back door, it was held that the opening of a small outfitter's shop in one of the front rooms of the house did not constitute such an alteration in the dominant tenement that the crossing of the servient tenement by a few customers, for the purpose of going to the shop by the back door, instead of com-

ing in the front way, would constitute an excessive user of the right of way. However, the court very carefully limits its decision to the circumstances of this particular case, and does not pretend to enunciate any general rule.

"When a right of way to certain land exists by adverse use and enjoyment only, although evidence of the exercise of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition." *Parks v. Bishop* (1876) 120 Mass. 340, 21 Am. Rep. 519. In accordance with this reasoning, it was held that the use of a way generally as a back entrance for a building occupied by a blacksmith shop, a carriage shop, and a paint shop for the prescriptive period of time created a right to use the passageway "for all purposes reasonably necessary for a manufactory upon the two lots," and that, upon the buildings being destroyed by fire and rebuilt for a manufactory and storehouse, the owner thereof was entitled to the use of the way for the purpose of bringing in goods for storage and use therein, and that such use would affect "no substantial alteration in the condition or character of the dominant estate, and no change, except in degree, in the exercise of the easement." The court makes the distinction between this case and *Atwater v. Bodfish* (Mass.) supra, in the following language: "But if the condition and character of the dominant estate are substantially altered,—as in the case of a way to carry off wood from wild land, which is afterward cultivated and built upon; or of a way for agricultural purposes, to a farm, which is afterwards turned into a manufactory or divided into building lots,—the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate."

In *Baldwin v. Boston & M. R. Co.* (1902) 181 Mass. 166, 63 N. E. 428, where the use of a path had been gained by prescription at a time when the dominant tenement had only one house and a barn upon it, it is held that the building of two additional houses of two tenements each effects a change only in the

degree of the use of the land, and not in the character of such use, and that the right to the use of the pathway is not affected thereby. "No case has been shown to us," says the court, "nor are we aware of any, where the change in the use of the land has been only in degree, and not in kind, in which it has been held that the way could not be used to the land in the changed condition, especially if there was no increased burden upon the servient estate."

Light, air, and space.

It is held in *Martin v. Goble* (1808) 1 Campb. (Eng.) 320, that where a building which has acquired a prescriptive right to light is converted from a malt house into a dwelling house, in its new state it is entitled only to the same degree of light which was necessary to it in its former state, and that the owner of adjoining ground may, accordingly, erect a wall which prevents the admission of sufficient light for domestic purposes, provided enough light is admitted for the making of malt.

In *City Nat. Bank v. Van Meter* (1899) 59 N. J. Eq. 32, 45 Atl. 280, an action involving the question of the loss of an easement for the ingress of light and air to a window by the tearing down of the old building, the court devotes its attention to other points and does not discuss the fact that the old building was used as a clothing store, while the new one, erected on the same site, is used as a bank.

Water rights.

It was held in *Lutterell's Case* (1727) 4 Coke, 86a, 16 Eng. Reprint, 1065, 10 Eng. Rul. Cas. 294, that a prescriptive right to divert water for fulling mills was not lost by the tearing down of such mills, and the erection on their places of mills to grind corn. It is said in that case: "If a man has had estovers either by grant or prescription to his house, although he alters the rooms and chambers of this house as to make a parlor where it was the hall, or the hall where the parlor was, and the like alteration of the qualities and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed; and although he builds new chimneys or makes a new addition to his old house, by that he shall not lose his prescription, but he can't employ or L.R.A.1917A.

spend any of his estovers in the new chimneys or the part newly added. The same [is the] law of conduits and water pipes and the like: So, if a man has an old window to his hall and afterwards he converts the hall to a parlor or any other use, yet it is not lawful for his neighbor to stop it, for he shall prescribe to have the light in such part of his house. And although in this case the plaintiff has made a question for as much as he has not prescribed generally to have said watercourse to his mills generally, but particularly to his fulling mills, yet for as much as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only of the quality, or the name of the mill and that without any prejudice in the watercourse to the owner thereof: for these reasons it was resolved that the prescription remained."

See *National Guaranteed Manure Co. v. Donald* (1859) 4 Hurlst. & N. (Eng.) 8, 28 L. J. Exch. N. S. 185, 7 Week. Rep. 185, an action involving the rights of a railroad company which had succeeded to the lands and properties of a canal company, in which it was held that the canal company, having been created by an act of Parliament, could acquire no rights for purposes other than those for which it had been created, and accordingly could have acquired by prescription no rights to the use of water which it could have transferred to the railroad company for the purposes of the railroad.

IV. Easements created by necessity.

It seems to be the American rule that easements created by necessity are not limited to the use to which the dominant tenement was being put at the time the easement came into existence, but that they adhere to the land in any lawful use to which it may be put. In England, however, the rule seems to be the other way.

In *Erie R. Co. v. S. H. Kleinman Realty Co.* (1915) 92 Ohio St. 96, 110 N. E. 527, an action involving a right of way by necessity across railroad tracks, originating at a time when the dominant tenement was used for farming and pasturing purposes, the court says, with respect to the effect on the easement of the platting of the lands with a view to selling the lots for residence purposes: "The policy of the law as to easements should be one that encourages the growth and development of lands. If

Stetson enjoyed this easement for the benefit of his entire farm south of the track, the same easement would be available if Stetson should divide up the farm into 5-acre parcels for gardening and truck farming, and sell each parcel to a different person; and if the development of these lands brought them within or near to a municipal corporation, and resulted in their being platted and divided into building lots, Stetson's easement by way of necessity would pass to each separate lot owner."

Where the grantor of land continues to use a cart path across it as a way of necessity as appurtenant to land used for agricultural purposes, the subsequent use of such dominant tenement for ice storage purposes will not affect the right to the enjoyment of the cart path, the enjoyment of such a way of necessity, in the absence of proof of a contrary intention, being limited only to its use in connection with all lawful uses of the dominant tenement, and not to the particular use to which it was devoted at the time of the creation of the easement. *Whittier v. Winkley* (1882) 62 N. H. 338.

Were, in *Myers v. Dunn* (1881) 49 Conn. 71, the owner of land, originally bought as woodland and pasture land, that subsequently made the site of a dwelling house, was claiming a way by necessity across the land of the original owner, the court says, in answer to the claim of the holders of the servient tenement, that such a right of way was limited to the use of the land as wood and pasture land: "This claim is without foundation. The owner of land has a right to the most profitable use, the most beneficial enjoyment thereof, subject to limitations not necessary here to be mentioned. He may erect buildings and raise grain upon, and dig ores beneath it; and when, by their conveyance to the defendant's [owner of dominant tenement] grantor the administrators imposed, in favor of the land granted, a way of necessity over the locus in quo, they are presumed to have intentionally done it for any or all of these purposes."

It is held, however, in *London v. Riggs* (1880) L. R. 13 Ch. Div. (Eng.) 798, that in the case of a way of necessity implied to the owner of a close who sells his land surrounding the same, the right of way may be used only for such purposes as will enable the owner to enjoy his close in the condition in which it existed at the time of the grant. In L.R.A.1917A.

this case the close changed from agricultural to building land. The court said: "I think . . . that the man who does not take the pains to secure an actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principle on which this case can be decided. I may be met by the objection that a way of necessity must mean something more than what I have stated, because, where the grant is of the inclosed piece, the grantee is entitled to use the land for all purposes, and should therefore be entitled to a right of way commensurate with his right of enjoyment. But there again the grantee has not taken from the grantor any express grant of a right of way; and all he can be entitled to ask is a right to enable him to enjoy the property granted to him as it was granted to him."

V. Easements created by statute.

Where, in compliance with a statute requiring railroads to construct, among other things, for the convenience of the occupiers of land adjoining the railway, passages over the tracks, a railroad constructed a crossing to connect two parcels of agricultural land severed by its tracks, it was held that the use of one of the parcels as a tennis court by a large number of persons who passed over the tracks at the crossing in question was unlawful, it being the rule that "the obligation of a railway company with regard to the construction of accommodation works has reference to, and is limited by, the user of the land at the time that the railway is constructed and the land is taken." The court said: "User of this kind is, in my opinion, quite outside the purpose for which the land was used at the date when the plaintiffs acquired it, and does very substantially increase the burden upon the plaintiffs. The user of the land does enlarge and alter the nature, character, and extent of the right previously enjoyed, and, in my opinion, it would be a far greater burden upon the servient tenement, and would subject the plaintiffs to much greater strain and burden in the management of their traffic. . . . In these circumstances the plaintiffs are entitled to relief, but they are not entitled to the wide declaration they ask, restricting the user of the crossing to agricultural purposes. There will be a declaration that the de-

fendants are not entitled to use the level crossing as a means of access to the ground for the tennis club and its members and friends, or otherwise so as substantially to increase the burden of the easement by altering or enlarging its character, nature, or extent as enjoyed at the time of the construction of the railway." *Taff Vale R. Co. v. Canning* [1909] 2 Ch. (Eng.) 48.

But where the lands had been acquired by the Crown for the purpose of fortifications, and a railroad was subsequently empowered by an act of Parliament to lay its tracks across such lands, it being provided that the company should make and provide "such convenient communications across, over, or under such railway . . . as shall . . . be necessary for the convenient enjoyment and occupation of the lands," it was held in *United Land Co. v. Great Eastern R. Co.* (1875) L. R. 10 Ch. (Eng.) 586, 44 L. J. Ch. N. S. 685, 33 L. T. N. S. 292, 23 Week. Rep. 896, affirming (1873) L. R. 17 Eq. 158, that purchasers of such lands could build houses thereon, and that the occupants of the houses would be entitled to use the level crossings over the railroad. In distinguishing this case from the later case of *Taff Vale R. Co. v. Canning* (Eng.) *supra*, the court in the later case, referring to this case, says: "Now it must be remembered that the lands were taken by the Crown for the purpose of fortifications. James, L. J., pointed out that 'the railway company were to make such communications for the convenient enjoyment of the lands as the commissioners of woods and forests should, in their judgment, think necessary;' and that it was impossible to say that that clause involved a restriction that the communication was to be only such as they should think necessary for the convenient enjoyment and occupation of the lands exactly in their present state and for no other purposes. That would wholly defeat the object for which the lands were being taken."

VI. Easements created by award under inclosure acts.

Finch v. Great Western R. Co. (1879) L. R. 5 Exch. Div. (Eng.) 254, involved an inclosure award of a right of way forever to remain "a private carriage road and driftway for the use of the respective owners and occupiers for the time being of the allotment over which the same passes and several old inclosed meadows." "There seems to be no

doubt," the court says, "that at the time of the award the driftway in question served merely as a mode of access to a few meadows used exclusively for agricultural purposes. The Great Western Railway now passes through some of these meadows and the cattle pen . . . is in one of them. The result, of course, is that probably thousands of cattle pass along the driftway for every one that passed when the award was made, and the question is whether such a user of the way allotted by the award can be justified. Upon the whole, we are of opinion that it can be justified; that the right of way is general in its terms, and that, though the altered circumstances of the land have greatly increased the traffic on the road, that circumstance does not affect the right of the Great Western Railway, as owners and occupiers for the time being, to make use of it in the manner above described."

And in *Newcomen v. Coulson* (1877) L. R. 5 Ch. Div. (Eng.) 133, where an inclosure award granted the allottees "a right of way and liberty of passage for themselves and their respective tenants and farmers of the place, lands, and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle," it was held that the allottees were not confined to the use of the road for agricultural purposes only, but that it might be used for the purposes of houses erected on the allotments. E. L. D.

OKLAHOMA SUPREME COURT.

JAMES W. LUSK et al., Receivers of St. Louis & San Francisco Railroad, Plffs.
in Err.,

v.

S. P. EDDINGTON.

(— Okla. —, 159 Pac. 491.)

Receivers — injury in operation of railroad — liability.

Where the receivers of a railroad company, by mere license or permission of another railroad company, without being the lessee of such company, run trains over a road owned and operated by such company, and in so doing kill live stock on such road, which injury occurs, not from any negli-

Headnote by EDWARDS, C.

Note. — For duty of lessee or licensee as to railroad fences, see annotation following this case, post, 539.

gence in the operation of the particular train, but in consequence of the omission to inclose the road with a good and lawful fence, such receivers are not liable. For other cases, see *Railroads, I. in Dig.* 1-52 N. S.

(July 25, 1916.)

ERROR to the County Court for Carter County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's animals. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, and E. H. Foster, for plaintiffs in error:

When the evidence leaves it uncertain as to whether the injuries complained of were due to negligence or some innocent cause, it is not sufficient to sustain a cause of action, and the plain duty of the trial court is to direct a verdict against the party holding the affirmative.

Patton v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; *Solts v. Southwestern Cotton Oil Co.* 28 Okla. 706, 115 Pac. 776; *Chicago, R. I. & P. R. Co. v. Watson*, 36 Okla. 1, 127 Pac. 693; *Chicago, R. I. & P. R. Co. v. Duran*, 38 Okla. 719, 134 Pac. 876.

The duty imposed by the statute to maintain the road, fences, or cattle guards undoubtedly rested upon the Rock Island alone, and that company, and not defendants, would "be liable for all animals killed by reason of the failure to construct such fence."

Kansas City, Ft. S. & G. R. Co. v. Ewing, 23 Kan. 273; *Kansas P. R. Co. v. Wood*, 24 Kan. 619; *St. Louis, W. & W. R. Co. v. Curl*, 28 Kan. 622; *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. 991; *Atchison, T. & S. F. R. Co. v. Henderson*, 27 Okla. 560, 112 Pac. 986; *St. Louis & S. F. R. Co. v. Webb*, 36 Okla. 235, 128 Pac. 272; *St. Louis & S. F. R. Co. v. McClelland*, 36 Okla. 573, 128 Pac. 1081; *St. Louis & S. F. R. Co. v. Smith*, 41 Okla. 314, 137 Pac. 357; *Atchison, T. & S. F. R. Co. v. Ward*, 32 Okla. 187, 120 Pac. 982; *St. Louis & S. F. R. Co. v. Brown*, 32 Okla. 483, 122 Pac. 136; *Missouri, K. & T. R. Co. v. Savage*, 32 Okla. 376, 122 Pac. 656; *Ft. Smith & W. R. Co. v. Dixon*, — Okla. —, 152 Pac. 350.

Defendants were under no duty to maintain a lookout.

Atchison, T. & S. F. R. Co. v. Ward, 32 Okla. 187, 120 Pac. 982; *St. Louis & S. F. R. Co. v. Brown*, 32 Okla. 483, 122 Pac. 136; *Missouri, K. & T. R. Co. v. Savage*, 32 Okla. 376, 122 Pac. 656. L.R.A.1917A.

Mr. J. B. Champion, for defendant in error:

Evidence of the killing of the cow is sufficient to warrant the submission of the question of negligence to the jury.

Missouri, K. & T. R. Co. v. Ford, 24 Okla. 352, 103 Pac. 602.

If the contention of the railroad company be true, that said cow and yearling were killed on Mullen's crossing (a public crossing), then, it would be liable for failure to exercise ordinary care to prevent injury to said cattle after discovering their presence upon the track.

Chicago, R. I. & P. R. Co. v. Westheimer, 44 Okla. 287, 144 Pac. 366.

Edwards, C., filed the following opinion:

As a matter of convenience, the parties will be referred to as plaintiff and defendants, according to their position in the lower court.

This action was instituted by the plaintiff in the justice court of Carter county, and from the judgment rendered for the plaintiff in that court was appealed to the county court, and there tried and judgment again rendered for the plaintiff, and the defendants appeal to this court. The record discloses that on the 11th day of July, 1914, a yearling bull, the property of plaintiff, was killed upon the railroad right of way at Mullen's crossing, 4 miles east of Ardmore, and that on the 7th day of July a cow, the property of plaintiff, was killed about 3 miles east of Ardmore. This action is to recover damages for the killing of said animals. The record discloses that the line of railway upon which the animals were killed is owned by the Rock Island Railroad, but that the defendants, as receivers of the Frisco Railroad, operated trains over said line. The theory of the plaintiff is that by reason of the failure, refusal, and neglect of the defendants to keep up the fence along the right of way, which they wrongfully, carelessly, and negligently permitted to be left open and down, the live stock strayed upon the right of way and were killed. No one testifies as to the actual circumstances under which the animals were killed, but from the time fixed by some of the witnesses at which the train of the Frisco passed over this part of the track, there is possibly evidence to warrant the jury in finding that the animals were killed by a Frisco train.

The statute covering the fencing of its line by a railroad (§§ 1435 and 1438, Revised Laws of 1910) is as follows:

"1435. It shall be the duty of every person or corporation owning or operating any railroad in the state of Oklahoma to fence its road, except at public highways

and station grounds, with a good and lawful fence."

"1438. Whenever any railroad corporation or the lessee, person, company, or corporation operating any railroad, shall neglect to build and maintain such lawful fence, such railroad corporation, lessee, person, company, or corporation operating the same, shall be liable for all animals killed by reason of the failure to construct such fence."

In the case of *Kansas City, Ft. S. & G. R. Co. v. Ewing*, 23 Kan. 273, under a similar statute, it is held: "Where a railway company, by the mere license or permission of another company, runs an engine over the road of the latter company, without being the assignee or lessee of such company, and a cow is killed by the engine on the road, which injury occurs not from any negligence in the running of the engine, but in consequence of the omission to inclose the road with a good and lawful fence to prevent animals from being on such road, a judgment for damages, attorneys' fees, and costs may be properly rendered against the company owning the road."

The court declined to decide whether or not the company operating the particular train by which the animals were killed would in any event be liable.

It is not contended in the case at bar that these defendants, or the railroad company for which they are receivers, owned the road upon which the animals were killed, nor is it contended that they operated the same, or that they did more than operate trains upon this line of road, which was owned and operated by another railroad corporation.

In the case of *Kansas P. R. Co. v. Wood*, 24 Kan. 619, in which the Kansas Pacific Railway Company was sued for damages for animals killed upon its road by reason of failure to fence, and in which the plaintiff recovered judgment against the railroad company for damages for stock killed by a train upon such road, operated by the receivers, the question was whether or not the company or the receivers were liable. Justice Brewer, in rendering the opinion, says: "Upon the other question, as the statute has made no exception on account of a receiver, the courts are not warranted in making one. This is not a case in which a party is relieved from a statutory duty because a superior duty or force prevents compliance. It may be true, as counsel urge, that after full possession has been transferred to the receiver, the company may not enter to build the fence, and that the court appointing the receiver would punish for contempt any such interference L.R.A.1917A.

with his possession. If the statute had been enacted after the appointment of a receiver, it may well be that this argument would be conclusive. But here the statute was in force years before the appointment of any receiver. The company failed to comply with its behests. It accepted the alternative, i. e., liability for all stock killed by trains run upon its road. This liability arises, not from any negligence in the running of the trains, any misconduct of the receiver or his employees. If it did, it might well be argued that his should be the responsibility. The default is that of the company. It did not complete its road as the statute contemplated that it should be completed. It is not the theory of the law that the receiver succeeds to the company in all its powers and duties of construction and completion of the road. He simply preserves the property pending the litigation for its future owners. He takes the road as he finds it, and unless specially ordered otherwise by the court appointing him, he discharges his full duty, and is guilty of no omission, no misconduct, if he turn it over at the close of his trust in as good condition as he received it. So that it cannot be said that the want of a fence is his default. Whether the property of the corporation in his hands can be charged with injuries resulting from the default of the company prior to his appointment, we need not stop to inquire. By the record, the only one in default was the company, and it alone is sought to be charged with the responsibility. . . . A distinction may be drawn between those statutory duties which require constant action on the part of those operating the road, such as ringing the bell at every crossing, and those which, like the one in question, are of the nature of permanent improvements. If the company has complied with the former while it was running and operating the road, an omission during the possession of the receiver may not be the default of the company. But an omission of the latter, when the company had the power and opportunity to obey, is its default, and one for which it remains liable so long as its chartered relations continue to the road."

There is no particular difference between the statute under consideration by the Kansas court and the statute here. It will be observed that by our statute (§ 1438, supra), the lessee, person, company, or corporation operating any railroad, who shall neglect to build and maintain a lawful fence, is made liable for all animals killed by reason of such failure. This statute does not require that the train doing the injury be owned and operated by the company

owning and operating the road, but the liability fixed is general for "all animals" killed. The statute does not mention the matter of negligence in the management of the train doing the injury, nor make the liability contingent in any particular upon negligence in its operation, and, in our judgment, if the negligent operation of a train would make the company operating the same liable for the animals killed by such negligence, it would still not relieve the company owning and operating the

road from its statutory liability by reason of failure to build and maintain a fence. In the case at bar, however, there is no competent evidence whatever that there was any negligence in the operation of the train by which the animals in question were killed, and, in the absence of such evidence, the defendants in this case are not liable.

The cause is reversed and remanded.

Per Curiam:

Adopted in whole.

Annotation—Duty of lessee or licensee as to railroad fences.

As to effect of lease or other contract upon liability of lessee of railroad for failure of duty to fence, see note in 44 L.R.A. 755.

Since the common-law rule that no person is obliged to fence his premises applies to railroad companies, it follows that the duty to fence a railroad right of way exists only as a result of legislative enactment. But statutes imposing some sort of duty with respect to railroad fences have been enacted in nearly all jurisdictions, and the question arises upon whom such statutes have imposed the duty,—the inquiry in the present instance being as to the nature of the duty in this respect which is imposed upon lessees or licensees of railroads. This, of course, depends upon the phraseology of the various statutes, and the construction placed thereon by the courts, although in many instances the statutes are so express as to require little, if any, construction. For example, in some jurisdictions the statutes expressly include lessees among those required to inclose their railroads by fences. As shown by adjudications falling within the scope of this annotation, statutes of the latter character have been enacted in Iowa,¹ Kansas,² New York,³ Oklahoma,⁴ Oregon,⁵ and England.⁶ And in Arkansas,

where it is expressly provided by statute that a foreign lessee of a railroad within the state shall be liable for violation of any state law, and the state laws require the erection of stock gaps where the road passes through inclosed lands, it has been held that a foreign corporation leasing a railroad in the state is liable under the statute.⁷

But the majority of the statutes requiring railroad fences do not in terms impose a duty upon the lessees, although in the great majority of instances the statutes are sufficiently broad to warrant a ruling by the courts that a duty to erect or to maintain existing fences is imposed upon lessees or licensees operating the road of another railroad corporation. In fact, some of the statutes would seem to preclude any other conclusion.

Thus, in Indiana, by Rev. Stat. 1881, § 4001 (reincorporated in Burns's Rev. Stat. 1894, §§ 5312, 5313), every railroad operating over a road of another company is liable to third persons for all damages occasioned by its trains to the same extent as though it owned the road, so that a lessee is liable for stock killed by its trains which had entered upon the right of way because it was not properly fenced as required by statute.⁸ And un-

¹ See Iowa cases set out infra, note 33.

² See *Rouse v. Redinger* (1895) 1 Kan. App. 355, 41 Pac. 433, applying Kan. Laws 1874, chap. 94, p. 143, §§ 1-5; *Union Trust Co. v. Kendall* (1878) 20 Kan. 515; *Kansas P. R. Co. v. Wood* (1880) 24 Kan. 619, wherein the statute is set out in full; *Missouri P. R. Co. v. Morrow* (1884) 32 Kan. 217, 4 Pac. 87, expressly holding that it is the duty of a lessee operating a railroad to erect the statutory cattle guards; *Missouri P. R. Co. v. Ricketts* (1891) 45 Kan. 617, 26 Pac. 50, holding same as next preceding case.

³ See New York cases set out infra, notes 37 and 38.

⁴ See *Lusk v. Eddington*, ante, 536.

⁵ See *Eaton v. Oregon R. & Nav. Co.* L.R.A.1917A.

(1890) 19 Or. 391, 24 Pac. 415, and *Eaton v. Oregon R. & Nav. Co.* (1890) 19 Or. 397, 24 Pac. 417, holding that a statutory provision (Hill's Code, § 4044) that any corporation or lessee or agent receiving, owning, or operating any railroad, shall be liable for stock killed on any unfenced track, was intended to make the corporation owning the road and the company operating it liable jointly and severally for damages arising from breach thereof.

⁶ See English act as set out in *Bennett v. Covert* (1864) 24 U. C. Q. B. 38.

⁷ *St. Louis & S. F. R. Co. v. Hale* (1907) 82 Ark. 175, 100 S. W. 1148, applying Kirby's Ark. Dig. §§ 6732, 6743, 6757, 6758.

⁸ *Wabash R. Co. v. Williamson* (1891) 3 Ind. App. 190, 29 N. E. 455; *Pittsburgh, C.*

der an earlier Indiana statute which provided that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company shall be liable jointly or severally with such company for stock killed in violation of an act which required fences, a lessee operating in the name of the owner was liable for stock killed by it upon the unfenced road.⁹ And under the earlier act a construction contractor acting in the name of and protected by the rights of a railroad company was embraced by the phrase "other persons" as used in the statute.¹⁰ Under that act, however, it was not sufficient to show that the stock in question was killed by one operating its trains over the road of another, but it was essential to show also that he did so as lessee while running or controlling the road in the name of the lessor;¹¹ a lessee operating or running the road of another in his own name rather than in that of the owner not being liable under the statute,¹² such being the law until the statute was amended in 1877.¹³ And under this statute a railroad company, by leasing the roadbed, machinery, franchises, and effects of another railroad, and running and operating the same, did not, at least in the absence of a contract to so do, become liable for stock killed before the lease was made and while the road was being operated by the lessor in an unfenced condition.¹⁴

So, in Illinois, where the statutes provide that the owner of property may

build a fence after refusal of the railroad company to do so, and collect double damages from such corporation "or party actually operating or using such railroad," any party actually using or occupying a railroad is liable for failure to build a fence after notice from the landowner.¹⁵

And in Wisconsin, where every railroad corporation operating any road must erect fences under penalty of liability for resulting injury to live stock, a railroad corporation operating for its own benefit a railroad as lessee thereof does so subject to the duty to fence imposed by statute.¹⁶

So, in Missouri, where every corporation operating any railroad in the state must erect and maintain lawful fences under penalty of liability in double damages, any railroad company operating a railroad is liable for failure to fence the right of way, even though it does not own the road.¹⁷

And Oklahoma has a similar statute, it being "the duty of every person or corporation owning or operating any railroad" to fence the same, and it being provided that "any railroad corporation or lessee, person, company, or corporation operating any railroad" shall be liable for animals killed by reason of failure to construct such a fence;¹⁸ but this statute does not apply to receivers of a railroad corporation who are merely operating its trains over the tracks of another corporation by mere license or permission, the owner railroad itself operating the road.¹⁹

C. & St. L. R. Co. v. Thompson (1898) 21 Ind. App. 355, 50 N. E. 828.

⁹ Indianapolis, C. & L. R. Co. v. Warner (1871) 35 Ind. 515, construing and applying 3 Ind. Stat. 413.

¹⁰ Huey v. Indianapolis & V. R. Co. (1873) 45 Ind. 320.

¹¹ Cincinnati & M. R. Co. v. Paskins (1871) 36 Ind. 380, holding that in the absence of an allegation to such effect the complaint did show a cause of action against the lessee; Cincinnati & M. R. Co. v. Townsend (1872) 39 Ind. 38, holding that an allegation that defendant was running its trains upon another's road at the time the live stock in question was killed was insufficient, and rendered the complaint subject to demurrer.

¹² Pittsburgh, C. & St. L. R. Co. v. Bolner (1877) 57 Ind. 572, holding that the statute did not apply to all lessees of railroads, and that liability could not be attached to any not clearly within its terms; Pittsburgh, C. & St. L. R. Co. v. Hannon (1878) 60 Ind. 417; Pittsburgh, C. & St. L. R. Co. v. Currant (1878) 61 Ind. 38; Cincinnati, H. & D. R. Co. v. Bunnell (1878) 61 Ind. 183; Cincinnati, H. & D. R. Co. v. Nor-L.R.A.1917A.

ris (1878) 61 Ind. 285; Jeffersonville, M. & I. R. Co. v. Downey (1878) 61 Ind. 287.

¹³ See Pittsburgh, C. & St. L. R. Co. v. Currant (Ind.) supra, and the Indiana statute set out in the text, supra, 8.

¹⁴ Pittsburgh, C. & St. L. R. Co. v. Kain (1871) 35 Ind. 291.

¹⁵ Ohio & M. R. Co. v. Russell (1885) 115 Ill. 52, 3 N. E. 561.

¹⁶ McCall v. Chamberlain (1861) 13 Wis. 637; Cook v. Milwaukee & St. P. R. Co. (1874) 36 Wis. 45, construing and applying Wisconsin Rev. Stat. § 1810.

¹⁷ Porter v. Illinois Southern R. Co. (1909) 137 Mo. App. 293, 117 S. W. 680, construing Missouri Rev. Stat. 1899, § 1105, to apply to a railroad company operating a railroad constructed by another corporation, whether the possession is by lease, purchase, or otherwise; Farley v. St. Louis, K. C. & N. R. Co. (1880) 72 Mo. 338, construing Missouri Rev. Stat. 1879, § 809, to apply to a railroad company operating its trains over the tracks of another railroad company, under an "arrangement" made with such other company.

¹⁸ See Lusk v. EDDINGTON, ante, 536.

¹⁹ (Okla.) Ibid.

So, in Washington, where "all railroad companies owning or operating lines of railroad" in the jurisdiction are liable for stock killed unless the road is fenced, a corporation operating a railroad owned by another corporation is within the statute.²⁰

And in Maine, where the statute provides that legal and sufficient fences should be made and maintained, but does not say by what corporation, and the statute also provides that after notice "the corporation owning, controlling or operating such railroad" is liable to a forfeiture for neglect to build or repair, a lessee operating and having full control of another's road is within the purview of the statute, and liable for injuries resulting from an illegal or insufficient fence.²¹

And under statutes making railroad corporations and their agents liable for animals injured as a result of a neglect to erect and maintain proper fences, a lessee,²² a railroad corporation operating the road of another corporation under a contract,²³ and a construction contractor²⁴ all are agents within the meaning of the act, and therefore liable for injuries to animals struck by a train operated by them, the animals having come upon the track at a point where the

track was unfenced or where the fence was out of repair.

And under a California statute which merely declares that railroad corporations must make and maintain good and sufficient railroad fences under penalty of liability for stock killed because of such failure, it has been held that a railroad company in possession of and operating and controlling a railroad as lessee is within the statute, and is liable for stock killed or injured as a result of a failure to maintain a statutory fence.²⁵

And although a railroad company operating trains over the road of another as lessee or licensee has no authority to enter upon or fence the sides of the track, and no obligation rests upon it to do so, it has been ruled that it is responsible for all injury resulting from its use of the road in an unfenced condition, the owner having failed to erect the statutory fence,—it being said that the demands of public policy require that it shall be responsible for injuries resulting from the defective condition of which it knew and with respect to which it must have assumed the risk, it having presumed to use the road in its unfenced and unprotected condition.²⁶

And in Kentucky a lessee of a road from a railroad company which had con-

²⁰ See *Oregon R. & Nav. Co. v. Dacres* (1890) 1 Wash. 105, 23 Pac. 415, construing Washington Territory Laws of 1883, p. 51 (Act Nov. 28, 1883, §§ 1, 8).

²¹ *Gould v. Bangor & P. R. Co.* (1889) 82 Me. 122, 19 Atl. 84, construing and applying Maine Rev. Stat. chap. 51, §§ 36, 37.

²² *Clement v. Canfield* (1856) 28 Vt. 302, applying Vermont Comp. Stat. chap. 26, § 41. In this connection the court said: "It does not seem to us there is any difficulty in extending the statute to everyone who runs the road under or by permission of the company, until such fences and cattle guards are erected. The word 'agent' is a very extensive term, and may be fairly applied to almost anyone who performs the office of another. This lessee, in one sense certainly, is the agent of the company. He is performing their functions, and clothed with their prerogatives, or he could not be allowed to take tolls or freight and fare upon the road, or to run engines where he does probably. In this sense he is the agent of the company, and having, as such agent, acquired the powers and prerogatives of the company, is it anything unreasonable that he should, while exercising such powers and prerogatives, be subjected to the same liabilities which the law imposes upon the company and their agents who destroy property? But it is said that a lessee is not of the class of agents referred to in the statute." L.R.A.1917A.

ute; that the statute probably refers primarily to those agents of the company who are under their control, like engineers and conductors. But does not the very relation in which the term 'agent' is used in this statute show that the legislature must have adopted that most extensive term for the very purpose of reaching any and all persons who might acquire the right to run the road, under the powers conferred upon the corporation? Any other construction would seem to be contrary to the fair use of the term 'agent' with reference to the subject-matter. I am well aware that a lessee is not the agent of the corporation for all, or for most, purposes. But in this sense, inasmuch as they execute these important public functions under and by virtue of the franchises conferred upon the corporation, they may fairly be regarded as their agents."

²³ *Bay City & E. S. R. Co. v. Austin* (1870) 21 Mich. 390.

²⁴ *Gardner v. Smith* (1859) 7 Mich. 410, 74 Am. Dec. 722.

²⁵ *Johnson v. Southern P. Co.* (1909) 11 Cal. App. 278, 104 Pac. 713, applying California Civ. Code, § 485.

²⁶ *Illinois C. R. Co. v. Kanouse* (1866) 39 Ill. 272, 89 Am. Dec. 309; *Toledo, P. & W. R. Co. v. Rumbold* (1866) 40 Ill. 143 (dictum); *East St. Louis & C. R. Co. v. Gerber* (1876) 82 Ill. 632 (dictum).

tracted with an adjoining landowner to erect and maintain fences has been held liable in tort for animals injured because of failure to perform the contract duty.²⁷

In Ohio, without reference to the statute involved, it has been held that a railroad company running its trains over the tracks of another railroad company, both companies using such tracks under a traffic agreement calling for joint running and management, was liable jointly with the owning company for failure to fence the track as required by law.²⁸

But some statutes have been construed as not extending to lessees or licensees.

Thus, in Canada, where by the terms of "the Railway Act" (Can. Consol. Stat. chap. 66, §§ 13, 15) it is the duty of a railway company to erect fences under penalty of liability for live stock injured as a result of a failure to do so, and the term "company" as so used means the company authorized to construct the railway, a lessee of a railway is under no duty to construct railway fences,²⁹ unless it has by a special agreement confirmed by statute contracted to assume the duties and obligations of the lessor company.³⁰

And where the statute, as in Iowa at one time, made any railroad company running or operating "its" road and failing to fence absolutely liable for injuries to live stock, a lessee merely in possession of and running a road of another was declared not to be liable under the statute for stock killed by its trains run-

ning on an unfenced portion of the road;³¹ but otherwise where the lessee had the exclusive right to run, operate, and control the road for a definite and extended period, and had exercised the right of maintaining fences, it having been held in such case that the lessee was for fencing purposes more than a lessee, and was in fact the company owning and running the road within the meaning of the statute.³² But by Iowa Act of April 3, 1868, the statute of that state was extended to "lessees operating or running any railroad" the same as the company owning or controlling the same.³³

So, in New York, under § 44 of chap. 10 of the Laws of 1850, as amended by § 8 of chap. 282 of the Laws of 1854, which provided that "every railroad corporation, whose line of road is open for use, . . . and every railroad company formed, or to be formed, but whose lines are not now open for use, shall, before the lines of such railroad are opened, erect and thereafter maintain fences on the sides of their roads," etc., under penalty of liability for resulting injuries, it was held that such statutes did not impose any duty or liability upon foreign railroad corporations operating on roads within the state under a contract therefor or a lease thereof.³⁴ But there was one decision to the contrary, the position being taken that the leased road was in fact the lessee's line of road within the meaning of the act.³⁵ And in another case the court of appeals

²⁷Howard v. Maysville & B. S. R. Co. (1902) 24 Ky. L. Rep. 1051, 70 S. W. 631, holding that proof or admission of the existence of the contract between the lessor and the plaintiff made unjustifiable the giving of a peremptory instruction to find for the lessee.

²⁸Berchold v. Lake Shore & M. S. R. Co. (1878) 4 Ohio Dec. Reprint. 329.

²⁹Bennett v. Covert (1864) 24 U. C. Q. B. 38.

³⁰Van Natter v. Buffalo & L. H. R. Co. (1868) 27 U. C. Q. B. 581, and Holmes v. Grand Trunk R. Co. (1868) 27 U. C. Q. B. 595, holding that a railway company occupying and operating a railway as tenant thereof was bound to fence the same.

³¹Liddle v. Keokuk, Mt. P. & M. R. Co. (1867) 23 Iowa, 378, construing and applying Iowa Laws 1862, chap. 169, § 6. In this connection the court said that "the language is clear, plain, and fairly susceptible of but one meaning. The law does not require the lessee to fence the road, nor make him liable for injuries to property if he does not. Giving it the most liberal construction, . . . we still think it would require at our hands the clearest judicial

legislation to extend it so as to cover plaintiff's claim."

³²Stewart v. Chicago & N. W. R. Co. (1869) 27 Iowa, 282.

³³(Iowa) Ibid.; Stephens v. Davenport & St. P. R. Co. (1873) 36 Iowa, 327, holding a lessee liable for stock killed by its trains; Clary v. Iowa Midland R. Co. (1873) 37 Iowa, 344, holding that a contract by the lessor to keep up the fences could not relieve the lessee from the liability imposed by statute; Downing v. Chicago, R. I. & P. R. Co. (1876) 43 Iowa, 96 (cattle guard).

³⁴Parker v. Rensselaer & S. R. Co. (1853) 16 Barb. (N. Y.) 315; Shanchan v. New York & N. H. R. Co. (1869) 10 Abb. Pr. (N. Y.) 398.

³⁵Labussiere v. New York & N. H. R. Co. (1860) 10 Abb. Pr. (N. Y.) 398, note. And see Ditchett v. Spuyten Duyvil & P. M. R. Co. (1876) 67 N. Y. 425, wherein the court seems to have inclined to the view that a lessee of a railroad belonging to another corporation, if in possession of and operating the same, would be responsible for the erection and maintenance of fences under the statute. And see also Burchfield v. Northern C. R. Co. (1870) 57 Barb. (N. Y.)

decided that a railroad company was liable for failure to fence a road which it did not own, but over which it ran its cars in conjunction with several other railroad companies, all of which used and maintained the road for their joint benefit.³⁶ And the provision of the Laws of 1864, chap. 582, § 2, imposing the duty of maintaining fences upon the lessees of the railroad of any railroad corporation,³⁷ was retained in N. Y. Laws 1890, chap. 565, § 32, as amended by Laws 1891, chap. 367, as amended by Laws 1892, chap. 676, the act reading, "Every railroad corporation

and any lessee or other person in possession of the road," etc.³⁸ Under the latter provision, however, it has been decided that a railroad company having a traffic arrangement with another railroad company, by which the former was allowed to run one train a day over the road of the latter, was not a person in possession of the road within the meaning of the act, and was therefore not liable, no lease being established.³⁹

And some other statutes do not under all circumstances apply to lessees or licensees.⁴⁰

589, wherein the court indicated that in its opinion the court in *Parker v. Rensselaer & S. R. Co.* (N. Y.) supra, gave the Act of 1850 too narrow a construction.

³⁶ *Tracy v. Troy & B. R. Co.* (1868) 38 N. Y. 433, 98 Am. Dec. 54, affirming (1867) 55 Barb. 529. This decision was founded upon peculiar facts in that the road in question was constructed solely for the use of several associated railroads, all of which were stockholders in the corporation building the road, which corporation was not formed for profit and did not own or run any rolling stock, and in fact had no right to do so, being supported by assessments on the railroad companies for whose benefit it was constructed.

³⁷ See *Throne v. Lehigh Valley R. Co.* (1895) 88 Hun. 141, 34 N. Y. Supp. 525, and *Burchfield v. Northern C. R. Co.* (1870) 57 Barb. (N. Y.) 589, holding that lessees of a railroad who were operating the same were liable under the statute for stock killed by reason of neglect to erect and maintain fences as required by statute.

³⁸ See *Throne v. Lehigh Valley R. Co.* (N. Y.) supra, and *Edwards v. Buffalo, R. & P. R. Co.* (1896) 8 App. Div. 390, 40 N. Y. Supp. 788.

³⁹ *Edwards v. Buffalo, R. & P. R. Co.* (N. Y.) supra. In this case, Ward, J., dissented, contending that "the statute under consideration should receive a fair and liberal construction. Its purpose evidently was to make any railroad corporation liable that was using an unfenced track upon which animals were killed by its trains. It was not necessary that the defendant should have had exclusive possession of the Lehigh road. It was only necessary that it should have the right of possession and an actual possession for the purposes of its trains. With all due respect, I think the view taken by the majority of the court gives too limited a construction to the statute, and defeats the purposes of the legislature in enacting it."

⁴⁰ See Indiana cases set out supra, notes 11 and 12, and the Oklahoma case cited supra, note 19. G. J. C.

OKLAHOMA SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Plff. in Err.,

v.

HARRIETT ALMA BELL.

(— Okla. —, 159 Pac. 336.)

Evidence — restoration of highway — sufficiency.

1. In a suit in damages for personal injuries, based upon the theory that defendant had failed to restore a highway to its former

state, or to such a condition that its usefulness would not be materially impaired, in violation of Comp. Laws 1909, §§ 1360, 7498, evidence examined and held, that, as there was evidence reasonably tending to prove the condition of the highway at the place of the accident, prior to the construction of the crossing at which the injury occurred, and that the same had not been restored, the court did not err in submitting the question of whether it had been restored to the jury. Held, further, that § 7498, supra, was applicable to a railway crossing constructed subsequent to its enactment.

For other cases, see *Trial, II. b, in Dig. 1-52 N. S.*

Headnotes by TURNER, J.

Note. — The question whether the negligence of the operator of an automobile is imputable to a person riding with him so as to preclude a recovery by the latter against a third person is considered in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953. That note also covers the question of the personal contributory negligence of the passenger.

The related question as to the responsibility of a guest for injury to a third person through negligence of the operator of the car is treated in the note to *Wilkinson v. Myatt-Dicks Motor Co.* L.R.A.1915E, 439; and see later case, *Anthony v. Kiefer*, L.R.A.1915F, 876. As to liability on the theory of joint enterprise, see *Judge v. Wallen*, L.R.A.1915E, 436, and note; and

Negligence — imputed — passenger in automobile.

2. The contributory negligence of the chauffeur cannot be imputed to one who is traveling in the vehicle with him by invitation of the owner of the car. To render one liable for the negligence of the chauffeur, either the relation of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise, whereby responsibility for each other's acts exists.

For other cases, see Negligence, II. c, 1, in Dig. 1-52 N. S.

Same — joint enterprise.

3. Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control or management.

For other cases, see Negligence, II. c, 1, in Dig. 1-52 N. S.

Proximate cause — defective highway — overturning of automobile.

4. In a suit in damages for personal injuries, where the evidence discloses that, at the place of the injury, defendant's track runs practically east and west and intersects the public highway at right angles on about a 5-foot grade; that the highway is carried over the railroad on a crossing, and slopes back on both sides of the track for a distance of some 20 feet; that about that distance south and parallel to the track, and some 3 or 4 feet under the surface of the highway, defendant had placed a culvert, consisting of pipe about 18 inches in diameter and about 25 feet long, for the purpose of conveying the water from the hills south and east of the railroad into a creek some 40 or 50 feet from its west end; and where, at the time of the injury, the water, in flowing through the culvert and falling from the west end of the pipe, had made a hole some 20 or 30 feet in diameter down to the level of the water in the creek, a distance of some 18 feet, and had caused the dirt over that end of the pipe to sink and encroach upon the highway to such an extent that, while the wagon track of the highway ran straight from the crossing up to the hole, it deflected to the left around the hole, which was obscured by weeds and undergrowth, and where, on the day of the injury, deceased and two others were riding as guests of the owner in the back seat of an automobile, going south along this highway: that over the chauffeur, in the front seat, he had no control; that the car mounted the

crossing between the rails of defendant's railroad slowly and a little to the west of the traveled way; that, after the front wheels had crossed the south rail, the chauffeur, having dropped the magneto key on the floor of the car, with his right hand still grasping the steering wheel, reached to pick it up, and that, while so doing, he deflected the car so far to the right as to run to the edge of the hole, where it slipped on the crumbling earth and fell into the hole, and, in falling, turned over and killed deceased—held, that the negligence of defendant in leaving the hole in the highway was the proximate cause of the injury.

For other cases, see Proximate Cause, IV. a, in Dig. 1-52 N. S.

Same — concurring negligence.

5. Where the negligence of defendant and the act of a third person concur to produce the injury complained of, so that it would not have happened in the absence of either, the negligence is the proximate cause of the injury.

For other cases, see Proximate Cause, I. in Dig. 1-52 N. S.

Highway — interference with — care.

6. That part of the charge which made it the absolute duty of defendant to keep the hole in question "free from weeds, brush, or other obstruction, or to erect such barriers as would reasonably be calculated to prevent the driving or falling in such hole by persons traveling that highway," was not error, in that it placed too high a degree of care on defendant.

For other cases, see Trial, III. c, 4, in Dig. 1-52 N. S.

Trial — imputed negligence — question for court.

7. On the undisputed facts in this case, the question of imputed negligence was one of law for the court, and not a question of contributory negligence, required to be left to the jury as a question of fact, by Const. art. 23, § 6.

For other cases, see Trial, II. c, 8, in Dig. 1-52 N. S.

(June 13, 1916.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of her husband, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. W. F. Evans, R. A. Kleinschmidt, and J. H. Grant, for plaintiff in error:

There were no facts proven which entitled

the liability of co-owners as such is treated in the note to *Hamilton v. Vioue*, L.R.A. 1916E, 1300.

Generally as to defect in highway as proximate cause of an injury, see notes in 13 L.R.A.(N.S.) 1252 and 20 L.R.A.(N.S.) 732. Specifically as to obstruction in highway, see 1917A.

way as proximate cause of an injury notwithstanding intervening cause, see note to *Louisville Home Teleph. Co. v. Gasper*, 9 L.R.A.(N.S.) 548.

Generally as to duty with respect to condition of highway, see notes in 13 L.R.A.(N.S.) 1219 and 20 L.R.A.(N.S.) 512.

the plaintiff to recover under § 1360 of our statutes, and the court should have so instructed the jury; and an instruction permitting a recovery thereunder is erroneous.

Chicago, M. & St. P. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118; Sutton v. Chicago, St. P. M. & O. R. Co. 98 Wis. 157, 73 N. W. 993; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113, 14 Am. Neg. Rep. 676; Missouri, K. & T. R. Co. v. Byrne, 40 C. C. A. 402, 100 Fed. 359; Stephens v. Oklahoma City R. Co. 28 Okla. 340, 33 L.R.A.(N.S.) 1007, 114 Pac. 611; Bales v. McConnell, 27 Okla. 407, 40 L.R.A.(N.S.) 940, 112 Pac. 978; La Londe v. Peake, 82 Minn. 124, 84 N. W. 726; Setter v. Maysville, 114 Ky. 60, 69 S. W. 1074; Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L.R.A. 365, 46 Am. St. Rep. 849, 61 N. W. 1101; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Ætna F. Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 801, 60 Fed. 557; Scheffer v. Washington City, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; Hannibal v. Campbell, 30 C. C. A. 63, 57 U. S. App. 484, 86 Fed. 297; Richardson v. Boston, 156 Mass. 145, 30 N. E. 478; Logan v. New Bedford, 157 Mass. 534, 32 N. E. 910; Tarras v. Winona, 71 Minn. 22, 73 N. W. 505.

If the deceased was engaged in a joint enterprise with the other members of the automobile party, or with the driver of the machine, Du Bose, the negligence of the driver is imputable to him, and the plaintiff cannot recover.

Davis v. Chicago, R. I. & P. R. Co. 16 L.R.A.(N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; Shultz v. Old Colony Street R. Co. 193 Mass. 309, 8 L.R.A.(N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 Ann. Cas. 402; Payne v. Chicago, R. I. & P. R. Co. 39 Iowa, 523; Nesbit v. Garner, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; McBride v. Des Moines City R. Co. 134 Iowa, 398, 109 N. W. 618; Koplitz v. St. Paul, 86 Minn. 373, 58 L.R.A. 74, 90 N. W. 794; Johnson v. Gulf, C. & S. F. R. Co. 2 Tex. Civ. App. 139, 21 S. W. 274; Donnelly v. Brooklyn City R. Co. 109 N. Y. 16, 15 N. E. 733; Titus v. New Scotland, 90 Hun, 468, 35 N. Y. Supp. 971; Schron v. Staten Island Electric R. Co. 16 App. Div. 111, 45 N. Y. Supp. 124, 3 Am. Neg. Rep. 61; Cass v. 3d Ave. R. Co. 20 App. Div. 591, 47 N. Y. Supp. 356; Boyden v. Fitchburg R. Co. 72 Vt. 89, 47 Atl. 409; L.R.A.1917A.

Omaha & R. Valley R. Co. v. Talbot, 48 Neb. 627, 67 N. W. 599; Allyn v. Boston & A. R. Co. 105 Mass. 77; Yarnold v. Bowers, 186 Mass. 396, 71 N. E. 799; Consolidated Traction Co. v. Holmark, 60 N. J. L. 456, 38 Atl. 684; Baxter v. St. Louis Transit Co. 103 Mo. App. 597, 78 S. W. 70; Missouri, K. & T. R. Co. v. Bussey, 66 Kan. 735, 71 Pac. 261; Bush v. Union P. R. Co. 62 Kan. 709, 64 Pac. 624; Brommer v. Pennsylvania R. Co. 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577.

One traveling upon a public highway, who carelessly or wilfully quits the traveled portion thereof and is injured thereby, is not entitled to recover.

Elliott, Roads & Streets, 2d ed. § 621; Tritz v. Kansas City, 84 Mo. 632; Brown v. Glasgow, 57 Mo. 156; Sykes v. Pawlet, 43 Vt. 446, 5 Am. Rep. 295; Perkins v. Fayette, 68 Me. 152, 28 Am. Rep. 84; Fitzgerald v. Berlin, 64 Wis. 203, 24 N. W. 879; Rice v. Montpelier, 19 Vt. 470; Packard v. Packard, 16 Pick. 191; Tisdale v. Norton, 8 Met. 388; Campbell v. Race, 7 Cush. 408, 54 Am. Dec. 728; Ireland v. Oswego, H. & S. Pl. Road Co. 13 N. Y. 526; Hay v. Weber, 79 Wis. 587, 24 Am. St. Rep. 737, 48 N. W. 859; Rhyner v. Menasha, 97 Wis. 523, 73 N. W. 41; Hannibal v. Campbell, 30 C. C. A. 63, 57 U. S. App. 484, 86 Fed. 297.

Before a defendant can be made to respond in damages for an accident, it must appear that he was negligent in the discharge of some duty toward the plaintiff, and that such negligence was the direct and proximate cause of the injury complained of.

St. Louis & S. F. R. Co. v. Hess, 34 Okla. 615, 126 Pac. 760; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Hughes v. Chicago, R. I. & P. R. Co. 35 Okla. 482, 130 Pac. 591; Kreigh v. Westinghouse, C. K. & Co. 11 L.R.A.(N.S.) 684, 81 C. C. A. 338, 152 Fed. 120; Eberhardt v. Glasgow Mut. Teleph. Asso. 91 Kan. 763, 139 Pac. 416; Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; Gulf, C. & S. F. R. Co. v. Turner, — Tex. Civ. App. —, 93 S. W. 195; Oklahoma City R. Co. v. Barkett, 30 Okla. 28, 118 Pac. 350; St. Louis & S. F. R. Co. v. Kral, 31 Okla. 624, 122 Pac. 177; 8 Thomp. Neg. 1914, § 50; Stephens v. Oklahoma City R. Co. 28 Okla. 340, 33 L.R.A.(N.S.) 1007, 114 Pac. 611.

It is extremely prejudicial to bring into the case for the first time at the trial, and without notice to the defendant, new and additional specifications, such as the duty to erect barriers.

Chicago, R. I. & P. R. Co. v. McIntire,

29 Okla. 797, 119 Pac. 1008; Wesley v. Diamond, 26 Okla. 170, 109 Pac. 524; Herbert v. Wagg, 27 Okla. 674, 117 Pac. 209; King v. Stephenson, 29 Okla. 29, 116 Pac. 183.

Messrs. Harris & Nowlin, for defendant in error:

The court gave to the jury an accurate statement of the statutory duty imposed upon defendant with reference to the crossing in question.

Yonkers v. New York C. & H. R. R. Co. 165 N. Y. 142, 58 N. E. 877; Bush v. Delaware, L. & W. R. Co. 166 N. Y. 210, 59 N. E. 838.

A violation of a duty imposed by statute is negligence.

29 Cyc. 436; Evansville & I. R. Co. v. Allen, 34 Ind. App. 636, 73 N. E. 630; Atchison, T. & S. F. R. Co. v. Aderhold, 58 Kan. 293, 49 Pac. 83, 2 Am. Neg. Rep. 546; See v. Wabash R. Co. 123 Iowa, 443, 99 N. W. 106; Seybold v. Terre Haute & I. R. Co. 18 Ind. App. 367, 46 N. E. 1054, 2 Am. Neg. Rep. 516; Dyer County v. Chesapeake, O. & S. W. R. Co. 87 Tenn. 712, 11 S. W. 943; Whitby v. Baltimore, C. & A. R. Co. 96 Md. 700, 54 Atl. 674; Kansas v. Kansas City Belt R. Co. 102 Mo. 633, 10 L.R.A. 851, 14 S. W. 808; Lincoln v. St. Louis, I. M. & S. R. Co. 75 Mo. 127; Nixon v. Hannibal & St. J. R. Co. 141 Mo. 425, 42 S. W. 942; Taylor, B. & H. R. Co. v. Warner, — Tex. Civ. App. —, 31 S. W. 66; Texas C. R. Co. v. Randall, 51 Tex. Civ. App. 249, 113 S. W. 180; International & G. N. R. Co. v. Butcher, — Tex. Civ. App. —, 81 S. W. 819; St. Louis, Southwestern R. Co. v. Smith, 49 Tex. Civ. App. 1, 107 S. W. 638; Missouri, K. & T. R. Co. v. Davis, 53 Tex. Civ. App. 547, 116 S. W. 423.

Defendant's violation of a statutory duty rendered it liable for injuries resulting therefrom.

Moore v. Jefferson City Light, Heat & P. Co. 163 Mo. App. 266, 146 S. W. 825; Johnson v. Northwestern Teleph. Exch. Co. 48 Minn. 433, 51 N. W. 225; Freeman v. Missouri & K. Teleph. Co. 160 Mo. App. 271, 142 S. W. 733; Whitby v. Baltimore, C. & A. R. Co. 96 Md. 700, 54 Atl. 674; Baldwin v. Greenwood's Turnp. Co. 40 Conn. 238, 16 Am. Rep. 33; Hey v. Philadelphia, 81 Pa. 44, 22 Am. Rep. 733; Crawfordsville v. Smith, 79 Ind. 308, 41 Am. Rep. 612; Campbell v. Stillwater, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320; Postal Telegraph Co. v. Zopfi, 93 Tenn. 369, 24 S. W. 633; Anderson v. Miller, 96 Tenn. 35, 31 L.R.A. 604, 54 Am. St. Rep. 812, 33 S. W. 615; Rosenbaum v. Shoffner, 98 Tenn. 624, 40 S. W. 1086; Evansville & I. R. Co. v. Allen, 34 Ind. App. 636, 73 N. E. 630; L.R.A.1917A.

Bales v. McConnell, 27 Okla. 407, 40 L.R.A. (N.S.) 940, 112 Pac. 978.

The record fails to disclose any negligence upon the part of the driver of the car.

Smith v. Travel, 20 Okla. 512, 94 Pac. 529; First Nat. Bank v. Walworth, 22 Okla. 878, 98 Pac. 917; Lockwood Bros. v. Frisco Lumber Co. 22 Okla. 31, 97 Pac. 562.

The negligence of the driver of the automobile, if any, was not imputable to plaintiff's decedent under the circumstances in this case.

Robinson v. New York C. & H. R. R. Co. 66 N. Y. 11, 23 Am. Rep. 1; Dyer v. Erie R. Co. 71 N. Y. 228, 12 Am. Neg. Cas. 347; Masterson v. New York C. & H. R. R. Co. 84 N. Y. 247, 38 Am. Rep. 510; Wosika v. St. Paul City R. Co. 80 Minn. 364, 83 N. W. 386, 8 Am. Neg. Rep. 72; Finley v. Chicago, M. & St. P. R. Co. 71 Minn. 471, 74 N. W. 174; Johnson v. St. Paul City R. Co. 67 Minn. 260, 36 L.R.A. 586, 69 N. W. 900, 1 Am. Neg. Rep. 93; Howe v. Minneapolis. St. P. & S. Ste. M. R. Co. 62 Minn. 71, 30 L.R.A. 684, 54 Am. St. Rep. 616, 64 N. W. 102; Kessler v. Brooklyn Heights R. Co. 3 App. Div. 426, 38 N. Y. Supp. 799; Walsh v. Altoona & L. V. Electric R. Co. 232 Pa. 479, 81 Atl. 551; Shultz v. Old Colony Street R. Co. 193 Mass. 309, 8 L.R.A.(N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 Ann. Cas. 402; Loso v. Lancaster County, 77 Neb. 466, 8 L.R.A.(N.S.) 618, 109 N. W. 752; Cotton v. Willmar & S. F. R. Co. 99 Minn. 366, 8 L.R.A.(N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935; Dean v. Pennsylvania R. Co. 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; Pyle v. Clark, 25 C. C. A. 190, 49 U. S. App. 260, 79 Fed. 744, 2 Am. Neg. Rep. 100; Evans v. Lake Erie & W. R. Co. 78 Fed. 782; Dale v. Denver City Tramway Co. 97 C. C. A. 511, 19 Ann. Cas. 1223, 173 Fed. 789; Winona v. Botzet, 23 L.R.A.(N.S.) 204, 94 C. C. A. 563, 169 Fed. 321, 21 Am. Neg. Rep. 445; Missouri, K. & T. R. Co. v. Rogers, 91 Tex. 52, 40 S. W. 956; Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319; St. Clair Street R. Co. v. Eadie, 43 Ohio St. 91, 54 Am. Rep. 802, 1 N. E. 519; Hydes Ferry Turnp. Co. v. Yates, 108 Tenn. 428, 67 S. W. 69; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127; Ouversen v. Grafton, 5 N. D. 281, 65 N. W. 676; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76, 14 Am. Neg. Rep. 218; Noonan v. Consolidated Traction Co. 64 N. J. L. 579, 46 Atl. 770; Baker v. Norfolk & S. R. Co. 144 N. C. 36, 56 S. E. 553;

Alabama & V. R. Co. v. Davis, 69 Miss. 444, 13 So. 693; *Leavenworth v. Hatch*, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65; *Payne v. Chicago, R. I. & P. R. Co.* 30 Iowa, 523; *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899, 11 Am. Neg. Cas. 402; *Atchison, T. & S. F. R. Co. v. Calhoun*, 18 Okla. 75, 89 Pac. 207, 11 Ann. Cas. 681; *Ward v. Brooklyn Heights R. Co.* 119 App. Div. 487, 104 N. Y. Supp. 95, 190 N. Y. 559, 83 N. E. 1134; *Connor v. Wabash R. Co.* 140 Mo. App. 675, 129 S. W. 777; *Cathey v. Seattle Electric Co.* 58 Wash. 176, 108 Pac. 443; *North Alabama Traction Co. v. Thomas*, 164 Ala. 191, 51 So. 418; *Fujise v. Los Angeles R. Co.* 12 Cal. App. 207, 107 Pac. 317; *Yeates v. Illinois C. R. Co.* 241 Ill. 205, 89 N. E. 338; *Mittelsdorfer v. West Jersey & S. R. Co.* 77 N. J. L. 698, 73 Atl. 538; *Noakes v. New York C. & H. R. R. Co.* 195 N. Y. 543, 88 N. E. 1126; *Wilson v. Puget Sound Electric R. Co.* 52 Wash. 522, 132 Am. St. Rep. 1044, 101 Pac. 50; *Chadbourne v. Springfield Street R. Co.* 199 Mass. 574, 85 N. E. 737; *Eckels v. Muttschall*, 230 Ill. 462, 82 N. E. 872; *Nonn v. Chicago City R. Co.* 232 Ill. 378, 122 Am. St. Rep. 114, 83 N. E. 924; *Zalotuchin v. Metropolitan Street R. Co.* 127 Mo. App. 577, 106 S. W. 548; *Southern R. Co. v. King*, 128 Ga. 383, 11 L.R.A. (N.S.) 829, 119 Am. St. Rep. 390, 57 S. E. 687; *Burleigh v. St. Louis Transit Co.* 124 Mo. App. 724, 102 S. W. 621; *McBride v. Des Moines City R. Co.* 134 Iowa, 398, 109 N. W. 618; *Petersen v. St. Louis Transit Co.* 199 Mo. 331, 97 S. W. 860; *Feehley v. Springfield Traction Co.* 119 Mo. App. 358, 96 S. W. 421; *Scheib v. New York City R. Co.* 115 App. Div. 578, 100 N. Y. Supp. 986; *Terwilliger v. Long Island R. Co.* 152 App. Div. 168, 136 N. Y. Supp. 733.

Turner, J., delivered the opinion of the court:

On December 21, 1910, Harriett Alma Bell, widow of Fred Bell, deceased, for herself and Mary Alma Bell, their only child, in the district court of Oklahoma county, sued the St. Louis & San Francisco Railroad Company in damages for personal injuries resulting in the death of the said Fred Bell. The petition as amended, after alleging the corporate existence of defendant, and that, on October 28, 1910, it was operating a line of railroad in this state through Spencer to Oklahoma City, substantially states that on said day deceased was riding as a guest in an automobile driven by one Du Bose along the public highway; that, after the car had crossed defendant's tracks at right angles, going south on a crossing one-half mile west of L.R.A.1917A.

Spencer, and while descending the south side of its roadbed, the driver of the car ran it upon the brink of a hole in the highway, negligently left open by defendant, in violation of the statute, and into which it fell, and, in falling, overturned and killed said Bell, to her damage and that of her child in a sum certain. For answer, defendant, after a general denial, alleged that the injury, if any, was the result of the negligence, not of defendant, but of the driver of the car, and also the contributory negligence of deceased. After reply filed, in effect a general denial, there was trial to a jury and judgment for plaintiff, and defendant brings the case here.

At the close of all the evidence the court, in effect, instructed the jury (No. 5) that it was the duty of defendant in constructing a crossing for its railroad over a public highway to restore the highway to its former state, or to such a condition that its usefulness would not be materially impaired, and thereafter maintain the same in such condition against any effects in any manner produced by the railroad. He also told the jury that it was the further duty of defendant to construct a crossing across that portion of its tracks, roadbed, or right of way over which any public highway may run, and maintain the same, unobstructed, in a good condition for the use of the public, and to build and maintain in good condition all culverts that may be necessary on its right of way at such crossings, and that a failure so to do was negligence. No complaint is made that such is not the law, but it is assigned that the evidence was insufficient to support the charge, in that there was no evidence reasonably tending to prove the condition of the highway at the place of the accident, prior to the construction of the crossing, and hence none to show that it had not been restored within the contemplation of Comp. Laws 1909, § 1360. There is no merit in this contention, for the reason that the evidence, considered with the photographs, discloses that, prior to the construction of this crossing, the road, at the precise point where the injury occurred, instead of being a hole, was a fairly level well-traveled public road upon a section line. Neither is there merit in the contention that the charge was inapplicable for the reason that the crossing in question was already established before § 7498 of Comp. Laws 1909 was passed. This for the reason stated in *Yonkers v. New York C. & H. R. R. Co.* 165 N. Y. 142, 58 N. E. 877, where the court, construing a similar statute, in view of a like contention, said: "It is quite true, as the learned counsel for the defendant contends, that this statute is prospective in its operation.

It had no application to proceedings in the court pending prior to its enactment. . . . It is quite clear, however, that it is not limited in its application to railroads, constructed subsequent to its enactment, or to bridges over crossings thereafter constructed. It was manifestly intended to apply to objects in existence at the time of its enactment, and consequently to all bridges constituting the highway at railroad crossings, whether constructed after the law went into effect or before. The purpose of the statute was to insure greater safety at such highway crossings, and that object could not be effected without applying the law to all such bridges existing at the time that it went into effect, without regard to the date of their construction."

See, also, *Bush v. Delaware, L. & W. R. Co.* 166 N. Y. 210, 59 N. E. 838.

Continuing, the court, in the same instruction, charged: "And if you find and believe from a preponderance of the evidence that the defendant railway company failed in the performance of any of its duties as above outlined, and that by reason thereof such a condition was created, caused, or permitted to exist at said crossing, and on said right of way, as that the said Fred Bell lost his life on or about the date mentioned in plaintiff's petition, and that, but for the existence of said conditions at said crossing, the said Fred Bell would not have lost his life, as aforesaid, then the court instructs you that negligence of the defendant company, if such you find existed, was the proximate cause of the death of said Fred Bell, regardless of any acts or conduct of the driver of the automobile in which the said Bell was riding, and your verdict should be for the plaintiff, unless you find from a preponderance of the evidence that the said Fred Bell failed to use ordinary care for his own safety, as explained in these instructions, but for which failure of care, on the part of said Bell, the accident would not have happened."

Which means that, if defendant failed to perform its said statutory duty, and, in consequence thereof, deceased was injured, its failure so to do was the proximate cause of the injury, independent of any act on the part of the driver of the car, and that plaintiff should recover, provided, of course, deceased was not guilty of contributory negligence. This is the law. The jury was not concerned in the negligence of the driver. Assuming that the doctrine of imputed negligence is recognized in this jurisdiction under a proper state of facts, the jury was not concerned with the negligence of the driver for the reason that, if negligent, his negligence cannot be imputed to

Bell, as we shall later see. That being true, the court did right to lay the negligence of the driver out of the case and leave it to the jury to say whether defendant violated its statutory duty as charged, and, if so, to declare, as a matter of law, that such was negligence and the proximate cause of the injury.

But it is contended, assuming the negligence of defendant as charged, such was not the proximate cause of the injury as a matter of law under the facts in this case, and the court erred when he so charged. This sends us to the facts. Essential to the determination of this question, they are few and undisputed. The evidence discloses that, at the place of the injury, defendant's track runs practically east and west and intersects the public highway at right angles on about a 5-foot grade; the highway being carried over the railroad by a crossing, the dirt road sloping back on both sides of the track for a distance of some 20 feet. About that distance south of and parallel with the track, and about 3 or 4 feet under the surface of the highway, defendant had placed a culvert, consisting of a pipe some 18 inches in diameter and 25 feet long, in order to convey the water from the hills south and east of the railroad into a creek some 40 or 50 feet from its west end. At the time of the injury, the water, in flowing through the culvert and falling from the west end of the pipe, had made a hole some 20 or 30 feet in diameter down to the level of the waters of the creek, a distance of some 18 feet, and had caused the dirt over that end of the pipe to sink and encroach upon the highway to such an extent that, while the wagon tracks in the road ran straight from the crossing up to it, they deflected to the left around the hole, which was obscured by weeds and undergrowth. The evidence further disclosed that, on the day of the injury, deceased with two others was riding as a guest of the owner in the back seat of an automobile going south along this highway; that over the driver, in the front seat, he had no control; that the car mounted the crossing between the rails of defendant's track slowly, and selecting the best part of the crossing, a little to the west of the traveled way; that, after the front wheels had crossed the south rail, the driver, having dropped his magneto key on the floor of the car, with his right hand still grasping the steering wheel, reached to pick it up; and that, while so doing, still going slowly, he deflected the car so far to the right as to run upon the edge of the hole, where it slipped upon the crumbling earth and fell into the hole, and, in falling, turned over and killed deceased.

The act of the driver in so deflecting his car was the cause of the fall; but, as that act would not have resulted in injury but for the negligence of defendant in leaving the hole in the highway, the negligence of defendant was the proximate cause of the injury.

In *Bales v. McConnell*, 27 Okla. 407, 40 L.R.A.(N.S.) 940, 112 Pac. 978, plaintiff was employed about a corn sheller, operated by cogs negligently left unguarded, when he slipped from a wagon and fell; and, upon alighting on the ground near the cogs, to steady himself, thrust out his hand, which was caught in the unguarded cogs. In determining, as a matter of law, the proximate cause of the injury, we said: "That which caused plaintiff to slip from the wagon was the cause of his fall, but the negligently unguarded cogs were the proximate cause of his injury."

In that case we cited *Postal Teleg.-Cable Co. v. Zopfi*, 93 Tenn. 369, 24 S. W. 633, where, as to proximate cause, the court said: "A familiar illustration is the fall of a person upon an ice-covered pavement into an open cellar. In such case, the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred."

In that case, plaintiff sought to recover for personal injuries sustained by his minor daughter. The facts were that defendant had negligently left a telegraph pole lying between the platform and the first stepping stone leading from his front gate to the pike. His little daughter, on her way home from school on a rainy day, in stepping over the pole to pass in at the gate, stepped upon the platform, slipped, lost her balance, fell upon the pole, and was injured. It was held that the negligence of the company, in leaving the pole where it was, was the proximate cause of the injury. Quoting approvingly from *Anderson v. Miller*, 96 Tenn. 35, 31 L.R.A. 604, 54 Am St. Rep. 812, 33 S. W. 615, we said: "In *Postal Teleg.-Cable Co. v. Zopfi*, 93 Tenn. 374 [24 S. W. 633], the same distinction is illustrated where the fall of a young girl was caused by the slippery condition of a walkway, but the injury proximately resulted from the telegraph company negligently leaving its pole where she fell upon it, and received an injury which would not have resulted but for the presence of the pole, even though she had fallen. In that case a hypothetical case is put to further illustrate the distinction of a person falling upon an ice-covered pavement into an open cellar. In such case, the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred," and cited other cases in support L.R.A.1917A.

of our holding. Among others was *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320, concerning which we said: "The material allegations of the complaint were that the railroad company, with the consent and permission of the defendant city, had its track and operated its railroad along the side of, and in places lengthwise upon, one of the streets of the city; that, owing to its construction, it was a dangerous place for a horse with a carriage to go upon; that it was without fence or barrier between the part of the street occupied by the track and the part not so occupied, to prevent horses running upon it; that, as plaintiff, in his buggy, was driving his horse along the street, near said part of the track, his horse, suddenly frightened by a car moving along the track, and notwithstanding plaintiff's efforts to prevent him, ran upon the track where it was laid on and along the street, overturned the buggy, and injured plaintiff. One of the grounds of demurrer, which was sustained, was that the frightening of the horse by the moving car, and not the negligence of the city to properly guard the street, was the proximate cause of the injury, but the court held not so, and reversed the trial court."

In *Walrod v. Webster County*, 110 Iowa, 349, 47 L.R.A. 480, 81 N. W. 598, the facts were that plaintiff was driving a team over a bridge, and, when near the north or bridge end of the approach, the off horse became frightened by a flash of lightning, and, squatting or setting back in the harness, guided or pushed the near horse against the railing of the approach, which gave way and precipitated horses and driver over the side of the approach and down to the ground beneath, resulting in the injuries of which plaintiff complained. As to the proximate cause, in the syllabus, it is said: "Defects in the railing of a bridge were the proximate or efficient cause of the accident, when the railing was broken by a team of horses, one of which was frightened by a flash of lightning, if the accident would not have happened had the railing been sufficient, although, on the other hand, it would not have happened except for the lightning."

Which cause, we think, is precisely in point for the reason that it is, in effect, there held that, while it was the lightning which deflected the team against the railing and caused the fall, as the deflection would not have resulted in injury but for the negligence of defendant in failing to maintain a sufficient railing, the negligence of defendant in failing so to do was the proximate cause of the injury. The most that can be said in favor of defendant in

this connection is that the act of the driver in deflecting his car, as stated, concurred with the negligence of defendant to produce the death of Bell. Assuming such to be true, defendant's negligence was nevertheless the proximate cause of the injury; for, as stated in *Moore v. Jefferson City Light, Heat & P. Co.* 163 Mo. App. 266, 146 S. W. 825, quoting approvingly from *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn. 433, 51 N. W. 225: "Where the negligence of the defendant and the act of a third person concurred to produce the injury complained of, so that it would not have happened in the absence of either, the negligence was the proximate cause of the injury."

We are therefore of opinion that the instruction states the law.

We said awhile ago that the negligence of the driver, if any, could not be imputed to Bell. And this is true, for the reason that the undisputed facts disclose that Bell was riding in the car as a guest, at the invitation of the owner, and had no control over the driver. When such are the facts, 29 Cyc. 548, lays down the rule thus: "While there are some decisions to the contrary, the great weight of authority is that the negligence of the driver of a private conveyance will not be imputed to a person riding with him, but who has no authority or control over him, such as that of master and servant. To create the imputation of negligence, the passenger must have assumed such control and direction of the vehicle as to be considered practically in the exclusive possession of it. Merely making suggestions as to the route to be taken, or warning the driver of the danger, does not amount to sufficient authority or control. The negligence of the driver will not be imputed to persons on the vehicle at the invitation of the owner."

In *Anthony v. Kiefner*, 96 Kan. 194, L.R.A.1916F, 876, 150 Pac. 524, a mother and son were sued in damages for personal injuries inflicted by an automobile driven by the son. There was judgment against them both. Of the mother's contention, the court said:

"She insists that she was a mere guest or passenger in the automobile, and that the negligence of Lynn Kiefner, the owner and driver of the automobile, is not imputable to her. If she was only a guest of his and had no control of the automobile or of the operator, his negligence cannot be imputed to her. It was determined in *Leavenworth v. Hatch*, 57 Kan. 57, 57 Am. St. Rep. 309, 45 Pac. 65, that a person riding in a private conveyance by invitation of its owner is not responsible for his action, and that his negligence which contributes

to an accident cannot be imputed to the guest. In *Reading Twp. v. Telfer*, 57 Kan. 798, 57 Am. St. Rep. 355, 48 Pac. 134, 2 Am. Neg. Rep. 138, a man accompanied by his wife was driving over a defective highway, and she was injured. In her action to recover from the township, it was insisted that her husband was guilty of contributory negligence, and that she was chargeable with his negligence. There was no personal negligence on her part, but it was claimed that in a sense her husband was her agent, that the visit was undertaken on her solicitation, and that therefore negligence on his part which contributed to the injury was imputable to her. Upon these claims, the court said: 'The fact, if it be such, that the journey was undertaken at the solicitation of the wife, possesses no weight. It cannot be that one who merely secures from another the favor of transportation in a private vehicle takes upon herself or himself all risk of the driver's negligence en route. To so hold would minimize the problem for consideration into a mere question of fact as to which of the travelers solicited the other, the one the favor of journey, or the other the pleasure of company. If the one who asks to be carried hence is the master, so, on the other hand, the one who invites to a ride is also the master. If the maiden who begs of her escort a carriage drive is the mistress throughout the journey, so the gallant who invites his lady would likewise be the master until her safe return. It may be conceded that persons of mutual purpose and equal privileges of direction and control, who travel in the same vehicle in pursuit of a common object, are the agents of each other in such a sense that the negligent act of one, in furtherance of the common scheme, is imputable to all; but such mutuality or equality of direction and control does not exist in the case of a journey taken by husband and wife.' 57 Kan. 801.

"It was there recognized that there was a conflict in the authorities upon the question, but it was held that negligence could not be imputed to a guest or passenger, and it was further stated that 'the doctrine of imputable negligence, except when countenanced by statute, is a fiction of the law which finds small favor with the courts, and has been very infrequently applied in our own.' 57 Kan. 803. . . .

"In the late case of *Corley v. Atchison, T. & S. F. R. Co.* 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764, a man was riding in an automobile as the guest of the driver. In a collision with a railway train, the occupants of the automobile were killed. The wife of the guest brought an action on the basis that her husband's death was due to

the negligence of the railway company. It was claimed by the railway company that the collision resulted from the negligence of the driver of the automobile, and that the guest was chargeable with his negligence. In speaking of the claim, the court said: "The doctrine that one who voluntarily becomes a passenger in a conveyance thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated. The history of its rise and decline is traced in a note in 8 L.R.A.(N.S.) 597, where cases are gathered illustrating all phases of the subject. Save in a few jurisdictions, the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. Notes 9 Ann. Cas. 408; 19 Ann. Cas. 1225; and Ann. Cas. 1913B, 684. See also *Denton v. Missouri, K. & T. R. Co.* 90 Kan. 51, 47 L.R.A.(N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639. This rule applies in the case of a guest who is riding with the driver for their mutual pleasure. 29 Cyc. 548-550; note in 8 L.R.A.(N.S.) 648; 7 Am. & Eng. Enc. Law, 447, 448." 90 Kan. 73."

In the *Corley Case*, supra, the court also said: "Save in a few jurisdictions, the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. . . . This rule applies in the case of a guest who is riding with the driver for their mutual pleasure."

In *Withey v. Fowler Co.* 164 Iowa, 377, 145 N. W. 923, in the syllabus, it is said: "To impute a driver's negligence to an occupant of his carriage, the relation between them must be something more than that of host and guest, and the mere fact that both have engaged in the drive because of mutual pleasure does not materially alter the situation."

In *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345, 18 S. W. 2, in the seventh paragraph of the headnotes, it is said: "The contributory negligence of the driver of a vehicle cannot be imputed to one who is traveling in the vehicle with him by his invitation. To render one liable for the negligence of the driver of a vehicle in which he is traveling, either the relation of master and servant or principal and agent must exist, or the parties must be engaged in a joint enterprise whereby responsibility for each other's acts exists."

More could not be said in support of a doctrine so well settled. And the court did not err in refusing to submit to the jury the question of whether the deceased, at the

time he was killed, was engaged in a joint or common enterprise with the driver of the car, as requested (instruction No. 6). This for the reason that there was no evidence from which a joint enterprise might have been reasonably inferred. On this point there is no dispute as to the facts. The evidence discloses that, on the day of the injury, one Powell was the owner of an automobile; that he and his wife lived in Oklahoma City and had two lady friends visiting them; that a young man named Du Bose had been teaching Powell how to drive his car; that on that day Powell and his wife and his visitors planned an automobile trip in the country to purchase some chickens and eggs; that about noon that day Powell, finding it impossible for him to go, arranged with Du Bose to drive the car, which he did, the party consisting of the driver, Mrs. Powell, and the two lady visitors; that the party started from Powell's residence and drove to a garage in the city for gasoline; that there Du Bose suggested to Mrs. Powell to invite deceased to be their guest on the drive, to which she agreed, and suggested that he be asked to bring his gun along, as he was an expert rifle shot; that thereupon Du Bose telephoned the invitation from the garage, which was accepted, whereupon the party drove to his residence, where he joined them. The evidence further discloses that, on the journey, Du Bose and Mrs. Powell occupied the front seat of the car, the rear seat being occupied by the deceased and the two lady visitors; that the party drove east to Spencer, and, after spending a short time at the club grounds, started to return to the city, the passengers still being seated in the car as stated; and that, in crossing the defendant's line of road on the way home, the accident occurred as stated. Assuming that the trip was a "joy ride," as contended, it was not a joint or common undertaking.

In *Atwood v. Utah Light & R. Co.* 44 Utah, 366, 140 Pac. 137, the court, quoting approvingly from *Cotton v. Willmar & S. F. R. Co.* 99 Minn. 366, 8 L.R.A.(N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935, said: "Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management."

It follows that, as the negligence of the driver cannot be imputed to the deceased, the court did right to decide that question

on the undisputed facts as a matter of law, and that the question so decided was not a question of contributory negligence, required to be left to the jury as a question of fact by Const. art. 23, § 6, as contended by defendant.

Did the court err in further charging thus: "No. 7. It was not only the duty of the railroad company to so construct and maintain the said highway upon its right of way and said crossing as to prevent the washing or creation of a deep hole in said highway, or in close proximity to the traveled portion thereof, but it was also its duty to keep any such dangerous place free from weeds, brush, or other obstruction, or to erect suitable barriers as would reasonably be calculated to prevent the driving or falling into said hole by persons traveling that highway; and if it was neglect on the part of the railroad company of its duties, as herein explained, which was the direct and proximate cause of said accident, then the defendant railroad company is responsible for the consequences thereof, unless you shall further find from the evidence that the said deceased was guilty of contributory negligence, as set out in these instructions."

Defendant says he did because, it is urged, that part of the charge which made it the duty of defendant to keep the hole in question "free from weeds, brush, or other obstruction, or to erect suitable barriers as would reasonably be calculated to prevent the driving or falling into said hole by persons traveling that highway," placed too high a degree of care on defendant, who insists that the company was chargeable with ordinary care only in maintaining the highway at that point, and the question of whether it exercised that degree of care only should have been left to the jury. But the charge is substantially in keeping with the spirit of the statute. Section 1360, *supra*, made it the duty of defendant to restore this highway at the point in question "to its former state, or to such condition as that its usefulness shall not be materially impaired," and to keep it that way "against any effects in any manner produced by" its railroad. Now, if the statute had intended to charge defendant with the exercise of ordinary care only so to do, it would have said so. As it is, the statute is peremptory and reads, "shall restore," and "thereafter" shall "maintain." Besides, as this culvert was in aid of, if not a part of, its crossing across its right of way, § 7498 made it the duty of defendant to "maintain the same unobstructed, in a good condition for the use of the public." "Shall" construct "and maintain unobstructed" is the language of the statute, L.R.A.1917A.

and not that defendant shall exercise ordinary care only so to do, as defendant would have us believe.

There being no contention that the court erred in charging on contributory negligence, or, indeed, that deceased was guilty of any, and no merit in the remaining assignments of error, the judgment of the trial court is affirmed.

All the Justices concur, except **Thacker, J.**, not announcing.

Thacker, J., concurring (June 29, 1916):

I concur in the conclusion reached in this case; but I am not satisfied with the manner in which the question of imputed negligence is treated, and cannot agree that it "was one of law for the court, and not a question of contributory negligence to be left to the jury as a question of fact." The essential facts are stated in the opinion of the court.

In Black's Law Dictionary, 2d ed. 810, it is said: "Contributory negligence, when set up as a defense to an action for injuries alleged to have been caused by the defendant's negligence, means any want of ordinary care on the part of the person injured (or on the part of another whose negligence is imputable to him), which combined and concurred with the defendant's negligence and contributed to the injury as a proximate cause thereof, and as an element without which the injury would not have occurred. *Baltimore & O. S. W. R. Co. v. Young*, 153 Ind. 163, 54 N. E. 791; *Dell v. Phillips Glass Co.* 169 Pa. 549, 32 Atl. 601; *Barton v. St. Louis & I. M. R. Co.* 52 Mo. 253, 14 Am. Rep. 418; *Plant Invest. Co. v. Cook*, 20 C. C. A. 625, 41 U. S. App. 109, 74 Fed. 503; *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L.R.A. 812, 37 S. W. 851; *Riley v. West Virginia C. & P. R. Co.* 27 W. Va. 145."

If the negligence of a third party was such an independent intervening cause as to prevent the negligence of a defendant from being regarded a proximate cause of plaintiff's injuries, there would be no occasion, of course, to impute such third party's negligence to the plaintiff to prevent his recovery, as there would be an absence of actionable negligence on the part of the defendant; and it is only where the negligence of a third party is contributory that the question of imputing it to a plaintiff can arise; when imputed to a plaintiff, such negligence becomes his own contributory negligence, of course. Imputed negligence is not a distinct and independent defense in any case, but is a feature and part of the defense of contributory negligence, as

shown by the above quotation. The question of imputed negligence is foreign to any issue in this case, and ought not to have been discussed unless involved in the defense of contributory negligence, which is relied upon by the defendant for relief against its actionable negligence; and the treatment of this question, in the opinion of the court, shows beyond question that it is involved in and arises out of this defense.

The defense of contributory negligence cannot arise, of course, in any case unless the defendant has been guilty of actionable negligence; that is, negligence which, but for such defense, would render it liable for damages to the plaintiff (*St. Louis & S. F. R. Co. v. Long*, 41 Okla. 177, 137 Pac. 1156, Ann. Cas. 1915C, 432); but when a defendant pleads this defense in a case where the legal effect of its existence would defeat the action, and there is evidence of actionable negligence on the part of the defendant, the court should leave the whole question of the existence of contributory negligence, including the question of imputed contributory negligence, to the jury.

Section 6, art. 25 (Williams's, § 355) of the Constitution of Oklahoma, reads: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury."

This provision of our Constitution was evidently intended to effect some change in the pre-existing law, or in what would otherwise be the law of this state; and, as no such provision was necessary to make all questions of fact in such defenses questions to be left to the jury, it seems too obvious to admit of extended discussion that the intent was to convert into questions of fact to be determined by the jury, what otherwise had been, or would be, in this state, questions of law for the judge. Without this provision in our Constitution, whenever, as a matter of law, the evidence was conclusive that the plaintiff had been guilty of contributory negligence (whether directly or by imputation), or whenever, as a matter of law, there was no evidence, or not sufficient evidence, of such negligence, or any essential element thereof, to sustain this defense, the judge, with authority, might so direct the jury; but not so under this provision of our Constitution. If this provision of our Constitution means less than this, it means practically nothing; and, if the opinion of the majority of my associates, which treats a question as to an element of the defense of contributory negligence in this case as a question of law just as if there was no such constitutional provision, is allowed to stand, its logical effect will be to strike down this provision L.R.A.1917A.

of our Constitution, or, at least, to leave it merely declaratory of what was theretofore and would still be the law without it. In this, this decision is in conflict with all past decisions of this court touching this question. It must be clear from this provision of the Constitution that the defense of contributory negligence has been stripped of all those legal presumptions and conclusions formerly indulged and drawn by courts, and reduced to a question of fact for the jury. See *St. Louis & S. F. R. Co. v. Long*, supra.

Imputed negligence, like every other element of contributory negligence, existed in fact before it had, and independent of, legal sanction; and the effect of this provision of our Constitution upon its elemental character is to leave it where the law found it; that is, a question of fact. It must be obvious that, under some circumstances, the negligence of one party may be imputable to another as a matter of fact, wholly independent of any question of legal sanction or effect; and, under our Constitution, as formerly, a plaintiff may, in fact, be guilty of contributory negligence, either directly or through another whose negligence is in fact imputed to him, with the legal effect that it defeats his right to recover; but the whole question as to whether he is so guilty is one of fact for the jury.

In *St. Louis & S. F. R. Co. v. Hart*, 45 Okla. 659, 146 Pac. 436, in discussing this section of the Constitution, it is said: "It is obvious, however, that this section does not contemplate that a plaintiff, seeking damages for personal injuries, is entitled to recover regardless of the question of fault or negligence on his part. We take it that, if the evidence conclusively shows that such an one deliberately walked in front of a moving train with suicidal intent and was killed [injured], it would be the duty of the courts, trial or appellate, to set aside a verdict in his favor and grant a new trial."

The opinion in that case does not predicate the statement quoted upon any power of the court to pass upon the existence or sufficiency of evidence of contributory negligence, but is based upon the view that such a state of facts negatives the existence of actionable negligence on the part of the defendant, as will clearly appear from the following additional excerpt from the same: "If the plaintiff permitted a train approaching at that gait to run him down and injure him, there being nothing to prevent him from getting out of the way, the court probably would be justified in reversing the verdict in his favor and remanding the cause for a new trial, upon the grounds that there was no evidence reasonably tend-

ing to support the same; but, having arrived at the conclusion that there was sufficient evidence of negligence on the part of the defendant to take the case to the jury on that question, it would seem to follow that it was for the jury to say whether the testimony of the plaintiff as to getting his foot caught between the plank and rail was sufficient explanation of why he did not retire to a place of safety, after he discovered that the train was backing toward him, to absolve him from the charge of contributory negligence. As we have said before, in this jurisdiction the question of contributory negligence is always for the jury. At most, the only function of the court is to define for the jury the meaning of the term 'contributory negligence,' as used in § 6, supra, and instruct them that it is always a question of fact for their determination. In no event is the court authorized to direct a verdict or sustain a demurrer to the evidence, upon the ground that it conclusively appears that the plaintiff is guilty of contributory negligence as a matter of law."

The earlier case of *St. Louis & S. F. R. Co. v. Long*, supra, is to the same effect. If, as is undoubtedly true, "in no event is the court authorized to direct a verdict or sustain a demurrer to the evidence upon the ground that it conclusively appears that the plaintiff is guilty of contributory negligence as a matter of law," it must necessarily follow that in no event is the court authorized to direct a verdict or sustain a demurrer to the evidence, upon the ground that it conclusively appears that the plaintiff is not guilty of contributory negligence as a matter of law,—the constitutional rule must be allowed to work both ways and be equally available to either of the parties. If trial courts would confine their instructions for the guidance of juries in such cases to the question of actionable negligence on the part of defendants, instead of invading the province of the jury in respect to the question of contributory negligence, much danger of confusion and much risk of error would be avoided; and if this court would abstain from discussing when and what evidence does, and when and what does not, prove or tend to prove contributory negligence, and confine itself to the field left to it by the constitutional provision under consideration, a clearer understanding of the law in this regard would result. See *Gelrugh v. Charles T. Derr Constr. Co.* 29 Okla. 538, 151 Pac. 875.

It may be thought at first blush that this view would lead to the conclusion that, where the undisputed evidence shows actionable negligence on the part of a defendant, without any evidence whatever of

contributory negligence on the part of the plaintiff, a trial court would be without power to set aside a verdict against plaintiff's right to recover and grant him a new trial; but no such result would ordinarily follow. It may also be thought at first blush that this view would lead to the conclusion that, where the undisputed evidence shows contributory negligence on the part of a plaintiff, the court would be without power to set aside a verdict against defendant and grant him a new trial; but no such result would ordinarily follow. In either such case, such evidence of passion or prejudice would no doubt cause the trial judge to exercise the utmost care to see that, in respect to the primary question of actionable negligence, the verdict is justified; and, if there is no ground for setting the same aside, as against the evidence or the weight thereof upon this primary question, as where the pleadings or uncontroverted evidence left no question but that of contributory negligence to be determined by the jury, such a manifestly wrong verdict would ordinarily, at least, be attended by facts and circumstances which would bring the case within the discretionary power of the court to set aside the verdict and grant a new trial, upon the ground of "irregularities" or "misconduct" on the part of the jury within the meaning of the first or second subdivision of § 4196, Statutes 1893 (§ 5033, Rev. Laws 1910), specifying causes for which a new trial may be granted. If, for instance, the jurors, upon examination as to their qualifications, had denied that they had any bias or prejudice, such a verdict, unsupported by any evidence, or contrary to all the evidence, might tend to show that they had wrongfully qualified and were guilty of misconduct in this respect, and might entitle the party against whom the verdict was rendered to a new trial; and such bias or prejudice would ordinarily be referable to and tend to sustain some proposition under which the trial court might, in the exercise of its wide discretion, grant a new trial under the statutory causes therefor. See *Soper v. Medberry*, 24 Kan. 128; *Kelley v. Pennsylvania R. Co.* (C. C.) 33 Fed. 857; *Baylis v. Travelers' Ins. Co.* 113 U. S. 320, 28 L. ed. 980, 5 Sup. Ct. Rep. 494, 9 Fed. Stat. Anno. 349, 350. This, of course, is upon the assumption that no other ground for granting a new trial appeared.

It does not follow that, because both parties are entitled to a jury verdict upon the defense of contributory negligence and every part of the same, that it is not within the power of the court to set aside such a palpably wrong finding of the jury as to the existence or nonexistence of contributory

negligence, when not fairly reached, as the mere granting of a new trial, and thus sending the case to another jury, is not a denial to either party of his constitutional right to have a jury determine the existence or nonexistence of this defense without undue interference from any court (*Devine v. St. Louis*, 257 Mo. 470, 51 L.R.A. (N.S.) 860, 165 S. W. 1014); and this provision of our Constitution was not intended and should not be construed to deprive the courts of general jurisdiction of their inherent power to grant new trials for statutory causes known to the common law which were intended to secure a fair verdict. As to this power in general, see 20 Cyc. 722; 2 *Thomp. Trials*, 2d ed. § 3711, p. 1975, and notes; 4 *Minor, Inst.* 836, 837; 2 *Jones's Bl. Com.* §§ 510, 513, pp. 1998-2006; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; *Clark v. Great Northern R. Co.* 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760, and notes thereto; *McMahon v. Rhode Island Co.* 32 R. I. 237, 78 Atl. 1012, Ann. Cas. 1912D, 1229, and notes. Courts, in order to secure fair trials, often grant new trials where there is nothing to be determined except questions of fact within the exclusive province of the jury, and where the question must ultimately be determined by a jury; and the fact that it has long been the rule that the judge must ultimately yield to the jury in such cases is shown by the following statement in 2 *Jones's Bl. Com.* 510, p. 1998 (287): "If two juries agree in the same or a similar verdict, a third trial is seldom awarded; for the law will not readily suppose that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones."

And in *Devine v. St. Louis*, supra, it is held: "The constitutional right to trial by jury is not infringed by the granting by the court of a new trial for the award of excessive damages by the jury."

This is true although the jury must ultimately determine the amount of damages. But if, in any case, the court has no such power to relieve from a finding unsupported by any evidence or against sufficient undisputed evidence, such a case is exceedingly improbable; and it may be said that, if the jury would be free to commit absurd errors and return false verdicts not subject to review, they are no more free to err than are the courts in respect to the ultimate powers intrusted to them. In any event, it seems very clear under this section of our Constitution that the entire defense of contributory negligence is one of fact, and that both parties are entitled to have the same and every part thereof determined by a jury, without any further instruction from the L.R.A.1917A.

court than is permitted by the two cases first herein cited. The whole question of the existence or nonexistence of contributory negligence is for the jury, and their conclusion upon it, when fairly reached, is not re-examinable,—their finding is conclusive. See 9 Fed. Stat. Anno. 349.

It follows from the foregoing views that, in my opinion, the court erred in instructing the jury to the effect that the negligence, if any, of the driver of the automobile in which Fred Bell, deceased, was riding at the time of the accident resulting in his death could not be imputed to the latter, notwithstanding such instruction appears to have been absolutely true, as this was an unwarranted invasion by the court of the exclusive province of the jury to determine the truth of the same; the instruction, being unauthorized, was impertinent, though appearing to us to be true. And, although this instruction appears to us to have been true, and the jury would no doubt have so found without it, the error, in my opinion, probably constitutes a substantial violation of a constitutional right within the meaning of § 6005, Rev. Laws 1910, which reads: "No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury . . . unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of . . . constitutes a substantial violation of a constitutional . . . right."

But, although I have more doubts as to this, I am inclined to think that it does not follow that this case should be reversed on account of this error, as the error appears to have been invited by the defendant when, in its sixth requested instruction, it asks the court to invade the province of the jury in respect to the defense of contributory negligence and instruct it that, under the hypothetical case therein stated, the negligence of the driver of the automobile, in which Fred Bell, deceased, was riding at the time of the accident resulting in his death, should be imputed to the latter, and that plaintiff's right to recover should be denied. That a judgment will not be reversed on account of an error invited by the party asking reversal is well settled by the opinions of this court. *Standard Marine Ins. Co. v. Trader's Compress Co.* — Okla. —, 148 Pac. 1019; *Wallace v. Duke*, 44 Okla. 124, 142 Pac. 308; *Brissey v. Trotter*, 34 Okla. 445, 125 Pac. 1119; *Ardmore Oil & Mill. Co. v. Robinson*, 29 Okla. 79, 116 Pac. 191, 2 N. C. C. A. 799; *St. Louis & S. F.*

R. Co. v. Long, 41 Okla. 177, 137 Pac. 1156, Ann. Cas. 1915C, 432.

It is true the defendant did not ask the instruction given, that asked by it being diametrically opposed to the one given, but it did ask the court to instruct upon the

question of imputed negligence; and the error in the instruction given is in instructing at all upon this question.

I do not believe that such an error, so invited, would warrant a reversal of this case.

MINNESOTA SUPREME COURT.

JOSEPH SCHLECHTER, Appt.,
v.

MINNA FELTON, Exrx., etc., of Johan Felton, Deceased, Respt.

(— Minn. —, 158 N. W. 813.)

Fraud — positive statement — honest belief.

Where a person makes a false representation of a material fact susceptible of knowledge and relating to a matter in which he has an interest, and as to which he may be expected to have knowledge, and makes such statement unqualifiedly and as of his own knowledge, and with intent to induce action, the statement constitutes a legal fraud, and after it has been acted on by another to his damage the person making it cannot be heard to say that he honestly believed that the statement he made was true. Such honest belief is not a defense to an action for fraud.

For other cases, see *Fraud and Deceit, IV. in Dig. 1-52 N. S.*

(July 21, 1916.)

APPEAL by plaintiff from an order of the District Court for Douglas County denying a motion for judgment notwithstanding a verdict for defendant, or for a new trial, in an action brought to recover damages for alleged fraudulent representations as to the number of acres in a tract of land purchased by plaintiff from defendant's deceased husband. Reversed.

The facts are stated in the opinion.

Mr. Constant Larson, for appellant:

Plaintiff's proof covers all the elements

Headnote by HALLAM, J.

Note. — The question whether statements made without knowledge of their falsity will support an action for fraud is discussed in notes to Shackett v. Bickford, 7 L.R.A. (N.S.) 646, and Davis v. Trent, 49 L.R.A. (N.S.) 1219, which present the attitude of the American courts citing the leading English case of Derry v. Peek, L. R. 14 App. Cas. 337, 58 L. J. Ch. N. S. 864, 61 L. T. N. S. 265, 38 Week. Rep. 33, 1 Megone, 292, 54 J. P. 148, 12 Eng. Rul. Cas. 250, to which the court in SCHLECHTER v. FELTON refers as the foundation for the decisions not in harmony with its conclusion. L.R.A.1917A.

necessary to make out a case of fraud in an action for deceit.

Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Bullitt v. Farrar, 42 Minn. 8, 6 L.R.A. 149, 18 Am. St. Rep. 485, 43 N. W. 566; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Freeman v. F. P. Harbaugh Co. 114 Minn. 283, 130 N. W. 1110; Miller v. Bricker, 117 Minn. 394, 136 N. W. 14; Bunkers v. Peters, 122 Minn. 130, 141 N. W. 1118; O'Brien v. American Bridge Co. 110 Minn. 364, 32 L.R.A. (N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012; 24 Harvard L. Rev. 438; Grinnell, Deceit, p. 70; Shackett v. Bickford, 7 L.R.A. (N.S.) 646, note; 1 Cooley, Torts, p. 949; 20 Cyc. 27.

Mr. J. D. Sullivan for respondent.

Hallam, J., delivered the opinion of the court:

Plaintiff bought a small tract of land from John Felton. Felton later died. Defendant is executrix of his will. Plaintiff claims that Felton misrepresented to him the number of acres in the tract, and brought this action in deceit against the executrix to recover damages. It is conceded no recovery could be had in an action against an executrix in the district court on the ground of mutual mistake, or on any other theory than that of tort or fraud. The jury found for defendant, and plaintiff appeals. The only errors assigned relate to the court's instructions to the jury.

The court instructed the jury as follows: "If there were no representations, or if the representations were honestly made and there was a breach of the representations, there would be a different action than this action is. . . . The action that we have before us, remember, has for its basis a

SCHLECHTER v. FELTON, however, is not necessarily at variance with the doctrine of Derry v. Peek, supra, since the statement which formed the basis of action was contractual in its nature so as to permit the recovery of damages upon its turning out to be false, as for breach of implied warranty. That the court, in deciding SCHLECHTER v. FELTON meant, however, to go further than this, is evidenced by its statement that "the wrong is not, at least in such a case as this, breach of contract. It is tort."

See also in this connection Aldrich v. Scribner, 18 L.R.A. (N.S.) 379.

fraudulent transaction, fraudulent and false representations."

And, further: "If you should find that he was well justified in making the statements and that he honestly believed them true, . . . then it would not be a fraud action."

This presents squarely the question whether, in an action based on false representations, honest belief of the defendant in the truth of his representations is a good defense. The question is one on which the decisions are not in harmony. Some hold that since the action is in fraud it cannot be maintained unless there is moral turpitude. On the other hand, many authorities hold that false representation of a material fact susceptible of knowledge, made by one as of his own knowledge, is a fraud even though the defendant believed it to be true. Lord Blackburn stated this position well when he said: "If, when a man thinks it is highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false,—it is positive fraud." *Brownlie v. Campbell*, L. R. 5 App. Cas. 925, 953.

We do not regard the question as an open one in this state. In *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360, Justice Berry stated the essentials of actionable fraud tersely as follows: "An action for deceit lies against one who makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge when he does not know whether it is true or false, with intention to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived, and induced to so do or refrain, to his damage."

This statement is perhaps not specific enough to fully cover this case. We think, however, that the court in *Bullitt v. Farrar*, 42 Minn. 8, 12, 6 L.R.A. 149, 18 Am. St. Rep. 485, 43 N. W. 568, quite committed itself to the proposition that honest belief in the truth of statements made is not a defense, when it said: "Whether the representations were made innocently or knowingly they would equally operate as a fraud upon the plaintiff, provided they were made unqualifiedly, or as of defendant's own knowledge."

If there can be any doubt as to the meaning of that language, there can be none as to the language of the court in *Freeman v. F. P. Harbaugh Co.* 114 Minn. 283, 286, 130 N. W. 1112, when it was said of the statements of defendant's representative Lee: "That Lee supposed he was stating the facts, or had no actual knowledge on, the

subject, does not excuse him or his principal from the result, if the plaintiff relied on his representation. . . . An unqualified affirmation amounts to an affirmation as of one's own knowledge." See also *Miller v. Bricker*, 117 Minn. 394, 136 N. W. 14.

Drake v. Fairmont Drain Tile & Brick Co. 129 Minn. 145, 151 N. W. 914, and *Jacobson v. Chicago, M. & St. P. R. Co.* — Minn. —, L.R.A.1916D, 144, 156 N. W. 251, are in accord, but they all involve the equitable right of rescission, and not the legal right to damages. The statement in *O'Brien v. American Bridge Co.* 110 Minn. 364, 377, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012, on the authority of the English cases which will be presently referred to, was only dictum.

While intent to deceive is always said to be an essential element of fraud, it was said in *Bullitt v. Farrar*, supra, that "a charge of fraudulent intent in an action for deceit may be maintained by proof of a statement made as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case, it is not necessary to make proof of an actual intent to deceive."

The rule as stated in the foregoing decisions is supported by credible authority elsewhere. 20 Cyc. 27; *Hindman v. First Nat. Bank*, 57 L.R.A. 108, 50 C. C. A. 623, 112 Fed. 931; *Prestwood v. Carlton*, 162 Ala. 327, 333, 50 So. 254; *Water Comrs. v. Robbins*, 82 Conn. 623, 74 Atl. 938; *Watson v. Jones*, 41 Fla. 241, 25 So. 678; *Kirkpatrick v. Reeves*, 121 Ind. 280, 22 N. E. 139; *Litchfield v. Hutchinson*, 117 Mass. 195; *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 9 Am. St. Rep. 727, 18 N. E. 168, 16 Mor. Min. Rep. 103; *Huntress v. Blodgett*, 206 Mass. 318, 92 N. E. 427; *Braley v. Powers*, 92 Me. 203, 209, 42 Atl. 362; *Hadcock v. Osmer*, 153 N. Y. 604, 47 N. E. 923; *Houston v. Thornton*, 122 N. C. 365, 373, 65 Am. St. Rep. 699, 29 S. E. 827; *Bird v. Kleiner*, 41 Wis. 134; *Davis v. Nuzum*, 72 Wis. 439, 1 L.R.A. 774, 40 N. W. 497. See article by Prof. Williston in 24 *Harvard Law Rev.* 415, 427. Mr. Bigelow puts it thus: "Indeed, where a person makes a statement in terms of his 'own knowledge' or the equivalent, he cannot escape liability, it seems, if it turn out to be false, by saying that his statement was made upon trustworthy information." Bigelow, Fr. p. 514.

The principle as stated by Judge Cooley is that, since the fraud consists of reckless assertions, "even the actual belief of the

party in the truth of what he asserts is immaterial." 2 Cooley, Torts, 3d ed. *585.

The cases which hold otherwise rest back on the authority of *Derry v. Peek*, L. R. 14 App. Cas. 337, 58 L. J. Ch. N. S. 864, 61 L. T. N. S. 265, 38 Week. Rep. 33, 1 Megone, 292, 54 J. P. 148, 12 Eng. Rul. Cas. 250. In that case it was held that an action for negligent misrepresentation cannot be maintained; that a reckless statement may be evidence of fraud, but that it is only when the circumstances indicate such recklessness or negligent disregard for the truth as to be incompatible with the idea of honesty that the action for fraud may be maintained.

Lord Esher, in discussing the same subject in *Le Lievre v. Gould* [1893] 1 Q. B. 491, 498, 62 L. J. Q. B. N. S. 353, 4 Reports, 274, 68 L. T. N. S. 626, 41 Week. Rep. 468, 57 J. P. 484, said that a charge of fraud cannot be maintained against a man unless it is shown that he had "a wicked mind." Recognizing that fraud may be predicated on reckless statements, Lord Bowen said that in such case "his mind is wicked, not because he is negligent, but because he is dishonest in not caring about the truth of his statement."

Lindley, L. J., in *Angus v. Clifford* [1891] 2 Ch. 449, 469, further said: "It is not sufficient that there is blundering carelessness, however gross, unless there is wilful recklessness, by which I mean wilfully shutting one's eyes, which is, of course, fraud."

It will be seen that after all the principal difference between the rule of the English cases and the rule as stated by Cooley, Bigelow, and Lord Blackburn, is that the making of the false statement which the speaker believes to be true, but the truth of which he has not sufficiently verified, is in the one case merely evidence of fraud, while in the other it is the fraud itself.

We are satisfied with the rule followed by the Minnesota cases, and have no desire to change it. Whether this rule should be applied to cases where the defendant had

no interest in the subject-matter of the representation, and derived no benefit therefrom, it is not necessary here to decide. What we do decide is that, where defendant has made a false representation of a material fact susceptible of knowledge and relating to a matter in which he has an interest, and as to which he may be expected to have knowledge, and makes such statement unqualifiedly and as of his own knowledge, and with intent to induce action, he cannot be heard to say, after the statement has been acted upon by the plaintiff to his damage, that he honestly believed that the statement he made was true.

The rule seems to us consonant with practical justice. It does the defendant no injustice. If his information is not absolute, neither should his statement be. He can always protect himself by stating what is true,—that is, that he has only a belief; or by stating the source of his information. He should not be allowed to hold what he has gained from the plaintiff by his own untrue assertion of fact. From the standpoint of the plaintiff it is hard to see why he should himself suffer the loss which the defendant has caused him, and by which the defendant has profited, simply because the defendant had a belief formed in reliance on sources of information which were not reliable. The wrong is none the less because the motive was not corrupt. The wrong is not, at least in such a case as this, breach of contract. It is tort. The name is not important. For want of a better name we call it fraud.

Some parts of the court's charge are not inconsistent with this rule. We have examined the charge with much care to see if, taken as a whole, it could not be sustained. We feel sure it cannot. The thought runs all through it that honest belief on the part of Felton in the truth of what he stated is a defense, though the statement was false and damaging. In our view of the law this is not correct and we think the charge erroneous.

Order reversed and new trial granted.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

SPOKANE & INLAND EMPIRE RAILROAD COMPANY, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(127 C. C. A. 61, 210 Fed. 243.)

Railroads — Safety Appliance Act — Interurban electric system.

1. An interurban electric railway system L.R.A.1917A.

which has all the characteristics in build and operation of a standard steam road is not within the provision of the Federal Safety Appliance Act, exempting from its operation cars which are used upon street railways, although to reach their terminals they are for a short distance run over the

Note. — The decision in *SPOKANE & I. E. R. Co. v. UNITED STATES* has been affirmed by the United States Supreme Court (241 U. S. 344, 60 L. ed. 1037, 36 Sup. Ct. Rep. 668).

Generally as to duty and liability under

tracks of an urban system which are so constructed that cars complying with the Federal statute cannot be accommodated on them.

For other cases, see Master and Servant, II, a, 4, d, (3), in Dig. 1-52 N. S.

Evidence — expert testimony — grab iron.

2. Whether or not openings in the sill or buffer of a passenger car subserve the same purpose as the grab irons required to be placed on the ends of the cars by the Interstate Commerce Commission is not a subject for expert testimony.

For other cases, see Evidence, VII, n, in Dig. 1-52 N. S.

(January 5, 1914.)

ERROR to the District Court of the United States for the Northern Division of the Eastern District of Washington (Rudkin, District Judge), to review a judgment in plaintiff's favor in an action brought to recover penalties for alleged violation of the Safety Appliance Act. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert, Ross, and Morrow, Circuit Judges.

Messrs. Graves, Klizer, & Graves, for plaintiff in error:

The provisions of the Safety Appliance Act are not applicable to cars used as are defendants.

Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 191 Fed. 40.

Expert evidence should have been received concerning the sufficiency of the handholds.

United States Smelting Co. v. Parry, 92 C. C. A. 159, 166 Fed. 407; Hutchinson Cooperage Co. v. Snider, 46 C. C. A. 517, 107 Fed. 633; Wabash Screen Door Co. v. Black, 61 C. C. A. 639, 126 Fed. 721; Pullman's Palace Car Co. v. Harkins, 5 C. C. A. 326, 17 U. S. App. 22, 55 Fed. 932; Central Coal & Coke Co. v. Williams, 97 C. C. A. 597, 173 Fed. 337; Union P. R. Co. v. Novak, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 573; Bellefontaine & I. R. Co. v. Bailey, 11 Ohio St. 335; Chicago G. W. R. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423; Pittsburgh, S. & N. R. Co. v. Lamphere, 69 C. C. A. 452, 137 Fed. 20; Chicago, R. I. & P. R. Co. v. Hale, 99 C. C. A. 379, 176 Fed. 71; Wabash R. Co. v. United States, 93 C. C. A. 393, 168 Fed. 1; Ft. Worth & D. C. R. Co. v. Wilson, — Tex. Civ. App. —, 24 S. W. 686; Colorado Midland R. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701, 13 Am.

Neg. Cas. 537; Louisville, N. A. & C. R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Neubauer v. Northern P. R. Co. 60 Minn. 130, 61 N. W. 912; Louisville & N. R. Co. v. Hall, 87 Ala. 708, 4 L.R.A. 710, 13 Am. St. Rep. 84, 6 So. 277; Betts v. Chicago, R. I. & P. R. Co. 92 Iowa, 343, 26 L.R.A. 248, 54 Am. St. Rep. 558, 60 N. W. 623; Baltimore & Y. Turnp. Road v. Leonhardt, 66 Md. 70, 59 Am. Rep. 156, 5 Atl. 346, 3 Am. Neg. Cas. 680; Louisville & N. R. Co. v. Davis, 99 Ala. 593, 12 So. 786; Birmingham Mineral R. Co. v. Wilmer, 97 Ala. 165, 11 So. 886; Louisville & N. R. Co. v. Binion, 107 Ala. 645, 18 So. 75; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; Relfanyder v. Chicago, M. & St. P. R. Co. 90 Iowa, 76, 57 N. W. 692; Schroeder v. Chicago & N. W. R. Co. 128 Iowa, 365, 103 N. W. 985; Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463; Jones v. Shaw, 16 Tex. Civ. App. 290, 41 S. W. 690; Galveston, H. & S. A. R. Co. v. Pitts, — Tex. Civ. App. —, 42 S. W. 255; International & G. N. R. Co. v. Mills, 34 Tex. Civ. App. 127, 78 S. W. 11; Hugins v. Southern R. Co. 148 Ala. 153, 41 So. 856; Taylor v. Monroe, 43 Conn. 36.

Any appliance which the jury may find, as matter of fact, to serve the purpose of the act and accomplish that which was intended by Congress, is a sufficient compliance with the act.

United States v. Boston & M. R. Co. 168 Fed. 148.

Messrs. Oscar Cain and Phillip J. Doherty, for the United States:

The cars in controversy were not used upon street railways within the meaning of the Safety Appliance Act.

Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. Central of Georgia R. Co. 167 Fed. 893; United States v. Atchison, T. & S. F. R. Co. 220 U. S. 37, 55 L. ed. 361, 31 Sup. Ct. Rep. 362; Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 10, 51 L. ed. 681, 685, 27 Sup. Ct. Rep. 407; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822; Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501, 46 L.R.A.(N.S.) 385, 33 Sup. Ct. Rep. 890; Hannah v. Metropolitan Street R. Co. 81 Mo. App. 78; Moore v.

Federal and state railway safety appliance acts, see notes to Chicago, M. & St. P. R. Co. v. United States, 20 L.R.A.(N.S.) 473, and Lake Shore & M. S. R. Co. v. Benson, 41 L.R.A.(N.S.) 49. L.R.A.1917A.

As to applicability of commerce clause or statutes thereunder to street railways or to interurban roads, see note to Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 46 L.R.A.(N.S.) 365.

American Transp. Co. 24 How. 1, 16 L. ed. 674; Union Mut. Acci. Asso. v. Frohard, 134 Ill. 228, 10 L.R.A. 383, 23 Am. St. Rep. 664, 25 N. E. 642; Ericsson v. Brown, 38 Barb. 390.

The court did not err in rejecting the testimony of experts that the depression or opening in the end sill would afford as much protection to men going between the ends of cars as the grab iron or handhold.

Baldwin v. St. Louis, K. & N. R. Co. 68 Iowa, 37, 25 N. W. 918; Brink's Chicago City Exp. Co. v. Kinnare, 168 Ill. 643, 48 N. E. 446; Illinois C. R. Co. v. People, 143 Ill. 434, 19 L.R.A. 119, 33 N. E. 173.

Ross, Circuit Judge, delivered the opinion of the court:

The plaintiff in error was, at the times here in question, a common carrier engaged in interstate commerce by means of an electric railroad between the city of Spokane, in the state of Washington, and Cœur d'Alene city, in the state of Idaho, and for alleged violations of the act of Congress known as the Safety Appliance Act, approved March 2, 1893 (chapter 196, 27 Stat. at L. 531, Comp. Stat. 1913, § 8605), as amended April 1, 1896 (chapter 87, 29 Stat. at L. 85, Comp. Stat. 1913, § 8610), and as further amended March 2, 1903 (chapter 976, 32 Stat. at L. 943, Comp. Stat. 1913, § 8613), the present action was brought by the government, the complaint in which action contains 15 counts, the first 12 of which allege in substance that the violation of the statute consisted in hauling over its road certain designated cars which were not provided with the grab irons or handholds required by the statute, and the last 3 of which alleged in substance the violation of the statute to have consisted in hauling over its road certain designated cars not provided with the automatic couplers thereby required. The case was tried with a jury, which returned a verdict against the railroad company, upon which judgment was given against it, resulting in the present writ of error in its behalf.

It is first urged that the cars in question do not come within the provisions of the Safety Appliance Act, and, second, that the trial court erred in refusing to permit the railroad company to introduce certain testimony, and in its instructions to the jury.

The first point thus urged is based upon the exception contained in § 1 of the act of March 2, 1903, excepting from the operation thereof cars "which are used upon street railways." The section reads as follows: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, L.R.A.1917A.

that the provisions and requirements of the act entitled, 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes and Their Locomotives with Driving-wheel Brakes, and for Other Purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

These, among other, facts appear from the undisputed evidence:

In addition to its interurban lines, one of which extends from Spokane to Cœur d'Alene, a distance of about 40 miles, the plaintiff in error owns the street railway system in Spokane. The interurban line extending to Cœur d'Alene is of standard gauge and of standard weight of rails. The superintendent of that system testified, among other things, as follows: "My superintendency is over the interurban lines. I do not control the street railway lines. On the interurban lines tickets are sold for particular stations the same as a railroad. We handle baggage for our passengers. Our trains are made up according to standard railroad rules, with markers to designate the trains, and are run on schedules and by train orders. The employees who are engaged in the street car service do not have anything to do with the operation of the interurban service. They use the same tracks, however, that come from the freight depot to the passenger terminal in the heart of the city. We do not take passengers on the interurban trains within the city limits exclusively. We receive passengers at points within the city limits for transportation outside, and drop passengers on interurban trains at various points within the

city, but within the city limits we do no strictly street car business."

The trains of the company in which were the cars here in question leave its passenger depot near the center of Spokane, and go out over the tracks of the company's street railroad system for a little over a mile to the yards of the company, where they take the direct line to Cœur d'Alene, which is on the company's private right of way. Those of the cars in question which are mentioned in the first 12 counts of the complaint are large passenger coaches having no grab irons or handholds on the ends of the cars; instead, on their ends there is a radial coupler and a heavy steel sill or buffer, round on the corners, in which buffer or sill, on the passenger coaches, there are, on each side of the coupler, openings measuring from 18 to 22 inches in length, and from 2½ to 3 inches of clearance, but on the baggage and mail cars the sill or buffer is solid.

The three cars mentioned in the last three counts of the complaint, and which it appears were brought into the interurban service because of a pressure of traffic, were street railway cars which not only had no automatic couplers thereon, but, because of their small size, were incapable of having them.

There is testimony to the effect—and none to the contrary—that the sharpness of the curves on the street car line is such as to make it impossible to run cars over that line having grab irons or handholds on the end of the cars. Contending that to be true, it is no answer to the government's action if the act of Congress in question is applicable to the company's interurban lines. To hold with the plaintiff in error on this point would be to hold that, because the company uses the tracks of its street car lines for a mere trifle of the distance between its terminal points in order to reach the center of the city of Spokane, its entire interurban line, which has all of the characteristics in build and operation of a standard steam road, is not subject to the Safety Appliance Act. That would indeed be a case of "the tail wagging the dog."

We are of the opinion that the act of Congress does not admit of such an interpretation, especially in view of the manifest purpose of the legislation. The exception from its operation of cars "used upon street railways," we think means, if not those solely used on street railways, at least such as are used on such railways in street railway traffic, which was not the case here, according to the testimony of the company's own witnesses.

In *Moore v. American Transp. Co.* 24 How. 1, 16 L. ed. 674, the Supreme Court, L.R.A.1917A.

in speaking of that provision of the Act of March 3, 1851, chap. 43, 9 Stat. at L. 635, Comp. Stat. 1913, § 8020, entitled, "An Act to Limit the Liability of Shipowners, and for Other Purposes," which declared: "This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation," said: "This word 'used' means, in the connection found, 'employed,' and doubtless, in the mind of Congress, was intended to refer to vessels solely employed in river or inland navigation."

The use of such interurban cars as we have here, engaged as they are in interstate commerce, for a comparatively short and relatively inconsiderable distance on a street railway in order to reach the city terminus of the company, handling no street car business, can hardly be considered an intermingling of traffic; but, if so, it would, in our opinion, no more make inapplicable the Safety Appliance Act to the interurban line than does the intermingling of intrastate with interstate traffic defeat the power of Congress over the latter. See *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822.

We also regard as tending to support our conclusion in this respect the decision of the Supreme Court in the case of *United States v. Atchison, T. & S. F. R. Co.* 220 U. S. 37, 55 L. ed. 361, 31 Sup. Ct. Rep. 362, where that court had under consideration that provision of the Act of March 4, 1907 (34 Stat. at L. 1415, 1416, Comp. Stat. 1913, §§ 8677, 8678), making it unlawful for common carriers subject to the act to permit any employee subject thereto to be on duty for a longer period than sixteen consecutive hours, or after that period to go on duty again until he has had at least ten consecutive hours off duty, or eight hours after sixteen hours' works in the aggregate, with certain exceptions not necessary to be mentioned, in which case the court said: "A trifling interruption would not be considered, and it is possible that even three hours by night and three hours by day would not exclude the office from all operation of the law, and to that extent defeat what we believe was its intent."

The rulings and instructions of the court below remain to be considered. During the trial the witness Robertson testified, among other things, that he had been employed for twenty-three years as brakeman, switchman, yardmaster, and conductor, and had had a great deal of experience in coupling and uncoupling cars, and was familiar with

the types of handholds ordinarily provided on steam railroads for the security of men going between the cars, and that generally there is uniformity in such appliances and the place of their location; that, "where there is a handhold on passenger coaches on steam roads, it is about midway from the bottom of the wooden sill to the bottom of the car above the track. The handholds that are used on steam railroads are about the height of my shoulder above the track. I am 5 feet 10 or 11 inches, and the handhold would strike me just about the shoulder. I have examined the passenger coaches on the Spokane & Inland Empire Railroad Company with reference to the openings which it claims is a handhold in the buffer or sill of their cars."

The record proceeds: "Thereupon counsel for defendant asked the witness then on the stand this question: 'What would you say of them as a safe and proper appliance, one that would tend to preserve men from injury who might have to go between the cars for any purpose?' Plaintiff's counsel thereupon objected to the question, stating that, 'the question is, is it a handhold?' The court sustained the objection 'on the ground that it invades the province of the jury;' that defendant was seeking to prove by the witness the very question that the jury were to decide. Counsel for defendant thereupon made the following offer of proof: 'Now, if your Honor please, I offer to prove by the witness on the stand, and I will call other witnesses, and particularly experienced railroad men, of years of experience, to prove by him and by them, by questions and answers addressed to them, that the opening in the beam or buffer of these electric cars is intended to subserve and does subserve the same purpose as the round iron appliance that is prescribed by the rules of the Interstate Commerce Commission at the present time, and is in use on steam railroads; that it is a better appliance than these are for the purpose of protecting men from injury who have to go between the cars. I offer to prove that and to ask questions of this witness to that effect.' Thereupon counsel for plaintiff objected to the offer, and the court sustained the objection upon the ground that it was not a question for expert testimony, but was a matter of common knowledge"—to which ruling the defendant excepted.

Another witness, Arlington Mahan, who was general foreman in the shops of the plaintiff in error, testified, among other things, as follows: "I am familiar with the passenger coaches of that company that have a buffer at the end and an opening in it. I was in the employ of the company at the time these cars or some of them were

purchased. The openings were in the beam or sill when the cars were received. There were handholds up and down on the sides of the cars when they were received. There were none on the ends of the cars in the place where they are put on steam cars. I know of no reason for the openings on top of the angle iron on that beam. The men use them for grab irons whenever they have occasion to couple or uncouple cars, or go between them. I have had occasion to couple and uncouple cars in that yard and other yards."

The record proceeds:

"Thereupon counsel for defendant asked the following question: 'Does that opening in the top of the sill serve the same purpose, and is it as well fitted for the purpose of protecting the lives and limbs of men who have occasion to go between the cars in the exercise of their duties as the form of grab irons that is used on steam cars, that is brought below the end of the car?'"

"Counsel for plaintiff objected to the question, and the court sustained the objection on the following grounds: 'I am of the opinion that this is one of the cases where witnesses must state facts, and not conclusions. Whether that is a reasonably safe appliance is within the knowledge of the ordinary man and no special experience is required.'"

"Thereupon defendant asked and was allowed an exception to the ruling. The witness further testified: 'I am familiar with the form of grab iron or handhold that is used on the passenger cars of steam railroads. It is attached to the end of the car, one on each corner, and projects downward. The Interstate Commerce Commission requires that they shall have a clearance of at least 2 inches, preferably 2½, below the car sill. The handle runs different lengths. The Interstate Commerce Commission requires that it shall be not less than 16 inches inside clearance. There is one of these on each side of the drawbar. The opening in the angle iron in that buffer on the Spokane & Inland Empire cars runs in length from 16 to 24 inches. It is from 2½ to 2¾ inches wide, and there is one of such openings on each side of the drawbar on both ends of the car, making four in all. It would be impossible to put on the passenger cars of the defendant such grab irons as are in use on the cars of steam railroads because, in going around the curves on the city streets, the coupler would strike a brake.'

"And thereupon the following question was asked and the following matters occurred:

"In your opinion, Mr. Mahan, and ob-

servation of these cars, is the opening in the angle bar a better and safer appliance for the safety of persons having occasion to go between the cars in the discharge of their duties than those that are used upon steam railroads.'

"Mr. Doherty: 'The question is objected to.'

"The court: 'I will sustain the objection.'

"Mr. Graves: 'To which we take an exception.'

"Mr. Graves: 'I now offer to prove by this witness and also by other witnesses called, with your Honor's permission, that the opening in this angle iron or sill or buffer is a better and safer appliance, better protection, greater protection to the men who have occasion to go between the cars than any form of grab iron or handhold that is known in railroad circles.'

"Mr. Doherty: 'I object to that.'

"The court: 'Objection sustained on the ground that it is a question for the jury.'

"Mr. Graves: 'To which the defendant excepts.'

In its instructions to the jury regarding this matter, the court told them that the act of Congress relative to safety appliances provided that railroad cars "used in interstate commerce shall be provided with secure grab irons or handholds on the ends and sides of each car for greater safety to men in coupling and uncoupling cars," and instructed them as follows: "The purpose of the act is to afford greater security to men coupling or uncoupling cars by reason of the presence of grab irons or handholds, than would be possible if there were nothing of the sort on the ends of the cars. If you should find from the evidence in this case that although there might not have been on the ends of the cars referred to anything which would be known technically as grab irons or handholds, yet if there were upon the ends of such cars an appliance which could be used as a grab iron or handhold, and which would afford as much se-

curity to men coupling or uncoupling the cars as would be afforded by having what would be technically known as grab irons or handholds on the ends of the cars, then your verdict should be for the defendant. The law does not require any particular kind of grab iron or handhold to be placed upon the end of the car, but only requires that some such appliance shall be placed there which will afford the person coupling or uncoupling cars equal security with that which would be obtained by the method I have given. Gentlemen, you have heard the testimony in this case, and you have examined the handholds in question, and it is for you to say from that testimony and from your personal examination of the cars whether the appliance provided by this company complies with the act of Congress; in other words, whether it affords that safety and protection to employees which the law contemplates and requires. The burden is upon the government to establish its case by a preponderance of the testimony. If, from a preponderance of the testimony offered herein, you are satisfied that the defendant has not furnished grab irons or handholds as I have defined these terms to you within the meaning of the law, you will find the defendant guilty on the first twelve counts."

We are of the opinion that the plaintiff in error has no valid ground of objection to these instructions, and agree with the trial judge that the question as to whether the openings in the buffer on the ends of the cars afford the security intended by the act of Congress was not the subject of expert testimony, and that the personal inspection of such openings by sensible jurors was a safer guide to the truth in regard to the matter than the mere opinion of witnesses.

The judgment is affirmed.

Affirmed by the Supreme Court of the United States, June 12, 1916 (241 U. S. 344, 50 L. ed. 1037, 36 Sup. Ct. Rep. 668).

IDAHO SUPREME COURT.

HARDY L. ALLEN, Appt.,

v.

JOHN KITCHEN, Resp't.

(16 Idaho, 133, 100 Pac. 1052.)

Land contract — description — sufficiency.

1. An executory contract for the sale of real estate, describing the property to be conveyed as "lots 11, 12, and 13, in block

13, Lemp's addition," and which contract fails to designate the state, county, or civil or political district in which the land is situated, and fails to disclose the municipal or other subdivision to which the tract of land is an "addition," is an insufficient and void description, and cannot be supplied or aided by parol evidence.

For other cases, see Deeds, II. o; Evidence, VI. j, in Dig. 1-52 N. S.

Note.—For effect of the Statute of Frauds upon the power of equity to reform a contract, see annotation following this case, post, 571.

Parol evidence — land contract — description.

2. In an action for the specific performance of an executory contract for the sale of real estate, parol evidence is admissible for the purpose of applying the description contained in the writing in order to show that there are lands of the name and description contained in the writing; but such evidence is not admissible for the purpose of supplying or adding to the description, in order to make it comply with the requirements of the Statute of Frauds.

For other cases, see Evidence, VI. j, in Dig. 1-52 N. S.

Same — extrinsic evidence — distinction.

3. In actions for the specific performance of executory contracts for the sale of real estate, the distinction should always be clearly drawn between the admission of oral extrinsic evidence for the purpose of identifying the land described in the writing, and applying the description therein contained, and that of supplying and adding to a description insufficient and void on its face.

For other cases, see Evidence, VI. j. in Dig. 1-52 N. S.

Land contract — incomplete description — reformation.

4. Courts of equity have the power and jurisdiction to so reform executory contracts for the sale of real estate as to require and compel them to speak the truth in a matter of description, where it is clearly established that the instrument on its face speaks falsely; but a court of equity has no power or jurisdiction, under the pretense of reformation or otherwise, to so construct or reconstruct such an agreement as to add to the description, or make a complete contract out of one which, on its face, was incomplete or insufficient to meet the requirements of the Statute of Frauds.

For other cases, see Reformation of Instruments, in Dig. 1-52 N. S.

Equity — legal rules.

5. Courts of equity can no more disregard statutory requirements and provisions than can courts of law, and whenever the rights or the situation of parties are clearly defined and established by the provisions of the statute, equity has no power or jurisdiction to change or unsettle those rights or that situation; but in all such cases the maxim "*Æquitas sequitur legem*" is applicable.

For other cases, see Equity, in Dig. 1-52 N. S.

Statute of Frauds — incomplete contract — status.

6. Where the Statute of Frauds requires certain contracts to be in writing, and prohibits oral evidence to establish such contracts, they must be deemed, both in law and equity, never to have been completed and consummated until reduced to writing and subscribed by the party to be bound, as required by the statute. In such case the law views the transaction as incomplete, L.R.A.1917A.

and that the assumed contract has never been consummated.

For other cases, see Contracts, I. e, in Dig. 1-52 N. S.

Executory contract — reformation.

7. Courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration, or description that has been inserted therein through deception, fraud, or mutual mistake, and to make its statements speak the truth as it was intended to insert it in the instrument. On the other hand, courts of equity have no power or jurisdiction to construct or reconstruct an executory contract for the parties, or to insert therein a new and essential element, or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding.

For other cases, see Reformation of Instruments, in Dig. 1-52 N. S.

(March 20, 1909.)

APPEAL by plaintiff from a judgment of the District Court for Ada County dismissing the complaint in a suit for the reformation and specific performance of a contract for the sale of real estate. Affirmed.

The facts are stated in the opinion.

Mr. J. C. Johnston, for appellant:

The contract of sale was sufficient under the Statute of Frauds without any reformation.

Bogard v. Barhan, 52 Or. 121, 132 Am. St. Rep. 676, 96 Pac. 673; Lente v. Clarke, 22 Fla. 515, 1 So. 149; Eggleston v. Wagner, 46 Mich. 610, 10 N. W. 37; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Barry v. Coombe, 1 Pet. 640, 7 L. ed. 295; Nichols v. Johnson, 10 Conn. 192; Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; Ryan v. United States, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913; White v. Hermann, 51 Ill. 243, 39 Am. Dec. 543; Miller v. Campbell, 52 Ind. 125; Ross v. Allen, 45 Kan. 231, 10 L.R.A. 835, 25 Pac. 570; Henderson v. Perkins, 94 Ky. 207, 21 S. W. 1035; Voorheis v. Eiting, 15 Ky. L. Rep. 161, 22 S. W. 80; Swallow v. Strong, 83 Minn. 87, 85 N. W. 942; Black v. Crowther, 74 Mo. App. 480; Ryan v. Davis, 5 Mont. 505, 6 Pac. 339; Barton v. Patrick, 20 Neb. 654, 31 N. W. 370; Lippincott v. Bridgewater, 55 N. J. Eq. 208, 36 Atl. 672; Richards v. Edick, 17 Barb. 260; Falls of Neuse Mfg. Co. v. Hendricks, 106 N. C. 485, 11 S. E. 568; Humbert v. Brisbane, 25 S. C. 506; Hitchcock v. Southern Iron & Timber Co. — Tenn. —, 38 S. W. 588; Watson v. Baker, 71 Tex. 739, 9 S. W. 867; Morrison v. Dailey, — Tex. —, 6 S. W. 426; 29 Am. & Eng. Enc. Law, 2d ed. 866.

Parol evidence may be resorted to for the purpose of identifying the description with its location upon the ground.

Plant v. Bourne [1897] 2 Ch. 281, 66 L. J. Ch. N. S. 643, 76 L. T. N. S. 820, 46 Week. Rep. 59; *Lente v. Clarke*, 22 Fla. 515, 1 So. 149; *Bulkley v. Devine*, 127 Ill. 406, 3 L.R.A. 330, 20 N. E. 16; *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355; *Wilson v. Riddick*, 100 Iowa, 697, 69 N. W. 1039; *Giles v. Swift*, 170 Mass. 461, 49 N. E. 737; *Tice v. Freeman*, 30 Minn. 389, 15 N. W. 674; *Black v. Crowther*, 74 Mo. App. 480; *Singleton v. Hill*, 91 Wis. 51, 51 Am. St. Rep. 868, 64 N. W. 588; 29 Am. & Eng. Enc. Law, 2d ed. pp. 866, 867; *Robeson v. Hornbaker*, 3 N. J. Eq. 60; *Dougherty v. Chesnutt*, 86 Tenn. 2, 5 S. W. 444; *Price v. McKay*, 53 N. J. Eq. 588, 32 Atl. 130.

It is sufficient if, upon the whole instrument, it can be fairly inferred in what state or county the land lies.

Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; *Scanlan v. Geddes*, 112 Mass. 15; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Quinn v. Champagne*, 38 Minn. 322, 37 N. W. 451; *Price v. McKay*, 53 N. J. Eq. 588, 32 Atl. 130; *Robeson v. Hornbaker*, 3 N. J. Eq. 60; *Dougherty v. Chesnutt*, 86 Tenn. 7, 5 S. W. 444; 29 Am. & Eng. Enc. Law, 2d ed. 868.

The description was subject to reformation.

Leitensdorfer v. Delphy, 15 Mo. 160, 55 Am. Dec. 137; 24 Am. & Eng. Enc. Law, 2d ed. pp. 648, 649, 654; *Bonbright v. Bonbright*, 123 Iowa, 305, 98 N. W. 784; *Penfield v. New Rochelle*, 18 App. Div. 83, 45 N. Y. Supp. 460; *Morrison v. Collier*, 79 Ind. 417; *Creigh v. Boggs*, 19 W. Va. 240; *Murphy v. Rooney*, 45 Cal. 78; *West v. Suda*, 69 Conn. 60, 36 Atl. 1015, 1 Am. Neg. Rep. 578; *Reese v. Wyman*, 9 Ga. 430; *Stricker v. Tinkham*, 35 Ga. 177, 89 Am. Dec. 280; *Christensen v. Hollingsworth*, 6 Idaho, 87, 96 Am. St. Rep. 256, 53 Pac. 211; *Sanner v. Smith*, 51 Ill. App. 671; *Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607; *Hendrickson v. Ivins*, 1 N. J. Eq. 562; *Hebler v. Brown*, 18 Misc. 395, 41 N. Y. Supp. 441; *Schotte v. Meredith*, 197 Pa. 496, 47 Atl. 844; *Lough v. Michael*, 37 W. Va. 679, 17 S. E. 181, 470; 6 Pom. Eq. Jur. § 766; *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731, 26 S. E. 885; *Fowler v. Fowler*, 204 Ill. 82, 68 N. E. 414; *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473; *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286; *Scarlett v. Stein*, 40 Md. 512.

The Statute of Frauds does not interfere with the power of the courts of equity to reform deeds or other instruments in which the parties intended to comply with the L.R.A.1917A.

statute, and were prevented by fraud, accident, or mistake.

Blackburn v. Randolph, 33 Ark. 119; *Johnson v. Johnson*, 8 Baxt. 261; *Durham v. Taylor*, 29 Ga. 166; *Rider v. Powell*, 4 Abb. App. Dec. 63; *Morrison v. Collier*, 79 Ind. 417; *Dutch v. Boyd*, 81 Ind. 146; *Pom. Spec. Perf. of Contr. § 261*; 6 Pom. Eq. Jur. §§ 682, 858, 859; *Brazoria County v. Youngstown Bridge Co.* 25 C. C. A. 306, 52 U. S. App. 6, 80 Fed. 10; *Hedges v. Dixon County*, 150 U. S. 192, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *White v. Port Huron & M. R. Co.* 13 Mich. 356; *Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 960.

Messrs. K. I. Perky and John F. MacLane, for respondent:

Contracts are insufficient under the Statute of Frauds, where they fail to identify the city or county in which the property is situated; and the deficiency cannot be supplied by parol evidence.

Hartshorn v. Smart, 67 Kan. 543, 73 Pac. 73; *Repetti v. Maisak*, 6 Mackey, 366; *Waters v. Ritchie*, 3 App. D. C. 379; *Holms v. Johnston*, 12 Heisk. 155; *Clark v. Chamberlin*, 112 Mass. 19; *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853.

The contract, being void under the Statute of Frauds, could not be reformed.

Davis v. Ely, 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. E. 138; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

Allshie, J., delivered the opinion of the court:

This action was instituted in the district court for the reformation and specific performance of a contract for the sale of real estate. The trial court sustained a demurrer to plaintiff's amended complaint, and entered judgment of dismissal and for costs against the plaintiff.

The contract upon which the action was brought is as follows:

This article of agreement, made and entered into this 21st day of May, 1908, by and between H. L. Allen, party of the first part, and John Kitchen, party of the second part, witnesseth: That the party of the first part has this day bargained to sell and convey to party of the second part, with good and sufficient abstract of title to the following described property, to wit: Lots 11, 12, and 13, in block 13, Lemp's addition. Consideration, seventeen hundred dollars (\$1,700). In consideration of the above, and in payment of the same, party of the second part has this day bargained to sell and convey to party of the first part by good and sufficient title, with good abstract showing the same, the following described property, to wit: Lot 27, Syringa

Park addition, consisting of 5 acres. Consideration, one thousand dollars (\$1,000). All papers to be completed and exchanged, and all sums and differences due and payable must be settled on or before the 28th day of May, except as otherwise agreed in above contract.

First party, H. L. Allen.

Second party, John Kitchen.

F. M. Eby, witness.

It is first contended that this contract is sufficient to admit oral evidence showing the location of the lots and property intended to be conveyed. It will be observed that the lots to be sold and transferred by the party of the first part are described as "lots 11, 12, and 13, in block 13, Lemp's addition," and that the property to be sold and transferred by the second party is described as "lot 27, Syringa Park addition, consisting of 5 acres." The contract nowhere shows or discloses the city, town, county, or state in which it was executed; nor does it show the city, county, state, or other civil or political division or district in which any of the property is situated. It is contended, however, by counsel for appellant, that parol evidence is admissible for the purpose of completing the description, so as to show the location of Lemp's addition and of Syringa Park addition. It is argued with much skill and ingenuity by appellant's counsel that oral evidence is admissible for the purpose of showing the city, town, or village to which these tracts of land are additions. Counsel has devoted a great deal of labor in collating the decisions upon the question, but our examination of them fails to disclose a case identical with this.

Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536, was a case where the contract consisted of a number of letters. The specific description of the property running through all these letters was given as the "Snow farm." The court held that where the land sold was so described, and it appeared that it was commonly designated and known throughout the neighborhood where situated by such a name, extrinsic evidence was admissible to "apply the description" to the land intended to be sold. It should not be overlooked, however, that all the letters in that case disclosed that the land was situated in Clay county, Kansas, and that all the letters written by the owner of the land were written from Clay Center, Clay county, Kansas. The county and state in which the property was situated was therefore designated and established by the several communications constituting the contract. Oral evidence was therefore unnecessary to complete the description, but was rather L.R.A.1917A.

necessary for the purpose of identifying and applying the description to the tract of land described by the writing.

In *Dougherty v. Chesnutt*, 86 Tenn. 1, 5 S. W. 444, the supreme court of Tennessee held a lease valid where the property let was described as follows: "All the right to quarry marble on the farm of Henderson Fudge, known as 'Rose Hill.'" It is also to be noted in this case that the instrument recited on its face that the lessor, the owner of the property, lived in Hawkins county, Tennessee, and the court observed that from such recital "it will reasonably be inferred that the lands lay in that county." Another thing that should not be overlooked in the case is that the lessee was let into possession of the property under this lease, and occupied and used the property for a considerable length of time under and in compliance with the lease. These facts would tend to raise an estoppel, and remove the contract from the bar of the Statute of Frauds. The syllabus to the case aptly states the exact points upon which the decision turned, as follows: "Parol evidence is admissible to apply, not to supply, a description of lands in a lease or deed; e. g., it is competent in this case to show by parol that there was a 'farm of Henderson Fudge' which was generally 'known as Rose Hill,' and to point it out."

Counsel places great reliance on the case of *Robeson v. Hornbaker*, 3 N. J. Eq. 60. In that case the New Jersey chancery court decreed specific performance of a contract which failed to state in what township, county, or state the lots were situated. It rested its decree, however, upon two statements of fact that appeared in the contract as parts of the description or identification of the property. One was reference to an ancient and well-known survey, commonly designated as "Fenton and Lofter's survey," and the other was reference to a stream known as "Brasscastle brook" at a point "where the small stream puts in from the meadow." Concerning this description the court said: "In this description there is a guide; in the first place, the Brasscastle brook, which is a stream well known in that part of the country where the parties reside. It is evident from the agreement that it is a watercourse commanding a good head of water. It is a natural object, about which there can be no dispute or mistake. Then, again, the line of the property intersects the old line of the Fenton and Lofter's surveys, and makes that line a part of its boundary. These ancient surveys are in many parts of the country as well understood and known as the lines of townships or counties. They constitute the most notorious and safe

boundaries of property, especially woodland, as I take the present to be. With these designations of locality in the description (to say nothing of others) I see no propriety in turning the party out of court on a demurrer." It is obvious, therefore, that the New Jersey case does not support the description contained in the contract under consideration. In that case the property was tied to well-known natural objects and permanent monuments, one of which was a well-known public survey, and the other a natural stream, both probably well known throughout the state of New Jersey. This is by no means improbable, when we remember that the entire state, with its 7,800 square miles, is not as large as many counties in Idaho.

In *Lente v. Clarke*, 22 Fla. 515, 1 So. 149, the Florida supreme court held the following description sufficient: "My forty near the Garrison lands, in Hernando county;" and, after reviewing a great many cases dealing with descriptions and analyzing the particular description involved in that case, the court said: "No one can for a moment doubt that by the expression, 'my forty near the Garrison lands, in Hernando county,' both parties understood and were dealing as to a single half of a half of a quarter section, claimed to be owned by the intestate, Thomas W. Clarke, and lying near lands known as the 'Garrison lands' in that county. It must be assumed, looking at the terms of the contract, not only that they both had in view and understood that they were dealing as to, and contemplated a particular piece of land, but that they are lands in the county known as the 'Garrison lands,' and that both parties had these lands in their minds as the lands near which the intestate's 'forty' was situated. The contract identifies and furnishes the means of finding the land." Concluding the opinion, the court said: "If it be that the intestate owned another forty near the Garrison lands, and consequently answering the same description, whereby the sufficiency of the contract as identifying a particular piece of land would be destroyed, the defendant can develop the fact in her answer." In the Florida case the county and state were designated, and the description was confined to a 40-acre tract,—presumably a forty as designated by the government survey,—and it was likewise designated as a forty owned and possessed by the vendor at the time the agreement was made, and situated in close proximity to real estate known as the "Garrison lands." As extreme as this case seems, still it falls short of supporting the description involved in the case at bar.

In *Price v. McKay*, 53 N. J. Eq. 588, 32 L.R.A.1917A.

Atl. 130, the court held a receipt dated at Jersey City, and describing the property as a lot on Bramhall avenue, No. 470, a sufficient description. In support of this the court referred to the Massachusetts cases, where it is held that the place of the date of the contract to convey real estate affords a presumption that the estate is situated in that place, and cited *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110. The chancellor, however, stated that he was willing to rest the decision upon the description contained in the receipt, freed from any such presumption. This description is the nearest approach to the case at bar to which our attention has been called. The chancellor in that case, by a circuitous course of reasoning, said: "In the first place, the receipt indicates the vendor of the property—the defendant—and the lot purchased is, therefore, a lot owned by the defendant. Next, it is a lot, No. 470 Bramhall avenue, owned by her, and these two marks are together sufficient to locate the property." This reasoning proceeds upon the fundamental basis that Bramhall avenue, independent of any city or municipality, was a well-known thoroughfare or natural object and permanent monument, and that any street number tied to that avenue would become definite and certain. There can be no doubt as to the conclusion reached in that case, if it be once conceded that Bramhall avenue was such a natural and permanent landmark and thoroughfare as it is assumed to be by the opinion of the court.

We have reviewed the foregoing cases for the reason that they are by far the strongest cases that appellant has cited in support of his position. Many other cases are cited, but none, perhaps, so extreme as these. On the contrary, the great majority of courts have held that executory contracts and agreements for the sale of real estate must be complete and speak in definite terms of all the conditions, terms, and descriptions necessary to constitute the contract.

In *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853, the supreme court of California, as late as 1902, in considering the sufficiency of a description contained in a memorandum, said: "An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land

about which the parties negotiated, and supplying a description thereof which they have omitted from the writing."

In 1903 the supreme court of Kansas, in *Hartshorn v. Smart*, 67 Kan. 543, 73 Pac. 73, had under consideration a description reading as follows: "The southeast of twenty-five, nine, Kingman, Kansas." This the court held to be an insufficient description, and that parol evidence was inadmissible to aid or help out the description.

In *Repetti v. Maisak*, 6 Mackey, 366, the supreme court of the District of Columbia had under consideration a description of property in the city of Washington, reading as follows: "Part of lots 1 and 2 in square, south of square 1036." The court held this description insufficient and void, and said: "In a suit for specific performance of a contract to convey real estate, the agreement must be made out fully in writing. Parol evidence cannot be resorted to, to supply any of its terms." To the same effect is *Clark v. Chamberlin*, 112 Mass. 19; *McConnell v. Brillhart*, 17 Ill. 361, 65 Am. Dec. 667; *Holms v. Johnston*, 12 Heisk. 155, and many other authorities that might be cited.

This court has uniformly held that such a contract must speak for itself, and that parol evidence will not be admitted to supply any of its terms. In *Kurdy v. Rogers*, 10 Idaho, 416, 423, 79 Pac. 195, 196, this court said: "The contract must speak for itself; and, if it is sufficiently definite in its terms to enlighten the court of the intent of the parties, it will be enforced. Oral evidence is not admissible to make a contract of this character or supply any of its terms or conditions, for the reason that it would open the door to all manner of fraud and deception." The latter case has been cited and approved and followed by this court in *Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111, and *Sponberg v. First Nat. Bank*, 15 Idaho, 671, 99 Pac. 712.

It is contended, however, that the latter case is authority for the admission of oral evidence to supply the defects in the description in the case at bar. In that case the letter constituting the memorandum was written under the letterhead of the First National Bank of Montpelier, Idaho, and was dated at Montpelier, and was signed by the cashier of the bank in his official capacity, and referred to and described the property as the "side room in our bank." This court held that oral evidence was admissible for the purpose of identifying the property described as the "side room in our bank." The only purpose of such evidence was that of identification. The bank referred to was the First National Bank of Montpelier, Idaho, and was of neces-

sity located at Montpelier. It was a First National Bank, and, of course, as such had but one banking house. The only thing necessary, therefore, was to identify the particular lot and block on which the First National Bank of Montpelier was located. It was clear from the description itself that there could only be one such property at Montpelier. No such question was involved as that presented here, and none of the cases cited in support of that holding go to the extent claimed in this case, nor do they support the proposition that parol evidence can be admitted for the purpose of supplying an insufficient description.

In the case at bar, there is no reference to any record or external or extrinsic description from which a complete description could be had, and no natural object or permanent monument is referred to in the writing, nor is any well and generally known point, place, or locality described or used as a tie. The evidence to be introduced would not be that of identification of a description, good on its face; but it would be for the purpose of supplying, completing, and perfecting a description on its face insufficient and incapable of application. The name of the city, town, or village, and also the county and state, must be supplied by extrinsic evidence. If the writing contained anything from which the name of the civil or political subdivision or municipality to which these tracts are additions could be ascertained, then oral evidence would be admissible to apply the description contained in the writing to the lands as marked and bounded either by recognized legal subdivisions or by metes and bounds. We are in full accord with the views expressed in *Sponberg v. First Nat. Bank*, *supra*, in that respect. The distinction, however, should always be clearly drawn between the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property, and that of supplying and adding to a description insufficient and void on its face.

The complaint in this case recognized the fact that the description of the property as contained in the contract might be, and probably was, insufficient, and the plaintiff therefore sought to have the contract reformed, so that the one description would read as follows: "Lots 11, 12 and 14, in block 13, in Lemp's addition to Boise City, Idaho, as shown by the recorded plat on file"—and the other description read: "Lot 27, in Syringa Park addition, in Ada county, Idaho, as shown by the recorded plat hereof on file in the office of the recorder of deeds, Ada county, Idaho." It is alleged in the complaint that the contracting par-

ties consulted maps and plats and submitted the same to the scrivener who drew up the contract, and instructed him to take the description from the maps, and that by neglect, mistake, and oversight he omitted a part of the description, as appears from the contract. The question arises as to whether or not a contract of this kind within the Statute of Frauds (§ 6007, of the Revised Codes) can be so reformed by a court of equity as to make a good and complete description out of an insufficient and void description. It is not a question here of making a contract speak the truth which by its terms speaks untruthfully, or, in other words, of making a contract express the true intent of the contracting parties where in fact it expresses on its face something they did not intend or agree upon. There is no contention made here that the contract in any way speaks untruthfully. The complaint is that it does not speak the whole truth. This is the very thing the Statute of Frauds is enacted to guard against. It requires the contract to be in writing, and prohibits oral evidence to establish a contract of this kind. There is no contract until it is reduced to writing as provided by law. It is not a question as to what the contract was intended to be, but, rather, was it consummated by being reduced to writing as prescribed by the Statute of Frauds? Admittedly an essential portion of the contract in this case was not reduced to writing and subscribed by the party to be bound. This case, therefore, presents the question of adding to and supplying an insufficient description, rather than that of reforming an untruthful description. If a court of equity can supply one requirement of a contract that is required by the Statute of Frauds to be in writing, it may supply another, and the logical conclusion would be that it might in the end supply all the requirements, and thereby contravene a positive statute. This cannot be done.

Courts of equity are as much bound by positive enactments of law as are courts of law. It was said by the Supreme Court of the United States in *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71: "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void, because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof." And likewise, in *Magniac v. Thomson*, 15 L.R.A.1917A.

How. 282, 14 L. ed. 696, it was said "that, wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim '*Æquitas sequitur legem*' is strictly applicable."

In *Dickinson v. Glenney*, 27 Conn. 104, the court was called upon to grant relief by reforming a deed and correcting and perfecting the acknowledgment of a married woman. The court, in considering its power to grant the relief, said: "But at the threshold of this inquiry we are met with the established doctrine that equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form without which the agreement is absolutely void, even as between the parties to it; that it will not fabricate for contracting parties those essential ingredients of a contract, without which, in the eye of the law, there subsists no valid contract whatever. In such cases the intent of parties to conform to the enactments or rules of law will not avail them, and, having fallen short of its requirements, they have consummated no agreement at all."

The case at bar differs from most of the cases to which our attention has been called by the briefs, in that there is no element of estoppel involved. Here the plaintiff has never entered into possession of the property about which he sought to contract, nor has he paid any part of the purchase price. He has not placed any improvements upon the property, nor has he been induced to act in any manner to his prejudice by reason of this contract or of the action or conduct of the defendant. Nothing appears in the case to remove it from the operation of the Statute of Frauds, or by reason of which plaintiff may invoke the doctrine of estoppel against the defendant. In fact, it does appear that neither party to the agreement ever did anything under the agreement in any manner looking to its consummation or carrying out its provisions.

Respondent argues, and cites cases to support his contention, that courts of equity cannot interpose their equitable jurisdiction for the reformation of contracts that fall within the operation of the Statute of Frauds. He contends that an executory contract for the sale of real estate cannot, in the face of the plain provisions of the Statute of Frauds (§ 6007, Rev. Codes), be reformed by a court of equity so as to render the contract enforceable after its reformation in a case where it was not enforceable before reformation. Counsel for appellant, on the other hand, contends that

such contracts are subject to reformation by courts of equity for fraud, deception, and mistake, the same as any other contracts cognizable by courts of equity.

These propositions and contentions at once present a question of equity jurisprudence on which both the courts and text-writers are at variance in their opinions. Mr. Pomeroy, Jr., author of the latest edition of Pomeroy's Equity Jurisprudence, represents what might be termed the extreme of the authorities sustaining the jurisdiction and power of equity courts "to uplift" the Statute of Frauds and reform executory contracts, so as to make them speak the intent of the parties as their minds met in the oral contract. 2 Pom. Eq. Jur. 3d ed. §§ 864-868. It is safe to say that the American authorities supporting the position that this class of contracts is subject to reformation, the same as any other contracts, rest upon and revolve about the case of *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 550, the opinion in which was written by Chancellor Kent in 1817. That was a case where a cestui que trust, after reaching majority, filed a bill in equity to compel the reconveyance of 50 acres of land that had been included by mistake in a deed of conveyance previously executed by the trustee. It seems that the trustee sold 200 acres of land, and in executing the deed by mistake included, not only the 200 acres, but an additional tract of 50 acres belonging to the cestui que trust. Chancellor Kent, considering the grounds upon which to rest a decree granting the plaintiff relief in that case, took occasion to consider at some length and in detail the equitable jurisdiction of the court of chancery to reform contracts that are within the provisions of the Statute of Frauds. This case has furnished the basis for a great deal of discussion, and, to my mind, some very illogical reasoning in support of an unlimited power in equity courts for reformation of executory contracts falling within the bar of the Statute of Frauds. The cases supporting this doctrine are to be found in the notes to §§ 865, 866, and 867 of vol. 2 of Pomeroy on Equity Jurisprudence, and notes to *Gillespie v. Moon*, 7 Am. Dec. 567, and *Page v. Higgins*, 5 L.R.A. 152 et seq.

The case of *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, perhaps represents the extreme view on the other side, to the effect that courts of equity have no jurisdiction or power to reform instruments that fall within the Statute of Frauds. That case is a very able and exhaustive review of the authorities and consideration of the principle involved, and deals with the equitable principle upon which it must of necessity rest. L.R.A.1917A.

The court there considered, reviewed, and distinguished the case of *Gillespie v. Moon*. The Massachusetts court insists that the opinion of Chancellor Kent is not authority for holding that an executory contract for the sale of real estate can be so reformed as to include within the contract property that is not described in the agreement. The view taken by the Massachusetts court in *Glass v. Hulbert* has been adopted and followed in Connecticut (*Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133), in Maine (*Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205), in New Jersey (*Miller v. Chetwood*, 2 N. J. Eq. 199), in Michigan (*Climmer v. Hovey*, 15 Mich. 18), in Oregon (*Whiteaker v. Vanschoiack*, 5 Or. 113), and in North Carolina (*Davis v. Ely*, 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. E. 138).

After a very careful examination of the many authorities dealing with this question, we are clearly of the opinion that courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration, or description that has been inserted therein through deception, fraud, or mutual mistake, and to make the statements speak the truth as it was intended to insert them in the instrument. On the other hand, we are equally satisfied that a court of equity has no power or jurisdiction to construct an executory agreement for the parties, or to insert therein new and essential elements, or matter that is required by the statute to be reduced to writing in order to make the contract valid and binding. In other words, reformation does not mean recreation. The court will not, under the guise of reforming an instrument, construct or reconstruct the instrument, so as to make it comply with the statute.

Mr. Pomeroy's discussion on this subject, when reduced to its final analysis, as contained in § 865 (vol. 2), seems to clearly recognize the force of this position. He says that all possible errors in such a contract, whether arising from mistake, surprise, or fraud, and for that reason requiring a reformation, are reducible to two general classes: First, cases where the contract by its terms includes subject matter which was not intended by the parties to come within its operation; and, second, those contracts wherein by means of the mistake, surprise, or fraud, some part of the subject matter intended to be included within the contract has been omitted. In the one case he says parol evidence is admissible to prove that the contract contains too much subject matter; in the other case, parol evidence is admissible to prove that the contract does not contain enough sub-

ject matter. These two propositions are sustained by the weight of authority.

Our examination of this matter satisfies us that the contract sued upon is not such a completed contract within the requirements of the Statute of Frauds as is capable of specific performance. We are equally clear, on the other hand, that this is not a case for reformation of a contract. The reformation sought would have the effect of

supplying the contract with a material and essential element, rather than that of correcting a mistake that has been made in the contract itself.

The judgment of the trial court must be affirmed, and it is so ordered. Costs awarded in favor of respondent.

Sullivan, Ch. J., and Stewart, J., concur.

Annotation—Effect of the Statute of Frauds upon the power of equity to reform a contract.

- I. Introductory, 571.**
- II. Part performance, 572.**
- III. Effect upon the right to reform deeds and mortgages:**
 - a. In general, 573.**
 - b. Theories, 579.**
- IV. Effect upon the right to reform contracts generally, 582.**
- V. Effect upon the right to reform contracts defectively written, 584.**
- VI. Effect upon the right to reform contracts when it is sought to specifically enforce the contract as reformed:**
 - a. In general, 586.**
 - b. View that relief cannot be granted, 587.**
 - c. View that relief may be granted, 591.**
 - d. Summary, 594.**

I. Introductory.

It is a well-settled rule that a written agreement cannot be modified by parol evidence as to prior negotiations; the writing is conclusively presumed to contain the final result of those negotiations. But an exception to this rule exists in equity in case of mistake, accident, or fraud, and parol evidence is competent to show that the writing does not represent the true agreement of the parties.¹ Accordingly equity exercises its power to reform the writing and make it conform to the true agreement. The effect which the Statute of Frauds has upon this power of equity to reform writings upon parol evidence is the subject of investigation in the present note.

It is generally held that clear and convincing evidence is necessary to

make out the mistake, accident, or fraud in order to bring the case within the exception to the parol-evidence rule. The character of evidence, however, is not covered; it is assumed that the evidence is such as to warrant equitable relief by way of reformation. This investigation is confined to determining how far the Statute of Frauds interferes with this power to reform an instrument which, by the statute, is required to be in writing.

The courts frequently reform instruments clearly required by the Statute of Frauds to be in writing, but without referring to the statute. Some courts treat such cases as authority for the proposition that the Statute of Frauds does not interfere with the power of a court of equity to reform a writing; other courts treat them as no authority on this point. The failure to consider the Statute of Frauds may be due to the fact that it has not been pleaded, which, according to some authorities, at least,² renders it unavailable to a party who might have taken advantage of it; or the case, for some reason, may have been regarded as being taken out of the operation of the statute by part performance. It is also possible that the attention of the court was not directed to the statute. These considerations have led to the conclusion that such cases are of little or no value on the point under annotation, and they have accordingly been excluded.

The note has been confined to the equitable remedy of reformation; it is not concerned with the admissibility of parol evidence, as affected by the Statute of Frauds, in other actions.

¹ See note to *Butler v. Barnes*, 12 L.R.A. 273, as to equity jurisdiction to correct mistakes in contracts.

² In *Simmons Creek Coal Co. v. Doran* (1892) 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239, where the Statute of Frauds was raised as an objection to correcting a L.R.A.1917A.

deed so as to include more land than originally embraced, the court states: "We need not enter upon a discussion in this regard here, as the deeds themselves furnish the means of making the correction, and the Statute of Frauds was not pleaded."

There are two respects in which a contract may fail to express the intention of the parties. It may be broader than was intended, including more subject matter, for example, more land, than was intended; or it may contain less subject matter than was intended. A contract which contains different subject matter than was intended is, in effect, a combination of the foregoing, for there is an inclusion of subject matter not intended and an omission of that which was intended; a reformation of such a contract involves a striking out of certain matter and the insertion of other matter. Reformation has also been attempted in a class of cases which falls within neither of the foregoing; that is, a case in which the parties have failed to perfect the writing, leaving it defective as to the entire subject matter intended to be affected thereby.

It may be stated generally at this point that there are two theories in regard to the effect of the Statute of Frauds upon the power of equity to reform an instrument. One is that the statute does not interfere, whether the relief consists in broadening the writing and making it applicable to subject matter not included therein, or in restricting the writing. This theory is undoubtedly supported by the weight of judicial authority so far as it applies to executed contracts such as deeds and mortgages, and as it applies to contracts generally in which reformation is sought apart from specific performance of the contract as reformed. It has the approval of considerable judicial authority even as applied to the reformation of an executory contract and specific performance of the contract as reformed. In addition to the judicial authority this theory is approved by text-writers of prominence, whether applied to broadening or restricting the writing, the simple reformation of an executory contract or its reformation and specific performance as reformed.³ It is not claimed that the Statute of Frauds does not apply in courts of equity generally, but the theory is that the statute does not divest equity of its jurisdiction in case of fraud or mistake.

On the contrary, at least one jurisdiction holds that the Statute of Frauds

prevents relief by way of reformation of a deed where the relief sought is the inclusion of land omitted from the writing. But in this jurisdiction relief may be had where it can be granted by restricting the writing. Where it is sought to reform an executory contract and specifically enforce it as reformed, the better-considered cases deny the relief, especially where it requires inclusion of subject matter omitted from the writing.

Where the writing is defective, the majority of cases hold that it cannot be reformed. Although there is some authority to the contrary on this point, it is difficult to understand the reason for it.⁴

If the theory that the Statute of Frauds does not interfere with the jurisdiction of equity in case reformation is sought for mistake, accident, or fraud is carried to its logical limits, it can make no difference whether the contract is executed or executory, nor whether there has been a partial performance or not. In other words, the right to reform is the same whether the contract is within or without the Statute of Frauds. But some cases have hesitated at carrying the doctrine to such a conclusion, and have distinguished between executed and executory contracts, or have searched the evidence for some equity in favor of reformation, or something to make out a case of part performance. It has therefore seemed advisable to adopt a classification which shows the particular kind of contract sought to be reformed.

It is apparent that if the part of the contract sought to be supplied or modified by parol evidence be not within the Statute of Frauds, the statute presents no obstacle to the reformation. It seems in many instances the omitted provision or provision sought to be modified is not itself within the Statute of Frauds. This would seem to render the statute inapplicable. But few cases⁵ have based the decision on this ground, or even mentioned the possibility of such a distinction.

II. Part performance.

The doctrine of part performance is applicable to reformation; if there has been a part performance, the case is taken out of the statute, whether a deed,⁶

³ Pom. Eq. Jur. 3d ed. § 866; Story, Eq. Jur. 13th ed. § 161.

⁴ See note 5.

⁵ This seems to have been the theory of the Kentucky court in holding that the Statute of Frauds did not prevent the reformation. L.R.A.1917A.

tion of a defectively written executory contract and specific performance of the contract as reformed. See *infra*, notes 28 and 102.

⁶ *Beardsley v. Duntley* (1877) 69 N. Y. 580. The decision in this case is based up-

mortgage,⁷ or other contract⁸ is involved. No attempt, however, has been made in this note to present an exhaustive list of the cases in which the Statute of Frauds is held not to prevent reformation, on the theory that there has been a part performance.

on the fact that there had been a part performance; and, in distinguishing the case from *Glass v. Hulbert*, the court states that there is this difference, and also it does not appear that in Massachusetts the Statute of Frauds contains a provision to the effect that nothing contained therein shall be construed to abridge the powers of a court of equity to compel the specific performance of an agreement, in cases of part performance of the same, as in the case in New York. A small tract which had been omitted by means of fraudulent representation of the vendor that the description in the deed included it was decreed to the vendee. The action is stated to have been brought to obtain specific performance of the oral agreement for the sale of the omitted portion.

The Statute of Frauds is not considered in *Philpot v. Elliott* (1851) 4 Md. Ch. 273. In that case it is stated that whatever doubt may have been entertained as to the state of the law prior to the case of *Moale v. Buchanan* (Md.) *infra*, there certainly can be no doubt now "that it is competent to a party in a court of equity to offer parol evidence of a mistake in an agreement in writing relating to land, to have it rectified, and then specifically executed as rectified." The case of *Moale v. Buchanan* (1840) 11 Gill & J. (Md.) 314, above referred to, does not go to the extent regarded in *Philpot v. Elliott*. In *Moale v. Buchanan* there was an agreement on the part of debtors to make an assignment of their property for the benefit of their creditors. In making the assignment certain lands which were to have been included were omitted by mistake. Subsequently the lands so omitted were levied upon by other creditors of the assignor. The assignee for the benefit of creditors had taken possession of the land, and in an action by him to have the ground omitted in the deed of trust inserted therein and for an injunction against the levying creditors, the court, in granting him relief, expressly bases the right to relief upon the fact that the contract had been partly performed, thus taking the case out of the Statute of Frauds. The relief sought in *Philpot v. Elliott* (Md.) *supra*, however, was denied because the mistake was not clearly made out, and relief was granted in accordance with the admission of the defendant.

In *Tilton v. Tilton* (1838) 9 N. H. 385, where tenants in common, in carrying out a parol award of arbitrators, who, under parol agreement, were to divide the land, omitted a tract of land from the deed of one of the

III. Effect upon the right to reform deeds and mortgages.

a. In general.

It is now settled by a great weight of judicial authority that the Statute of Frauds does not prevent the reformation of a deed,⁹ whether by way of

cotenants, such tract was inserted upon an action brought for that purpose; but this is upon the distinct ground that there had been a part performance. The court states that "the governing rule is that nothing is to be considered as a part performance which does not put the party into a situation which is a fraud upon him unless the agreement be performed." After discussing the facts of the case, the court concludes that "it would be a most manifest fraud upon the plaintiff to permit the defendant to escape from a complete execution of his contract."

See *Sampson v. Mudge* (1882) 13 Fed. 260, *infra*, note 14.

⁷ *Rider v. Powell* (1863) 4 Abb. App. Dec. (N.Y.) 63, holding that a bond and mortgage given by a purchaser who had gone into possession, for a balance due on the purchase price, might be reformed so as to include interest on the balance due, as orally agreed upon between the parties, instead of interest on the payments after they became due, as was provided in the bond and mortgage by mistake.

⁸ In *Metropolitan Lumber Co. v. Lake Superior Ship Canal, R. & Iron Co.* (1894) 101 Mich. 577, 60 N. W. 278, a case involving a sale of timber, in which it was sought to insert a description of lands that had been omitted by mistake, a payment had been made and the purchaser had proceeded to lumber the tracts not in dispute before the omission was discovered. A reformation of the contract by the insertion of the omitted tract was sustained. The court in the latter case states that whatever may be the rule where nothing has been done under the oral contract, we think that in this country the overwhelming weight of authority supports the jurisdiction where part performance is shown sufficient to warrant a specific performance under an oral contract.

⁹ It is stated in *Kennedy v. Kennedy* (1841) 2 Ala. 571, in an action by the heirs of a grantor against the heirs of a grantee, to set aside the deed and to obtain a decree that the defendant conveyed to the complainant so much of the land involved as was undisposed of by the grantee in his lifetime, that neither the common law, which accords the writing higher dignity in the scale of evidence than the mere oral statement, nor the Statute of Frauds and Perjuries, inhibits the admission of parol evidence to vary or totally defeat a written contract tainted with fraud.

correcting a description in a deed which by mistake describes property other than that intended,¹⁰ omits a tract from the description,¹¹ or conveys

too much land, and by the reformation it is sought to restrict the instrument.¹² An estate conveyed may be cut down,¹³ and, it seems, may be

¹⁰ In *Wall v. Arrington* (1853) 13 Ga. 88, a description in a series of deeds was corrected so as to describe a lot other than that which had been mistakenly inserted.

Morrison v. Collier (1881) 79 Ind. 417 (purchase price was assumed to have been paid); *Conaway v. Gore* (1880) 24 Kan. 389 (purchaser had paid purchase price); *Johnson v. Johnson* (1874) 8 Baxt. (Tenn.) 261 (purchaser had been in possession for a number of years). See *Judson v. Miller*, *infra*, note 17. See *Comstock v. Coon*, *infra*, note 34.

In *Hamar v. Medsker* (1878) 60 Ind. 413, the object and policy of a statute relating to conveyances by married women was held not contravened nor thwarted by the reformation of the deed of a married woman who had sold her land and received the purchase money, so as to correct a mistake in the description of the land sold and intended to be conveyed.

See *McLennan v. Johnson* (1871) 60 Ill. 306, *infra*, note 28.

¹¹ *Blackburn v. Randolph* (1878) 33 Ark. 119, reforming a description of land so as to include a parcel omitted through a series of deeds.

Wykle v. Bartholomew (1913) 258 Ill. 358, 101 N. W. 597. The description of the land correctly stated the quantity, but, in describing it by metes and bounds, a mistake was made. The purchaser had gone into possession of the entire quantity claimed by him.

Rousseau v. Lambert (1888) 10 Ky. L. Rep. 23, 7 S. W. 923. The court concludes that unless the deed can be reformed, the vendor "will hold what he sold, was paid for, and both parties intended should be conveyed by the deed."

This is the theory of *Place v. Johnson* (1873) 20 Minn. 219, Gil. 198, although there was part performance in that case, and the court relies on the part performance. Subsequent Minnesota cases make it clear, however, that the Statute of Frauds does not interfere to prevent the reformation of a contract. See *infra*, note 104.

Hitchins v. Pettingill (1878) 58 N. H. 386. Vendor had remained in possession of the tract omitted and paid the taxes on it.

McDonald v. Yungbluth (1891) 46 Fed. 836, disapproving of *Glass v. Hulbert* (purchaser had paid larger amount of purchase price, but had not been let into possession).

The holding in *Tilton v. Tilton*, *supra*, note 6, is approved in the subsequent case of *Craig v. Kittredge* (1851) 23 N. H. 231, where it was held competent to reform a deed made by a father to one of his children in pursuance of an oral partition so as to include an undivided share in certain buildings which was omitted by mistake; no reference is made to the Statute of Frauds.

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The contrary of this is held in *Glass v. Hulbert* (Mass.) *infra*.

In *Churchill v. Rogers* (1825) 3 T. B. Mon. (Ky.) 81, reformation of a deed so as to include land omitted is denied. It seems that there was a subsequent oral agreement that the lines of the deed might be extended to include the omitted tract, and it is stated that to reform the deed and grant relief on such an agreement "would be directly contrary to the letter as well as the spirit of the statute against frauds and perjuries." In the light of other decisions in this jurisdiction this cannot be regarded as the rule in this jurisdiction.

¹² *Gillespie v. Moon* (N. Y.). See discussion of this case, *infra*.

See *Schettiger v. Hopple* (1856) 3 Grant, Cas. (Pa.) 54, *infra*, note 48.

Without any reference to the Statute of Frauds, the court, in *Jordan v. Walters* (1899) — Iowa, —, 80 N. W. 530, reformed a contract for the sale of real estate, and a deed executed in pursuance thereof, by making the description cover only the part of a lot which the vendor owned, instead of the entire lot, as described in the instrument.

¹³ *Wyche v. Greene* (1852) 11 Ga. 159, reforming a deed of slaves so as to convey a life estate to donee, with remainder to her children, upon a bill filed by a remainderman against the husband of donee, after donee's death.

In *Correll v. Greider* (1913) 258 Ill. 479, 101 N. E. 930, a deed of land purchased by a husband, to the wife, which conveyed to her a fee simple instead of a base or qualified fee, subject to being defeated upon her dying before the husband, as was the agreement, was reformed after the death of the wife, and the court refused to allow an heir of the wife to set up the Statute of Frauds as a defense, the court stating that the Statute of Frauds cannot be pleaded as a matter of defense to a bill to reform a deed on account of mutual mistakes. The heir of the wife was also a devisee in a will made by her, devising to her husband a life estate in the real estate in question, and directing that at his death the same should be sold and the proceeds distributed in part to the party seeking to set up the Statute of Frauds. It was claimed by the husband in this case that he had paid money belonging to him for the property, and this was found to be the fact by the court.

A reservation of crops may be written into a deed. *Hendrickson v. Ivins* (1832) 1 N. J. Eq. 562, *infra*, note 58.

In *Taylor v. Luther* (1835) 2 Sumn. 228, Fed. Cas. No. 13,796, upon a bill in equity to redeem premises asserted to be mortgaged, the Statute of Frauds and Per-

enlarged;¹⁴ a trust may be inserted as to the land conveyed,¹⁵ without violating the Statute of Frauds.

Likewise it is held that the statute does not prevent the reformation of mortgages,¹⁶ either by substituting the land intended instead of that inserted by mistake,¹⁷ or including land omitted by mistake.¹⁸ That it does not prevent the reformation of a writing intended as a deed, but inadvertently executed as

a mortgage, by striking out the defeasance clause, see *Kennedy v. Poole*, post, 600.

The suits do not in all instances take the direct form of reformation. In this connection the case of *Gillespie v. Moon*,¹⁹ which has become the leading case in support of the theory that the Statute of Frauds does not prevent reformation, should be noticed. That was a bill in equity to correct a mistake in

juries, which requires every contract for the sale of land to be in writing, was held not to prevent the showing that a deed absolute was in fact a mortgage. See exhaustive note in L.R.A.1916B, 18, on the admissibility of parol evidence that a written instrument which, on its face, imports a complete transfer of a legal or equitable estate or interest in property, was intended to operate as a mortgage or pledge.

That parol evidence may be received to show a mistake in a deed for the purpose of reforming the same is held in *Clayton v. Freet* (1860) 10 Ohio St. 544, upon the authority of the case of *Davenport v. Sovil*, infra, note 17; but there is no discussion of the Statute of Frauds. By mistake the deed in this case conveyed property to the grantee and her heirs instead of conveying a life estate to the grantee, remainder to her children, as was intended.

¹⁴In *Sampson v. Mudge* (1882) 13 Fed. 260, upon a bill for the reformation of a deed which conveyed only a life estate instead of a fee, as was intended, owing to a mistake of the scrivener, the court reformed it upon parol evidence. The case arose in Massachusetts, and the court determined it under the Massachusetts law, and states that, under this law, a mistake such as was involved in this case may be corrected in equity. Reference is made to the case of *Glass v. Hulbert* (Mass.) infra, and it is then stated that "it is enough here to say that the court in that case escapes the argument of part performance upon grounds which are wholly inapplicable in this case, and this is, of itself, a vital difference between the two."

¹⁵The deed in *Harvey v. Hand* (1911) 48 Ind. App. 392, 95 N. E. 1020, was made as part of a family settlement, and the parties seeking to have it reformed were heirs of the grantor, who claimed to have paid a consideration for the deed.

¹⁶The Statute of Frauds does not prevent the reformation of a mortgage given by a surety so as to correctly describe the note secured thereby. *Prior v. Williams* (1866) 3 Abb. App. Dec. (N. Y.) 624. The action in this case was to be allowed to redeem as against a prior mortgage, in addition to having the mortgage reformed. The court in this case disapproves of the obiter statement of the chancellor in *Ontario Bank v. Mumford* (1848) 2 Barb. Ch. (N. Y.) 596, where, in a case in which the word "not" was inserted in a surety bond

by mistake, the court states that it could not be reformed as against the surety, "for the Statute of Frauds requires an agreement in writing to bind a surety, and if the surety has not already executed a valid agreement to answer for the debt or default of his principal, this court cannot compel him to execute such an agreement upon the ground that he has attempted to do so, but has failed of accomplishing his object by mistake or inadvertence."

There is obiter in *Dutch v. Boyd* (1881) 81 Ind. 146, to the effect that a mortgage in which the description of the land omits the name of the county and state may be reformed without violating the statute.

¹⁷*Judson v. Miller* (1895) 106 Mich. 140, 63 N. W. 965. A deed given by the plaintiff in the suit was also reformed. The right to reform seems not to be based upon any equitable right which the plaintiff had obtained by anything he had done, as the lower court found that the complainants had not done anything which they would not have done or omitted to do but for the mistake.

Ruhling v. Hackett (1865) 1 Nev. 360. The distinction between restricting the writing and supplying an omission is noticed and disapproved.

Davenport v. Sovil (1856) 6 Ohio St. 459, holding that a mortgagee whose mortgage described the wrong land and who had sold the land described was entitled to relief by way of reformation by inserting the correct description and ordering an appraisal and sale of the premises as correctly described.

But reformation of a mortgage on a homestead which, by mistake, described the wrong land, has been refused. See note 30, infra.

¹⁸In *De Peyster v. Hasbrouck* (1854) 11 N. Y. 582, a mortgage upon the security of which the plaintiff had loaned money was reformed at his instance so as to include land which had been omitted therefrom through the fraud of the mortgagor. There is no reference to the Statute of Frauds. In addition to the oral proof in this case, however, there was a certificate signed by the mortgagor that the mortgage was intended to cover all the property, mill privileges, buildings, etc., which were omitted.

¹⁹(1817) 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559.

the description of land conveyed, and to compel a reconveyance of the part which had been included therein by mistake. The grantor owned 250 acres in a tract and claimed to have sold but 200 acres thereof, and established this contention to the satisfaction of the court. A written agreement of sale stated that the agreement was to convey a tract of land containing 200 acres, and the deed subsequently made described the land as "containing 200 acres, more or less;" but in the deed the land was described by metes and bounds, and these followed the boundaries as contained in the deed to the vendor of the 250 acres. The Statute of Frauds was urged on behalf of the grantee as preventing relief. The court does not refer to the statute, but, after determining that there had been a mistake, states that "relief can be had against any deed or contract founded in mistake or fraud. The mistake may be shown by parol proof and relief granted to the injured party, whether he sets up the mistake affirmatively by bill or as a defense." Although the suit was one to compel the grantee to reconvey the tract in dispute, and the decree granted this relief, the case is not one for the specific performance of a parol agreement. So far as this case involved a reconveyance, it was not one for the reformation of a contract, but one for the enforcement of an oral trust. This case is discussed further, *infra*, VI. c.

In the foregoing cases relief is granted without reference to whether the relief consisted in adding to the contract or restricting it. It appears that both forms of relief were granted. The supreme court of Massachusetts,²⁰ in the early case of *Glass v. Hulbert*, makes a distinction as to whether the relief consists

in adding to the terms of the written contract or restricting it. In the former case, that is, where the relief sought consisted in adding to the terms of the written contract, the Statute of Frauds is held to prevent the reformation; but if the reformation attempted is by way of restricting the operation of the grant, it is no violation of the statute.²¹ This theory is held to authorize the reformation of a mortgage inadvertently executed by mutual mistake instead of a deed, by striking out the defeasance clause, in *Kennedy v. Poole*, post, 600.

The case of *Glass v. Hulbert*²² has become a leading case in support of the theory that a contract within the Statute of Frauds cannot be reformed by making the contract include obligations or subject matter to which its written terms do not apply. The importance which this case has attained because of the thorough examination of the question and its frequent citation justifies a somewhat extended discussion thereof. The bill was filed by a purchaser of land who had received a conveyance thereof and paid the whole amount of the purchase money, to compel the grantor to convey a portion of the tract which, by fraud or mistake, had been omitted from the conveyance already made. The court points out that if the allegations of the bill should be sustained by the proofs, the plaintiff would have a clear right to a rescission of the contract; but this relief he did not seek, the prayer of the bill being that the defendant be compelled to convey to the plaintiff the tract which he alleged was included in the oral contract of sale, but omitted from the deed. While strictly not a suit for the reformation of a deed, it is so treated, and practically amounts to such. The

²⁰ *Glass v. Hulbert* (1869) 102 Mass. 24, 3 Am. Rep. 418.

²¹ In *Stockbridge Iron Co. v. Hudson Iron Co.* (1871) 107 Mass. 290, a case involving a conveyance of land with a reservation of mineral rights, the reservation of the mineral rights was construed as creating new rights to the grantor out of the granted premises; consequently the reservation might be restricted without violating the Statute of Frauds. The dispute in this respect turned upon whether the mineral right amounted to a reservation or an exception. The court holds that it amounts to a reservation, as above stated, but states that if it had amounted to an exception, "whatever is excluded from the grant by exception remains in the grantor as of his former title or right; and to modify the deed so as to limit and reduce that, either in extent or duration of L.R.A.1917A.

the estate or right retained, is in effect to enlarge the operation of the deed and make it convey estate, title, or rights which the written instrument will not operate to convey;" and this is stated to be contrary to the Statute of Frauds.

In *Wilcox v. Lucas* (1876) 121 Mass. 21, 3 Mor. Min. Rep. 380, there was held to be the right to reform a deed which omitted an exception intended to be written therein, without violating the Statute of Frauds.

A grantor who, by mistake, executed and delivered a deed describing the land intended to be conveyed, and by mistake included therein lands not owned by him, may have the deed reformed to correctly describe the land without violating the Statute of Frauds. *Goode v. Riley* (1891) 153 Mass. 585, 28 N. E. 228.

²² (1869) 102 Mass. 24, 3 Am. Rep. 418.

court points out that there had been no part performance such as would be held to take the case out of the Statute of Frauds. The court reasons thus: "If the case stood merely upon the oral contract of sale with a conveyance of part and a neglect or refusal to convey another part of the land which was the subject of the alleged contract, we do not think it would be contended that the plaintiff could compel a conveyance of the other land against a party denying the contract and setting up the Statute of Frauds. Courts are bound to regard that statute in equity as well as at law.

. . . But the plaintiff claims that he in fact purchased the whole of a certain tract of land which included the 17 acres now in dispute; that the description of the boundaries as agreed upon and inserted in the deed was so agreed on and inserted upon the representation of the defendant and the belief of the plaintiff that it did include said 17 acres; and that the failure of the deed to embrace and convey that part of the land was occasioned either by the mutual mistake of the parties as to the position of the southwest corner of land of . . .

or else by the misrepresentation, deceit, and fraud of the defendant in relation thereto. In either alternative the plaintiff contends that he is entitled to a reformation of the deed to make it conform to the sale actually contracted by the parties." Continuing, the court states that "such a reformation not only requires a description of the subject-matter of the sale, different from the express terms of the oral contract, but would enlarge the effect and operation of the deed, as a conveyance. It involves the transfer of the legal title to land not covered by the deed already given. It requires a new deed to be executed and delivered by the defendant to the plaintiff. Whether that deed shall embrace the entire subject of the alleged contract of purchase, with a corrected description to make it conform to facts and abutments as they were represented to be, or merely convey the 17 acres omitted from the deed already given, the order for its execution will enforce the specific performance of a contract for the sale of lands, for which there exists no memorandum, note, or other evidence in writing signed by the party to be charged therewith. As to the 17 acres in dispute, the obligation to convey them rests solely in the oral contract. The defendant denies any contract which includes them. The plaintiff seeks to establish such a contract by parol evidence, and

enforce it. The deed itself furnishes no means of making the correction sought for, and no evidence of the contract relied on for this purpose; nor is it in any sense an acknowledgment of the substance of the alleged oral agreement. The power to rectify deeds and other written instruments undoubtedly exists in this court under the clauses of the statute giving equity jurisdiction in cases of fraud, accident, and mistake, or the clause giving it generally where there is no adequate remedy at law. . . . But the power will be exercised in subordination to other fixed principles of law and especially to statute provisions. If the rules restricting the administration of judicial remedies which are prescribed by the Statute of Frauds were to be disregarded in this branch of equity procedure, it would open the door to all the forms of fraud which that statute was intended to prevent. The statute is not a mere rule of evidence, but a limitation of judicial authority to afford a remedy. It requires that contracts for the sale of land, in order to be enforced by judicial proceedings, must be substantiated by some writing. This provision of law cannot be dispensed with merely for the reason that the want of such writing was occasioned by accident, mistake, or fraudulent representations, unless some other ingredient enters into the case to give rise to equities stronger than those which stand upon the oral contract alone, which estop the other party from setting up the statute."

The fact that the omission or defect in the writing by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express was occasioned by mistake or by deceit and fraud will not alone constitute such an estoppel as to prevent the application of the Statute of Frauds.²³

In other cases of the reformation of deeds and mortgages, the court notices the distinction between restricting and broadening the writing, and denies the validity of the distinction, holding that the Statute of Frauds does not prevent the reformation of a deed although the relief demanded consists of adding to the terms thereof.²⁴ It has been stated

²³ (Mass.) *Ibid*.

²⁴ *Noel v. Gill* (1886) 84 Ky. 241, 1 S. W. 428. Description of some lots added, while the description of another, inserted by mistake, was stricken out. Party seeking reformation was in possession of lots added.

Ruhling v. Hackett (1865) 1 Nev. 360. Description of lot intended to be mort-

by the courts holding to the theory that the statute does not prevent reformation, whether the effect is to enlarge or restrict the writing, that the courts holding the opposite view have only such limited equity jurisdiction as the statutes of the state conferred upon them.²⁵ However, the courts which have followed the opposite rule have asserted that their equitable jurisdiction in case of fraud or mistake is without restriction.²⁶

As pointed out above in the leading cases of *Gillespie v. Moon and Glass v. Hulbert*, the relief which was sought was in the nature of compelling a conveyance. It has been held that although a bill to correct a description in a deed alleges that the defendant entered into a verbal agreement with the complainant for the sale and conveyance of the land in question, and prays that he may be ordered to specifically perform the agreement, the bill is not properly one to enforce the specific performance of an executory contract, but to correct a mistake in an executed one. The Stat-

ute of Frauds does not apply to such a case.²⁷

A suit by the vendor to correct a mistake in his deed by inserting therein an agreement reserving a vendor's lien has been held not within the Statute of Frauds, and therefore to be within the general jurisdiction of the chancellor to correct for fraud, omission, or mistake.²⁸ It is the theory of this case, however, that the Statute of Frauds does not de-vest equity of its jurisdiction to reform a writing, and this is the theory of the subsequent cases in this state, both as to executed and executory contracts.²⁹

It has been held that there must be a valid, binding contract to reform, or reformation cannot be decreed. On this theory reformation of a mortgage on a homestead which, by mistake, described the wrong land, has been refused.³⁰

Having reformed the deed, the courts have granted the plaintiff the relief to which he is entitled under the correct description. Relief has been given against a creditor who is seeking to hold the property as that of the grantor,³¹

gaged was inserted by court instead of another described by mistake.

It is stated in *Tilton v. Tilton* (1838) 9 N. H. 385, that a court of equity is competent to correct and reform any material mistake in a deed or other written agreement, whether that mistake be the omission or insertion of a material stipulation, and whether it be made out by parol testimony or be confirmed by other more cogent proofs. And the same rule applies to contracts within the operation of the Statute of Frauds. There was a part performance in this case, however.

Davenport v. Sovil (1856) 6 Ohio St. 459, relying upon *Gillespie v. Moon* (N. Y.) supra.

That a special warranty deed may be reformed into a general warranty, see *Efta v. Swanson* (1909) 109 Minn. 94, 123 N. W. 56.

²⁵ *Noel v. Gill* (1886) 84 Ky. 241, 1 S. W. 428; *Atwood v. Mikeska*, post, 602.

²⁶ In *Glass v. Hulbert* (1869) 102 Mass. 24, 3 Am. Rep. 418, the court states that "the argument of the plaintiff is addressed mainly to the question of the equity jurisdiction of this court in cases of fraud or mistake like that alleged in the present suit. There can be no doubt upon that point. There is no ground upon which jurisdiction in equity is so readily entertained and freely exercised. It is given to this court without restriction, if the parties have not a plain, adequate, and complete remedy at law."

²⁷ *McLennan v. Johnston* (1871) 60 Ill. 306, a description, viz., "the south 50 feet of the south 100 feet of lot 23," was reformed to read "the south 50 feet of lot 18." See *Beardsley v. Duntley*, supra, note 6. L.R.A.1917A.

²⁸ *Worley v. Tuggle* (1868) 4 Bush (Ky.) 168.

²⁹ See supra, note 24, and infra, notes 38 and 100.

³⁰ *Petesich v. Hambach* (1880) 48 Wis. 443, 4 N. W. 565. It was the opinion of part of the court that reformation must be refused on the theory that the mortgage being of a homestead, and not a valid contract, it could not therefore be reformed. The other part of the court dissented from the latter proposition without saying anything as to the Statute of Frauds, and on an equal division of the justices, the judgment of the court below, denying the reformation, was affirmed.

The holding that the mortgage cannot be reformed so as to include the homestead, on the theory of the invalidity of the contract as to the homestead, is affirmed in *O'Malley v. Ruddy* (1891) 79 Wis. 147, 24 Am. St. Rep. 702, 48 N. W. 116, the court stating that until the affirmance in *Petesich v. Hambach* is overruled, it is the decision of the court, notwithstanding it was decided by a divided court. Nothing is said of the Statute of Frauds in *O'Malley v. Ruddy*.

See infra, subd. V.

³¹ In *Blackburn v. Randolph* (1878) 33 Ark. 119; *Morrison v. Collier* (1881) 79 Ind. 417; *Comstock v. Coon* (1893) 135 Ind. 640, 35 N. E. 909, a judgment creditor of the original grantor was enjoined from selling the omitted land under an execution levied thereon, and the complainant's title thereto was quieted.

This question took a different form in *Wall v. Arrington* (1853) 13 Ga. 88; that is, whether the deed could be reformed against a judgment creditor,—a query that was answered in the affirmative.

or by quieting title thereto.³² A mortgage having been reformed may be foreclosed.³³

b. Theories.

As stated in the introduction, it is a theory of the majority of courts that the Statute of Frauds has no application to a suit to correct a deed, to make it conform to the intention of the parties.³⁴ Again it is stated: "The Statute of Frauds does not interfere in any respect with the power of courts of equity to reform deeds or other instruments, in which the parties intended to comply with the requirements of the statute, and failed through accident, mistake, or fraud."³⁵

In this very sweeping language we are told in one case³⁶ that chancery "will open the written contract, whether executed or executory, within or without the Statute of Frauds, a conveyance of realty or personalty, to let in an equity arising from facts perfectly distinct from the construction of the instrument itself; and whatever doubts may have existed at one time to the contrary, it is now established on the great and essential principles of justice that release may be had against a mistake in a written contract; that such a mistake may be shown by parol proof, and release granted

ed to the injured party, whether he sets up a mistake affirmatively by bill, or as a defense, or to rebut an equity."

It has been stated that the "courts of equity go upon the ground that the Statute of Frauds is no real obstacle in the way of administering equitable relief so as to promote justice and prevent wrong. They do not overrule the statute, but, to prevent fraud or mistake, confer remedial rights which are not within the statutory prohibition. In respect to such needful remedies, the statute as to them is 'uplifted.' It has also been said that in case of a written conveyance of land which does not convey as much land as was agreed, or different or more land than was intended by the parties, the court will fasten a personal obligation upon the party benefited by the mistake to correct it, upon the ground that he was holding the property as trustee."³⁷

We are told in an obiter statement that "the developing science of the law and its ever-waxing love of justice, increasing the omnipotence of the chancellor for equitable purposes, soon settled that this statute [the Statute of Frauds] in nowise modified" the exception which admits of evidence in case of accident, mistake, or fraud for the purpose of varying a written instrument.³⁸

The position of the courts is well

³² In *Noel v. Gill* (1886) 84 Ky. 241, 1 S. W. 428, in addition to reforming the deed by adding a tract of land which had been omitted therefrom, the court quieted the title of the party seeking reformation thereon.

See case in preceding note, where title was quieted as against a creditor.

³³ In *Judson v. Miller* (1895) 106 Mich. 140, 63 N. W. 965, a foreclosure of the mortgage as reformed was granted in addition to the reformation.

Davenport v. Sovil (1856) 6 Ohio St. 459, see *supra*, note 17.

See *Worley v. Tuggle* (1868) 4 Bush (Ky.) 168, where a deed was reformed by inserting a vendor's lien thereon, and the lien was enforced. A peculiar doctrine exists in this state, as will be seen by reference to note 29, *supra*.

De Peyster v. Hasbrouck (1854) 11 N. Y. 582. But in this case the lands included in the mortgage were ordered to be first sold.

And see *Prior v. Williams* (1866) 3 Abb. App. Dec. (N. Y.) 624.

³⁴ *McLennan v. Johnson* (Ill.) *supra*; *Wykle v. Bartholomew* (1913) 258 Ill. 358, 101 N. E. 597; *Correll v. Greider* (1913) 258 Ill. 479, 101 N. E. 930.

"Parol evidence may be received to show a mistake in a written instrument, whether it is one given in the case of a contract required by the Statute of Frauds to be in L.R.A.1917A.

writing or not. The statute does not apply to such a case." *McLennan v. Johnston* (1871) 60 Ill. 306 (deed).

In *Comstock v. Coon* (1893) 135 Ind. 640, 35 N. E. 909, an action by a wife to whom her husband had conveyed real estate through a third party, to reform the description in the deed, which, by mistake, described the wrong land, it is stated that the Statute of Frauds has no bearing on the sufficiency of the complaint. It is stated that this is not an action to compel specific performance or in any other way to enforce the contract, but simply to have a mistake in a conveyance corrected.

³⁵ *Blackburn v. Randolph* (1878) 33 Ark. 119 (omitted parcel inserted).

³⁶ *Wyche v. Greene* (1852) 11 Ga. 159. The only question, however, the court had to decide in this case, was whether a deed to slaves, which conveyed an absolute estate therein, could be reformed so as to convey a life estate to the donee, with remainder to her children,—a question the court answered in the affirmative.

This seems to have been the theory of *Rogers v. Atkinson* (1846) 1 Ga. 12, although it does not appear that reformation was granted in that case.

³⁷ *Noel v. Gill* (1886) 84 Ky. 241, 1 S. W. 428.

³⁸ *Worley v. Tuggle* (1868) 4 Bush (Ky.) 168.

stated by Brewer, J., in *Conaway v. Gore*,³⁹ as follows: "Another claim of counsel is, that the Statute of Frauds presents an insuperable obstacle to the plaintiff's recovery. The argument is, that the contract for the sale of the land was in parol; that there is no allegation or proof of the delivery of possession, the making of improvements, or any other matters which take a parol contract out of the Statute of Frauds; that the deed which was executed was a conveyance of other land, and therefore neither a conveyance nor a contract for the land in question. The argument is elaborated by counsel, and many authorities are cited. But these authorities run along the line of the doctrine of specific performance; while the case at bar comes under the head of the reformation of contracts. The difference between the two is marked and substantial. One aims to enforce a parol contract as though it were in writing; the other seeks simply to conform the written to the real contract. One would avoid the necessity of any writing; the other would simply correct the writing. The principles which control the one are essentially different from those which control the other. If a parol contract were sought to be enforced, the arguments and authorities of counsel would be in point. But the reformation of a deed already made, the correction of a contract already in writing, involve very different considerations. The question is not whether there has been such a performance as renders inequitable the nonenforcement of the parol contract,

but whether the written is the actual contract. It is not the substituting of acts in pais for the written contract, but it is making the written the expression of the real contract. We think, therefore, that the argument and authorities of counsel based upon the Statute of Frauds are not apt, and the objection urged not well taken. It would undervalue the whole doctrine of the reformation of contracts and deeds if the case were to be treated as though no written contract had ever been made. The reformation implies the existence of a written contract. It corrects that which exists, and does not seek to avoid the necessity of that which is not."

An action to reform a deed absolute so as to impress a trust upon part of the land conveyed, in accordance with an antecedent oral contract or agreement, has been held not an action to enforce a parol contract for the sale of real estate or any interest therein, but is an action to reform a written contract so that it will contain and express that which was agreed upon and intended by the parties, and consequently is not affected by the Statute of Frauds.⁴⁰

It has been stated that the Statute of Frauds does not apply to the correction of mistakes in description.⁴¹

A mistake of the parties to a contract concerning lands has been stated to take the case out of the Statute of Frauds.⁴²

The supreme court of New Hampshire⁴³ considered the Statute of Frauds in connection with another statute providing that "the supreme court shall have the powers of a court of equity in cases

³⁹ (1880) 24 Kan. 389 (the description was reformed in this case).

⁴⁰ *Harvey v. Hand* (1911) 48 Ind. App. 392, 95 N. E. 1020. It is stated that in "such case the contract is to all intents and purposes written, and 'equity deems as done that which the parties to the contract had agreed and intended to do.' . . . Under this rule and the allegations if this complaint the deed in question should have contained, and in equity does contain, an express grant" of the part of the land "conveyed by said deed, to have and to hold" the same in trust for the *cetui que trust*. "This is an express trust in writing, and in no manner affected by the Statute of Frauds."

⁴¹ *Morrison v. Collier* (1881) 79 Ind. 417. It is further stated that if the Statute of Frauds did apply, the party who was urging it in this case could not interpose the statute, since he was not a party to the parol agreement, being a judgment creditor of the vendor. The description was accordingly reformed so as to describe land not embraced in the deed.
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Dutch v. Boyd (1881) 81 Ind. 146 (dictum), mortgage involved.

Morrison v. Collier is approved in *Harvey v. Hand* (1911) 48 Ind. App. 392, 95 N. E. 1020.

⁴² *Davenport v. Sovil* (1856) 6 Ohio St. 459. This court, after coming to the conclusion that a mistake may be proved by parol in a contract for the sale of land, admits "that it is difficult or impossible to reconcile this doctrine with the letter of the statute for the prevention of frauds and perjuries;" but it is stated that this is also true in case of the doctrine that part performance of a contract takes it from the operation of the statute. It is stated that "mutual mistake of the parties to a contract concerning lands will take the case out of the Statute of Frauds as that a part performance will do so."

⁴³ *Hitchins v. Pettingill* (1878) 58 N. H. 386. It was accordingly held in this case that a deed from which there had been omitted a 10-acre tract by mistake could be reformed so as to include the omitted lands, although the vendors continued in

cognizable in such court and may hear and determine according to the course of equity in case of charitable uses, trusts, fraud, accident, or mistake . . . of specific performance of contracts . . . and in all other cases where there is not a plain, adequate, and complete remedy at law;" and states that these provisions, though printed in different chapters, "are consistent parts of one law. We are not to give either of them a strained construction, liberal or strict, for the special purpose of justice in a particular case, or for the general purpose of making the law what, in our judgment, it ought to be. . . . The Statute of Frauds severed from all other law, written and unwritten, and taken in its literal sense, would deny these plaintiffs the relief of specific performance even if they had taken possession of the 10-acre lot and made valuable improvements upon it, and would leave people remediless in a great number of cases of fraud, accident, or mistake for which ample remedies are provided by the statutes of equity jurisdiction. And the latter statute, torn from the general body of the law, taken literally, and administered as if there were no other law, would deprive the community of safeguards which the Statute of Frauds and the common law were designed to afford, and which the statute of equity was not designed to take away. . . . If, without written evidence of a contract for the sale of land, the vendee pays for the land, and, with the knowledge and consent of the vendor, takes possession of it and makes valuable improvements upon it, he is entitled to the relief of specific performance. Upon the literal construction of the Statute of Frauds there could not be a decree for specific performance

in such a case, and there could not be by parol evidence a reformation of a deed enlarging its operation. But the statute, rightly construed, does not destroy either of these remedies."

Some of the cases which hold that the Statute of Frauds does not prevent reformation do so on the distinct ground that an executed contract is involved.⁴⁴ Thus, a mortgage has been reformed by inserting the correct description of the land intended to have been mortgaged. Relief was denied in the lower court on the theory that, as the mortgagee had done nothing which he would not have done, nor omitted to do anything which he would have done but for the mistake, he was not entitled to relief in equity. Notwithstanding the opinion of the lower court, it does not seem likely that the mortgagee would have parted with his money if he had not thought he was obtaining security. The supreme court, however, does not base the relief on any change of circumstances of the party seeking relief, but states that equity has full power, on the ground of mistake alone, to correct an erroneous description of land in an executed contract, although the Statute of Frauds requires such conveyance to be in writing.

Other cases, however, in addition to making the distinction between executed and executory contracts, emphasize the fact that money has been paid by the party seeking the reformation,⁴⁵ or that he is in such a position that it would be a fraud upon him if the contract were not performed.⁴⁶ These cases recognize the power of equity to reform an instrument notwithstanding the Statute of Frauds; but, as stated, rest the decision to a certain extent upon the fraud that would result if relief were denied.

possession of the 10-acre lot and paid the taxes on it.

⁴⁴Judson v. Miller (1895) 106 Mich. 140, 63 N. E. 965.

⁴⁵Ruhling v. Hackett (1865) 1 Nev. 360. This case involved the reformation of a mortgage by correcting the description, which, by mistake, described the wrong piece of land. The court states: "But if the contract be executed, money paid, and land omitted by mistake from the instrument which it was the intention of the parties to include, it would be a deplorable defect in the equity powers of our courts if relief could not be granted." It is stated: "There are many cases in which it is held, and perhaps the weight of authority sustains the doctrine, that a court of equity will not correct a mistake in an executory contract where the mistake is denied by answer, and L.R.A.1917A.

enforce its specific performance as corrected."

⁴⁶Tilton v. Tilton (1838) 9 N. H. 385. There was a part performance in this case, however, the court stating: "In the case before us the terms of the contract are clear and distinct, the acts done in part execution of the contract are of the strongest character, the plaintiff has released or conveyed to the defendant all the lands assigned to him, the defendant has also released to the plaintiff his portion of the lands except the woodland, and this was omitted by a clear mistake. The parties have both been in possession pursuant to their deeds, and erected partition fences to a certain extent. . . . It would be a most manifest fraud upon the plaintiff to permit the defendant to escape from a complete execution of his contracts."

One case,⁴⁷ in discussing this question, makes the preliminary statement that "whether mistake alone; distinct from fraud, is also a ground in equity for depriving a defendant of the protection of the Statute (of Frauds), is a vexed question." Referring then to the cases of executed contracts, the court states that "it may be said that our equity courts have, since these early decisions, always proceeded on the assumption that where there is a mistake in a deed or other written contract, delivered as the final execution of the contract or agreement intended to be made between the parties, and where the party setting up the deed or contract will receive a benefit not intended by either party, and a fraud will result if the mistake be not corrected, then the correction of the executed contract will be made on the plaintiff's application."⁴⁸ . . . But these were all cases of the reformation of executed contracts, deeds, or other contracts, and in such contracts an element of fraud manifestly arises when the party, after knowledge of the mistake which has given him a benefit to which he knows he was not entitled, insists upon holding this benefit to the loss of the other party. This fraudulent aspect of the case, arising originally from mistake, was clearly the real basis, I think, of Chancellor Kent's decision in *Gillespie v. Moon*; and the decisions in this class of cases therefore must really be considered as only extending to deny the protection of the Statute of Frauds in those cases of mistake where a fraud would be accomplished if the statute were a protection. The general expression in these decisions that mistake as well as fraud is ground

for denying the protection of the statute must be construed with reference to the circumstances of the case in which the equitable remedy in case of mistake was given, and in each of the above cases referred to, the mistake relieved against and made the basis for affirmative relief was a mistake which had been made in the deed or contract which carried into execution the previous agreement, and, by reason of execution of the agreements without the variations which were omitted by mistake, a fraud resulted, if the statute were available in defense."

IV. Effect upon the right to reform contracts generally.

As has been shown above, many of the cases involving deeds and mortgages state the rule broadly enough to include contracts generally. And the rule has been so applied and the Statute of Frauds held not to prevent the reformation of a contract required by the statute to be in writing.⁴⁹ A contract for the sale of land may be reformed so as to require a general warranty deed instead of a special warranty or quit claim, as was inserted therein by fraud of vendor.⁵⁰ A contract between vendor and vendee by which the vendee was to surrender the land and the vendor was to surrender the notes evidencing the purchase price, except the first, which the vendee mistakenly believed to be for a smaller amount than was the fact,—a mistake known to the vendor, who sought to profit thereby,—will be corrected so as to relieve the vendee of the payment of the larger amount.⁵¹

The Statute of Frauds has been held

⁴⁷ *Wirtz v. Guthrie* (1913) 81 N. J. Eq. 271, 87 Atl. 134.

⁴⁸ *Schettiger v. Hopple* (1857) 3 Grant, Cas. (Pa.) 54, an action in ejectment by a grantee in which the defendants, his grantors, defended on the ground that a certain tract of land was included in the deed by mistake, and claimed that the deed should be reformed so as to conform to the intention of the parties. The court states that the defendants are in effect plaintiffs in chancery, seeking a decree that the disputed tract be reconveyed to them because included in their deed by mistake. The court further states that the Statute of Frauds and Perjuries does not stand in the way, for although the effect would be to pass an estate by parol, yet the statute must be so construed as to prevent frauds, and not to promote them, and this would apply where a mistake, and not fraud, was the ground of relief sought; for though a mistake does not necessarily include a fraud, yet to set up and use a written instrument for a dif-

ferent purpose from that for which it was made would be as inequitable as to take advantage of an instrument fraudulently obtained. It was held, however, in this case, that there was no such mistake as authorized the reformation.

⁴⁹ See *Castleman-Blakemore Co. v. Pickrell & C. Co.* (1915) 163 Ky. 750, 174 S. W. 749.

⁵⁰ In *Efta v. Swanson* (1909) 109 Minn. 94, 123 N. W. 56, a special warranty deed had been executed in accordance with the contract, and reformation of this was also granted.

⁵¹ *McCurdy v. Breathitt* (1827) 5 T. B. Mon. (Ky.) 232, 17 Am. Dec. 65; while this is discussed as a question of reformation and specific performance, the question arose upon an action to enjoin the collection of a judgment which the vendor had obtained for the larger amount. It was urged that the court should do no more than cancel the writing and restore the parties to the state in which they were

not applicable to prevent relief to a lessee who, through the fraud of the lessor, had agreed to pay more for the lease than he would have otherwise agreed upon.⁵³

A contract in which, by mistake, the party seeking reformation assumed a liability on certain notes when the real agreement was to assume a liability on other notes, may be reformed.⁵³

A contract of a railroad company, relating to switching charges with a furnace company, which, by mistake, omitted a provision that the switching charges should be for the advantage of parties other than the party making the contract, who should be operating certain furnaces, may be corrected so as to include this provision without violating the Statute of Frauds.⁵⁴

The theory of these courts is well stated in the dissenting opinion in *Osborn v. Phelps*,⁵⁵ where, after referring to the power of courts of equity to reform instruments for mistake, the writer continues: "Now, the statute was never intended to wrest from courts of equity this portion of its jurisdiction. Such is neither its language nor purpose. Its language is 'that no suit in law or equity shall be brought,' etc.; not that equity shall not, as before the statute, exercise its beneficent and remedial power to reform written contracts."

This same argument appears in *Hun-*

ter v. Bilyeu,⁵⁶ where the courts states that if the mistake be clearly proved, "who shall say that a court of equity transcends its powers or violates the rule of law in declaring the contract to be as the parties have made it? We cannot think the Statute of Frauds and Perjuries has any application to such cases. . . . It in fact makes a new and different contract; yet, if the mistake is clearly established, which should give way, that rigid rule of the common law, or that power residing in a court of equity to correct mistakes?" It was held, however, in this case, that the mistake was not sufficiently proven.

It is the theory of some cases that fraud takes a case out of the statute. One court⁵⁷ having to do with a marriage contract states that the Statute of Frauds does not mean to say that a written marriage contract or other of the contracts within the 4th section of the statute is not to be reformed and corrected by the verbal contract which preceded it whenever not to allow the correction would be to permit one of the parties to perpetuate a fraud on the other. See further discussion of the theory of the cases in subd. III. b, supra.

The Statute of Frauds has been held not to interfere with the reformation of a bond which, by mistake, had not been executed in accordance with statute.⁵⁸ The court says: "This is a case

before the writing was executed, without enforcing it as modified. The court, however, held that it could be enforced as modified.

⁵³ *Kirtland v. Schanck* (1872) 61 Barb. (N. Y.) 348, after stating that the Statute of Frauds is not applicable, the court continues: "It would be if the defendants had refused to give a lease to the plaintiff, according to the agreement, but where the allegation is that the lease was obtained by fraudulent representations, and was executed under misstatements of the defendants, the agreement by parol would be sufficient to maintain the cause of action."

⁵⁴ In *Thompson v. Marshall* (1860) 36 Ala. 504, 76 Am. Dec. 328, the theory of the court is not clear. It is stated with reference to a contract which was signed by one of the parties only that "if the complainant's promise to discharge the duties imposed upon him by the contract specified in the instrument to be reformed is within the Statute of Frauds, it would not of itself be a sufficient reason for refusing to reform the instrument. The instrument itself is in writing. If the complainant had refused to perform the contract on his part, there might be some reason for withholding the desired decree of reformation. But no reason for refusing the decree exists when the complainant does not seem to have L.R.A.1917A.

omitted the performance of any duty imposed upon him by the contract."

⁵⁴ *Baird v. Erie R. Co.* (1911) 148 App. Div. 452, 132 N. Y. Supp. 971. It was urged that the contract under consideration being in fact only in parol, the Statute of Frauds was a defense to the reformation. The court states that "the apparent answer to this is that the parties supposed the contract had been expressed in the written instrument,—in which they were mistaken, and plaintiff now asks the court to declare the intention of the parties by correcting the written instrument, thus making it what they supposed it was. When the correction is made the contract will no longer rest in parol." This case was affirmed in (1914) 210 N. Y. 225, 104 N. E. 614, but without referring to the Statute of Frauds.

⁵⁵ (1848) 19 Conn. 63, 48 Am. Dec. 133. This case is discussed in detail below.

⁵⁶ (1863) 30 Ill. 228 (complainants had gone into possession of the land and made valuable improvements).

⁵⁷ *Durham v. Taylor* (1859) 29 Ga. 166 (holding that the statute did not prevent the reformation of a marriage contract after the marriage).

⁵⁸ *Smith v. Allen* (1830) 1 N. J. Eq. 43, 21 Am. Dec. 33. Upon the authority of this case it was held in *Hendrickson v. Ivins* (1832) 1 N. J. Eq. 562, that a deed

where the agreement, if entered into at all, must have been regulated by law; it admitted of neither extension nor abridgment. . . . It is manifest that the one party agreed to give and the other to accept such a bond as would enable the sheriff legally to release the defendant from arrest in that particular case so far as to give him the benefit of the limits." It would seem, therefore, that this was a reformation that was not based entirely upon parol evidence.

Likewise the Statute of Frauds has been held not to prevent the reformation of a recognizance in a bastardy proceeding by inserting therein the correct surname of the complainant, instead of the surname of the defendant, which was inserted therein by mistake.⁵⁹

There is a statutory enactment in some states that authorizes the reformation of a written contract under certain conditions. When the required conditions are presented, reformation has been granted of a land contract without reference to the Statute of Frauds.⁶⁰

V. Effect upon the right to reform contracts defectively written.

A written contract may be defective by failure to include in the writing some essential provision of the agree-

ment, or by an omission to reduce the agreement to legal form. There is no enforceable contract until it is reduced to writing, as provided by law. As stated in ALLEN v. KITCHEN, ante, 563, the complaint in such a case is that the writing "does not speak the whole truth. This is the very thing the Statute of Frauds is enacted to guard against." Consequently it is held there can be no reformation of such a contract so as to make it enforceable.⁶¹ This rule is applied to prevent the reformation of a contract for the sale of lands by correcting an insufficient description, and specifically enforcing the contract as reformed.⁶² Likewise reformation and specific performance were refused in a case involving the sale of land in which it was the intent and design of the parties that two writings should be executed, one by the vendor and the other by the vendee, the writing executed by each of the said parties to contain and specify that part of the contract which was to be by him performed, and, being so executed, to be delivered to the other party, but in which, by mistake and accident, each party put his signature to the paper intended for the signature of the other.⁶³

While the court in Safe Deposit & T. but did contain the one that interest should be paid at the rate of 1 per cent per annum. The Code provision in California is to the effect that "when, through fraud or a mutual mistake, or a mistake of one party which the other knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express the intention so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

⁵⁹ See Davimos v. Green (1914) 83 N. J. Eq. 596, 92 Atl. 96, infra.

might be reformed by inserting therein a reservation of crops on the land conveyed. These cases are explained in Wirtz v. Guthrie, supra, note 47, to have been decided on the theory that "where there is a mistake in a deed or other written contract delivered as the final execution of the contract or agreement intended to be made between the parties, and where the party setting up the deed or contract will receive a benefit not intended by either party, and a fraud will result if the mistake be not corrected, then the correction of the executed contract will be made on the plaintiff's application."

⁶⁰ Neining v. State (1893) 50 Ohio St. 394, 40 Am. St. Rep. 674, 34 N. E. 633. The bond recited the condition that "the said Ado Kyne (the defendant) shall personally appear . . . and there answer unto a complaint of bastardy, made by Margie Kyne," etc. The name "Margie Kyne" was inserted by mistake instead of "Margie Coss," the complainant.

⁶¹ Higgins v. Parsons (1884) 65 Cal. 280, 3 Pac. 881. The contract for the conveyance of real estate was reformed by changing a stipulation that interest should be paid at the rate of 1 per cent per annum to accord with the agreement which was that it should be paid at the rate of 1 per cent per month. The vendor believed at the time of signing the instrument that it contained that stipulation, and the vendee that it did not contain the stipulation,

Contra, see cases, notes 70, 71.

ALLEN v. KITCHEN, ante, 563; Osborn v. Phelps (1848) 19 Conn. 63, 48 Am. Dec. 133; Mead v. White (Mead v. Winslow) (1909) 53 Wash. 638, 23 L.R.A.(N.S.) 1197, 132 Am. St. Rep. 1092, 102 Pac. 753; Rowell v. Smith (1905) 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773.

See Petesch v. Hambach, supra, note 30.

A contract of employment void because never signed by both parties, and also void for lack of consideration, being unilateral, even if it had been signed, cannot be reformed by adding thereto an oral agreement void under the Statute of Frauds. Rosen v. Philipsborn Co. (1909) 135 App. Div. 499, 120 N. Y. Supp. 486.

⁶² ALLEN v. KITCHEN, ante, 563.

⁶³ Osborn v. Phelps (1848) 19 Conn. 63, 48 Am. Dec. 133.

Co. v. Diamond Coke & Coal Co. post, 596, seems to assume that the contract might be reformed, but not specifically enforced as reformed, in the next paragraph it is stated that, by reforming the contract by oral testimony, the whole agreement is reduced to a parol contract, which by the statute is declared to be void. The reformation, therefore, would seem to amount to nothing so far as entitling the party seeking it to any relief, except, possibly, to be protected from the enforcement of the contract as written against him.

It has been held that a court is without power to reform a contract for the sale of land which, by mistake, omitted that part of the oral agreement relating to a release of dower and homestead.⁶⁴

This rule prevents the reformation of a building contract which was signed by the sureties under the words, "In presence of sureties,"—a signing which was held not a sufficient note or memorandum in writing to satisfy the Statute of Frauds, and charge the signers as sureties on the contract.⁶⁵

This rule was applied and the Statute of Frauds held to prevent reformation of a defectively written collateral promise of guaranty, although the minds of the parties met on all the essentials of a verbal promise to make a valid guaranty, but, through mutual mistake, without any element of fraud, failed to embody it in the writing.⁶⁶ The court states: "It will not do to hold that the mere delivery of the consideration as between the original parties to the contract, though sufficient to support a guaranty, if one be properly made, is a part performance of a verbal contract to make a valid guaranty, taking the latter out of the Statute of Frauds, under the familiar principle that where relations between parties to a verbal agreement, required to be reduced to writing to satisfy the Statute of Frauds and so give it validity, have so far ceased to be executory as to one party thereto that it would operate as a fraud upon him to permit the other to successfully put up

the Statute of Frauds as an excuse for nonperformance, a court of equity, while respecting the statute, will lay its hands upon that other and enforce obligations deemed to have been created by the circumstances not within the statute, but resting upon him in good conscience, with a corresponding equitable remedy to give them vitality; that equity thereby may leave the Statute of Frauds intact, yet satisfy the ends of justice by avoiding the injurious consequences that would, or might, otherwise flow from the mistake. It would take much time and require a very broad field to be explored to define the precise boundaries to which such obligations are deemed to be cognizable by a court of equity, so that, while respecting the Statute of Frauds, it can prevent its being used to accomplish the very purpose it was designed to avoid. That it cannot be carried so far as to entirely nullify the statute would seem not to be open to question. Courts of equity have been accustomed to take great liberties, and probably seldom too great, in this matter, but they have never gone so far but that in each instance it was at least assumed that the real policy of the statute was left intact. The growth of equity in the line under discussion, while very rapid at first, has not perceptibly advanced in recent years. Many judicial warnings may be found in the books against any further development of the idea that the Statute of Frauds may be 'uplifted,' so to speak, and the consequences of non-compliance with it thereby be avoided, pointing to instances where it was thought it had already been extended to the danger line, if not beyond, and suggesting that to further extend it would, in effect, avoid it altogether."

It has been held that a memorandum of the sale of goods which is insufficient to satisfy the Statute of Frauds cannot be reformed.⁶⁷

A contract with a limited partnership association, signed by one of the managers, but which is unenforceable unless signed by at least two of the managers,

⁶⁴ *Stodalka v. Novotny* (1893) 144 Ill. 125, 33 N. E. 534. The court states that the written instrument was without validity in respect of the estate of homestead of the vendors in the property, and the court was without power to vitalize it. The plaintiff asked that defendant be compelled to convey, but no point is made of this fact. A small cash payment was made at the execution of the contract.

⁶⁵ *Mead v. White* (*Mead v. Winslow*) (1909) 53 Wash. 638, 23 L.R.A.(N.S.) 1197, 132 Am. St. Rep. 1092, 102 Pac. 753. The L.R.A.1917A.

action was to reform the contract and recover damages of the sureties for a breach thereof,—relief which was denied.

⁶⁶ *Rowell v. Smith* (1905) 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773.

⁶⁷ *Lee v. Hills* (1879) 66 Ind. 474. It was claimed in this case that the omission from the memorandum of the fact which made it insufficient was the result of the mistake. The court states that it is immaterial how the omission occurred, as it is very clear that, under the law, parol evidence cannot be received to supply the omitted fact in

cannot be reformed so that it shall be and appear to be executed by at least two of the managers and specifically enforced as reformed.⁶⁸ In the course of the opinion it is stated that to a bill in equity "to reform an instrument in writing, if the proposed reformation involves the specific enforcement of an oral agreement within the Statute of Frauds, or the term sought to be added will so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute is a sufficient answer unless the defendant is estopped to plead it."

And it has been held that a resolution of a city council instructing the mayor to purchase property, which does not amount to a contract, cannot be reformed so as to give it the force and effect of a contract, as that would be creating by parol a contract which the law requires to be in writing.⁶⁹ Upon petition for rehearing, the decision refusing to reform the contract is approved, but upon the theory that reformation as requested would result in a contradiction of the memorandum and would introduce an element not agreed upon by the parties, and not omitted by the mistake of the party sought to be charged, or by mutual mistake of such party and the party who would enforce the memorandum if reformed.

the memorandum. The omission was of the word "sold" before the name of the purchaser in the memorandum.

⁶⁸ *Andrews Bros. Co. v. Youngstown Coke Co.* (1889) 39 Fed. 353. It is stated, however, in the opinion, that there was no such mistake as authorized the reformation independent of the Statute of Frauds.

⁶⁹ *Carskaddon v. South Bend* (1895) 141 Ind. 596, 39 N. E. 667, the resolution of the city council instructing the mayor to purchase the property had been accepted by the owner of the property, who, in his petition for reformation, states that it was the intention of the mover of the resolution and of the council in adopting it that such action should complete the purchase of the property. The court states that it is not necessary to determine the effect of the resolution if it fully expressed the alleged intention of the council, but it may well be suggested as doubtful if a complete purchase by ex parte resolution is possible; "but that reformation of the resolution is not possible we have no doubt; as written it was not a contract, and it was desired by the reformation to give it the quality and force of a contract."

⁷⁰ *Hughes v. Payne* (1908) 22 S. D. 293, L.R.A.1917A.

On the contrary, it has been held that an executory contract for the sale of real estate in the form of a receipt for a cash payment, which is an insufficient memorandum to satisfy the Statute of Frauds because not stating the purchase price of the real estate nor when the deed was to be delivered and the balance of the purchase price paid, may be reformed, and specifically enforced as reformed.⁷⁰ And it has been held that a contract which omitted the description of the land intended to be conveyed may be reformed without violating the Statute of Frauds, and specifically enforced as reformed.⁷¹

VI. Effect upon the right to reform contracts when it is sought to specifically enforce the contract as reformed.

a. In general.

In the case of an executory contract, relief is frequently sought by way of reformation and specific performance.⁷² The introduction of specific performance raises additional questions. There are two theories on the right to relief in such a case. According to the one, the Statute of Frauds prevents the relief sought, especially where it is sought to broaden the scope of the contract and make it more burdensome upon the defendant. According to the other, the statute does not prevent such relief, whether the relief sought consists in broadening the

117 N. W. 363. The receipt in this case was dated, and read, "Received of E. C. Hughes Three hundred dollars (\$300) in part payment on south east quarter section 30. R. 124-79, in Walworth County, S. D., W. H. Payne," and it was alleged that through mistake, oversight, and inadvertence the matters enumerated in the text above were omitted. After stating that the memorandum was insufficient under the Statute of Frauds, the court does not further consider the Statute of Frauds, but treats it as a question of the right to reformation of a contract merely.

⁷¹ *McMee v. Henry* (1915) 163 Ky. 729, 174 S. W. 746. It was accordingly held in this case that a contract which merely stated the sum to be paid by the purchaser and the time of payment could be reformed by inserting therein the description of the property intended to be conveyed. The action in the case was one by the purchaser to recover the cash payment made by him, in which action the vendor set up the contract and asked for its reformation and specific performance.

⁷² *McCurdy v. Breathitt* (1827) 5 T. B. Mon. (Ky.) 232, 17 Am. Dec. 65, supra, note 51.

scope of the writing or restricting it. These theories will be discussed in detail.

b. View that relief cannot be granted.

It is the doctrine of the English courts that specific performance of an executory contract will not be decreed with parol variations or additions.⁷³ This has been treated as the same as an attempt to reform the contract and specifically enforce it as reformed.⁷⁴ The rule denying relief in such cases is held to apply irrespective of the Statute of Frauds.⁷⁵ It appears, therefore, to be much broader than the subject of investigation in this note. Accordingly, the statement of the rule as found in the books and few cases examined has been accepted without an exhaustive investigation of all the cases applying it.

Notwithstanding parol evidence is inadmissible under this rule, irrespective of the Statute of Frauds, in some of the English cases, the Statute of Frauds is considered. It is treated, however, merely as strengthening the position of the courts in a conclusion arrived at independently thereof.⁷⁶ Sir Wm. Grant, *M. R.*, in *Woollam v. Hearn*,⁷⁷ after pointing out that in a bill to compel the specific performance of an agreement to execute a lease with parol variations, the parol evidence is offered, not for the purpose of resisting, but of obtaining, a decree, first to falsify the written agreement and then to substitute in its place a parol agreement to be executed by the court, concludes thus: "Thinking as I do that the Statute (of Frauds) has been already too much broken in upon by supposed equitable exceptions, I shall not go farther in receiving and giving effect to parol evidence than I am forced by precedent." The evidence was accordingly refused and the bill dismissed.

In *Atty. Gen. v. Sitwell*,⁷⁸ a contract for the sale of a manor, with its appurtenances, was made in ignorance of the

fact that an advowson was appendant or appurtenant thereto. After the contract had been signed and the purchaser let into possession, this fact was discovered, and the purchaser refused to complete his purchase unless the advowson was conveyed to him with the rest of the property. Upon a bill by the vendor for specific performance of the contract without the advowson, or with an exception of the advowson, Alderson, B., says: "The next question which would have arisen would have been whether or not, on the ground of mistake, one party not intending to sell, and the other not intending to purchase, the advowson, I could have reformed the agreement, and have directed the specific performance of it when so reformed. I confess I should have had great difficulty in holding that this could be done; because I cannot help feeling that, in the case of an executory agreement, first, to reform [it on the ground of mistake] and then to decree an execution of it would be virtually to repeal the Statute of Frauds. The only ground on which, I think, the case could have been put, would have been, that the answer contained an admission of the agreement as stated in the bill. . . . But, in my present view of the question, it seems to me that the court ought not, in any case where the mistake is denied or not admitted by the answer, to admit parol evidence, and upon that evidence to reform an executory agreement."

The question has usually arisen in such cases over the introduction of parol evidence to show the mistake; and, in accord with the rule above stated, the parol evidence has been held inadmissible. When a party is seeking to specifically enforce a contract as written, the courts of equity admit parol evidence of a mistake or fraud, and, when the mistake or fraud is sufficiently made out, refuse specific performance of the contract as written.⁷⁹ Referring to the fore-

⁷³ 2 Story, Eq. Jur. 13th ed. § 770a; *Woollam v. Hearn*, 7 Ves. Jr. 211, 32 Eng. Reprint, 86, 6 Revised Rep. 113, and note thereto in 2 White & T. Lead. Cas. in Eq. pt. 1, *518.

⁷⁴ *Macomber v. Peckham* (1889) 16 R. I. 485, 17 Atl. 910.

⁷⁵ 2 Story, Eq. Jur. 13th ed. § 770a; *Woollam v. Hearn* (Eng.) and *Macomber v. Peckham* (R. I.) supra.

⁷⁶ In *Clowes v. Higginson* (1813) 1 Ves. & B. 524, 35 Eng. Reprint, 204, it is stated that "the exclusion of parol evidence offered to explain, add to, or in some way to vary, a written contract relative to land, stands upon two distinct grounds; not simply as L.R.A.1917A.

being in direct opposition to the Statute of Frauds, . . . but also upon the general rule of evidence independent of that statute."

⁷⁷ (1802) 7 Ves. Jr. 211, 32 Eng. Reprint, 86. The English court applied this theory to prevent the reformation of a lease, at the suit of the lessee, by reducing the rent provided in the writing.

⁷⁸ 1 Younge & C. Exch. 559.

⁷⁹ After referring to this rule, the court in *Clowes v. Higginson* (1813) 1 Ves. & B. 524, 35 Eng. Reprint, 204, states that the "rule admitting evidence in those cases is intelligible and clear. It is admitted not to vary an agreement as it is expressed

going rule it has been stated in some cases that parol evidence of mistake or fraud is admissible in defense, but not admissible in obtaining affirmative relief. While in a sense this statement of the rule may be true, it must be understood to rest upon the fact that it is not admissible on behalf of one seeking the specific performance of a written contract with parol variations, but is admissible to defeat the specific performance of a contract as written. In other words, the inadmissibility in the one case and admissibility in the other is determined by the fact that specific performance of a different agreement is sought in the one case than in the other.

It has been stated that relief by way of declaring the writing not the true agreement may be given in a suit to have the written contract, or some of its terms, set aside, annulled, or restricted, as well as to a defendant resisting its specific enforcement.⁸⁰

Where a party seeking specific performance offers to perform the omitted

part of the oral agreement, he has been held entitled to relief.⁸¹

This is held irrespective of the Statute of Frauds, and is not changed by it; for, as said in an early case,⁸² the statute does not say that the same exceptions shall not hold to a written agreement as held before the statute; the statute does not say that a written agreement shall bind, but that an unwritten agreement shall not bind.

The admissibility of parol evidence in defense of an action in specific performance of the contract as written, to show that the writing does not represent the true agreement of the parties, is not within the scope of the present note, as it has to do with specific performance, and not with reformation. The rule is stated here generally to show its relation to the rule with which it has often been confused. Furthermore, in some such cases, the plaintiff has been given an option of accepting the contract as modified by the parol evidence, or having his bill dismissed.⁸³ But where the plaintiff,

open to no objection, and therefore upon the letter binding, but to show circumstances of fraud, making it unconscientious in the party who so obtained it to insist upon, and unjust in the court to decree, the performance.⁸⁴

2 Story, Eq. Jur. 13th ed. § 770.

This rule of the English court is referred to in *Westbrook v. Harbeson* (1827) 2 M'Cord, Eq. (S. C.) 112, where the court states that "there are many cases where parol evidence has been admitted on the part of a defendant to shew a mistake in a deed in order to prevent the specific execution of it; but I am not aware of any where it has been admitted on the part of the complainant to set up a different deed from the one which has been executed." It was accordingly held in this case that parol evidence was incompetent to show that a wife who joined her husband in a deed of land intended to relinquish her inheritance, and not merely her dower, as stated in the deed. The action was one brought by a subsequent purchaser of the land against the heirs of the wife, and prayed that they might be compelled to release their right to the land.

This rule is approved by other American courts. *Osborn v. Phelps* (1848) 19 Conn. 63, 48 Am. Dec. 133; *Glass v. Hulbert* (1869) 102 Mass. 24, 3 Am. Rep. 418.

In *Best v. Stow* (1845) 2 Sandf. Ch. (N. Y.) 298, specific performance of an agreement for the exchange of lands was refused on the ground that the written instrument did not contain the agreement which the defendant entered into, and therefore he was not bound to perform it.

The court in *Leas v. Eidson* (1852) 9 Gratt. (Va.) 277, an action for specific performance, in which performance was resisted on the ground of mistake as to a parcel of land containing 14 acres, which it was alleged was embraced in the lands which the plaintiff sold and the defendant purchased, and was of such value relatively to the balance of the tract as to entitle the defendant, if he could not get the said parcel of land, to have a rescission of the contract, or at least such an abatement of the purchase money as would compensate him for the injury, it is stated that a mutual mistake of the parties in a matter which is part of the essence of the contract, and substance of the thing contracted for, will be corrected by a court of equity, and may be good ground for rescinding the contract or executing it on equitable terms of compensation, according to circumstances, even though the contract be in writing and required to be so by the Statute of Frauds. This is merely obiter in this case, however.

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⁸⁰ *Glass v. Hulbert* (1869) 102 Mass. 24, 3 Am. Rep. 418.

⁸¹ In *Martin v. Pycroft* (1852) 2 De G. M. & G. 785, 21 L. J. Ch. N. S. 448, 16 Jur. 1125, 42 Eng. Reprint, 1079, 22 Eng. Rul. Cas. 852, the Statute of Frauds was held not to prevent relief to a lessee who sought specific performance of an agreement to make a lease which had omitted an agreement on his part to pay a premium, where the lessee offered to pay the premium.

⁸² *Clinan v. Cooke* (1802) 1 Sch. & Lef. 22, 6 Eng. Rul. Cas. 721, 15 Eng. Rul. Cas. 344.

⁸³ *Campbell, J., in Climber v. Hovey* (1866) 15 Mich. 18; *Macomber v. Peckham* (1889) 16 R. I. 485, 17 Atl. 910.

who has sought specific performance of a contract as written, chooses to have specific performance of the agreement as modified by answer, rather than have his bill dismissed, it has been stated⁸⁴ that it is not "making a decree upon the evidence, but upon the submission of the plaintiff and of the defendant in his answer;" to execute the agreement upon fair terms.

The expressions of opinion contained in the English cases discussed above are directly in accord with the adjudications in one line of American authorities, to the effect that the Statute of Frauds prevents the reformation of an executory contract and the specific performance of the contract as reformed. One court,⁸⁵ after reviewing the cases of executed contracts in which relief was granted notwithstanding the Statute of Frauds, concludes that the reasons for these decisions do not reach "to executory contracts within the terms of the statute where there has been no part performance, and the party who sets up the statute has not received and does not retain any benefit derived by him from the mistake, but merely denies the right to bring an action on the parol contract because of the statute." Accordingly the Statute of Frauds was held a defense to a bill by the vendor for the reformation of a contract by including therein a tract omitted by mistake, and the specific enforcement of the contract as reformed, where the purchasers had not received and did not retain any benefits derived from the mistake. Much of the reasoning in this case is applicable whether the parol variation consists in striking out or adding land; but, in distinguishing this case from a remark of Vice Chancellor

Pitney,⁸⁶ in a case involving the striking out of a lot from an executory contract, the court seems to make a distinction on this theory. But in a subsequent case,⁸⁷ any distinction between adding to and restricting seems to be eliminated, as in that case reformation of a deed and the specific performance of the agreement as reformed were denied at the suit of the vendor, where the reformation consisted in making the sale subject to a right of way over the land, the court stating that the vendor is "asking defendant to take less than he bargained for at the same price. He can only compel him to take less by obtaining an alteration of the agreement as written. The agreement that he would enforce must be made out in part of parol, and this the statute forbids."

The theory that the Statute of Frauds prevents the reformation of a contract and specific performance as reformed is well stated in the language of a court⁸⁸ adhering thereto, "that if two parties enter into an agreement respecting the sale of real estate, and fail to reduce that agreement to writing, according to their intention, it is not competent for the purchaser to come into a court of chancery for the purpose of having the written agreement rectified by the aid of parol evidence, and then the execution enforced." To do this would be in effect to charge a party upon a contract not made in writing and signed by him. The court, while stating the rule broadly enough to include a restriction of the operation of the writing, was actually dealing with a case in which an enlargement of the writing was sought; and it is impossible to determine whether the parol evidence was held inadmissible on

⁸⁴ *Rich v. Jackson* (1794) 6 Ves. Jr. 341, note, 31 Eng. Reprint, 1081, 4 Bro. Ch. 514, 29 Eng. Reprint, 1017.

⁸⁵ *Wirtz v. Guthrie* (1913) 81 N. J. Eq. 271, 87 Atl. 134. The vendor sought to insert the omitted parcel, apparently to meet the objection of the purchaser that the rental value of the premises mentioned in the agreement was less than stated by the vendor, and the attempt by the purchaser to set aside the sale.

⁸⁶ Vice Chancellor Pitney held in *Keim v. Lindley* (1895) — N. J. Eq. —, 30 Atl. 1063, that the Statute of Frauds was not infringed by striking out a lot from a contract and enforcing it as thus reformed, on the theory that the lots intended to be conveyed were actually described. The decree of the chancery court was reversed in (1896) 54 N. J. Eq. 418, 34 Atl. 1073, upon the ground that the contract in question was made by an agent without authority, and the construction of the Statute of L.R.A.1917A.

Frauds on the point involved was not reached. The court in *Wirtz v. Guthrie*, in commenting upon this case, makes a distinction between adding lands not described and striking out lands described.

⁸⁷ *Voght v. Mullin* (1914) 82 N. J. Eq. 452, 89 Atl. 533.

In *Davimos v. Green* (1914) 83 N. J. Eq. 596, 92 Atl. 96, the rule of *Wirtz v. Guthrie* and *Voght v. Mullin* was applied to prevent the reformation of a contract by supplying the name of the vendor by parol and specifically enforcing it as reformed at the suit of the vendee.

⁸⁸ *Osborne v. Phelps* (Conn.) supra, holding that there could be no reformation and specific performance, at the instance of the purchaser, of a contract for the sale of land in which two writings, each containing the part to be performed by the party signing it, were by mistake signed by the wrong party.

the theory that equity will not reform a writing within the Statute of Frauds and then specifically enforce it as reformed, or on the theory that equity will not do this when it is sought to enlarge the operation of the writing. The latter is the view that has ordinarily been taken of this case.

As indicated in the preceding paragraph, a distinction is made between reforming a contract where the reformation consists in enlarging the terms thereof, or merely restricting the contract. The majority of American courts which hold that the Statute of Frauds prevents the reformation of an executory contract for the sale of real estate and its specific enforcement as reformed do so only where the relief sought consists in adding to the terms of the contract or enlarging its scope. The supreme court of Rhode Island⁸⁹ in such an action, in which the relief sought consisted in including omitted land, says: "We do not wish to express any opinion . . . beyond what is required by the case at bar," and that, as reformation consisted in enlarging the scope or operation of the contract, it must be

denied. A number of other jurisdictions are in accord with this decision.⁹⁰ And this is the theory of the supreme court of Massachusetts in the leading case of *Glass v. Hulbert*,⁹¹ in which the court states: "When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the Statute of Frauds, or when the terms sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no right has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defense. . . . The fact that the omission or defect in the writing by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express was occasioned by mistake or by deceit and fraud will not alone constitute such an estoppel."

In discussing the power of a court of equity to reform an instrument so as

⁸⁹ *Macomber v. Peckham* (1889) 16 R. I. 485, 17 Atl. 910. It was urged that the oral testimony should be received because it was shown that the contract could be reformed as desired by striking certain words in it, as well as by adding others to it. In answer to this argument the court states: "We think, however, that if the effect of the change is to enlarge the scope or operation of the contract, it does not matter whether the change is made by striking out words or adding them, for in either case the contract will not be the contract which the defendant signed, and will be more burdensome to him."

⁹⁰ *Elder v. Elder* (1833) 10 Me. 80, 25 Am. Dec. 205, holding that a contract for the sale of a parcel of real estate situated in two towns could not be reformed and specific performance thereof granted where one of the towns was omitted by mistake in the description. The vendee in this case had paid the first instalment upon the purchase price.

Climer v. Hovey (1866) 15 Mich. 18. It has been stated that where there are no circumstances creating an equitable estoppel "it is difficult to perceive wherein the correction of a contract by parol evidence differs from the enforcement of an agreement resting entirely in parol. . . . But every parcel of land or interest imported into a contract which does not refer in any way thereto must be thus affected by unwritten stipulations, and the attempt to do this is nothing else than an attempt to put parol agreements on the same footing with writings."

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The written opinion contained in this case, however, does not express the holding of the entire court. There were four justices upon the supreme court at this time Martin, Ch. J., concurred in the result; Cooley, J., concurred on the theory that a case sufficiently clear to warrant a specific performance was not made out, and he states that he expresses no opinion as to the power of the court to correct a mistake in a contract. It is stated simply that *Christiancy, J.*, concurred; and this is interpreted in *Metropolitan Lumber Co. v. Lake Superior Ship Canal, R. & Iron Co.* (1894) 101 Mich. 577, 60 N. W. 278, to mean that *Christiancy* concurred with *Cooley*.

Davis v. Ely (1889) 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 607, 10 S. E. 138, holding that an executory contract will not be reformed so as to include an omitted tract where the only purpose is to specifically enforce it as reformed. The court states that "to admit the testimony in such cases would be, as has been said, virtually repealing the Statute of Frauds and opening the door to a flood of evils the extent of which it would be impossible to estimate."

McCann v. Pickup (1885) 17 Phila. (Pa.) 56 (contract described wrong tract); *Allen v. Kitchen*, ante, 563 (where description was insufficient).

And see *Safe Deposit & T. Co. v. Diamond Coke & Coal Co.* post, 598.

⁹¹ (1869) 102 Mass. 24, 3 Am. Rep. 418 (this case involved a deed, and is discussed more fully in that connection).

to enlarge its operation, the court in *Glass v. Hulbert*⁹² states that this is done on the theory "that in equity the previous oral agreement is held to subsist as a binding contract notwithstanding the attempt to put it in writing. . . . But when the omitted term or obligation is within the Statute of Frauds, there is no valid agreement which the court is authorized to enforce outside of the writing; in such case relief may be had against the enforcement of the contract as written or the assertion of rights acquired under it contrary to the terms and intent of the real agreement of the party, and such relief may be given as well upon the suit of a plaintiff seeking to have a written contract or some of its terms set aside, annulled, or restricted as to a defendant resisting its specific performance. . . . Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the Statute of Frauds. That statute forbids the enforcement of certain kinds of agreement without writing, but it does not forbid the defeat or restriction of written contracts, nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced not to establish a normal agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. . . . But rectification by making the contract include obligations or subject matter to which its written terms will not apply is a direct enforcement of

the oral agreement as much in conflict with the Statute of Frauds as if there were no writing at all."

The supreme court of Massachusetts holds in the case of executed contracts that reformation may be granted by way of restricting the writing. That such a restricted executory writing may be enforced has been assumed, at least, in the cases.⁹³ But that court has said that it has been doubted whether, when fraud is the ground for relief, the contract as narrowed or restricted may be enforced,⁹⁴ and the court observed that the "difficulty is that if the fraud vitiates and defeats the instrument, then the modified agreement to be enforced must be that which is proved by parol evidence, and this seems to violate the statute." The court concludes, however, that "the instrument, in such case, is not void. It is voidable only, and that not at the election of the party who committed the fraud. He is not entitled to control the extent of the effect that shall be given to his fraudulent conduct; and it is not for him to object that the fraud is availed of only to defeat the rights which he has secured by fraud beyond what he is fairly entitled to by the terms of the real agreement between the parties. When those are separable, and the nature of the case will admit of it, the court may enforce the written contract in accordance with its terms, giving relief against the fraudulent excess or the clause improperly inserted."

c. View that relief may be granted.

Under the other theory it is held that an executory contract for the sale of real estate may be reformed, and, as reformed, specifically enforced.⁹⁵ One case⁹⁶ having disapproved what is con-

⁹² (Mass.) *Ibid*.

⁹³ *Keim v. Lindley* (1895) — N. J. Eq. —, 30 Atl. 1063. See note on reversal of this case *supra*, note 86. *ALLEN v. KITCHEN*, ante, 563.

The court in *Elder v. Elder* (Me.) *supra*, expressly refrains from deciding this point, stating that such a decision is not necessary.

⁹⁴ *Glass v. Hulbert*, *supra*.

⁹⁵ See cases cited in notes 113-118.

An agreement by a grantor who, by mistake, had failed to convey all of the land sold, with his grantee, who had gone into possession of the omitted tract and paid the purchase price, to convey the omitted tract, has been held not to be a contract of leasing or of sale of land, nor to be governed by the rules applicable to contracts for the purchase of lands where there has been no part performance. *Ross L.R.A.1917A*.

v. Purse (1891) 17 Colo. 24, 28 Pac. 473. And this is true although the grantee has asked that the written agreement be reformed and specifically enforced.

See *Philpot v. Elliott*, *supra*, note 6.

See *Worley v. Tuggle*, *supra*, note 29.

⁹⁶ *Ring v. Ashworth* (1856) 3 Iowa, 452. It is stated that "it is therefore claimed that while the respondent may be allowed to show in defense that there was a mistake in the written agreement, and thus resist the specific performance as prayed, and while equity might for him reform and correct the contract whether the alleged mistake was set up by answer or cross bill, yet the same relief will not be extended to the party who, as complainant, seeks similar relief."

In an obiter statement in *Keisselbrack v. Livingston* (1819) 4 Johns. Ch. (N. Y.) 144, the court, after referring to the English rule

ceived to be the rule, making a distinction between the admissibility of parol evidence "where a party is seeking" and "when he is resisting a specific performance," regards the question as settled that reformation of an executory contract for the sale of real estate may be had and specific performance of the reformed contract decreed. It is stated that "so far as the introduction of proof to show mistake may be said to violate the Statute of Frauds, it must be very evident that it can make no difference whether it comes from the complainant or respondent."⁹⁷ On the authority of this case it has been held that a lease may be reformed by inserting therein a stipulation omitted by mutual mistake, that the lessee should have the privilege of buying the land at any time during the term of the lease, upon terms stated, and specific performance of the agreement granted, without violating the Statute of Frauds.⁹⁸

The case of *Gillespie v. Moon*⁹⁹ has been regarded as the leading case in support of the theory that there is no distinction as to the admissibility of parol proof to show a mistake, whether such proof is offered affirmatively or as a defense. The court makes no reference to

the Statute of Frauds in this connection and expressly states that the cases in which parol proof has been limited to defensive purposes have been cases in which specific performance with parol variations was involved. The court was not dealing with such a case, hence had no occasion to, and did not, notice the limitations of the doctrine now under consideration, although it is stated that "there are numerous instances in which the plaintiff has claimed and obtained relief by showing a mistake in the agreement, and there would be a most deplorable failure of justice if the mistake could only be shown and corrected when set up by a defendant to rebut an equity." While the case has often been cited without reference to whether the contract involved was executed or executory, it must be remembered that an executed contract was involved, and that there was no question of specific performance.

Other cases have applied the same rule to executory contracts that apply to executed ones, and have reformed and specifically enforced, as reformed, instruments admittedly so defective as to be specifically unenforceable without reformation. It has been held that a contract

that parol proof cannot be allowed to correct a mistake in favor of a plaintiff seeking specific performance of the corrected agreement, states: "I am not sufficiently instructed at present to admit the soundness of this distinction."

⁹⁷ *Ring v. Ashworth* (Iowa) supra. The court in *Macomber v. Peckham* (1889) 16 R. I. 485, 17 Atl. 910, refers to the statement found in some opinions that there is no reason why oral testimony should not be received as readily when offered by the complainant to reform the written contract and enforce it when reformed as when offered by the defendant to defeat its enforcement; then continues: "This may be so when the written contract is not within the Statute of Frauds, but when the contract is within the statute, the difference between receiving oral testimony when offered for the purpose of varying the contract and enforcing it as varied, and receiving it when offered for the purpose of showing that the contract as written is not what was agreed to, and of defeating the enforcement, is the difference between doing what is forbidden by the statute and doing what is not forbidden."

The reason for the rule is that the parties are not seeking "similar relief." Admitting that the written contract does not contain the true contract of the parties, in the one case the party is seeking to specifically enforce the true contract; in the other case he is seeking to enforce the written contract. The Iowa court very properly L.R.A.1917A.

denies that there is any distinction between the situations as stated by it; but there is a very proper distinction between the situations to which the rule is applied.

⁹⁸ *Butler v. Threlkeld* (1902) 117 Iowa, 116, 90 N. W. 584. The court regards the rule in this jurisdiction settled by the case of *Ring v. Ashworth* (Iowa) supra, but in the opinion it is stated that "the writer would be inclined, but for the former decision of this court, to the view that relief in such a case should be denied. The court ought not to write into a contract that which, to be enforceable, the law required the parties not only to agree to, but to reduce to writing in order to be enforceable. It seems like an indirect attempt to enforce the specific performance of an oral agreement for the sale of land."

⁹⁹ (1817) 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559. See comment of New Jersey chancery court on this case, supra, note 48, and see also *ALLEN v. KITCHEN*, ante, 563.

See supra, note 19.

The court in *Macomber v. Peckham* (1889) 16 R. I. 485, 17 Atl. 910, states "that the remarks of Kent [in *Gillespie v. Moon*] and Story [in his *Equity Jurisprudence*] seem to have been directed against the doctrine of the English chancery court, which, as we have seen, is applied to all written contracts whether within the statute [Statute of Frauds] or not; and it does not appear that in making them they gave thought to the distinction created by the statute [Statute of Frauds]."

for the sale of land which failed to mention any land may be reformed by inserting the description of the land, and, as reformed, specifically enforced, where it was alleged that the purpose and intent of the contract was to evidence a sale of the property described, and to describe it, but, by mutual mistake of the parties, the contract was signed with such matters omitted.¹⁰⁰ And it has been held that an executory contract in the form of a receipt for a cash payment, which is an insufficient memorandum to satisfy the Statute of Frauds because not stating the purchase price of real estate nor when the deed was to be delivered and the balance of the purchase price paid, may be reformed without violating the Statute of Frauds.¹⁰¹ But see discussion in subd. V. hereof for cases to the contrary where the contract is defective.

The theory of the Kentucky court is that supplying description does not conflict with the Statute of Frauds, since "the necessity for description does not come from the statute; it comes rather from the common law on contracts. Without a description the contract is too indefinite for enforcement."¹⁰² Assuming the correctness of this theory, the case amounts to nothing more than a holding that where the part of the agreement sought to be supplied on reformation is not within the Statute of Frauds, the statute is no bar to the reformation. But the court's position that the necessity for description does not come from the Statute of Frauds is extremely doubtful. Browne, in discussing the contents of the memorandum,¹⁰³ says that "it must, of course, appear from the memorandum what is the subject matter of the defendant's engagement. Prop-

¹⁰⁰ *McMee v. Henry* (1915) 163 Ky. 729, 174 S. W. 746. The contract recited that it was "entered into this day between M. H. of the first part and W. M. of the second part said W. M. agrees to pay the sum of \$. . . cash in hand as soon as the deed is examined, to be satisfactory, also agrees to give check for \$. . . immediately to bind contract."

This case was followed in *Castleman-Blakemore Co. v. Pickrell & C. Co.* (1916) 163 Ky. 750, 174 S. W. 749, where, in an action in damages for breach of contract, the plaintiff attempted to show a parol agreement not contained in the contract. The court states: "We deem it unnecessary to pass on the question whether or not the oral agreement relied on is one not to be performed within one year from the making thereof, and therefore within the Statute of Frauds. A written contract may be reformed and specifically enforced or damages awarded for its breach as reformed. . . . And this is true though that part of the agreement which it is claimed was omitted from the contract by fraud or mistake is within the Statute of Frauds;" citing *McMee v. Henry*.

¹⁰¹ *Hughes v. Payne* (1908) 22 S. D. 293, 117 N. W. 363. It appears from the allegations of the complaint that the plaintiff purchased of the defendant, and the defendant agreed to sell and convey to the plaintiff by good and sufficient deed, a quarter section of land described in the complaint for the agreed price of \$12 per acre, \$300 of which was paid in cash on that day, and the balance was to be paid on the delivery of the deed within one week, the defendant to sign the written memorandum or receipt set forth in the complaint, and it was alleged that the time and manner of making the payment of the balance was not specified therein, through mistake, oversight, and inadvertence. The court states that "while the contract or receipt is exceeding-

ly meager, it contains sufficient to show that the respondent, on the day specified, agreed to sell to the plaintiff the quarter section of land described in the contract, and that he received \$300 on account of said contract. It clearly appears from this receipt who was the party selling and the party purchasing the land, and the description of the land contracted to be sold." See supra, note 70, for form of receipt.

¹⁰² *McMee v. Henry* (Ky.) supra. The court continues this argument by stating that "the Statute of Frauds does not prescribe the form for contracts, nor does it affect the fundamentals of a contract other than to require that contracts for the sale of land be reduced to writing; but such a contract might be reduced to writing and meet all the requirements of the Statute of Frauds as written, still be unenforceable under the law of contract for lack of definiteness, and that is the case we have in hand. There is a written memorandum signed by the parties, but for want of description of the thing sold, it is so indefinite that it cannot be enforced in its present condition, but it is admitted by the demurrer that it does not express the contract which the parties orally agreed upon and attempted to put in writing; that is, appellee agreed to sell and the appellant agreed to pay the consideration named for a certain piece of real estate on Third street; he avers that this was omitted from the contract by oversight and mistake of the draftsman and the parties. He does not seek to enforce the contract as it stands, for that would be impossible. He asks to have the contract reformed because of the oversight and mistake. We have reached the conclusion that there is abundant reason and authority for affording the relief requested, and that the Statute of Frauds cannot be invoked against it."

¹⁰³ Browne, *Stat. Fr.*, 5th ed. § 385. A similar conclusion appears in note in 11

erty which is purported to be bargained for must be so described that it may be identified." It is difficult to conceive of a statute requiring a contract to be in writing, but not requiring a description of the property which is the subject matter of the contract to be in writing.

The Minnesota court granted reformation and specific performance as reformed by inserting the correct description in a sale of a lot,¹⁰⁴ the court stating that "where the written contract, whether executed or executory, fails, through mistake or fraud, to express the actual agreement orally agreed on, it may be reformed as well by including in it the description of a subject matter omitted as well as by excluding from it a subject already in it."

Where the contract itself requires the aid of external proof, any mistake which is shown to exist in the general and unqualified terms of that part of the agreement which depends for its explanation upon external proof may be corrected by parol, and specific performance decreed as corrected without violating the statute.¹⁰⁵

d. Summary.

Briefly summarizing the foregoing:

L.R.A. 98, and that in 11 L.R.A. 143, with reference to the right to specific performance.

¹⁰⁴ *Olson v. Erickson* (1890) 42 Minn. 440, 44 N. W. 317. After referring to the fact that it is admitted generally that a court has the power to make the writing conform to the oral agreement by excluding a subject not intended to be in it, the court states: "We do not see the difference in principle between that and making it conform by inserting another subject. In either case the oral agreement is the guide and controls the action of the court."

¹⁰⁵ In *Keisselbrack v. Livingston* (1819) 4 Johns. Ch. (N. Y.) 144, an agreement to execute a lease for lives contained the clause that the lease was to contain the usual clauses, restrictions, and reservations in leases given by the lessor. The court states that, by the particular terms of this agreement, it is required to deal with written and parol proof to ascertain the clauses and restrictions and reservations that were intended; accordingly parol evidence was admitted to show that one of the provisions contained in the printed form of lease given by the lessor was not to be observed.

¹⁰⁶ *Wirtz v. Guthrie* (1913) 81 N. J. Eq. 271, 87 Atl. 134; *Voght v. Mullin* (1914) 82 N. J. Eq. 452, 89 Atl. 533; *Davimos v. Green* (1914) 83 N. J. Eq. 596, 92 Atl. 96.

And see expression of opinion of English courts, *supra*.

But see *Keim v. Lindley* (1895) — N. J. Eq. —, 30 Atl. 1063, *supra*, note 86. L.R.A.1917A.

under one theory, an executory contract for the sale of real estate cannot be reformed and specific performance of the contract as reformed decreed,¹⁰⁸ especially where the relief demanded consists of including land omitted from the written contract,¹⁰⁷ or of substituting land in the contract, which, by mistake, described the wrong land,¹⁰⁸ or of supplementing a defective description,¹⁰⁹ or correcting a contract in which each party signed a writing intended for the other,¹¹⁰ or correcting an agreement which failed to contain a release of dower and homestead.¹¹¹

In the case of a contract which is unenforceable as to any of the subject matter because of a failure to comply with the statute, it is generally held that equity is precluded by the statute from reforming the writing and specifically enforcing it as reformed, on the theory that to do so would be to charge a party upon a contract not made in writing and signed by him; but see discussion of this question *supra*, subd. V.

Under the contrary theory, reformation of an executory contract for the sale of real estate may be granted and specific performance of the reformed contract decreed,¹¹² whether the relief consists in

See obiter on *Ruhling v. Hackett* (1865) 1 Nev. 360, *supra*, note 45.

¹⁰⁷ *Elder v. Elder* (1833) 10 Me. 80, 25 Am. Dec. 205; *Davis v. Ely* (1889) 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. W. 138; *Macomber v. Peckham* (1889) 16 R. I. 485, 17 Atl. 910.

¹⁰⁸ *Climer v. Hovey* (1866) 15 Mich. 18, holding that the description of the land in an executory contract for the sale of land could not be reformed to include lands other than those described. The action in this case was one for specific performance, and it was sought in this action to substitute the lands.

McCann v. Pickup (1885) 17 Phila. (Pa.) 56.

¹⁰⁹ *Safe Deposit & T. Co. v. Diamond Coke & Coal Co.* post, 596; and *ALLEN v. KITCHEN*, ante, 563.

¹¹⁰ *Osborn v. Phelps* (1848) 19 Conn. 63, 48 Am. Dec. 133.

¹¹¹ *Stodalka v. Novotny* (1893) 144 Ill. 125, 33 N. E. 434.

¹¹² This rule is approved in *Creigh v. Boggs* (1881) 19 W. Va. 240, where a vendor brought an action to specifically enforce a contract for the sale of real estate which the parties, in making a survey of the land, had orally modified as to boundaries (a different situation from that which is the subject of investigation in this note), the court stating that, as the object of the Statute of Frauds is to prevent the mischief arising from the resort to parol evidence to prove the existence and terms of an alleged

correcting a description¹¹³ or inserting a description,¹¹⁴ or supplying other omitted matter.¹¹⁵ A lease may be reformed by inserting therein an agreement of sale, without violating the Statute of Frauds.¹¹⁶

Reformation of contracts by adding thereto has been granted, without any discussion of the question.¹¹⁷

contract in the cases specified in the statute, it would seem that it should be held inapplicable in this case, as the contract and all its terms were as clearly established as if they had been fully set out in the original written contract. This case is approved in *Fishack v. Ball* (1891) 34 W. Va. 644, 12 S. E. 856, but nothing is said of the Statute of Frauds.

¹¹³ *Ring v. Ashworth* (1856) 3 Iowa, 452 (one parcel of land sold was misdescribed. This mistake was corrected).

Olson v. Erickson (1890) 42 Minn. 440, 44 N. W. 317. Reformation granted by inserting "Block 2" instead of "Block 1," which was inserted by mistake.

In *Trout v. Goodman* (1849) 7 Ga. 383, a contract for the sale of land, under which the purchaser had gone into possession and paid the purchase money, was reformed so as to include more land than specified in the contract, and specific performance was decreed upon the authority of *Gillespie v. Moon*, note 19, *supra*.

That an executory contract for the sale of real estate may be reformed so as to correct a mistake in the description, and specifically enforced as reformed, is held in *Flynn v. Finch* (1908) 137 Iowa, 378, 114 N. W. 1058, upon the authority of *Butler v. Threlkeld* (Iowa) *supra*; but there is no discussion of the Statute of Frauds.

¹¹⁴ *McMee v. Henry* (1915) 163 Ky. 729, 174 S. W. 746.

¹¹⁵ *Hughes v. Payne* (1908) 22 S. D. 293, 117 N. Y. 363; *Atwood v. Mikeska*, post, 602.

Without mentioning the Statute of Frauds, in *Hallam v. Corlett* (1887) 71 Iowa, 446, 32 N. W. 449, the court reformed a contract for the exchange of land by inserting therein an agreement on the part of one of the parties to pay to the other in money an amount equal to a mortgage which the other had assumed on the land which he was to receive.

¹¹⁶ *Butler v. Threlkeld* (1902) 117 Iowa, 116, 90 N. W. 584.

¹¹⁷ In *Murphy v. Rooney* (1872) 45 Cal. 78, adjoining landowners who had purchased from a grantee of the Federal government who had not then received his patent entered into an agreement in writing reciting that, whereas their division fences did not run on the section line, each would deed to the other any land he might have of the other when the vendor gave a deed. The real agreement was that the deed need not be given until the one demanding it should pay the other what the land had cost him, but this the draftsman left out. Upon an ac-L.R.A.1917A.

Some jurisdictions have a statute which authorizes reformation of a written contract upon certain conditions and also provides that a contract may be first revised and then specifically enforced. Under such a statute, where the required condition existed, a contract for the exchange of real estate¹¹⁸ was reformed and then specifically enforced.

tion in ejectment by one of the owners to recover a portion of his land, the court found that, by mistake of the draftsman, some of the terms of the agreement had been omitted; therefore, it might be reformed, and, as reformed, specifically enforced. The court states that the mutual promises of the parties to the contract constituted a sufficient consideration to support the agreement, and so take it out of the "eighth section of the Statute of Frauds." What the provisions of this section were does not appear. No reference is made to a statute such as is held to govern subsequent cases in this jurisdiction. See subsequent note.

¹¹⁸ The statute provides that "when, through fraud or a mutual mistake of the parties . . . a written contract does not fully express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Civ. Code, § 3399. Section 3401 provides that "in revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be." Section 3402 provides that "a contract may be first revised and then specifically enforced." Under this statute relief by way of reformation and specific performance was granted to one of the parties to a contract for the exchange of real estate. The Statute of Frauds was held no obstacle to relief to a party to the contract, which was for the exchange of land, by substituting the word "exchange" for the word "sell," inserting a more particular description of the real property which was the subject matter of the contract, striking out a certain term of the contract, and inserting a certain other term therein. *House v. McMullen* (1909) 9 Cal. App. 664, 100 Pac. 344.

Kee v. Davis (1902) 137 Cal. 456, 70 Pac. 294, reforming a written contract for the exchange of real estate in which the land owned by the plaintiff, to be transferred to the defendant, was stated to be "subject to encumbrance of 3,000," by making the reference to the encumbrance read, "subject to a mortgage of \$3,000 due two years from date, and to bear interest at the rate of 8 per cent per annum, interest payable annually." The omission of the kind of encumbrance and terms thereof occurred through mutual mistake. W. A. E.

PENNSYLVANIA SUPREME COURT.

SAFE DEPOSIT & TRUST COMPANY OF
PITTSBURGH

v.

DIAMOND COAL & COKE COMPANY,
Appt.

(234 Pa. 100, 83 Atl. 54.)

Statute of Frauds — contract to sell
real estate — insufficient boundaries
— effect.

1. A contract to sell a specified number of acres of land out of a larger tract, the boundaries to be fixed in the future, is void under the Statute of Frauds.

For other cases, see Contracts, II. c, 5, a, in Dig. 1-52 N. S.

Specific performance — void contract —
reformation.

2. Specific performance cannot, in the absence of estoppel, be granted of a contract for sale of real estate, the description of the boundaries of which has been reformed by parol evidence, if it was so defective as to render the contract void under the Statute of Frauds.

For other cases, see Specific Performance, I. c, in Dig. 1-52 N. S.

(January 2, 1912.)

APPEAL by defendant from a decree of the Court of Common Pleas, No. 3, for Allegheny County, sustaining a demurrer to a cross bill for the reformation of a written agreement for the sale of coal and for the specific performance of the agreement as reformed. Affirmed.

The Midland Steel Company owned 903 acres of coal land upon which it had given a mortgage to the Safe Deposit & Trust Company of Pittsburgh to secure bonds. The steel company entered into a contract to sell 200 acres of coal out of this tract to the Diamond Coal & Coke Company. The steel company had prior thereto entered into a trade agreement for the exchange of lands with the Monongahela River Consolidated Coal & Coke Company, which at the time of the contract with the coal company had not been made certain, so that the boundaries of the tract to be sold to the coal company could not be stated, although the contract with that company provided that a description of the boundaries should be furnished at least ten days prior to the delivery of the deed. The steel company attempted to secure permission from the trustee and bondholders to consummate the agreement with the Monongahela Company, but this permission was refused, and it

Note.—For effect of the Statute of Frauds upon the power of equity to reform a contract, see annotation following *Allen v. Kitchen*, ante, 563.
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could not therefore furnish the required description to the coal company. Notwithstanding the failure to have its bounds made definite, the coal company served notice that it would enter upon the property and begin to mine coal on the premises. Thereupon the trust company sought an injunction, which was denied on the ground that, the mortgagor not being in default, the trust company had not sufficient interest to maintain the bill. The steel company then intervened and sought to enjoin the mining of coal on the property and to secure a cancellation of the contract. The coal company thereupon filed the cross bill which is in issue in this case, seeking to reform the contract and secure its performance.

Further facts appear in the opinion.

Messrs. Stone & Stone, for appellant:

A contract entered into by reason of fraud may be reformed.

Hurst v. Kirkbride, cited in *Wallace v. Baker*, 1 Binn. 616; *Christ v. Diefenbach*, 1 Serg. & R. 464, 7 Am. Dec. 624; *Flagler v. Pleiss*, 3 Rawle, 345; *Tyson v. Passmore*, 2 Pa. St. 122, 44 Am. Dec. 181; *Renshaw v. Gans*, 7 Pa. 117; *Rearich v. Swinehart*, 11 Pa. 233, 51 Am. Dec. 540; *Lippincott v. Whitman*, 83 Pa. 245; *Rinker v. Aetna L. Ins. Co.* 214 Pa. 608, 112 Am. St. Rep. 773, 64 Atl. 82.

Messrs. Patterson, Sterrett, & Acherson, for appellees:

Even if the memorandum were enforceable, nevertheless, since it is executory, parol evidence even of a fraud, while admissible to strike the paper down, would be inadmissible to vary it and then enforce it, because this would violate the Statute of Frauds.

McCann v. Pickup, 17 Phila. 56; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Andrews Bros. Co. v. Youngstown Coke Co.* 39 Fed. 354; *Workman v. Guthrie*, 29 Pa. 495, 72 Am. Dec. 654; *Davis v. Ely*, 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. E. 138; *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205; *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910; *Climmer v. Hovey*, 15 Mich. 18; *Dyer's Appeal*, 107 Pa. 454; *Lord's Appeal*, 105 Pa. 451.

Mestrezat, J., delivered the opinion of the court:

This is a cross bill in which the Diamond Coal & Coke Company (herein called the coal company) is plaintiff, and the Midland Steel Company (herein called the steel company) and the Safe Deposit & Trust Company, trustee (herein called the trustee), are defendants. The plaintiff seeks to reform by parol an executory contract

in writing for the sale of coal lands, and prays for a decree of specific performance of the contract as reformed. The facts and the proceedings leading up to the filing of the cross bill are stated by the reporter. The part of the contract sought to be reformed is the description of the coal lands sold by the steel company to the coal company, the cross plaintiff.

Analyzing the written contract between the parties, we find that the agreement is a proposition to sell 200 acres of coal the precise boundaries of which could not then be exactly stated, but the description of the boundaries was to be substantially as stated. The eastern boundary line is stated, with the privilege of the steel company to extend it, and the northern boundary line was to be the line of the lands of the coal company at least the full length thereof, with the right of the steel company, in its discretion, to extend the line along the line of the Lilley coal. The western boundary of the tract "shall be the boundary line as decided upon between the steel company and the land of the Monongahela River Consolidated Coal & Coke Company," and the southern boundary was to be a straight line determined in consideration of the other boundaries so that the tract should contain 200 acres.

If there is any more uncertain and indefinite description of lands agreed to be sold and purchased in any case in this court, it has escaped observation. There is neither course nor distance given to any of the four boundary lines. In fact, the memorandum of agreement distinctly states that at the date of its execution the precise boundary lines "cannot be exactly stated." The only thing definitely stated in the memorandum is the number of acres to be sold. The vendor company owned 903 acres of coal, and out of that body it proposed to sell 200 acres to the coal company. There is not one of the boundary lines, as will be observed, that is definitely described. The length of the east and north lines is not fixed, but depends upon the discretion of the vendor. The western line "shall be the boundary line as decided upon between the steel company and land of the Monongahela River Consolidated Coal & Coke Company, as determined by a proposed trade arrangement between the steel company and the Monongahela River Consolidated Coal & Coke Company," which leaves the line undetermined until the boundary line has been fixed by the proposed trade arrangement, and the southern line is not given, but is to be "determined in consideration of the other boundaries." It is not averred in the bill, and hence must be assumed not to be a fact, that the proposed trade

arrangement has yet been consummated and the boundary line therein provided for has been determined. It is apparent that without this line neither the north nor the west line of the coal lands sold can be ascertained. It is not alleged that the coal company took possession of any definitely described tract of 200 acres, or, in fact, of any coal land in pursuance of the sale, or made any improvements thereon. Neither these nor any other matters of estoppel, except the payment of \$5,000 on the \$300,000 consideration, are averred in the bill. It follows that, by reason of the defective description of the lands, the contract of sale is indefinite, uncertain, and not self-sustaining, and is therefore void, and not enforceable under the Statute of Frauds.

The Act of April 22, 1856 (P. L. 533; 2 Purdon's Dig. 13th ed. p. 1757), known as the "Statute of Frauds," provides in its 4th section that "all decorations . . . of any lands, . . . and all grants and assignments thereof shall be manifested by writing, . . . or else to be void." Without this statute, an agreement either in writing or by parol to sell lands is not valid unless its terms are sufficiently definite to identify the subject of the sale. Under the statute, the land must not only be sufficiently described to identify it, but the contract must be in writing, or it is void and not enforceable. The statute requires both the consideration and the subject of the agreement to be definitely defined. The land must be described in the agreement or by reference to a plan or other matter so that it can be identified and located, and the description must be sufficiently definite within itself, and not require the aid of parol testimony or be left to the future action of the same or other parties. *Illothouse v. Rynd*, 9 Sadler (Pa.) 193, 12 Atl. 340; *McCoy v. Brunot*, 183 Pa. 105, 38 Atl. 1102; *Soles v. Hickman*, 20 Pa. 180; *Cunningham v. Neeld*, 198 Pa. 41, 47 Atl. 954; *Agnew v. Southern Ave. Land Co.* 204 Pa. 192, 53 Atl. 752; *Baldrige v. George*, 216 Pa. 231, 65 Atl. 662.

It is apparent that the contract as written cannot be specifically performed, and it is equally clear that no essential part of it can be supplied or reformed by parol testimony, and, as thus varied or changed, be specifically enforced against the vendor. If the written agreement lacks any of the essentials necessary to make it a complete contract, the statute declares it void. *Melton v. Davison*, 123 Pa. 298, 16 Atl. 431. The vendee corporation, recognizing the invalidity of the agreement as written and its inability to enforce specific performance of it, seeks by its cross bill to reform

the contract by parol, and then to have the contract as thus rectified specifically carried out by the vendor. The ground on which the reformation is sought is fraud which, as set out in the 9th paragraph of the bill, is averred to consist in the steel company, prior to the consummation of the agreement, exhibiting to the coal company a map showing the steel company's property and designating thereon the coal agreed to be conveyed and the western boundary of the tract, and fraudulently misrepresenting that such boundary line was substantially the line decided upon as determined by the proposed trade arrangement with the Monongahela company, by reason of which representations the coal company accepted said designation and description in the contract as the western boundary line. We have possibly gone as far as any American state in admitting oral testimony to vary and contradict written instruments. We have uniformly held that parol evidence is competent to vary or contradict a writing where there was fraud, accident, or mistake in the creation of the instrument itself, or where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed, and without which it would not have been executed. In such cases, where the parol evidence is sufficient to warrant a chancellor in reforming the instrument, it is admissible to contradict or vary the writing. Wherever the oral evidence furnishes this degree of proof, our courts, in the exercise of equitable jurisdiction, have reformed the writing so as to make it conform to the intention of the parties in the execution of the instrument. We have applied this doctrine, and permitted parol testimony to be introduced for the purpose of reforming both executory and executed contracts. Wherever a written instrument fails to express the intention of the parties, by reason of fraud, accident, or mistake, the injured party may invoke the equitable jurisdiction of the court, which, by the aid of parol testimony, may reform it. This is the well-settled doctrine of our state, as has frequently been declared by this court. No party should, in morals or in law, insist upon the performance of a written agreement which, by reason of fraud, accident, or mistake, does not speak the intention of the parties, and a chancellor will reform the instrument so as to make it declare their real intention. Equity looks alone to justice and fair dealing, and will command even the law, hampered by its technicalities, to obey her decree enforcing the true intention of the parties to a contract.

While, therefore, the admissibility of parol evidence, under proper limitations, to alter, vary, and even to contradict a written instrument in such cases, is settled in this state, it has not yet been determined by this court that, the instrument having been varied or rectified by the evidence, the court may decree specific performance of the agreement in its varied or corrected form where the contract is required by statute to be in writing. It is one thing to alter or vary a written contract by parol evidence, and quite another to specifically enforce it in its varied or altered form. In the absence of fraud, accident, or mistake, a written contract speaks for itself, and parol evidence will not be received to vary or contradict it. The rule, that a written contract cannot be altered or contradicted by parol evidence is, however, relaxed, and the courts will not enforce it where the agreement does not speak the intention of the parties by reason of fraud, accident, or mistake, but will rectify the contract so as to declare their real intention. In the absence of statutory inhibition, a chancellor will, where there is no adequate remedy at law, compel a party to keep his written engagements. That is one of the settled powers of a court of equity. It simply involves the application of the exception to the general rule that parol evidence is not admissible to vary or contradict a written instrument.

Where, however, the people speaking through the legislative branch of the government have declared that contracts relating to certain subjects shall possess certain requisites necessary to their validity, it is not within the power or the jurisdiction of a court of equity to annul or disregard the mandate. Equity corrects that wherein the law is deficient, but where the statutory law has spoken, equity must remain silent. A chancellor cannot by his decree repeal or set at naught an act of assembly constitutionally valid. To uphold such a power or to enforce such a doctrine is in the very teeth of the proposition that "all power is inherent in the people." Where the Federal or state Constitution imposes no prohibition, the legislature may declare the manner in which or the instrument by which lands in the state shall be sold and transferred, and the courts have no discretion in the enforcement of the statutory provision. We are clear that upon reason and authority a court of equity cannot vary or rectify by parol an executory agreement in writing for the sale of lands, and as thus varied, in the absence of an estoppel, specifically enforce performance of it. It is the doctrine of this court, declared in numerous cases, that, where a written agreement is varied by oral testimony, the whole contract in legal contemplation becomes

parol. If there is anything settled in our law, that principle is firmly established. When, therefore, a party to an executory agreement in writing for the sale of lands succeeds in reforming it by oral testimony, he reduces the whole agreement to a parol contract, and deprives himself of the right to have it specifically performed. He pulls down the house on his own head. When he converts the writing into an oral agreement, the statute declares it to "be void." He has rectified the written contract, and in its place has established an agreement which in contemplation of law is parol, and therefore, by statutory mandate, absolutely invalid and without force. The true contract, as declared by the chancellor, cannot be enforced. "It is then apparent," says Judge Hare, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 994, "that the contract as it stands is not the true one, and that the true contract is invalidated by the statute, and as the former ought not to be, and the latter cannot be, enforced, there is no room for a decree of specific performance." Our Statute of Frauds declares that all grants and assignments of land shall be manifested by writing "or else to be void," and under this statute, therefore, a parol contract for the sale of land is a nullity, and no court can decree its specific performance. It is equally apparent that this rule applies whether the contract originally was oral, or whether it becomes so by the decree of a chancellor reforming the written agreement and thereby reducing the whole contract to parol. Equity strikes down the written agreement, and substitutes the parol contract as expressive of the intention of the parties. In either case the statute declares the agreement void, and it is not within the power of a chancellor to rehabilitate and make it a valid instrument for the conveyance of land. Whether a written contract is reformed on the ground of fraud, accident, or mistake, the effect is the same, the whole contract is, in contemplation of law, reduced to a parol agreement which the Statute of Frauds declares to be void and incapable of being specifically enforced so as to compel the transfer of title to real estate.

The statute is not a mere rule of evidence, but a limitation of judicial authority to afford a remedy. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418, 423.

The above conclusion is in accord with the English doctrine as announced in the leading case of *Woollam v. Hearn*, 7 Ves. Jr. 211, 32 Eng. Reprint, 86, 6 Revised Rep. 113, decided in 1802. The case has been followed in subsequent decisions, and is the present law of England. The leading American case in support of this view is *Glass v. Hulbert*, supra. The bill was filed by the

vendee against the vendor, and asked relief in several particulars connected with the alleged oral contract of purchase. In dismissing the bill Mr. Justice Wells delivered an exhaustive opinion reviewing all the authorities on the subject, in which he said, inter alia: "When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the Statute of Frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the Statute of Frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defense. . . . Rectification by making the contract include obligations or subject-matter to which its written terms will not apply is a direct enforcement of the oral agreement, as much in conflict with the Statute of Frauds as if there were no writing at all." The same doctrine is announced and enforced in *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205; *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910; *Climmer v. Hovey*, 15 Mich. 18; *Davis v. Ely*, 104 N. C. 16, 5 L.R.A. 810, 17 Am. St. Rep. 667, 10 S. E. 138; *Westbrook v. Harbeson*, 2 McCord, Eq. 112; *Bogard v. Barhan*, 52 Or. 121, 132 Am. St. Rep. 676, 96 Pac. 673; *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 77 Am. St. Rep. 46, 25 So. 709; *Miller v. Chetwood*, 2 N. J. Eq. 199; *Webster v. Gray*, 37 Mich. 37; *Dennis v. Dennis*, 4 Rich. Eq. 307; *Allen v. Kitchen*, 16 Idaho, 133, ante, 563, 100 Pac. 1052, 18 Ann. Cas. 914.

In *Adams on Equity*, 5th Am. ed. 171, the learned author says: "Where land is the subject of the erroneous instrument, the reformation of an executed conveyance on parol evidence is not precluded by the Statute of Frauds, for otherwise it would be impossible to give relief. And where a mistake in an executory agreement relating to land is alleged, parol evidence may be admitted in opposition to the equity for specific performance. But it does not appear that, where the defendant has insisted on the benefit of a statute, the court has ever reformed such an executory agreement on parol evidence and specifically enforced it with the variation." The authorities cited by the learned counsel for the appellant do not rule the question raised by this record. Those decisions deal with executed contracts and with the admissibility of parol evidence to reform contracts in cases

where, as said by Woodward, J., in *Workman v. Guthrie*, 29 Pa. 495, 510, 72 Am. Dec. 654, "The Statute of Frauds and Perjuries has nothing to do with the question," and, as said in *Schettiger v. Hopple*, 3 Grant, Cas. 54, 56, "where no statutory provision intervened." While dicta in some of the opinions might apparently support the appellant's contention, the decision of the case did not require the court to pass upon the question involved in the present case. On the other hand, Judge Biddle, in *McCann v. Pickup*, 17 Phila. 56, 57, a bill filed to correct the description in an agreement in writing for the exchange of certain real estate, followed the English and Massachusetts rule, and refused to decree specific performance of the contract on parol evidence. In his opinion he said: "But when the omitted term or obligation is within the Statute of Frauds, there is no valid agreement which the court is authorized to enforce outside of the writing." The same doctrine is recognized in *Andrews Bros. Co. v. Youngstown Coke Co.* 7 Pa. Co. Ct. 67, by the circuit court of the United States for the western district of Pennsylvania. Judge Hare also sustains the doctrine in his elaborate note to *Woollam v. Hearn*, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 920, 944, in which he exhaustively reviews all the English and American cases on the subject to that date.

There is a conflict of authority on this side of the Atlantic on the question of the right of a court of equity, in the absence of part performance or other matters of estoppel, to reform by parol evidence an executory contract for the sale of land and specifically enforce it with the variation. In several states, courts of great respectability have held that a parol variation of the written agreement may be specifically

enforced notwithstanding the Statute of Frauds. The leading case relied upon by those who support that doctrine is *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559. That was a bill to reform, not an executory contract, but a deed which, it was alleged, by mutual mistake, included more land than was sold. The question under consideration here did not arise in that case, and hence what was said on the authority of the court to enforce a written contract with a parol variation for the sale of land must be regarded as dicta. In commenting on the doctrine announced in *Gillespie v. Moon* and analogous cases, the court in *Elder v. Elder*, supra, holding the opposite view, says: "In all these cases there was written evidence to amend by, either resulting from the plain intentions of the parties, although defectively expressed, or from previous instructions or subsequent declarations in writing." The subject is ably and elaborately discussed in *Macomber v. Peckham*, 18 R. I. 485, 17 Atl. 910, and the court denies the power to enforce a written contract with a parol variation for the sale of lands, and says that the arguments used in support of the rule "seem to have been directed against the doctrine of English chancery courts, which, as we have seen, is applied to all written contracts, whether within the statute or not, and it does not appear that in making them they gave thought to the distinction created by the statute."

For the reasons stated, we are of opinion that, in the absence of an estoppel, the court cannot reform a written contract for the sale of land and specifically enforce the agreement with the variation, and that therefore the court below was right in dismissing the plaintiff's cross bill.

The decree is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

RICHARD W. KENNEDY
v.

WILLIAM F. POOLE, Admr., etc., of Catharine Kennedy, Deceased, et al., Apts.

(213 Mass. 495, 100 N. E. 635.)

Reformation of instrument — changing mortgage to deed — Statute of Frauds.
A mortgage inadvertently executed by

Note. — For effect of the Statute of Frauds upon the power of equity to reform a contract, see annotation following *Allen v. Kitchen*, ante, 563.
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mutual mistake instead of a deed may be reformed by striking out the defeasance clause, notwithstanding the Statute of Frauds, since it does not require the creation of a new agreement which the statute requires to be in writing.

For other cases, see *Reformation of Instruments*, in *Dig. 1-52 N. S.*

(January 29, 1913.)

APPEAL by defendants from a decree of the Superior Court for Suffolk County overruling exceptions to the Master's report in a suit for the reformation of a mortgage deed of real estate. Affirmed.

The facts are stated in the opinion.

Mr. F. H. Stevens for appellants.

Mr. Martin T. Hall, for appellee:

Equity will reform an instrument for mutual mistake despite the Statute of Frauds.

Canedy v. Marcy, 13 Gray, 373; Hunt v. Rhodes, 1 Pet. 13, 7 L. ed. 32; Sawyer v. Hovey, 3 Allen, 331, 81 Am. Dec. 659; Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290, 13 Mor. Min. Rep. 120.

De Courcy, J., delivered the opinion of the court:

This is a bill in equity for the reformation of an instrument given by Catherine Kennedy to her son Richard W. Kennedy, the plaintiff, which was intended by the parties to convey an estate in fee simple in the estate therein described, but by mutual mistake was made in the form of a mortgage. The master finds as follows: The plaintiff agreed to purchase this "homestead" estate for \$1,200, which was a fair price; \$800 of this was to be obtained from the Natick Five Cents Saving Bank upon a note given by Catherine Kennedy and secured by a mortgage on the homestead. The payment of this mortgage the plaintiff was to assume, and he was also to give to his mother a note and second mortgage for the remaining \$400. The preparation of the legal papers was intrusted to the attorney for the bank; and instead of making a deed to the plaintiff and a mortgage back from him to his mother, he made out a mortgage to the plaintiff, and no deed. About two and one half years later the plaintiff gave to the savings bank a mortgage on various properties, including this homestead, and in so doing acted entirely in good faith, supposing that the legal title was vested in him; and the same attorney prepared the papers,—one of which was a discharge of the mortgage for \$800 given by Catherine Kennedy to the bank. In connection with this last loan the plaintiff as owner procured insurance on the homestead, payable in case of loss to the Natick Five Cents Savings Bank, first mortgagee, and the balance, if any, to Catherine Kennedy, second mortgagee, as their interests may appear. Until the death of his mother, about three and a half years after the execution of the instrument in question, the plaintiff collected the rent that was paid, made repairs on the house and barn, paid the taxes, water rates, insurance, and the interest on the bank mortgage, and in other ways acted as the owner in possession. L.R.A.1917A.

After her death, and when a tenant refused to pay rent, the plaintiff for the first time discovered the mistake that was made, and that he held a mortgage instead of a deed of the homestead. The attorney, who admitted that there should be a deed to the plaintiff, sought to find the same, but died before the matter was adjusted, and this litigation followed.

The exceptions of the defendants to the master's report raise the question whether these findings of fact were warranted by the evidence before him. We do not deem it necessary or profitable to recite in detail the testimony, a transcript of which accompanies the report. It is sufficient to say that there was ample warrant for every finding of fact, and that circumstances as to which there is no controversy afford the support of strong probability to the plaintiff's contention. The case presents one of those family disputes involving irreconcilable conflict of testimony, and dependent largely for its solution upon the credibility of witnesses; and we cannot say that the master, who had the opportunity to observe and compare the witnesses while under examination, was wrong in reaching his conclusions. The delay in discovering the mistake, which under other circumstances might preclude recovery on the ground of laches, evidently was accounted for satisfactorily to the master by the plaintiff's method of carrying on business, his relations to Catherine Kennedy, and his entire reliance upon the attorney for the bank in the preparation of the papers.

The Statute of Frauds does not operate to prevent the reformation of the instrument by means of striking out the clause of defeasance that was inserted by mutual mistake. No attempt is made to insert a parcel of land that was omitted from the writing, or to construct any agreement by introducing a new element that is required by the statute to be reduced to writing in order to make the agreement binding. Canedy v. Marcy, 13 Gray, 373; Sawyer v. Hovey, 3 Allen, 331, 81 Am. Dec. 659; Goode v. Riley, 153 Mass. 685, 28 N. E. 228.

The plaintiff's case seems to have been made out by clear and convincing proof, and the decree overruling the exceptions is adopted to make the instrument conform to the real intention of the parties. Long v. Athol, 196 Mass. 497, 17 L.R.A.(N.S.) 96, 82 N. E. 665, and cases cited. The entry must be:

Decree affirmed with costs.

OKLAHOMA SUPREME COURT.

GEORGE ATWOOD, Plff. in Err.,
v.
JOHN P. MIKESKA and Wifa.

(29 Okla. 69, 115 Pac. 1011.)

Reformation — inadvertent omission from instrument.

When, through mistake or accident, from an executory written contract or instrument, founded upon a valid consideration, for the sale of real estate, there was omitted matter intended to have been included, it may be reformed, and its specific performance decreed.

For other cases, see Reformation of Instruments, in Dig. 1-52 N. S.

(May 9, 1911.)

ERROR to the District Court for Oklahoma County to review a judgment in defendants' favor in an action for the reformation of a contract for the sale of real estate and for specific performance of the same. Reversed.

The facts are stated in the opinion.

Messrs. Burwell, Crockett, & Johnson, for plaintiff in error:

Written instruments of all kinds, whether for the sale of real estate or for other purposes, may be reformed and specific performance decreed where the omission from the contract or the inaccurate recitation therein is the result of a mutual mistake or fraud.

Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; 2 Pom. Eq. Jur. §§ 864-867; 10 Ballard, Real Prop. § 638; Butler v. Threlkeld, 117 Iowa, 116, 90 N. W. 584; Ring v. Ashworth, 3 Iowa, 452; Gillespie v. Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559; Wall v. Arrington, 13 Ga. 88; Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71; Philpott v. Elliott, 4 Md. Ch. 273; Tilton v. Tilton, 9 N. H. 385; Moale v. Buchanan, 11 Gill & J. 314; Bellows v. Stone, 14 N. H. 175; Bradford v. Union Bank, 13 How. 57, 14 L. ed. 49; Ruhling v. Hackett, 1 Nev. 365; Caley v. Philadelphia & C. County R. Co. 80 Pa. 363; Smith v. Jordan, 13 Minn. 264, Gil. 246, 97 Am. Dec. 232; Hunter v. Bilyeu, 30 Ill. 228; Schwass v. Hershey, 125 Ill. 653, 18 N. E. 272; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856; Redfield v.

Headnote by WILLIAMS, J.

Note. — For effect of the Statute of Frauds upon the power of equity to reform a contract, see annotation following Allen v. Kitchen, ante, 563. L.R.A.1917A.

Gleason, 61 Vt. 220, 15 Am. St. Rep. 889, 17 Atl. 1076; Strickland v. Barber, 76 Mich. 310, 43 N. W. 449; Hallam v. Corlett, 71 Iowa, 446, 32 N. W. 449; Sampson v. Mudge, 13 Fed. 260; Butler v. Barnes, 60 Conn. 170, 21 L.R.A. 273, 21 Atl. 419; 24 Am. & Eng. Enc. Law, 648; Perkins v. Canine, 113 Mich. 72, 71 N. W. 457; Hendrickson v. Ivins, 1 N. J. Eq. 562; Stines v. Hays, 36 N. J. Eq. 364; Andrews v. Gillespie, 47 N. Y. 487; Hunt v. Rhodes, 1 Pet. 1, 7 L. ed. 27; Langert v. Ross, 1 Wash. 250, 24 Pac. 443.

Messrs. Shartel, Keaton, & Wells, with Mr. Fred S. Caldwell, for defendants in error:

The written instrument exhibited by plaintiff is not sufficient to satisfy the Statute of Frauds.

20 Cyc. 261; Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Salemon v. McRae, 9 Colo. App. 23, 47 Pac. 409; Fox v. Easter, 10 Okla. 527, 62 Pac. 284; Catterlin v. Bush, 39 Or. 496, 59 Pac. 706, 65 Pac. 1064; Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118, 2 Ann. Cas. 286, affirmed in 202 U. S. 287, 50 L. ed. 1032, 26 Sup. Ct. Rep. 610, 6 Ann. Cas. 189; Williams v. Morris, 95 U. S. 444, 24 L. ed. 360; Grafton v. Cummings, 99 U. S. 100, 25 L. ed. 366; Norris v. Blair, 39 Ind. 90, 10 Am. Rep. 135; Wright v. Weeks, 25 N. Y. 153; Ringer v. Holtzclaw, 112 Mo. 519, 20 S. W. 800; Casady v. Woodbury County, 13 Iowa, 113.

Notwithstanding actual fraud practised upon the complainant by the adverse party, a contract which, pursuant to the requirements of the Statute of Frauds, has been reduced to writing, cannot be reformed or in any manner changed or varied by parol evidence.

Elder v. Elder, 10 Me. 80, 25 Am. Dec. 205; Atty. Gen. v. Sitwell, 1 Younge & C. Exch. 559, 5 L. J. Exch. 86; Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Climer v. Hovey, 15 Mich. 18; O'Malley v. Ruddy, 79 Wis. 147, 24 Am. St. Rep. 702, 48 N. W. 116; Stodalka v. Novotny, 144 Ill. 125, 33 N. E. 534.

On Petition for Rehearing.

Where the written instrument is on its face insufficient under the Statute of Frauds to constitute a valid contract, a court of equity cannot reform the instrument by adding to it a parol agreement of the parties which will supply the deficiency and render the instrument a valid contract.

Allen v. Kitchen, 16 Idaho, 133, ante, 563, 100 Pac. 1052, 18 Ann. Cas. 914; Rowell v. Smith, 123 Wis. 610, 102 N. W. 1, 3 Ann. Cas. 773; Rosen v. Philipsborn Co. 135 App.

Div. 499, 120 N. Y. Supp. 486; Mead v. White (Mead v. Winslow) 53 Wash. 638, 23 L.R.A.(N.S.) 1197, 132 Am. St. Rep. 1092, 102 Pac. 753.

Williams, J., delivered the opinion of the court:

Defendants in error and plaintiff in error, hereinafter referred to respectively as "first party" and "second party," contracted in writing as follows: "That said first party, being owners of the northeast quarter of section (15) fifteen, township (12) twelve north, range (4) four west of I. M., for and in consideration of the sum of (\$5,000) five thousand dollars, to be paid as hereinafter stated, agrees to deliver to the said first party a good and sufficient warranty deed, with a perfect title and abstract, to the above-described land and premises, (\$250) two hundred and fifty dollars cash in hand, the receipt of which is hereby acknowledged; (\$2,000) to be paid on November 1, 1906, without interest to date; and the remaining (\$2,150) twenty-one hundred and fifty dollars to be paid in two instalments as follows: \$1,075 on November 1, 1907, and \$1,075 on November 1, 1908, the two last above-mentioned amounts to bear 7 per cent interest from November 1, 1906, until paid. The said second party is to have privilege of paying all or part at any time and interest to cease. The said first party is to hold possession until the maturity of the present crop; to said second party to be granted privilege of entering upon that part of the land not occupied with crop, to prepare ground and sow the fall crop and make any necessary repairs." The first party refused to execute and deliver the deed. Whereupon the second party, as plaintiff, commenced suit against the first party as defendants, for the reformation of said contract and its specific performance, alleging that the first party agreed with plaintiffs in consideration of the sum of \$5,000, to be paid as follows: \$250 cash in hand, \$2,000 to be paid November 1, 1906, without interest, and the remaining \$2,150 in two instalments as follows: \$1,075 on November 1, 1907, and \$1,075 on November 1, 1908, each to bear interest from November 1, 1906, at the rate of 7 per cent per annum until paid. And the second party was, out of said purchase price, to pay off a certain mortgage thereon in the sum of \$600, and to have the option to pay all or any part of said purchase price at any time, and the defendants were to hold possession until maturity of the then growing

crops; the plaintiff to have the privilege of entering upon that part of the land not covered by the crop, in order to prepare for and sow his fall crop and make necessary repairs. That by reason of a mutual mistake and oversight, all of said conditions were not reduced to writing, though it was the intention of both parties that such should be done, and praying that the same be reformed, to be in accord with the facts and mutual intention of the parties thereto, and specific performance further to be decreed.

When, through mistake or accident, from an executory contract or instrument for the sale of real estate there has been omitted matter intended to have been included, it may be reformed, and its specific performance decreed. However, as to this point there is distinct conflict of authorities among the American decisions. The minority of the courts not having full equity jurisdiction hold that a contract within the Statute of Frauds may not be reformed, so as to extend the contract beyond what its terms import. *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Dwight v. Pomeroy*, 17 Mass. 303, 9 Am. Dec. 148. This also seems to be the English view. *Atty. Gen. v. Sitwell*, 1 Younge & C. Exch. 559, 5 L. J. Exch. 86, 93. The majority of American courts which have full equity jurisdiction hold that equitable relief by way of reformation may be applied without restriction, because the purpose of the statute was to promote justice and prevent wrong and not to hinder justice. *Thompson v. Marshall*, 36 Ala. 504, 76 Am. Dec. 328; *Blackburn v. Randolph*, 33 Ark. 119; *Murphy v. Rooney*, 45 Cal. 78; *Morrison v. Collier*, 79 Ind. 417; *Dutch v. Boyd*, 81 Ind. 146; *Moale v. Buchanan*, 11 Gill & J. 314; *Smith v. Greeley*, 14 N. H. 378; *Tilton v. Tilton*, 9 N. H. 385; *De Peyster v. Hasbrouck*, 11 N. Y. 582; *Gouverneur v. Titus*, 6 Paige, 347; *Wiswall v. Hall*, 3 Paige, 313; *Gower v. Sterner*, 2 Whart. 75; *Flagler v. Pleiss*, 3 Rawle, 345; *Blodgett v. Hobart*, 18 Vt. 418; 10 Ballard, Real Prop. 1904, p. 635; 2 Pom. Eq. Jur. 2d ed. §§ 864, 866; 36 Cyc. 925, note 61.

The judgment of the lower court is reversed, with instructions to overrule the demurrer and proceed in accord with this opinion.

All the Justices concur.

Petition for rehearing denied.

MAINE SUPREME JUDICIAL COURT.

ELIZABETH GOULD

v.

MAINE FARMERS' MUTUAL FIRE INSURANCE COMPANY.

(114 Me. 416, 96 Atl. 732.)

Insurance — additional policy by mortgagee — effect.

1. The mere indorsement of a check by a mortgagee sent in payment of a claim on a policy taken out by the mortgagee in the name of the mortgagor, and made payable to the mortgagee as his interest may appear and delivery of the check to the mortgagee, do not make the procuring of the policy the act of the mortgagor so as to defeat liability on a former policy procured by him with a loss payable to mortgagees clause, which provides that it shall become void if additional insurance is procured without assent of the insurer.

For other cases, see Insurance, III. c, 1, e, in Dig. 1-52 N. S.

Same — failure to notify insurer — effect.

2. Failure of a mortgagor to notify his insurer of a subsequent policy which, to his knowledge, the mortgagee takes in his name with loss payable to the mortgagee, is not sufficient to avoid a policy which he had secured upon the property, and which provided that it should become void in case of additional insurance without the assent of the insurer.

For other cases, see Insurance, VI. c, in Dig. 1-52 N. S.

(February 5, 1916.)

MOTION by defendant for new trial, and exceptions to rulings of the Supreme Judicial Court for Penobscot County, in an action brought to recover the amount alleged to be due on a fire insurance policy, which resulted in a verdict for plaintiff. Exceptions overruled.

The facts are stated in the opinion.

Messrs. Henry E. Coolidge and Arthur J. Dunton, for defendant:

Under the Maine standard form of policy, the policy is rendered void by the insured taking out other insurance without consent of the first insurer.

Towle v. Dirigo Mut. F. Ins. Co. 107 Me. 317, 78 Atl. 374; *Carleton v. Patrons' Androsoggin Mut. F. Ins. Co.* 109 Me. 79, 39 L.R.A.(N.S.) 951, 82 Atl. 649; *Bigelow v. Granite State F. Ins. Co.* 94 Me. 39, 46 Atl. 808.

Subsequent ratification may bind one on

Note. — For procuring of insurance by mortgagee as a violation of provision in policy of mortgagor against other or additional insurance, see annotation following this case, post, 607.
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a contract which another has assumed to make for him, even without his knowledge and consent. Failing to repudiate such a contract within a reasonable time after knowledge of it, and accepting the benefits, amount to a ratification.

Hastings v. Proprietors of Bangor House, 18 Me. 436; *Hilton v. Hanson*, 101 Me. 21, 62 Atl. 797; *Arnold v. Spurr*, 130 Mass. 347.

It is the duty of a policy holder to notify the company as soon as he learns that another policy is placed on his property. Failing to do this, and recognizing it as a valid policy in his proof of loss and even in the declaration in his suit, and retaining the benefits of this second policy, render it his policy to such an extent that it avoids the first policy.

German Ins. Co. v. Emporia Mut. Loan & Sav. Asso. 9 Kan. App. 803, 59 Pac. 1092; *McKelvey v. German American Ins. Co.* 161 Pa. 279, 28 Atl. 1115; *Eikenberry v. Edwards*, 67 Iowa, 14, 24 N. W. 570; *Hughes v. Insurance Co. of N. A.* 40 Neb. 626, 59 N. W. 112; *Humble v. German Alliance Ins. Co.* 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630; *Kelley v. People's Nat. F. Ins.* 262 Ill. 158, 50 L.R.A.(N.S.) 1164, 104 N. E. 188.

Messrs. L. B. Waldron and Mayo & Snare, for plaintiff:

Exceptions will not be sustained unless the case shows affirmatively that the excepting party has been aggrieved by the ruling complained of.

Bryant v. Knox & L. R. Co. 61 Me. 300.

"Other insurance" means other valid insurance.

Philbrook v. New England Mut. F. Ins. Co. 37 Me. 137; *Hayes v. Milford Mut. F. Ins. Co.* 170 Mass. 492, 49 N. E. 754; *Thomas v. Builders' Mut. F. Ins. Co.* 119 Mass. 121, 20 Am. Rep. 317.

The burden is on defendant to prove other valid insurance.

Thomas v. Builders' Mut. F. Ins. Co. supra.

The fact that the Providence Washington Company effected a settlement under its policy is immaterial.

Philbrook v. New England Mut. F. Ins. Co. and *Thomas v. Builders' Mut. F. Ins. Co.* supra.

Insurance procured by mortgagee for her own benefit and protection, and at her own expense, is independent insurance.

Cushing v. Thompson, 34 Me. 496; *McIntire v. Plaisted*, 68 Me. 363; *Gilman v. Commonwealth Ins. Co.* 112 Me. 528, L.R.A. 1915C, 758, 92 Atl. 721; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *Hardy v. Lancashire Ins. Co.* 166 Mass. 210, 33 L.R.A. 241, 55 Am. St. Rep. 395, 44 N. E. 209;

Nichols v. Fayette Mut. F. Ins. Co. 1 Allen, 63; *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121; *Hall v. Concordia F. Ins. Co.* 90 Mich. 403, 51 N. W. 524.

The mortgagee is not accountable to the mortgagor for insurance money received on a policy procured by him for his own benefit and at his own expense.

Concord Union Mut. F. Ins. Co. v. Woodbury, 45 Me. 447; *McIntire v. Plaisted*, 68 Me. 363; *Lindley v. Union Farmers' Mut. F. Ins. Co.* 65 Me. 368, 20 Am. Rep. 701.

A forfeiture is for the benefit of the insurer, and where it is found to exist is confined to the terms which create it. If such stipulations are susceptible of more than one meaning, that which is most favorable to the insured should be adopted.

Ferguson v. Union Mut. L. Ins. Co. 187 Mass. 8, 72 N. E. 358; *Mulville v. Adams*, 19 Fed. 887; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.* 74 Wis. 473, 5 L.R.A. 779, 43 N. W. 487; *Hayes v. Milford Mut. F. Ins. Co.* 170 Mass. 492, 49 N. E. 754; *Nichols v. Fayette Mut. F. Ins. Co.* 1 Allen, 63; *City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co.* 122 Mass. 165; *Philbrook v. New England Mut. F. Ins. Co.* 37 Me. 137; *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1122; *Bartlett v. Union Mut. F. Ins. Co.* 46 Me. 500; *Carpenter v. Continental Ins. Co.* 61 Mich. 635, 28 N. W. 749; *Hastings v. Westchester F. Ins. Co.* 73 N. Y. 141; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Alamo F. Ins. Co. v. Schmitt*, 10 Tex. Civ. App. 550, 30 S. W. 833; *McQueeney v. Phoenix Ins. Co.* 52 Ark. 257, 5 L.R.A. 744, 20 Am. St. Rep. 179, 12 S. W. 498; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Speagle v. Dwelling House Ins. Co.* 97 Ky. 646, 31 S. W. 282; *Burnett v. Eufaula Home Ins. Co.* 46 Ala. 11, 7 Am. Rep. 581.

Rights of the parties to the policy are not to be defeated or limited by acts of third parties for which they are not responsible.

City Five Cents Sav. Bank v. Pennsylvania F. Ins. Co. 122 Mass. 165.

Failure to give notice of other insurance, when notice is specifically required by the policy, does not necessarily work a forfeiture.

Tiefenthal v. Citizens' Mut. F. Ins. Co. 53 Mich. 306, 19 N. W. 9; *Mutual Reserve Fund Life Asso. v. Hamlin*, 139 U. S. 297, 35 L. ed. 167, 11 Sup. Ct. Rep. 614; *Joyce v. Maine Ins. Co.* 45 Me. 168, 71 Am. Dec. 536; *Hall v. Concordia F. Ins. Co.* 90 Mich. 403, 51 N. W. 524.

Where several pieces of property are separately insured by the same policy, a breach of condition as to one of the pieces of property does not avoid the policy in toto. L.R.A.1917A.

Clark v. New England Mut. F. Ins. Co. 6 Cush. 342, 53 Am. Dec. 44; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459, 49 N. W. 711; *Alamo F. Ins. Co. v. Schmitt*, 10 Tex. Civ. App. 550, 30 S. W. 833; *Dohlantry v. Blue Mounds Fire & Lightning Ins. Co.* 83 Wis. 181, 53 N. W. 448; *McQueeney v. Phoenix Ins. Co.* 52 Ark. 257, 5 L.R.A. 744, 20 Am. St. Rep. 179, 12 S. W. 498; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *German Ins. Co. v. Miller*, 39 Ill. App. 633; *Speagle v. Dwelling House Ins. Co.* 97 Ky. 646, 31 S. W. 282; *Sloat v. Royal Ins. Co.* 49 Pa. 14, 88 Am. Dec. 477.

Denial of liability on other grounds is a waiver of proof of loss.

Martin v. Fishing Ins. Co. 20 Pick. 389, 32 Am. Dec. 220; *Stringham v. Cook*, 75 Wis. 589, 44 N. W. 477; *Merrill v. P. B. Champagne Lumber Co.* 75 Wis. 146, 43 N. W. 653; *Cooper v. Insurance Co. of Pa.* 96 Wis. 362, 71 N. W. 606; *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 3 L.R.A.(N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977, 9 Ann. Cas. 91; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Morgan v. Illinois Ins. Co.* 130 Mich. 427, 90 N. W. 40; *Omaha F. Ins. Co. v. Hildebrand*, 54 Neb. 306, 74 N. W. 589; *Flaherty v. Continental Ins. Co.* 20 App. Div. 275, 46 N. Y. Supp. 934.

In the absence of a specific provision therefor in the policy, a failure to file proof of loss within a reasonable time does not work a forfeiture of rights under the policy.

North Berwick Co. v. New England F. & M. Ins. Co. 52 Me. 336; *Bartlett v. Union Mut. F. Ins. Co.* 46 Me. 500; *Ferguson v. Union Mut. F. Ins. Co.* 187 Mass. 8, 72 N. E. 358; *Mulville v. Adams*, 19 Fed. 887; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.* 74 Wis. 470, 5 L.R.A. 779, 43 N. W. 487; *Capital Ins. Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755, 50 Kan. 453, 31 Pac. 1070.

The only effect of delay in filing proof of loss is to postpone the time of payment.

Vangindertaelen v. Phenix Ins. Co. 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1122; *Kahnweiler v. Phenix Ins. Co.* 57 Fed. 563; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 13 S. W. 882.

Even a time limit for filing proof of loss is not to be construed as a forfeiture, when not so stipulated in the policy.

Coventry Mut. Live Stock Ins. Asso. v. Evans, 102 Pa. 281; *Sun Mut. Ins. Co. v. Mattingly*, 77 Tex. 162, 13 S. W. 1016; *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.* 35 W. Va. 666, 14 S. E. 237; *Capitol Ins. Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755, 50 Kan. 453, 31 Pac. 1070.

Bird, J., delivered the opinion of the court:

This is an action on a policy of insurance in the Maine standard form issued by defendant to the amount of \$1,150 on the buildings and contents of the plaintiff.

"The principal contention of the defense at the trial," quoting the statement of defendant's counsel, "that the only one which is of any real importance at the present time, was that the plaintiff had, subsequent to the taking out of a policy with the defendant company, placed additional insurance to the amount of \$1,650 with the Providence Washington Insurance Company, which, under the terms of the Maine standard form of policy, . . . avoided the defendant's policy; no permission being given for this subsequent insurance."

The uncontroverted facts appear to be: At the date of the policy on which this suit is brought, June 3, 1910, the plaintiff was the owner of the property insured, and the buildings were subject to a mortgage given by her and held by one Hannah Brown as assignee, and the policy upon which the suit is brought was made "payable in case of loss to Mrs. J. A. Brown, as her interest may appear as mortgagee." It contained the prescribed provision as to other insurance: "This policy shall be void . . . if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company." Rev. Stat. chap. 49, § 4.

Early in the year 1911 the mortgagee, at her own expense and without the knowledge of plaintiff, procured other insurance in the Providence Washington Insurance Company. This policy was apparently issued in the name of plaintiff, the loss being payable to Mrs. Brown as her interest might appear as mortgagee, and was always in the possession of Mrs. Brown in her lifetime and of her representatives after her decease. The buildings insured were totally consumed by fire on the 5th day of March, 1912. At no time previous to the fire did plaintiff give defendant notice of the issuance of the policy by the Providence Company or obtain its consent thereto from defendant. The plaintiff was undoubtedly aware as early as January, 1912, that some policy affecting the property had been procured by the holder of the mortgage, but there is no evidence that she ever saw the policy or knew its terms.

There was evidence tending to prove that plaintiff had no knowledge of the existence of the policy of the Providence Company earlier than January, 1912, while defendant claimed that there was at least evidence from which it was inferable that she knew

of and consented to it at the time of its issuance. There was also evidence tending to prove that the check given by the Providence Company in settlement of its policy to the administratrix of Mrs. Brown was indorsed by some member of the family of plaintiff, and returned to the administratrix, who cashed it and credited the avails upon the note secured by the mortgage. But there is no evidence that this was done pursuant to any agreement of the plaintiff and the administratrix. Nor does the record show what, if any, was the provision of the mortgage as to insurance.

The verdict was for plaintiff, and defendant filed a motion for new trial and a bill of exceptions, of which the writ, pleadings, evidence, and instructions of the court are made part. The motion is now waived, as well as all exceptions save to the refusal to give the following requested instructions:

"(1) If you are satisfied that the plaintiff, Mrs. Gould, received the check of the Washington Providence Insurance Company in settlement of her loss under their policy, and, knowing what it was for, indorsed that check so that it was collected by the representative of the Brown estate and credited on her mortgage, it would constitute a ratification by her of the act of the Browns in placing the policy, and would make it her policy.

"(2) If you are satisfied from the conduct of and the statements made by the plaintiff, Mrs. Gould, that she ratified the act of the Browns in taking out in her name the policy in the Providence Washington Insurance Company, it would render her policy in the Maine Farmers' Mutual Fire Insurance Company void, and prevent her recovery in this action.

"(3) If you are satisfied that Mrs. Gould, the plaintiff, before the fire of March 5, 1912, knew that a policy in her name and payable to the mortgagee had been taken out in the Providence Washington Insurance Company subsequent to the issuing of the policy in the Maine Farmers' Mutual Fire Insurance Company, and on the same property, and that she failed to give notice of such new policy to the Maine Farmers' Mutual Fire Insurance Company and obtain the assent of said company thereto in writing, such failure would render void the policy in the Maine Farmers' Mutual Fire Insurance Company, and that she cannot maintain this action and recover therein."

It is elementary law that the mortgagor and mortgagee have several distinct interests in the premises mortgaged, which either may insure for his own benefit; and equally so that, when a mortgagee insures his own interest without any agreement between him and the mortgagor therefor, and a

loss accrues, the mortgagor is not entitled to an allowance of the sum paid upon such loss, to be applied to the reduction or discharge of his mortgage debt, but the mortgagee may, notwithstanding, recover the whole amount due, or, as otherwise stated, that the mortgagee may insure for himself and at his own cost, and, when so insuring, the mortgagor is not to be benefited thereby. *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447, 453, 454; *McIntire v. Plaisted*, 68 Me. 363, 365; *Cushing v. Thompson*, 34 Me. 496, 499.

It has been held that, if the policy of the mortgage is made payable to the mortgagee as his interest may appear, this is regarded as an insurance of the mortgagor, and hence a subsequent insurance by the mortgagor vitiates the policy. *Continental F. Ins. Co. v. Hulman*, 92 Ill. 145, 34 Am. Rep. 122. See, however, *Wheeler v. Watertown F. Ins. Co.* 131 Mass. 1, 9. But insurance by the mortgagee does not affect the contract. *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410, 416. Additional insurance procured by the mortgagee upon the mortgagor's interest without the consent or knowledge of the mortgagor will not affect the rights of the mortgagor. *Fox v. Phenix F. Ins. Co.* 52 Me. 333, 334; *De Witt v. Agricultural Ins. Co.* 157 N. Y. 353, 360, 51 N. E. 977; *Church of St. George v. Sun Fire Office Ins. Co.* 54 Minn. 162, 166, 55 N. W. 909. See also *West Branch Lumberman's Exch. v. American Cent. Ins. Co.* 183 Pa. 366, 385, 38 Atl. 1081; *Johnson v. North British Ins. Co.* 1 Holmes, 117, 119, Fed. Cas. No. 7,400. See also *Burke v. Niagara F. Ins. Co.* 34 N. Y. S. R. 701, 12 N. Y. Supp. 254.

Without, or practically without, exception, cases holding that the insured ratified policies of insurance procured by others upon his interest have based their conclusions upon ratification as between principal and agent. See *German Ins. Co. v. Emporia Mut. Loan & Sav. Asso.* 9 Kan. App. 803, 59 Pac. 1092; *Hughes v. Insurance Co. of N. A.* 40 Neb. 626, 59 N. W. 112.

"Ratification," as used in the law of principal and agent, is the adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent in doing the act or making the contract without authority to do so. 31 Cyc. 1245. See also 2 Kent, Com. 13th ed. 616, note 3. And a knowledge of all material facts is indispensable. *Combs v. Scott*, 12 Allen, 493, 497. See also *Barnard v. Wheeler*, 24 Me. 412, 419.

The exceptions to the refusal of the first request must be overruled. We find no evidence that the check was received by the plaintiff in settlement of her loss. The indorsement of the check by someone authorized by her, or even by her, does not, under the circumstances, make the procuring of the policy her act by relation. Such indorsement of the check was as ineffectual for the purpose as the making of the formal proof of loss in *Titus v. Glens Falls Ins. Co.* supra, especially in the absence of any evidence showing, or tending to show, any undertaking or agreement for credit of the amount of the check upon the mortgage debt.

It is the opinion of the court that the evidence does not warrant the second requested instruction. There is an entire lack of evidence that the mortgagee assumed to act as agent of the plaintiff or intended to insure the interest of the plaintiff. *Nichols v. Fayette Mut. F. Ins. Co.* 1 Allen, 63, 69; *Humble v. German Alliance Ins. Co.* 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630.

The third requested instruction is to the effect that, if plaintiff, with knowledge of the policy procured by the mortgagee, failed to give notice to defendant of the new policy and obtain its assent thereto in writing, the policy in suit became void. That policy requires no notice of other insurance, and we are aware of no provision of law rendering it necessary, in the absence of such requirement. 2 May, Ins. § 364; *York v. Parker*, 109 Me. 414, 416, 84 Atl. 939.

The exceptions are overruled.

Annotation—Insurance: procuring of insurance by mortgagee as a violation of provision in policy of mortgagor against other or additional insurance.

As to effect of breach of policy of insurance by a mortgagor on rights of mortgagee, see annotation to *Brecht v. Law Union & Crown Ins. Co.* 18 L.R.A. (N.S.) 197; *Bacot v. Phenix Ins. Co.* 25 L.R.A. (N.S.) 1226; *People's Sav. Bank v. Retail Merchants' Mut. F. Ins. Asso.* 31 L.R.A. (N.S.) 455, and *Gilman v. Commonwealth Ins. Co.* L.R.A.1915C, 758. L.R.A.1917A.

As to the right of insurer to subrogation to mortgage, on payment of mortgage debt from proceeds of insurance on mortgagee's interest, see note to *Baker v. Monumental Sav. & L. Asso.* 3 L.R.A. (N.S.) 79.

The right of the insurer to subrogation upon paying mortgagee under a mortgage clause in a policy issued to the

owner of equity of redemption, to be subrogated to rights of mortgagee, is discussed in the note to *Milwaukee Mechanics' Ins. Co. v. Ramsey*, L.R.A.1916A, 556.

The objection of insurers to the procuring of additional insurance is based upon the theory that the insured will use less care to protect the insured property in proportion as the insurance is increased. Following out this reasoning, it is held that, in order to constitute a breach of the condition against additional insurance, it must appear that the same interest in the property was insured by the several policies. It is well settled that a mortgagor and mortgagee each have a separate and distinct insurable interest in the mortgaged property, and the separate insurance of the mortgagee is held not to avoid the mortgagor's insurance on the ground that it constitutes a breach of a condition in the latter's policy against other or additional insurance.

It would seem that the force of this reasoning as a ground of decision might be affected by the question whether or not the insurer, upon payment of the loss under the mortgagee's policy, would be entitled to subrogation to the latter's right under the mortgage (as to which, see note in 3 L.R.A.(N.S.) 79). The point, however, has not been made in any of the cases falling within the scope of the present note; and the reasoning is apparently recognized in dicta in a Massachusetts case (*Jackson v. Massachusetts Mut. F. Ins. Co.* (1839) 23 Pick. (Mass.) 418, 34 Am. Dec. 69), although, as shown in the note referred to, later Massachusetts cases denied the insurer's right to subrogation. It will be observed that some of the decisions in the present note in favor of the mortgagor do not depend upon this reasoning, but rest upon the ground that the mortgagor had no control over the mortgagee as regards insurance, or was not aware that he had taken out a policy on his own interest.

These distinctive insurable interests of the mortgagor and mortgagee, are recognized in *GOULD v. MAINE FARMERS' MUT. F. INS. CO.* ante, 604, where the court reaches the conclusion that there was no violation of the provision of the mortgagor's policy that it should become void if the insured had or should thereafter make any other insurance without the insurer's consent, although the mortgagee had obtained a policy in the mortgagor's name with a loss payable clause L.R.A.1917A.

and the mortgagor had given the insurer no notice thereof.

In *Hackett v. Cash* (1916) — Ala. —, 72 So. 52, the terms "additional insurance" and "other insurance" as used in policies providing for a forfeiture in case of such insurance, were held to refer to the same insurable interest in the property, and a policy issued to the mortgagor containing such a provision was held not to be avoided by reason of a policy insuring the mortgagee's interest, which did not accrue to the benefit of the mortgagor.

And in *Cannon v. Home Ins. Co.* (1897) 49 La. Ann. 1367, 22 So. 387, it was held that a mortgagor and mortgagee have distinct insurable interests, and that there was no violation of a provision of a policy issued to a mortgagor prohibiting "other insurance," by reason of a policy taken out by one who succeeded to the mortgagee's title, in the mortgagor's name, with a loss payable clause, which was secured without the mortgagor's authority and issued in his name without his knowledge, since the use of his name did not make the interest insured his.

And in *Guest v. New Hampshire F. Ins. Co.* (1887) 66 Mich. 98, 33 N. W. 31, it was held that the mortgagor could not prevent the mortgagee from obtaining insurance, and that where there was no collusion between the mortgagor and mortgagee whereby a policy taken by the latter was to give the former an interest in the policy, the provision of the mortgagor's policy that it should be avoided if the insured obtained further insurance was not violated by a policy procured by the mortgagee.

And there is a dictum in *Jackson v. Massachusetts Mut. F. Ins. Co.* (1839) 23 Pick. (Mass.) 418, 34 Am. Dec. 69, and *Church of St. George v. Sun Fire Office Ins. Co.* (1893) 54 Minn. 162, 55 N. W. 909, that a provision in a policy held by a mortgagor against other insurance is not violated by a subsequent policy obtained by the mortgagee on his separate interest.

It has been held that the words, "any property hereby insured," contained in a policy issued to a mortgagor providing that it should be void if there was other insurance on "any property hereby insured," mean the insured's interest or title in the property described, and that the provision is not violated by a policy taken by a mortgagee of the property on his interest, as the interests of the mortgagor and mortgagee are different.

Home Ins. Co. v. Koob (1902) 113 Ky. 360, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453.

In this case the court recognized that the purpose of provisions against other insurance was to prevent temptations to the insured arising out of overinsurance, and stated that, although it was assumed that the insurance effected by the mortgagee was directly for the mortgagor's benefit, still there could be no objection upon that ground in that case, as it appeared that both the mortgagor and mortgagee were ignorant of the insurance effected by the other, and unless the mortgagor knew of the other insurance and contemplated its possible advantage to him, it could have had no influence on his action. (Ky.) Ibid.

It has been held that the words, "any other person or parties interested," in a policy issued to a mortgagor providing, "If the assured, or any other person or parties interested, shall have existing during the continuance of this policy any other contract or agreement for insurance, . . . then this insurance shall be void and of no effect," include only persons or parties interested in the insurance, and that the expression, "any other contract or agreement for insurance," does not apply to insurance procured by a third person, and that such provision is not violated by reason of a policy procured by a representative of the mortgagee, who took title through foreclosure proceedings, where the policy was taken without the mortgagor's knowledge, although the representative had or claimed an insurable interest in the property, but had no interest in the policy issued to the mortgagor. Niagara F. Ins. Co. v. Seamon (1893) 144 Ill. 490, 19 L.R.A. 114, 28 N. E. 919, 32 N. E. 914; Commercial Union Assur. Co. v. Seamon (1893) 144 Ill. 506, 32 N. E. 916.

Although the mortgage contains a provision authorizing the mortgagee to protect his interest by insuring in case the mortgagor fails to do so, the mortgagee's act in procuring insurance will not avoid a policy held by the mortgagor where there has been no default on the latter's part in protecting the mortgagee by insurance, and he has no knowledge that the mortgagee has taken out a policy.

Thus, a policy issued to a mortgagor with a loss payable clause, and providing that it should be void if the insured had or afterward made other insurance on the property, was held not to be violated by reason of a policy procured by

the mortgagee on his interest without the mortgagor's knowledge and without a failure by him to insure, although the mortgage provided that the mortgagor should keep the property insured for the mortgagee's benefit, and that the latter might procure insurance upon the mortgagor's failure to do so, since this clause was not operative until the mortgagor defaulted in procuring insurance. Titus v. Glens Falls Ins. Co. (1880) 81 N. Y. 410.

This decision was followed in Doran v. Franklin F. Ins. Co. (1881) 86 N. Y. 635, where it was held that a policy obtained by a mortgagor which provided that it should be invalid if the insured should have or thereafter make any other insurance on the property was held not avoided by reason of the renewal by the mortgagee of a policy payable to him without the mortgagor's knowledge, although the mortgage contained a provision authorizing the mortgagee to insure in case the mortgagor failed to do so, as such renewal could not be regarded as the mortgagor's act.

And the doctrine announced in Titus v. Glens Falls Ins. Co. (N. Y.) supra, was approved in Cannon v. Home Ins. Co. (1897) 49 La. Ann. 1367, 20 So. 387, where there was held to be no violation of a provision of a mortgagor's policy prohibiting other insurance, by reason of a policy taken out by one who succeeded to the mortgagee's title, in the name of one who had succeeded to the mortgagor's title, without his authority or knowledge, although the mortgage provided that the mortgagor should keep the property insured for the mortgagee's benefit, and authorized the latter to procure insurance if the mortgagor did not, there appearing to have been no default on the part of the mortgagor to insure.

And where a mortgage authorized the mortgagee to procure insurance only in the event that the mortgagor failed to do so, a policy obtained by the mortgagor containing a provision that it should be void if the insured should make or procure any other contract of insurance is not avoided by reason of a policy procured by the mortgagee without the mortgagor's consent, which the mortgagee promised the mortgagor to have canceled, when the latter, upon learning of the existence of the second policy, informed him of the insurance obtained by her, which she believed complied with her agreement to insure, although the mortgagee failed to keep his promise to

procure the cancelation of his policy. *Kelley v. People's Nat. F. Ins. Co.* (1914) 262 Ill. 158, 50 L.R.A. (N.S.) 1164, 104 N. E. 188.

In *Church of St. George v. Sun Fire Office Ins. Co.* (1893) 54 Minn. 162, 55 N. W. 909, it was held that the mortgagor did not procure or adopt a policy which insured his interest and that of the mortgagee, which the agent of the latter secured before the delivery of the mortgage, and that there was no breach of a provision of a policy held by the mortgagor before the execution of the mortgage, that it should be void if the insured should procure any other contract of insurance, it appearing that the mortgage gave the mortgagee power to insure for his benefit upon the mortgagor's failure to do so, but that, although the mortgagor was notified that a policy had been obtained and charged to him, he had no knowledge that it covered his interest.

And a policy issued to a mortgagor which provided that if there should be any prior or subsequent insurance on the property insured or any part thereof without the insurer's consent, it should be void, has been held not to be avoided by reason of a policy which has been secured at the mortgagor's expense for the benefit of the mortgagee, by the agent through whom the mortgagor had negotiated his loan, where the mortgagor did not know that the policy had been effected, or that the amount retained by his agent for negotiating the loan covered the premium on the mortgagee's policy. *Cowart v. Capital City Ins. Co.* (1896) 114 Ala. 356, 20 So. 574.

And the fact that a mortgagee of land jointly owned had obtained a policy on his interest without the knowledge of the joint owner who subsequently insured her interest will not avoid her policy which provided that it should be void if the insured should have or thereafter make any other contract of insurance on the property insured, since the mortgagor had made no other contract of insurance on the property. *Carpenter v. Continental Ins. Co.* (1886) 61 Mich. 635, 28 N. W. 749.

In *Home Ins. Co. v. Koob* (1902) 113 Ky. 360, 58 L.R.A. 58, 101 Am. St. Rep. 354, 68 S. W. 453, it was said that although it might be inferred that, upon the failure of the mortgagor to keep the premises insured to at least the balance

of the mortgage debt, the mortgagee was authorized by the contract between it and the mortgagor to effect such insurance on the mortgagor's title, with loss payable to the mortgagee as its interest might appear, yet the mortgagee did not do so, but instead procured a policy which indemnified it for loss on its distinct interest alone, and it was held that the procuring of this policy did not constitute a breach of a provision of a policy held by the mortgagor, that it would be void in case other insurance was obtained on the property, and that the fact that the mortgagee charged or attempted to charge the mortgagor with the premium for such insurance was immaterial.

In *Perry v. Liverpool & L. & G. Ins. Co.* (1898) 34 N. B. 380, where an action was brought by a husband who with his wife had mortgaged property, to recover on a policy on the mortgaged premises providing that persons insured should give notice of other insurance already made or which should be afterwards made elsewhere on the property, otherwise the policy should be void, it was held that the policy was avoided by reason of a policy of which no notice was given, which had been obtained by the mortgagee in the name of the plaintiff's wife, with a loss payable clause in favor of the mortgagee, although the mortgagors did not know of the existence of such policy. The court took the view that the provision for forfeiture was plain and should not be gotten rid of by a mere assertion by the mortgagor that he did not know of the mortgagee's policy and also considered that the latter's policy was one for the benefit of the mortgagor, and that both policies insured the same interest.

In *Holbrook v. American Ins. Co.* (1852) 1 Curt. C. C. 193, Fed. Cas. No. 6,589, it was held that a mortgagor's policy providing that if the insured should thereafter make any other contract of insurance on the same property without giving notice, the policy should cease, would be avoided by a policy covering the mortgagee's interest taken at the expense of the mortgagor, since the mortgagor could compel the application of the proceeds of such policy to the payment of the mortgage debt, and it must therefore be deemed insurance effected by him within the provision of his policy.

J. T. W.

NORTH DAKOTA SUPREME COURT.

RE ESTATE OF JOHN D. GRAY, Deceased.

JOHN HENDERSON et al., Appts.,
v.

JULIA ANN GRAY et al., Respts.

(27 N. D. 417, 146 N. W. 722.)

Will — unconditional remainder.

1. In paragraph 2 of his will, testator devised a life estate in all his real property to his wife, and in paragraph 3 he made the following devise to his son Arthur: "Subject to the aforesaid life interest of my wife, Julia Ann Gray, and the following further provisions: (a) That within two years next succeeding the death of my wife, Julia Ann Gray, he pay or cause to be paid unto my daughter, Ruth Belcal, or her heirs, the sum of fifteen hundred dollars (\$1,500); (b) that he pay or cause to be paid unto my daughter, Myra Pieldman, or her heirs, within two years next succeeding the death of my wife, Julia Ann Gray, the sum of fifteen hundred dollars (\$1,500), I will and bequeath unto my son, Arthur Pierce Gray, or his heirs, the north one half of section twenty-eight, township one hundred forty, range sixty."

No provision is made in the will for a devise over in the event Arthur should decline to accept such devise.

Held, construing the will in its entirety, that the testator's intention was to vest in such son an unconditional estate in such property at his death, subject to the life estate in his widow, and subject further to a charge impressed thereon in favor of his two daughters, Ruth and Myra, as security for the payment to each within two years from the death of his widow of the legacy therein bequeathed.

For other cases, see *Wills*, III. g, 4 and 5, in *Dig. 1-52 N. S.*

Same — suspension of power of alienation.

2. Such devise to the son not being made subject to a condition precedent, there is no basis whatever for the contention of respondents that the same operates to suspend the power of alienation.

For other cases, see *Perpetuities*, in *Dig. 1-52 N. S.*

Same — rules of construction.

3. Certain well-settled rules of construction are referred to and applied in the opinion, all of which were designed as aids to the courts in determining and giving effect

to the real intent of the testator, which in all cases is the sole object in view.

For other cases, see *Wills*, III. a, in *Dig. 1-52 N. S.*

(March 30, 1914.)

APPEAL by petitioners from a judgment of the District Court for Barnes County reversing a judgment of the County Court which admitted to probate the will of John D. Gray, deceased, and holding certain provisions of the will invalid, in a proceeding for the probate of said will. Reversed.

The facts are stated in the opinion.

Messrs. Page & Englert, for appellants:

The will in no manner suspends the power of alienation, as the time within which the condition for the payment may be performed is no suspension of the power.

Hagen v. Sacrison, 19 N. D. 160, 26 L.R.A. (N.S.) 724, 123 N. W. 518; Robert v. Corning, 89 N. Y. 226; Dillenbeck v. Dillenbeck, 134 App. Div. 720, 119 N. Y. Supp. 134; Sawyer v. Cubby, 146 N. Y. 192, 40 N. E. 869; Garvey v. McDevitt, 72 N. Y. 556; Re Heberle, 155 Cal. 723, 102 Pac. 935; Re Pforr, 144 Cal. 121, 77 Pac. 825.

The absolute power of alienation is not suspended by this will, for the reason that the parties that are mentioned in or that are to take under it are in being and can at any time join together and convey an absolute interest in possession.

Torpy v. Betts, 123 Mich. 239, 81 N. W. 1094; L'Etourneau v. Henquenet, 89 Mich. 432, 28 Am. St. Rep. 310, 50 N. W. 1077; Murphy v. Whitney, 140 N. Y. 541, 24 L.R.A. 123, 35 N. E. 930; Sawyer v. Cubby, 146 N. Y. 192, 40 N. E. 869; 18 Am. & Eng. Enc. Law, 377; Thatcher v. St. Andrew's Church, 37 Mich. 264; Case v. Green, 78 Mich. 540, 44 N. W. 578; State v. Holmes, 115 Mich. 456, 73 N. W. 548; Crooke v. Kings County, 97 N. Y. 421; Bailey v. Bailey, 97 N. Y. 400; Garvey v. McDevitt, 72 N. Y. 556; Nellis v. Nellis, 99 N. Y. 505, 3 N. E. 59; Baldwin v. Palen, 24 Misc. 170, 53 N. Y. Supp. 520; Re Campbell, 149 Cal. 712, 87 Pac. 573; Fitz Gerald v. Big Rapids, 123 Mich. 281, 82 N. W. 56.

The will is not violative of the power of alienation, for the reason that the amounts to be paid by the beneficiaries to certain other beneficiaries under the will are a mere charge upon the land.

Headnotes by FISK, J.

Note. — For discussion of the question as to when a provision in a devise for the payment of a sum of money, or for the support of a third person, may be taken as a condition precedent, or as a condition subsequent, or as creating a charge upon the property devised, see annotation following this case, post, 617.
L.R.A.1917A.

As to remedies for enforcement of legacy charged upon a devise, see note to *Stringer v. Gamble*, 30 L.R.A. (N.S.) 815.

As to statute of limitation applicable to action to enforce an implied promise arising from acceptance of devise chargeable with payment of legacy, see note to *Stringer v. Stepiens*, 8 L.R.A. (N.S.) 393.

Radley v. Kuhn, 97 N. Y. 26; 30 Cyc. 1504.

The provision of the will for the payment of the legacy to testator's daughter is a charge upon the real property.

Whitehouse v. Cargill, 86 Me. 60, 29 Atl. 934; Hogg v. Browning, 47 W. Va. 22, 34 S. E. 754; Schrader v. Schrader, 158 Iowa, 85, 139 N. W. 160; Re Korn, 128 Wis. 428, 107 N. W. 659; McNally v. McNally, 23 R. I. 180, 49 Atl. 699; Spangler v. Newman, 239 Ill. 616, 88 N. E. 202; Hutchins v. Hutchins, 18 Misc. 633, 42 N. Y. Supp. 601; Lang v. Everling, 3 Misc. 530, 23 N. Y. Supp. 329; Smith v. Smith, 48 Hun, 617, 1 N. Y. Supp. 643; Loder v. Hatfield, 71 N. Y. 92; Re Ryder, 41 App. Div. 247, 58 N. Y. Supp. 635; Wellbrook v. Otten, 35 Misc. 459, 71 N. Y. Supp. 937; Goddard v. Pomeroy, 36 Barb. 546; Kelsey v. Deyo, 3 Cow. 133; Re Wise, 188 Pa. 258, 41 Atl. 526; Wertz's Appeal, 69 Pa. 173; Re Moran, 13 Pa. Super. Ct. 251; Rutt's Estate, 35 Pa. Super. Ct. 522; Waddell v. Waddell, 68 S. C. 335, 47 S. E. 375; Crawford v. Severson, 5 Gill, 443; Nellons v. Truax, 6 Ohio St. 97; Theobald v. Fugman, 64 Ohio St. 473, 60 N. E. 606; Daly v. Wilkie, 111 Ill. 382; Parsons v. Millar, 189 Ill. 107, 59 N. E. 606; Warner v. Bullen, 123 Ill. App. 138; Warner v. Bronson, 81 Vt. 121, 69 Atl. 655.

Mr. Taylor Crum, for respondents:

"The creation of the limitation or condition in a will takes place at the death of the testator," and the "absolute power of alienation" mentioned in the Civil Code is equivalent to the power of conveying an absolute fee.

Re Walkerly, 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772; Tucker v. Tucker, 5 N. Y. 417.

When, by will, John D. Gray devised to heirs which may not have been in being at the time of his death, he attempted to suspend the power of alienation contrary to the plain letter of the Code.

Cruikshank v. Home for the Friendless, 113 N. Y. 337, 4 L.R.A. 140, 21 N. E. 64; Haynes v. Sherman, 117 N. Y. 433, 22 N. E. 938; Trowbridge v. Metcalf, 5 App. Div. 318, 39 N. Y. Supp. 241; State v. Holmes, 115 Mich. 456, 73 N. W. 548; Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238; Leonard v. Burr, 18 N. Y. 107; Rong v. Haller, 109 Minn. 191, 26 L.R.A. (N.S.) 825, 123 N. W. 471; Crew v. Pratt, 119 Cal. 139, 51 Pac. 42; Whitney v. Dodge, 105 Cal. 192, 38 Pac. 636; Re Hendy, 118 Cal. 656, 50 Pac. 753; Re Cavarly, 119 Cal. 406, 51 Pac. 629; Hawley v. James, 16 Wend. 61.
L.R.A.1917A.

Fisk, J., delivered the opinion of the court:

In April, 1911, one John D. Gray died testate, leaving certain real and personal property in Barnes county. The provisions of his will, so far as material to the questions presented, are as follows:

"II. Unto my wife, Julia Ann Gray, I will and bequeath all of the personal property in my possession at the time of my death and a life interest in and to my real estate, more particularly described as the north one half of section twenty-eight, and the southeast one fourth of section twenty-one, all in township one hundred forty of range sixty in Barnes county, North Dakota (N. § 28, and S. E. § 21—140—60), it being my wish and direction that she retain full possession and enjoy the income from said real estate during the period of her natural life, but this interest and title shall terminate promptly at her death.

"III. Subject to the aforesaid life interest of my wife, Julia Ann Gray, and the following further provisions: (a) That within two years next succeeding the death of my wife, Julia Ann Gray, he pay or cause to be paid unto my daughter, Ruth Beale, or her heirs, the sum of fifteen hundred dollars (\$1,500); (b) that he pay or cause to be paid unto my daughter, Myra Fieldman, or her heirs, within two years next succeeding the death of my wife, Julia Ann Gray, the sum of fifteen hundred dollars (\$1,500), I will and bequeath unto my son, Arthur Pierce Gray, or his heirs, the north one half of section twenty-eight, township one hundred forty, range sixty (N. § 28—140—60).

"IV. Subject to the aforementioned life interest of my wife, Julia Ann Gray, and the further provision that within the two years next succeeding the death of my wife, Julia Ann Gray, he pay or cause to be paid unto my son, James Burley Gray, or his heirs, the sum of five hundred dollars (\$500), I will and bequeath unto my son, George H. Gray, the southeast quarter of section twenty-one, in township one hundred forty, of range sixty (S. E. § 21—140—60)."

Thereafter a petition in due form was presented to the county court for the probate of such will, and one Rachel M. Zellers, a daughter of the deceased, opposed the allowance of such probate upon the ground, among others, "that said alleged will is void, as the intent of the testator to give the remainder in fee to heirs of Julia Ann Gray is legally impossible, as the intention of the testator would put the freehold in abeyance; that no provision is made for any disposition of the decedent's real estate in case Arthur Pierce Gray and George H. Gray, or either of them, fail to pay certain

money to other heirs at law; and that there is an attempt to suspend alienation longer than the continuance of the lives in being at the testator's death. For a period of two years after the death of Julia Ann Gray, the real estate attempted to be devised might belong to no one; there being no devisee who has not attained his majority, as appears by the petition for proof and probate of the alleged will." The county court overruled such objection, and allowed the probate of the will, from which decision Rachel M. Zellers appealed to the district court, which court reversed the decision of the county court, holding such will of no validity in so far as the testator attempted to devise the real property therein described. From such decision this appeal is prosecuted.

Counsel, in their original briefs and orally, argued the case mainly upon the assumption that the devises to Arthur Pierce Gray and to George H. Gray were subject to conditions precedent, and that, as a consequence, the decision must turn upon the question of law as to whether by paragraphs 3 and 4 of the will the testator attempted to suspend the power of alienation for any period in excess of that permitted by the Code, §§ 4744 and 4745, which are as follows:

"Section 4744. The absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in § 4772.

"Section 4745. Every future interest is void in its creation, which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed."

Appellants' counsel earnestly contend that, under the paragraphs of the will aforesaid, the power of alienation is not unduly suspended contrary to § 4745. Numerous authorities are cited and relied upon in support of their contention, but their chief reliance is upon the case of *Torpy v. Betts*, 123 Mich. 230, 81 N. W. 1094, decided under a statute in all respects like the statutes of North Dakota above quoted. We shall not take the time nor the space necessary to enable us to analyze such case nor any of the cases cited in the original briefs, for we do not deem them in point, nor in any respect controlling in the case at bar. We merely remark, in passing, that upon the law point argued we would have no diffi-

culty in reaching a conclusion favorable to the respondent.

After careful consideration of the case, we became impressed with a belief that counsel had overlooked and failed to brief and argue what we were inclined to deem the controlling rule of construction: viz., that the devises to Arthur Pierce Gray and to George H. Gray were not upon condition either precedent or subsequent, but that the same were unconditional, and made subject merely to a charge in favor of the legatees Ruth Beleal, Myra Fieldman, and James Burley Gray. Thereupon we requested counsel to furnish supplemental briefs upon this phase of the case, which request has been complied with. A careful consideration of such supplemental briefs has served to confirm the correctness of our first impressions. As we construe the will, the premise upon which both counsel first argued the case in this court, to wit, that such real property was devised to the sons, Arthur Pierce and George H. Gray, upon conditions precedent that they should pay certain bequests to Ruth Beleal and Myra Fieldman, daughters, and to James Burley Gray, a son of the testator, is clearly erroneous. If correct in this conclusion, it necessarily follows that such devises were made either upon condition subsequent or merely subject to a charge upon the estates devised in favor of such legatees for the amounts of such legacies, and in either event the question argued in the original briefs, of the suspension of the power of alienation, cannot possibly be involved. We are firm in the belief that the testator merely intended to make such legacies charges against the estates.

We are confirmed in this belief by the provisions of the will. On the theory that the testator intended to make such devises subject to conditions precedent, it is quite natural that he would have made some provision for the vesting of title elsewhere in the event such conditions were not complied with, but the will is silent in this respect. Furthermore, such conditions could not be complied with until after the termination of the life estate in the mother, for such are the plain provisions of the will; and yet no provision is made for an abiding place for the title during the interim between the mother's death and a compliance with such conditions, which might be a period of two years. If held to be conditions precedent, it is, of course, well established that no estate could pass to the devisees until the conditions were complied with. Again, it clearly was testator's intent to bequeath to Ruth Beleal, Myra Fieldman, and James Burley Gray the sums stated, yet such intent must fail if the de-

vises to Arthur and George fail either through noncompliance with the alleged conditions precedent or otherwise. Moreover, the fact that the testator fixed a period of two years from and after the death of the mother in which such legacies could be paid by Arthur and George to Ruth, Myra, and James lends support to our construction of the will, for it is very improbable that the testator, if he intended to withhold the vesting of such estates in Arthur and George during the interim which might occur, would not have made some provision for the occupancy and control, as well as the ownership, of the property during such period. When we consider the entire will with a view of determining the intention of the testator, which is the sole object aimed at, we are forced to conclude that, subject to the life estate in the mother, the devises operated to vest title in Arthur and George unconditionally at the death of the testator, but that they took thereunder subject to a charge impressed upon their estates for the payments of the legacies aforesaid within two years after the mother's death. Well-settled rules of construction, as well as the authorities, lend ample support to our views. Brief reference to such rules and to a few authorities will here be made.

Page on Wills, § 461, announces a correct rule of construction as follows: "The sole object and intention of the rules upon the subject of construction is to ascertain the intention of the testator. As was said by Chief Justice Marshall: 'The intent of the testator is the cardinal rule in the construction of wills, and, if that intent can be clearly conceived, and is not contrary to some positive rule of law, it must prevail.' The purpose of the court in construing a will is solely to ascertain the intention of the testator as the same appears from a full and complete consideration of the entire will. The intention of testator is said, in a recent Virginia case, to be the 'life and soul of a will,' and if this intention is clear, and is not in violation of any rule of law, it must govern with absolute sway."

In § 465 this author also says: "Testator will be presumed to know the limits imposed by law upon his testamentary power, and to strive to comply with those limits. Thus, if one construction of the will will cause it to violate the rule against perpetuities, and another construction will make it comply with this rule, the construction which makes it comply with this rule will be preferred." And in § 466 we quote: "It will be presumed that a person, when he makes and publishes a will, intends to dispose of his whole estate, unless the presumption is rebutted by its provisions or evi-

dence to the contrary." And in § 752 we quote the following: "Devises are often made to one with the direction that he pay a certain sum to another. Whether the sum thus to be paid is made a charge upon the land by such gift is a question involving some difference of judicial opinion; but it can, in general, be determined by the same principles as those which determine whether a direction to support is a charge upon property devised or not. A gift to one, subject to the payment of a specified amount to another, is held to make the payment of such amount a charge upon the land devised. . . . Gifts of this sort are held to impose charges on the land devised, rather than to constitute conditions precedent, when there is no gift over in case of failure to pay the beneficiary designated. In cases of doubt the presence or absence of a gift over is held to determine whether the will creates a charge or imposes a condition precedent." See also Rood, Wills, § 623.

In 40 Cyc. 1683, we find the following accurate statement relative to how a condition in a will can be created: "To create a condition in the case of a devise or bequest apt words to that end must be used. It is not necessary, however, that any particular form of words shall be employed, but whenever it clearly appears from the language used, aided, it may be, in a proper case by extrinsic evidence, that it was the intention of the testator to impose a condition precedent or subsequent, such intention will be given effect. On the other hand, even the use of the words 'upon condition,' although they are of course most appropriate, will not create a condition if a contrary intent appears from the will. The intention to create a condition must clearly appear, for the courts will not construe a testator's words as importing a condition if a different meaning can be fairly given to them,"—citing numerous authorities in support of the text.

At page 1697 of the same treatise the author distinguishes a condition from a charge or trust in the following terse language: "The doctrine has been announced in many cases that a condition for the benefit of a person, particularly where it is a mere direction enjoining some act upon a devisee or legatee, without any expressed or clearly implied intention that its breach shall work a forfeiture of the estate, should be regarded as creating a charge or trust upon the land or fund in such person's favor, to be enforced as other charges and trusts, and not as a limitation upon the estate or interest devised, even though the words used may indicate a condition."

The adjudicated cases are very numerous in support of the rules of construction above

quoted. We will review briefly some of these cases:

A very similar case to the one at bar arose in Vermont, and is reported in *Casey v. Casey*, 55-Vt. 518. Taft, J., in speaking for the court, said: "The right of the plaintiff to maintain this action depends upon whether he took, under his father's will, the legal estate in the premises sued for. His father devised the premises to the plaintiff for life, with remainder to the plaintiff's children, upon the express condition that the plaintiff paid to his brother Michael \$700 on or before the 1st day of April after the testator's death. That sum has never been paid; and the defendant insists that the legal title to the premises has never vested in the plaintiff. There are cases in our sister states which hold that such conditions are conditions precedent, and that no title to the lands devised vests until the conditions are performed. Such may be the rule in the construction of deeds and contracts, but great latitude has been exercised by the courts in the construction of wills. 'It has been held that that which may be a condition precedent in a deed may be a condition subsequent in a will.' *Jennings v. Gower*, Cro. Eliz. pt. 1, p. 219. And the rules of construction are so liberal that it has been held that 'no precise form of words is necessary to create conditions in wills; but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect.' 2 *Williams*, Exrs. 1081. The case at bar should not turn upon any technical construction to be given the words used. The great object is to come at the intention of the testator. Nice grammatical constructions which lead aside from this grand object are to be disregarded. The testator provided some of his children with homes,—those, it is said, who were living in this state,—distributing his real property among them. He gave Michael, living out of the state, \$1,000, requiring the plaintiff to pay \$700 of it, and giving the plaintiff his home farm on condition that he should pay it on or before the 1st day of April after the testator's decease. It was the evident intent of the testator that upon his death the plaintiff should be vested at once with the title and ownership of the farm; that the payment of the \$700 should be charged upon it; and that it should be held subject to such equitable lien. This is the construction that we think should be given to the will. It could not have been the testator's intent that in case he had died on the last day of March, that the devisee should lose all benefit of the gift in case he did not pay the \$700 the next day. The plaintiff there-

fore had a sufficient title to maintain ejectment."

The supreme court of Michigan, in *McCarty v. Fish*, 87 Mich. 48, 49 N. W. 513, in speaking to the point, said: "The fact that the testator makes no provision in regard to the disposition of the estate, providing the event named for a devisee or legatee coming into full possession never occurs, is regarded as satisfactorily showing that it was not in the mind of the testator to create a contingent estate. In *Eldridge v. Eldridge*, 9 Cush. 516, Shaw, Ch. J., defines the rule of construction upon this subject thus: 'When, therefore, words are equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself or to the time of payment, courts are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent.' In *Dingley v. Dingley*, 5 Mass. 537, Parsons, Ch. J., states the rule as follows: 'For it is a rule of law that a remainder is not to be considered as contingent when it may be construed, consistently with the testator's intention, to be vested.' In *Smith's Appeal*, 23 Pa. 9, it was said: "The law favors an absolute rather than a defeasible estate; a vested rather than a contingent one; a primary rather than the secondary intent.' In *Letchworth's Appeal*, 30 Pa. 175, it was held that the law always inclines to hold the whole interest in property as vested rather than contingent, and therefore in case of doubt it declares the interest vested."

The following language from the supreme court of West Virginia is strikingly applicable to the case at bar: "He made no provision for their payment out of personality if there was any besides that given his wife, and it seems he owned no land besides that given his sons; and, as he surely expected all these legacies, amounting to \$12,300, besides the annual legacy of \$500 to his wife, to be paid, we may ask, how could he expect them to be paid except out of the land?" *Hogg v. Browning*, 47 W. Va. 22, 34 S. E. 754.

The Iowa court, in the very recent case of *Schrader v. Schrader*, 158 Iowa, 85, 139 N. W. 160, speaking through Mr. Justice Weaver, announces a like rule as follows: "That the testator regarded it as a lien or charge, and not a condition precedent, is made evident by the fact that he did not attempt to devise the fee to anyone else in case of George's failure to make the payment. . . . The fact that the will does not provide for a devise over to another on failure of the first-named devisee to perform the condition attached to the gift is by all authorities considered a circumstance of

much weight, indicating that the condition is not precedent to the vesting of an estate,"—citing *Cunningham v. Parker*, 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635; *Hoss v. Hoss*, 140 Ind. 551, 39 N. E. 255; *Hanna's Appeal*, 31 Pa. 53; *Pearcy v. Greenwell*, 80 Ky. 616; *Vandevort's Case*, 62 Hun, 612, 17 N. Y. Supp. 316. The provisions of the will in the Iowa case were not materially different from those in the will before us.

A very similar will was before the Wisconsin court in the recent case, *Korn's Will*, 128 Wis. 428, 107 N. W. 659. The will in that case gave the testator's widow the use and income of all his real estate during her life, and "after the death of my said wife I dispose of my property as follows; to wit, 3d. I will, devise, and bequeath to my son William Korn my farm [description], upon the express condition, however, that he shall pay to my daughter, Phillipina Steele, the sum of \$5,000 within one year after the death of my said wife." Mr. Justice Dodge, in speaking for the court, said: "This naturally brings us to a consideration of the intent with reference to this legacy. The will does not, in terms, provide that the same should be a charge, but uses the expression that the devise to William is upon the condition that he shall, within one year after the widow's death, pay this amount to Phillipina. The expression 'upon condition,' if not otherwise qualified, might be construed as a condition precedent, so that William could not take the land at all without making such payment, but since he was to take in possession immediately upon his mother's death, and was not required to make the payment until afterwards, namely, within a year, of course no condition precedent was intended. If, then, it is a condition at all, it is a condition subsequent; but there is no suggestion that his title is to be divested upon breach of that condition, and no provision is made for anyone else to take the land upon such breach. Hence it seems necessary to deduce some other practical meaning and purpose from this language. We are persuaded that the trial court reached substantially the right conclusion on this subject. We think it plain that this \$5,000 provision for the daughter—all that she receives under the will—was a very dominant purpose in the mind of the testator, and that his wishes, as evinced by the will, would not be satisfied unless she receives it; hence that he intended to declare his will that, out of this farm, constituting nearly half of his estate, should be paid, in any event, \$5,000 to the daughter, Phillipina; that this purpose should not be defeated either through William's inability

to raise that amount of money upon his limited estate therein or otherwise. To reach this result, he must have intended to confer upon her the right to a lien or charge for this amount upon the whole title in these premises, and we agree with the trial court in holding that the will does so. Such lien or charge being created, of course the right exists in her to invoke the powers of a court, whether of law or equity, to exert its proper machinery to render that lien effective in producing the money she is entitled to have. Courts of equity have many such methods within their power, prominent among which is the judicial sale, whereby any title or any portion found necessary may be transferred to a purchaser who will pay the amount of money requisite to satisfy the charge. We think it proper to declare also that, she being sui juris, her right to this legacy, with all its accompanying security, can be sold or transferred by her like any other property, so that anyone, other than William, paying to her the \$5,000 to which she is entitled may, with her co-operation, acquire all her rights in the land. We presume that the trial court intended to declare, by its judgment, a charge of this character, and no modification or change of the judgment, so construed, is necessary." We are in entire accord with the reasoning and conclusion of the Wisconsin court in the above case, and adopt such reasoning in the case at bar.

See also *McNally v. McNally*, 23 R. I. 180, 49 Atl. 699, which is directly in point in support of our holding. The language in the opinion is so pertinent to the case at bar that we cannot refrain from quoting therefrom: "The will of Mary McNally gave to her daughter Catherine Bell 'the upper tenement in house on lot No. 1, including lot, conditioned upon said Catherine paying to my daughter Annie Whalan the sum of \$400.' Also to 'Frank McNally the lower tenement in above said house, forever, conditioned upon said Frank paying to my son James E. and daughter Eliza the sum of three hundred dollars (\$300 cash).' The two tenements in house on lot No. 2 were devised in similar terms, the lower to James E. and Eliza, including lot, and the upper to Bridget McNally. Then followed these two clauses: 'The above sums to be paid within three years from the time of my decease. Also said James E. and Eliza are required to provide suitable provisions for the sustenance of my son Philip during his life.' . . . The first question raised is whether the payment of the sums stated is a condition precedent or condition subsequent, or a charge upon the real estate devised. It is plain that the will does not create a condition precedent, because the

devises are to take effect upon the death of the testatrix, while the payment is postponed for three years; nor a condition subsequent, because there is nothing in the will to show an intention of the testatrix to subject the estate to forfeiture. The payments were not for the benefit of her estate or of her heirs generally, to whom a forfeiture would inure, but a mode of equalizing her gifts by requiring children to whom real estate was devised to make payments of money to other children who received no other gift from her. As there is no residuary clause in the will, it is evident that her property consisted only of this real estate, which could not be divided into as many parts as there were children; hence the equalization in payments of money. The use of the word 'conditioned' does not necessarily imply a strict condition, either precedent or subsequent. The intention must control. 2 Washb. Real Prop. 5th ed. 446, ¶ 3, and cases cited in note 5. We think that the intent in this case was to make the payments a charge upon the estate devised."

See also *Spangler v. Newman*, 239 Ill. 616, 88 N. E. 202; *Perry v. Hale*, 44 N. H. 363. In the latter case the facts were that the testator devised a life estate in his farm to his wife and then to his son, "on condition that he pay testator's daughter Susan \$700, and his daughter Mary Ann \$800," and it was held that the bequests were a mere charge upon the farm.

We might cite many more authorities holding to the same effect, but we deem it unnecessary. We are entirely clear that, by the will in question, the testator did not

intend that the devises to his sons should be upon any condition either precedent or subsequent, but rather his intent was to vest in them, at the date of their mother's death, an unconditional estate, impressed, however, with a charge or trust in favor of the legatees aforesaid for the payment of such legacies. Not only the weight of authority, but, we believe, all authorities, support this conclusion.

In his supplemental brief respondents' counsel asserts that the foregoing authorities are not in point because of a distinction in the statutes relating to perpetuities, but we are wholly at a loss to understand how these authorities can be differentiated from the case at bar on such ground. Surely, if the provisions of the will create a mere charge instead of a conditional devise, the statute against perpetuities and limiting the suspension of the power of alienation has no relevancy. The rule of construction which requires the testator's intention to be given effect is universally recognized, and no different rule is in force in common-law states than is in force in Code states like North Dakota. Respondents' counsel seems to predicate his whole argument upon the assumption that the devises in question were upon a condition precedent, and, as we have seen, such assumption is unwarranted and without support in the authorities.

The judgment of the District Court is accordingly reversed, and the cause remanded for further proceedings.

Petition for rehearing denied April 13, 1914.

Annotation—Provision in devise for payment of a sum of money, or for the support of a third person, as a charge, a condition subsequent, or a condition precedent.

I. Scope and introduction, 617.

II. Considerations to be taken into account in determining testator's intention:

- a. As to the character of the annexed condition, 620.***
- b. As to the creation of a charge, 622.***

III. Cases involving the question whether or not a condition precedent was created:

- a. Cases in which the provision has been construed as a condition precedent, 626.***
- b. Cases in which the provision has been held not to create a condition precedent, 627.***

IV. Cases involving the question whether a condition subsequent was created, 629.

V. Cases considering the question whether or not a charge was created:

- a. Cases in which the provision has been construed as a charge, 634.***
- b. Cases in which the provision has been held ineffectual to create a charge, 646.***

I. Scope and introduction.

The purpose of this annotation is to bring together cases which discuss the character of a testamentary provision requiring a devisee of land to pay a sum of money to a third person, or for the benefit of the estate, or to support a third person, as imposing a condition upon the devisee upon the one hand, or a charge in favor of the person for whose

benefit the provision is made, on the other, as well in order to facilitate their examination and comparison as to ascertain the considerations which have influenced their decision. While cases in which the devise was accompanied by a direction to support and maintain a third person have been included, since such a direction is in effect a pecuniary legacy which is uncertain in amount, but rendered sufficiently certain by the circumstances,¹ and gives rise to the same questions as a direction to pay a money legacy, those in which the devise was on condition of supporting the testator himself have been excluded, since the only question that can arise in such a case is a very different one; namely, whether the provision relating to support is a condition precedent or is merely indicative of the consideration for the gift.

Questions arising out of the creation of a charge—such as whether the effect is wholly to exonerate the personal estate—are, of course, wholly outside the scope of this note; nor does such scope extend to the question whether the dev-

isee is merely constituted a trustee by the direction to pay, taking no beneficial interest himself; nor to the question as to when legacies are to be deemed charged upon testator's realty generally.

The question whether a provision in a will directing a payment to be made by a devisee creates a condition, either precedent or subsequent, or a charge on the property devised, is spoken of in *RE GRAY*, ante, 611, as though the alternatives are mutually exclusive,—in other words, as though the fact that such a provision creates a charge precludes it from operating as a condition. While countenance for this view may be found,² some courts have treated such a provision as a condition so far as the rights of the devisee were concerned, and at the same time as a charge where the rights of the legatee have come into question.³ The aversion of modern courts, imbued as they are with principles formerly peculiar to equity, to enforce a forfeiture, leads them to construe such a provision, although phrased as a condition, as a charge only,⁴ unless the intention of the

¹ *Richards v. Merrill* (1832) 13 Pick. (Mass.) 405.

² Thus, in *Taft v. Morse* (1842) 4 Met. (Mass.) 523, it is said that the fact that the testator created a lien or charge on the land is inconsistent with a devise on condition; for if the testator intended to give an estate on condition, there was no necessity for charging the lands in order to secure the payment of the legacies.

So, also, it has been held that the fact that the legatee has a remedy by enforcing a charge against the realty goes to show that payment is not a condition precedent to vesting. See *Creswell v. Lawson* (1835) 7 Gill & J. (Md.) 227.

In *Cunningham v. Parker* (1895) 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635, where testator devised and bequeathed to his son his entire residuary estate "on the condition and proviso that he pay to the above-named legatees respectively the legacies herein given within the period of four years after my decease, without interest; and the real estate so devised to my son Alexander Whitford is charged with the payment of the same," it was held, in view of the fact that there was no provision for a re-entry or a forfeiture, and no disposition consequent upon such a result, or contemplating it in any way, but, on the contrary, an explicit charge of the legacy upon the lands in the hands of the devisee, a failure to pay the legacies within the time specified did not involve a forfeiture.

³ In *Downer v. Downer* (1839) 9 Watts (Pa.) 60, where testator devised certain lands to a son, "provided, however, that he shall pay over to my executors for the benefit of the legatees hereafter mentioned" a stated sum in instalments, it was held L.R.A.1917A.

that the son's estate was clearly conditional, and was forfeited by his refusal to pay, or to accept the devise; but that the legacies nevertheless constituted a charge upon the land.

And see also *Miles v. Leigh* (1738) 1 Atk. 573, 26 Eng. Reprint, 360 (No. 127, infra); *Lindsey v. Lindsey* (1874) 45 Ind. 552 (No. 21, infra); *Reynolds v. Bond* (1882) 83 Ind. 36 (No. 139, infra); *Beck v. Montgomery* (1843) 7 How. (Miss.) 39 (No. 26, infra); *Hoover v. Hoover* (1847) 5 Pa. 351 (No. 145, infra).

⁴ In *Crawford v. Thompson* (1883) 91 Ind. 266, 46 Am. Rep. 598, it is said that, where the language of a will and the intention of the testator admit it, bequests expressed to be "on condition" subsequent are, in modern times, to be considered as imposing a trust, and not as imposing conditions which will take the property out of the legatee if he does not comply with them.

In *Re Kirk* (1882) L. R. 21 Ch. Div. (Eng.) 431, it was said by Jessel, M. R., that though the words "on condition" may be used by a testator, he does not mean to leave it to the choice of the devisee to say whether or not the person who is to take the benefit which is the subject of the condition is to have it or not. "The form looks like it, but the substance is not so. The substance is that he intends the legatee or devisee to perform the condition and the person who takes the benefit of it is to have it in any event. In other words, it is that he does not intend the devisee, by refusing to perform the condition, to disappoint the person whom I will call the legatee, nor does he intend the death of the devisee to disappoint the legatee."

Where there is no provision for a re-

testator clearly appears that the devisee shall lose the property if he fails to perform the imposed duty. It is also true that a provision may be so expressed as to create a charge and yet fail to disclose an intention on the part of the testator to annex a condition to the estate devised; just as a provision annexing a condition may be insufficient to create a charge. Very often, however, it is immaterial, where the rights of the devisee only are concerned, whether the provision in question is called a charge or a condition subsequent,—as in cases in which the ultimate question is whether the title has vested, or whether the devisee's estate is defeated where the condition has become impossible of performance (e. g., as by the death in testator's lifetime of the person for whose benefit the provision is made), and in these cases the discussion has usually

been whether performance was a condition precedent or subsequent. These cases, therefore, are not to be taken as denying by necessary implication that the testamentary provisions therein under construction are ineffectual to create a charge in favor of their beneficiaries. Conversely, a decision made where the rights of the beneficiary only are under consideration, that the provision creates a charge, is not necessarily conclusive that it does not also operate as a condition.

In some instances, provisions of the character herein under consideration have been construed in courts of law as creating a conditional limitation rather than a condition subsequent. This was for the purpose of avoiding the difficulty created where land was devised to the heir, by the rule that only the creator

entry or forfeiture, and nothing to support an inference that the estate was intended to depend upon performance of the condition, the words used will be held to import a covenant, and not a condition. *Cunningham v. Parker* (1895) 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635.

The general rule is that when a testator gives property to one person with or upon the condition that such person shall give a designated portion of such property or its proceeds to another person, a noncompliance with the condition by the immediate devisee or legatee does not work a forfeiture of the estate created by the will. *Prince v. Barrow* (1904) 120 Ga. 810, 48 S. E. 412.

In 1 *Sugden on Powers*, p. 122, it was said that the tendency in modern times is to depart from the fixed interpretation adopted in an earlier period, when these matters were considered only with reference to the common law, and "that what by the old law was deemed a devise upon condition would now perhaps, and in almost every case, be construed a devise in fee upon trust, and by this construction, instead of the heir taking advantage of the condition broken, the cestui que trust can compel an observance of the trust by a suit in equity." *Williams, J.*, referring to the foregoing passage, in *Wright v. Wilkin* (1862) 2 Best & S. (Eng.) 259, said: "As to the passage in 1 *Sugden on Powers*, 7th ed. p. 122, 8th ed. p. 106, pl. 15, I think all that Lord St. Leonards meant to say was that the remedy given in a court of equity for carrying out the intention of a testator was one which in old times the courts of law could not regard. Those courts thought themselves restrained from looking upon the proceedings in a court of equity as a remedy, and therefore held particular words in a will to constitute a condition, on the ground that, if they did not, there would be no remedy. That reason has long since L.R.A.1917A.

ceased, and therefore a different view is taken as to whether particular words constitute a condition. But I do not think that all words which would formerly have been looked on as creating conditions are now to be treated as trusts, but that this can be done only where the court of chancery can more conveniently give effect to the wish expressed than a court of law." An instance of the construction in a court of law of a provision as a condition, which was more apt to create a charge, may be found in *Crickmere v. Paterson* (1588) Cro. Eliz. pt. 1, p. 146, 78 Eng. Reprint, 403, 1 Leon. pt. 1, p. 174, where a man seised of certain land and having issue, two daughters, A and B, devised all his land to A and her heirs, that she pay unto B a certain sum of money at a certain time. The money was not paid; and it was adjudged that the words amounted in a will to a condition, and the reason given was that the land was devised to A for that purpose, otherwise B, to whom the money was appointed to be paid, would be remediless. In *Wheeler v. Walker* (1817) 2 Coan. 196, 7 Am. Dec. 264, it is said: "The meaning of the expression in *Crickmere's Case*, 'otherwise B, to whom the money was appointed to be paid, would be remediless,' has been quite misconceived. The idea communicated, undoubtedly, is this, that under the devise there was no other legal remedy. It is of no avail in this construction of the devise, that chancery may give redress, or that the devisee has engaged to make payment. The court neither refer to the remedy which a court of equity may impart, nor to any future possibilities: for the exposition given, it is a sufficient reason that the law gave no other redress by virtue of the devise, for the coercion of payment, than by construing the words to import a condition. This effectuated the intent of the testator."

of the estate or his heir could enter for a breach of a condition subsequent.⁵

For the same reason, courts of equity inclined to construe such provisions as creating a trust.⁶

II. Considerations to be taken into account in determining testator's intention.

a. As to the character of the annexed condition.

The rules of construction are so liberal that it has been held that no precise form of words is necessary to create conditions in wills, but whenever it clearly appears that it was the testator's intent to make a condition, that intent shall be carried into effect.⁷ If it is to be gathered from all the provisions of a will, taken together, that the expectation of the faithful performance of the duties imposed upon the devisee by the will served the purpose of a consideration in the mind of the testator to induce the devise, and that but for that expectation it would not have been made, and that it was not intended that the devisee should receive or retain the property devised unless he should discharge the duty, then the devise must be regarded as conditional.⁸

On the other hand, the use of the word "condition"⁹ or "provided"¹⁰ does not

necessarily imply a strict condition, either precedent or subsequent. The intention must control. Greater latitude in the construction of conditions has been exercised by the courts in the construction of wills than in the construction of deeds and contracts.¹¹

Likewise, there are no technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intention of the person who creates them.¹² No form of words will constitute a condition precedent when the intention of the testator, to be collected from every part of the will, clearly indicates a different purpose,¹³ and even the employment of the words "condition precedent" is not controlling.¹⁴ As there are no technical words which distinguish conditions precedent from conditions subsequent, whether they are one or the other depends upon whether the testator intended that a compliance with the requisition annexed to the estate devised should be a condition of its acquisition or merely of its retention.¹⁵ If the act or condition required does not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may be as well done after as before the vesting of the estate, or if, from the nature of the act to be performed and the time required for its

⁵ Taft v. Morse (1842) 4 Met. (Mass.) 523.

Thus, in Wellock v. Hammond (1592) Cro. Eliz. pt. 1, p. 204, 78 Eng. Reprint, 460, where testator devised lands to his wife for life, remainder to his eldest son, paying 40 shillings to each of his four brothers and his sister within two years after the death of the widow, it was held that the word "paying" should be construed as a limitation, and not as a condition, for, "if it be condition, it doth extinguish in the heir, and no remedy for the money; but being a limitation the law shall construe it that upon the nonpayment of the money his estate shall cease, and then the law shall carry it to the heir by custom, without any limitation over."

⁶ Thus, in Re Oliver (1890) 62 L. T. N. S. (Eng.) 533, it is said: "There is a well-known rule of construction that a devise upon condition that the devisee make certain payments within a given time will, as a general rule, be construed as a trust, and not as a condition, because if construed as a condition the only person who takes advantage of the condition being unperformed when the devise is by will is the testator's own heir. . . . If it was held that the devise must be construed as importing a condition and nothing else, the person entitled to receive the payments would lose the payments, because if the L.R.A.1917A.

payments were not made within a given time, the heir of the testator would enter and take the estate, and take it free. It was to get over that objection that it has been said that generally the right construction is to hold that the devise creates a trust, and not a condition."

⁷ Casey v. Casey (1853) 55 Vt. 518.

⁸ Lindsey v. Lindsey (1874) 45 Ind. 552.

⁹ McNally v. McNally (1901) 23 R. I. 180. 49 Atl. 699.

¹⁰ Woods v. Woods (1853) 44 N. C. (Busbee, L.) 290.

¹¹ Casey v. Casey (Vt.) supra.

¹² Robinson v. Comyns (1736) Cas. T. Talb. 164, 25 Eng. Reprint, 718; Lindsey v. Lindsey (1874) 45 Ind. 552; Hawkins v. Hansen (1914) 92 Kan. 740, L.R.A.1915A. 95, 142 Pac. 280; Morse v. Hayden (1889) 82 Me. 227, 19 Atl. 443; Creswell v. Lawson (1835) 7 Gill & J. (Md.) 227; Alexander v. Alexander (1900) 156 Mo. 413, 57 S. W. 110; Warner v. Bronson (1908) 81 Vt. 121, 69 Atl. 655; Burdis v. Burdis (1898) 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462; Finlay v. King (1830) 3 Pet. (U. S.) 346, 7 L. ed. 701.

¹³ Stark v. Smiley (1845) 25 Me. 201.

¹⁴ Winn v. Tabernacle Infirmary (1910) 135 Ga. 380, 32 L.R.A.(N.S.) 512, 69 S. E. 557.

¹⁵ Birmingham v. Lesan (1885) 77 Me. 494, 1 Atl. 151.

performance, it is evidently the intention of the party that the estate shall vest and the devisee or grantee perform the act after taking possession, then the condition is subsequent.¹⁶

The inclination of the courts toward a construction which will give the devisee a vested estate will lead them to hold a condition to be subsequent rather than precedent whenever it can fairly be done without violence to the language of the instrument under which the claims of the party are asserted.¹⁷

The fact that the devise is in direct terms which, if the will had stopped there, would have rendered it an absolute devise, tends to show that the condition annexed must be a subsequent, and not a precedent, one.¹⁸

Where it is manifest that the testator never intended the devise should fail because of the impossibility of performing the condition attached, it shows the condition to be subsequent rather than precedent.¹⁹

The fact that the property is not given elsewhere in the meantime, and that the condition cannot be performed until after the testator's death, goes to show that a condition precedent was not intended.²⁰

The fact that the obligation imposed is not a single act to be done or omitted at once, but of a continuing character,

which may run through a long series of years and require the performance of many acts, is indicative of an intention that it shall operate as a condition subsequent.²¹ But the fact that the condition requires something to be done which will take time is not conclusive that it should be construed as a condition subsequent. If it involves anything in the nature of a consideration, it is in general a condition precedent.²²

The fact that the enjoyment of the property is necessary to enable the devisee to perform the condition goes to show that it is not precedent.²³ Accordingly, conditions of support and maintenance in wills, without any language charging the property devised with the performance of the conditions, are generally regarded as conditions subsequent because of the implication that the devisee is to have possession and control of the premises for the purpose of fulfilling the conditions.²⁴

"In distinguishing between conditions precedent and subsequent, the time fixed for the performance, whether expressly or by implication, is a matter of no slight importance," and the fact that payment is postponed shows the condition to be subsequent.²⁵ And the fact that the will fixes no time within which the payment is to be made is a circumstance going to show that the pro-

¹⁶ *Lindsey v. Lindsey* (1874) 45 Ind. 552; *Hawkins v. Hansen* (1914) 92 Kan. 740. L.R.A.1915A. 95. 142 Pac. 280; *Burdis v. Burdis* (1898) 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462; *Finlay v. King* (1830) 3 Pet. (U. S.) 346, 7 L. ed. 701.

Whether a condition annexed to a devise is a condition precedent or subsequent is a question that does not depend upon the order in which the words creating the condition stand in the will, but upon the order of time in which it is required to be performed, according to the intention of the testator, to be collected from the entire will, respect being had in looking for that intention to the subject matter of the devise and the nature and object of the condition. *Creswell v. Lawson* (1835) 7 Gill & J. (Md.) 227.

¹⁷ *Schrader v. Schrader* (1912) 158 Iowa, 85, 139 N. W. 160; *Pennington v. Pennington* (1889) 70 Md. 418, 3 L.R.A. 816, 17 Atl. 329.

The law leans strongly against construing a legacy or devise so that it does not vest on the decease of the testator. *Sherman v. American Congregational Asso.* (1902) 51 C. C. A. 329, 113 Fed. 609.

¹⁸ See *Laurens v. Lucas* (1864) 6 Rich. Eq. (S. C.) 217.

¹⁹ (S. C.) *Ibid.*

²⁰ RE GRAY, ante, 611; *Creswell v. Lawson* (1835) 7 Gill & J. (Md.) 227. L.R.A.1917A.

²¹ *Burdis v. Burdis* (1898) 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462; *Merrill v. Emery* (1830) 10 Pick. (Mass.) 507; *Winn v. Tabernacle Infirmary* (1910) 135 Ga. 380; 32 L.R.A.(N.S.) 512, 69 S. E. 557; *Stark v. Smiley* (1845) 25 Me. 201; *Miller v. Negro Charles* (1829) 1 Gill & J. (Md.) 390; *Nunnery v. Carter* (1860) 58 N. C. (5 Jones, Eq.) 370, 78 Am. Dec. 231.

²² *Tilley v. King* (1891) 109 N. C. 461, 13 S. E. 936.

²³ *Birmingham v. Lesan* (1885) 77 Me. 494, 1 Atl. 151; *Alexander v. Alexander* (1900) 156 Mo. 413, 57 S. W. 110; *Laurens v. Lucas* (1864) 6 Rich. Eq. (S. C.) 217.

²⁴ *Hoss v. Hoss* (1894) 140 Ind. 551, 39 N. E. 255; *Gingrich v. Gingrich* (1896) 146 Ind. 227, 45 N. E. 101; *Morse v. Hayden* (1889) 82 Me. 227, 19 Atl. 443.

²⁵ *Re Oliver* (1890) 62 L. T. N. S. (Eng.) 533; *Leighton v. Leighton* (1870) 58 Me. 63.

The fact that the devise takes effect immediately, while payment of the legacy is postponed, shows that the payment of the legacy is not a condition precedent. *McNally v. McNally* (1901) 23 R. I. 180, 40 Atl. 699; *Korn's Will* (1906) 128 Wis. 428, 107 N. W. 659.

The fact that payment is postponed to a period which may extend beyond the life of the devisee is a circumstance going to show that the testator intended to make the pro-

vision was not intended as a condition precedent to vesting.²⁶

The fact that testator expressly provides that the devise shall be void if the devisee shall fail to perform the condition imposed goes to show that such condition is not precedent, since if it were such provision would be unnecessary.²⁷

Although the absence of a limitation over to a third person upon a failure to perform the condition has great weight where the intention is left in doubt,²⁸ it can have no influence where the meaning is clearly expressed, for it is an elementary principle that a condition precedent may be created without an ulterior limitation.²⁹

On the other hand, the fact that the estate is limited over to another legatee in the event of the nonperformance of the condition by the original legatee does not establish its character as a condition precedent.³⁰

The fact that, if the devisee should decline to make the payments and reject the devise, the legatee would lose his legacy, is not conclusive of the character of the condition.³¹

b. As to the creation of a charge.

The leaning of the court toward vesting, of which mention has already been made, inclines them, wherever possible,

vision a charge upon the land, rather than to impose a mere personal liability upon the devisee, which, under the circumstances, might be totally inadequate. *Re Kleinhenz* (1897) 28 Pittsb. L. J. N. S. (Pa.) 306.

Where a legacy vests at the death of the testator, although not payable until later, everything in it in the form of a condition must, from the necessity of things, be regarded as subsequent. *Sherman v. American Congregational Assn.* (1902) 51 C. C. A. 329, 113 Fed. 609.

²⁶ See *Schrader v. Schrader* (1912) 158 Iowa, 85, 139 N. W. 160.

²⁷ *Bryant v. Dungan* (1892) 92 Ky. 627, 36 Am. St. Rep. 618, 18 S. W. 636.

²⁸ The fact that no provision is made for the vesting of the property in the event of a broken condition is a circumstance going to show that the condition is not precedent to vesting. *Hoss v. Hoss* (1894) 140 Ind. 551, 39 N. E. 255; *RE GRAY*, ante, 611; and see also *McCarty v. Fish* (1891) 87 Mich. 48, 49 N. W. 513; *Woods v. Woods* (1853) 44 N. C. (Busbee, L.) 200; *Wellons v. Jordan* (1880) 83 N. C. 371; *Creswell v. Lawson* (1829) 7 Gill & J. (Md.) 227; *Warner v. Bronson* (1908) 81 Vt. 121, 69 Atl. 655.

²⁹ In *Pearcy v. Greenwell* (1883) 80 Ky. 616, it is said to be a general rule that "where there is no devise or limitation over to take effect upon failure to perform a condition annexed to the devise, the failure L.R.A.1917A.

to construe a provision for the payment of a legacy, or of a sum of money to the estate, or for the support of a third person, as creating a charge rather than a condition precedent.³²

The fact that testator evidently intended to benefit the person to whom the payment is to be made goes to show that the provision as to payment does not operate as a condition, but is to be regarded as a charge;³³ and in this connection the fact that the legacies are given to the testator's wife or children is entitled to much consideration.³⁴ The fact that such person happened to predecease the testator, whereby the provision in his favor lapsed, can make no difference in the construction of testator's intention at the time he executed the will.³⁵

It has been held that where there is nothing in the will to show an intention of the testator to subject the estate to forfeiture, and the payments directed to be made are not for the benefit of the estate or of the heirs generally to whom a forfeiture would inure, but are a mode of equalizing distribution, the provision should be regarded as creating a charge rather than a condition subsequent.³⁶

No particular language is necessary to create a charge of a legacy upon lands devised,³⁷ but such a charge may be created by implication,³⁸ which, how-

to perform the condition, though precedent, does not forfeit the devise, such conditions being construed to be subsequent conditions." (This, of course, does not make sense; probably the court had in mind the rule that in the absence of a gift over, a condition may, where the subject of the gift is personal property, be held inoperative as being in *terrorem*.)

³² *Tilley v. King* (1891) 109 N. C. 461, 13 S. E. 936.

³³ *Cheairs v. Smith* (1859) 37 Miss. 646.

³⁴ *Jacobs v. Ditz* (1913) 260 Ill. 98, 102 N. E. 1077.

³⁵ *Jacobs v. Ditz* (1913) 260 Ill. 98, 102 N. E. 1077; *Allen v. Allen* (1897) 121 N. C. 328, 28 S. E. 513.

³⁶ *Prince v. Barrow* (1904) 120 Ga. 810, 48 S. E. 412; *RE GRAY*, ante, 611; *Misenheimer v. Sifford* (1886) 94 N. C. 592; *Korn's Will* (1906) 128 Wis. 428, 107 N. W. 659.

³⁷ *Thayer v. Finnegan* (1883) 134 Mass. 62, 45 Am. Rep. 285.

³⁸ *Prince v. Barrow* (Ga.) supra.

³⁹ *McNally v. McNally* (1901) 23 R. I. 180, 49 Atl. 699; but see, as impliedly holding the contrary, *Hackadorn's Appeal* (1849) 11 Pa. 86 (No. 175, infra), and *Sauer v. Mollinger* (1890) 138 Pa. 338, 22 Atl. 89 (No. 187, infra).

⁴⁰ *Okeson's Appeal* (1868) 59 Pa. 99.

⁴¹ While, to make legacies a charge on

ever, must be plain and necessary. "If the testator designs to charge his estate, it is easy to do so in direct terms, as he can convey his meaning in such clear and unambiguous manner as to show no doubt of his intention. It is far better that legatees should occasionally encounter the hazard of loss than that estates should be trammelled with doubtful liens and uncertain encumbrances."³⁹

The statement is frequently to be found in the Pennsylvania decisions that a direction to devisees to pay money (unless out of the land devised)⁴⁰ im-

ports nothing more than a personal obligation;⁴¹ but in their adherence to this rule of construction, the Pennsylvania courts seem to stand alone.⁴²

It is well settled that a charge may be created by conditional words.⁴³ The character of the phraseology which permits provisions of the sort herein under consideration being construed as creating charges upon the property devised has been discussed in several cases which may be found in the subjoined footnote.⁴⁴ Charges have been held to be created by implication from the expres-

sion, it must be found that such was the testator's intention, still it is not necessary that its ascertainment should rest on direct expression; it is enough if the intention appears by natural and obvious implication from the provisions of the will. *Brandt's Appeal* (1839) 8 Watts (Pa.) 198; *Gilbert's Appeal* (1877) 85 Pa. 347; *Shenk v. Shenk* (1892) 150 Pa. 521, 24 Atl. 680; *Wise's Estate* (1898) 188 Pa. 258, 41 Atl. 526; *Sharp's Estate* (1898) 7 Pa. Super. Ct. 372; *Lake's Estate* (1883) 2 Del. Co. Rep. (Pa.) 12.

³⁹ *Hackadorn's Appeal* (1849) 11 Pa. 86.

⁴⁰ A naked direction to the devisee to pay a legacy creates only a personal liability if he accepts the devise; but a direction to the devisee to pay a legacy out of the lands devised, or as a condition on which the lands are devised, creates not only a personal liability if the devise is accepted, but also a charge upon the lands devised. *Wise's Estate* (1898) 188 Pa. 258, 41 Atl. 526.

⁴¹ *Miltenerberger v. Schlegel* (1847) 7 Pa. 241; *Hackadorn's Appeal* (Pa.) supra; *Wright's Appeal* (1849) 12 Pa. 256; *Schryer's Estate* (1868) 2 Brewst. (Pa.) 526; *Cable's Appeal* (1870) 91 Pa. 327; *Re Furst* (1879) 2 Pearson (Pa.) 492; *Walter's Appeal* (1880) 95 Pa. 305; *Van Vliet's Appeal* (1883) 102 Pa. 574; *Haworth's Appeal* (1884) 105 Pa. 362; *Rowson's Estate* (1897) 6 Pa. Dist. R. 61.

⁴² Thus, in *Porter v. Jackson* (1883) 95 Ind. 210, 48 Am. Rep. 704, it is said that where real estate is devised to the person who by the will is directed to pay a legacy, such legacy is an equitable charge upon the real estate so devised.

A statement to the same effect may be found in *Schanck v. Arrowsmith* (1853) 9 N. J. Eq. 314.

And in *Whitehouse v. Cargill* (1893) 86 Me. 60, 29 Atl. 934, it is said that when the same sentence or clause by which land is devised imposes upon the devisee the duty of paying an annuity or other sum of money, and no other fund is provided out of which the payment is to be made, such annuity or legacy is a charge upon the land.

In *Thayer v. Finnegan* (1883) 134 Mass. 62, 45 Am. Rep. 285, it is said that where the devisee of real estate is positively directed to pay legacies, especially if such

direction is contained in the same sentence with the devise, or appears to be given in consideration thereof, it has been sufficient to create a charge on the real estate; and if no other provision is made in the will for the payment of the legacies, this is considered to add to the strength of the presumption.

In *Hogg v. Browning* (1899) 47 W. Va. 22, 34 S. E. 754, it is said that where a testator gives land to a devisee and requires him to pay a legacy, there can be no presumption that the testator intended the devisee to pay the legacy out of personalty rather than realty, but the presumption should be the other way, that is, that he meant the land to be good for the legacy because he obliged the devisee to pay the legatee.

In *Robson v. Jardine* (1875) 22 Grant, Ch. (U. C.) 420, the court said: "I think the cases warrant the conclusion that where a testator gives real estate to one whom he directs to pay a legatee named in the will a sum of money, and the devisee accepts the devise, he takes the premises on the condition that he pay the legatee; and the land is in his hands subject to this burden, and liable for the fulfilment of the obligation."

⁴³ See cases cited in footnotes 45-48, infra.

When a deviser uses words suited to create an estate upon condition subsequent, and charges the same estate with the performance of all the duties and acts required by the conditional words, courts may conclude that it was the real intention of the deviser to make the estate continue to be security for the performance, and not to subject it to forfeiture for neglect. And words which were apparently designed to create an estate upon condition have been construed to have no such effect when performance was required of the only person who could legally make an entry to create a forfeiture of the estate. *Marwick v. Andrews* (1846) 25 Me. 525.

⁴⁴ In *Warner v. Bullen* (1905) 123 Ill. App. 138, the court, after an extensive review of the decisions, stated the general rule derived therefrom to be that if a devise of land be "on condition" that the devisee pay a stated sum to another, or "provided" he pay such sum, or "subject to"

sion employed, or with the aid of other indications of intention to be found in the will, where the devise was expressed to be "on condition,"⁴⁶ "with the condition,"⁴⁶ "subject to the condition,"⁴⁷

"provided,"⁴⁸ or "with the understanding"⁴⁹ that the devisee pay or furnish support. So, where the property is devised to him "subject to the payment" or "obligation,"⁵⁰ "by paying,"⁵¹ "on" or

the payment of such sum, or if the devise be "in consideration" that the devisee make such payment, in every such case the payment of such sum is by the plain intent of the will made a charge on the land so devised, unless the will elsewhere directs payment out of some other fund, or unless the will contains other language showing the testator did not intend the money should be a charge on the land.

In *Bugbee v. Sargent* (1843) 23 Me. 269, it is said that when an estate is devised on condition of, or subject to, the payment of a sum of money, or where the intention of the testator to make an estate, specifically devised, the fund for payment of a legacy, is clearly exhibited, such legacy is a charge upon the estate.

Where real estate is devised upon condition to pay a legacy, or with a direction to the devisee to pay the legacy in respect to the estate so devised to him, because the real estate has thus been devised, such real estate is in equity chargeable with the payment of the legacy, unless there is something in the will to rebut the legal presumption, or from which it can be inferred that the testator intended to exempt the estate devised from that charge. *Harris v. Fly* (1839) 7 Paige (N. Y.) 421; *Sistrunk v. Ware* (1881) 69 Ala. 273.

⁴⁶ See *Spangler v. Newman* (1909) 239 Ill. 616, 88 N. E. 202 (No. 52, infra); *Ellis v. Dumond* (1913) 259 Ill. 483, 102 N. E. 801 (No. 53, infra); *Warner v. Bullen* (1905) 123 Ill. App. 138 (No. 54, infra); *Wilson v. Piper* (1881) 77 Ind. 437 (No. 56, infra); *Crawford v. Thompson* (1883) 91 Ind. 266, 46 Am. Rep. 598 (No. 57, infra); *Ditchey v. Lee* (1906) 167 Ind. 267, 78 N. E. 972 (No. 58, infra); *Schrader v. Schrader* (1912) 158 Iowa, 85, 139 N. W. 160 (No. 59, infra); *Berry v. Headington* (1830) 3 J. J. Marsh. (Ky.) 315 (No. 158, infra); *Pearcy v. Greenwell* (1883) 80 Ky. 616 (No. 61, infra); *Bugbee v. Sargent* (1843) 23 Me. 269 (No. 63, infra); *Merritt v. Bucknam* (1886) 78 Me. 504, 7 Atl. 383 (No. 65, infra); *Gardenville Permanent Loan Assn. v. Walker* (1879) 52 Md. 452 (No. 161, infra); *Sherman v. Sherman* (1862) 4 Allen (Mass.) 392 (No. 73, infra); *Perry v. Hale* (1862) 44 N. H. 363 (No. 77, infra); *Horning v. Wiederspallen* (1877) 28 N. J. Eq. 387 (No. 79, infra); *Fox v. Phelps* (1837) 17 Wend. (N. Y.) 393, affirmed in (1838) 20 Wend. 437 (No. 164, infra); *Lodger v. Hatfield* (1877) 71 N. Y. 92 (No. 82, infra); *Lang v. Everling* (1893) 3 Misc. 530, 23 N. Y. Supp. 329 (No. 165, infra); *Hanna's Appeal* (1857) 31 Pa. 53 (No. 97, infra); *Walters's Estate* (1901) 197 Pa. 555, 47 Atl. 862 (No. 169, infra); *Re Moran* (1900) 13 Pa. Super. Ct. 251 (No. 114, L.R.A.1917A).

infra); *Gumaer's Estate* (1902) 19 Pa. Super. Ct. 621 (No. 115, infra); *McNally v. McNally* (1901) 23 R. I. 180, 49 Atl. 699 (No. 117, infra); *Casey v. Casey* (1853) 55 Vt. 518 (No. 119, infra); *Warner v. Bronson* (1908) 81 Vt. 121, 69 Atl. 656 (No. 120, infra); *Isner v. Kelley* (1902) 51 W. Va. 82, 41 S. E. 158 (No. 170, infra); *Korn's Will* (1906) 128 Wis. 428, 107 N. W. 669 (No. 125, infra); *Wigg v. Wigg* (1739) 1 Atk. 382, 26 Eng. Reprint, 244 (No. 128, infra); *Wright v. Wilkin* (1860) 2 Best & S. (Eng.) 259, 10 Week. Rep. 403 (No. 131, infra).

⁴⁸ See *Prince v. Barrow* (1904) 120 Ga. 810, 48 S. E. 412 (No. 156, infra).

⁴⁷ See *Daly v. Wilkie* (1884) 111 Ill. 382 (No. 50, infra); *Smith v. Smith* (1888) 48 Hun, 617, 15 N. Y. S. R. 893, 1 N. Y. Supp. 643 (No. 83, infra); *Springer's Appeal* (1886) 111 Pa. 228, 2 Atl. 855 (No. 104, infra).

⁴⁸ See *Parsons v. Millar* (1901) 189 Ill. 107, 59 N. E. 606 (No. 51, infra); *Woodward v. Walling* (1871) 31 Iowa, 533 (No. 157, infra); *Patrick v. Patrick* (1909) 135 Ky. 307, 122 S. W. 159 (No. 62, infra); *Smith v. Jackman* (1897) 115 Mich. 192, 73 N. W. 228 (No. 75, infra); *Skillman v. Van Pelt* (1832) 1 N. J. Eq. 511 (No. 141, infra); *Woods v. Woods* (1853) 44 N. C. (Busbee, L.) 290 (No. 86, infra); *Patterson v. Patterson* (1869) 63 N. C. 322 (No. 87, infra); *Misenheimer v. Sifford* (1886) 94 N. C. 592 (No. 166, infra); *Ruston v. Ruston* (1796) 2 Dall. (U. S.) 243, 1 L. ed. 365, 1 Am. Dec. 283 (No. 144, infra); *Holliday v. Summerville* (1832) 3 Penn. & W. (Pa.) 533 (No. 93, infra); *Pryer v. Mark* (1889) 129 Pa. 529, 19 Atl. 895 (No. 105, infra); *Phillips's Appeal* (1887) 17 Pittsb. L. J. N. S. (Pa.) 240 (No. 109, infra).

⁴⁹ See *Low v. Ramsey* (1909) 135 Ky. 337, 135 Am. St. Rep. 459, 122 S. W. 167 (No. 159, infra).

⁵⁰ See *Emery v. Swasey* (1902) 97 Me. 136, 53 Atl. 992 (No. 160, infra); *Re More* (1914) 179 Mich. 287, 146 N. W. 319 (No. 140, infra); *Knecht's Appeal* (1872) 71 Pa. 333 (No. 149, infra); *Hammond's Estate* (1900) 97 Pa. 119, 46 Atl. 935 (No. 152, infra); *Rutt's Estate* (1908) 35 Pa. Super. Ct. 522 (No. 116, infra).

⁵¹ See *Reynolds v. Bond* (1882) 83 Ind. 36 (No. 139, infra); *Phillips v. Stites* (1865) 2 Duv. (Ky.) 313 (No. 60, infra); *Ward v. Ward* (1834) 15 Pick. (Mass.) 511 (No. 71, infra); *Nellons v. Truax* (1850) 6 Ohio St. 97 (No. 143, infra); *Drake v. Brown*, 68 Pa. 223 (No. 101, infra); *Lake's Estate* (1883) 2 Del. Co. Rep. (Pa.) 12 (No. 107, infra); *Re Burkhardt* (1888) 18 Pittsb. L. J. N. S. (Pa.) 213 (No. 110, infra).

"upon his paying,"⁵² "after paying,"⁵³ or (the Pennsylvania decisions to the contrary notwithstanding) where he is directed to pay or furnish support by such expressions as "I direct that he pay,"⁵⁴ "he paying" or "to pay,"⁵⁵ "and [devisee] shall pay," or some equivalent expression,⁵⁶ "and at the time [the devisee] has to pay,"⁵⁷ or where the gift of money is "to be paid by" the devisee;⁵⁸ or where the devisee is to have the property "for paying,"⁵⁹ or "for which he is to pay,"⁶⁰ or is to pay "in consideration thereof."⁶¹

If it appears from the language of the will that the testator intended to couple the payment of the legacy by the dev-

isee with the devise of the land, so that the payment is to be made because, or as a condition on which, the devise has been made, then the real estate devised is in equity chargeable with the payment of the legacy.⁶²

Postponement of payment is a circumstance indicating an intention to charge the legacies on the land devised.⁶³

The absence of a limitation over, with the inference arising therefrom that the provision, though phrased as a condition, was not intended to operate as such, has sometimes been treated as evidence of an intention to create a charge.⁶⁴ For an instance in which the

⁵² See *Spence v. Robins* (1834) 6 Gill & J. (Md.) 507, 26 Am. Dec. 587 (No. 67, infra); *Taft v. Morse* (1842) 4 Met. (Mass.) 523 (No. 72, infra).

⁵³ See *Woods v. Gilson* (1901) 178 Mass. 511, 60 N. E. 4, 61 N. E. 58 (No. 74, infra).

⁵⁴ See *Kelsey v. Deyo* (1803) 3 Cow. (N. Y.) 133 (No. 80, infra).

⁵⁵ See *Lockett v. White* (1839) 10 Gill & J. (Md.) 480 (No. 68, infra); *Thayer v. Finnegan* (1883) 134 Mass. 62 (No. 162, infra); *Aston v. Galloway* (1843) 38 N. C. (3 Ired. Eq.) 126 (No. 85, infra); *Newell's Will* (1811) 1 Browne (Pa.) 311 (No. 92, infra); *Re Tower* (1845) 9 Watts & S. (Pa.) 103, 42 Am. Dec. 319 (No. 94, infra); *Swoope's Appeal* (1856) 27 Pa. 58 (No. 96, infra); *Barnes v. Com.* (1855) 3 Pittsb. L. J. (Pa.) 309, reported in *Pepper & L. Dig.* cols. 41, 141 (No. 108, infra); *Fishburn's Appeal* (1881) 10 W. N. C. (Pa.) 489 (No. 153, infra); *Toothman v. Barrett* (1878) 14 W. Va. 301 (No. 122, infra); *Sadd v. Carter* (1891) Prec. in Ch. 27, 24 Eng. Reprint, 15 (No. 126, infra); *Hodge v. Churchward* (1897) 16 Sim. 71, 60 Eng. Reprint, 799 (No. 130, infra); *Re Oliver* (1890) 62 L. T. N. S. (Eng.) 533 (No. 133, infra).

⁵⁶ See *Merrill v. Bickford* (1876) 65 Me. 118 (No. 64, infra); *Whitehouse v. Cargill* (1893) 86 Me. 60, 29 Atl. 934 (No. 66, infra); *Fox v. Phelps* (1837) 17 Wend. (N. Y.) 393, affirmed in (1838) 20 Wend. 437 (No. 81, infra); *Hutchins v. Hutchins* (1896) 18 Misc. 633, 42 N. Y. Supp. 601 (No. 84, infra); *Carter v. Worrell* (1887) 96 N. C. 358, 60 Am. Rep. 420, 2 S. E. 528 (No. 88, infra); *Clyde v. Simpson* (1854) 4 Ohio St. 445 (No. 90, infra); *Yearly v. Long* (1883) 40 Ohio St. 27 (No. 91, infra); *Solliday v. Gruver* (1848) 7 Pa. 462 (No. 95, infra); *Wert's Appeal* (1871) 69 Pa. 173 (No. 102, infra); *Wise's Estate* (1898) 188 Pa. 258, 41 Atl. 526 (No. 106, infra); *Re Kleinhenz* (1809) 28 Pittsb. L. J. N. S. (Pa.) 306 (No. 111, infra); *Sharp's Estate* (1898) 7 Pa. Super. Ct. 372 (No. 113, infra); *Powers v. Powers* (1871) 28 Wis. 659 (No. 124, infra); *Clark v. Clark* (1890) 17 Grant, Ch. (U. C.) 17 (No. 135, infra); *Gray v. Richmond* (1892) 22 Ont. Rep. 256 (No. 137, infra).

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⁵⁷ See *Kakuska v. Roubyk* (1910) 155 Ill. App. 452 (No. 55, infra).

⁵⁸ See *Crawford v. Severson* (1847) 5 Gill (Md.) 443 (No. 69, infra); *Buchanan v. Lloyd* (1898) 88 Md. 642, 41 Atl. 1075 (No. 70, infra); *Wallington v. Taylor* (1831) 1 N. J. Eq. 314 (No. 78, infra); *Gallagher's Appeal* (1864) 48 Pa. 121 (No. 100, infra); *Pierce v. Livingston* (1875) 80 Pa. 99 (No. 103, infra); *Re Hand* (1903) 33 Pittsb. L. J. N. S. (Pa.) 350 (No. 112, infra); *Waddell v. Waddell* (1904) 68 S. C. 335, 47 S. E. 375 (No. 118, infra); *Robson v. Jardine* (1895) 22 Grant, Ch. (U. C.) 420 (No. 136, infra).

⁵⁹ See *Abrams v. Winshup* (1827) 3 Russ. Ch. 350, 38 Eng. Reprint, 601 (No. 129, infra).

⁶⁰ See *Weaver's Estate* (1899) 2 Dauphin Co. Rep. (Pa.) 84 (No. 154, infra).

⁶¹ See *Outland v. Outland* (1896) 118 N. C. 138, 23 S. E. 972 (No. 167, infra); *Hogg v. Browning* (1899) 47 W. Va. 22, 34 S. E. 754 (No. 123, infra); *Sands v. Champlin* (1840) 1 Story, 376, Fed. Cas. No. 12,303 (No. 171, infra).

⁶² *Wise's Estate* (1898) 188 Pa. 258, 41 Atl. 526; *Re Moran* (1900) 13 Pa. Super. Ct. 251.

⁶³ *Hutchins v. Hutchins* (1896) 18 Misc. 633, 42 N. Y. Supp. 601.

⁶⁴ The absence of a devise over to any other person is a strong reason for construing a provision as creating a charge rather than a condition precedent. *Allen v. Allen* (1897) 121 N. C. 328, 28 S. E. 513.

The absence of any suggestion that the devisee's title is to be divested in case of failure to make the payment, and the absence of provision for anyone else to take the land upon such failure, go to show that the direction is intended to operate as a lien or charge upon the lands rather than as a condition subsequent. *Korn's Will* (1906) 128 Wis. 428, 107 N. W. 659.

An important criterion by which to determine the testator's purpose is the absence of a limitation over in case of defeasance, and words are often construed not to defeat the gift when no provision for such contingency is made. *McNeely v. McNeely* (1880) 82 N. C. 183.

presence of a limitation over has been taken as indicative of an intention not to create a charge, see *Rowson's Estate* (1897) 6 Pa. Dist. R. 61 (No. 188, *infra*.)

The circumstance that the subject of the devise is a life estate has been taken as indicative that the charge is on the land, and not on the person, for the obvious reason that the estate may terminate before the devisee derives the least benefit from it.⁶⁵ It may be noted in this connection that the fact of the legacy being a charge upon the realty is, where the testator's intention is in doubt, taken as indicative of an intention that the devisee should take a fee rather than a life interest.

A provision creating a condition may also be held to constitute a charge upon the land devised, although the condition may be void in law.⁶⁶

The fact that the testator, while making a gift over in another contingency, makes none in the event of a nonperformance of the duty enjoined, goes to show that it is not intended to operate as a condition. *Wellons v. Jordan* (1880) 83 N. C. 371.

The fact that the testator has declared that failure to perform another requirement shall operate to forfeit the devise, but has expressed no intention that a failure to comply with the provision in question shall so operate, goes to show that such provision should be regarded as creating a trust or charge, and not as limiting the estate devised. *Woodward v. Walling* (1871) 31 Iowa, 533.

See also, to the same effect, *Schrader v. Schrader* (1912) 158 Iowa, 85, 139 N. W. 160; *Cunningham v. Parker* (1895) 146 N. Y. 29, 48 Am. St. Rep. 765, 40 N. E. 635; *Woods v. Woods* (1853) 44 N. C. (Busbee, L.) 290.

⁶⁵ *Decker v. Decker* (1827) 3 Ohio, 157.

⁶⁶ In *Smith v. Alterly* (1649) 2 Freem. Ch. 136, 22 Eng. Reprint, 1111, a condition of paying a certain legacy was held to constitute a charge upon the land devised, notwithstanding the condition was void in law as to the legacy, since he who was to have the benefit of the breach of the condition was the heir who was to pay the legacy.

⁶⁷ See *Thayer v. Finnegan* (1883) 134 Mass. 62, 45 Am. Rep. 285 (No. 162, *infra*); *Cool v. Cool* (1904) 3 N. B. Eq. 11 (No. 171½, *infra*).

Where a testator, after giving legacies, makes no specific devise of his real estate, but, blending it with the personality in the residuary clause, gives it all to his residuary devisee, he thereby charges the realty with the payment of the legacy. *Gallagher's Appeal* (1864) 48 Pa. 121; *Greville v. Browne* (1859) 7 H. L. Cas. 689, 11 Eng. Reprint, 275, 5 Jur. N. S. 849, 7 Week. Rep. 673; *Re Bailey* (1879) L. R. L.R.A.1917A.

The blending of the realty and personality in one gift indicates an intention to create a charge upon the realty.⁶⁷ Blending takes place where the testator gives his real and personal estate to one, and directs him to pay legacies. They are a charge on the real estate because it is supposed to be his intention that all his legacies shall be paid.⁶⁸ A devise of lands followed, in a subsequent clause of the will, by a bequest of all the testator's personal property to the same persons to whom the lands were devised, with a direction that the legatees shall pay testator's debts and funeral expenses, is not such a blending of real and personal property by the testator as will operate to make legacies to other legatees a charge on the lands devised.⁶⁹

12 Ch. Div. (Eng.) 268, 48 L. J. Ch. N. S. 628, 41 L. T. N. S. 157, 27 Week. Rep. 909; *Hassel v. Hassel* (1776) 2 Dick. 527, 21 Eng. Reprint, 374; *Re Bawden* [1894] 1 Ch. (Eng.) 693, 63 L. J. Ch. N. S. 412, 70 L. T. N. S. 526; *Re Smith* [1899] 1 Ch. (Eng.) 365, 68 L. J. Ch. N. S. 333, 47 Week. Rep. 223, 80 L. T. N. S. 113.

⁶⁸ *Hackadorn's Appeal* (1849) 11 Pa. 86.

⁶⁹ *Van Vliet's Appeal* (1883) 102 Pa. 574.

III. Cases involving the question whether or not a condition precedent was created.

a. Cases in which the provision has been construed as a condition precedent.

Provisions for payment of legacies.

1. In *Wheeler v. Walker* (1817) 2 Conn. 196, 7 Am. Dec. 264, where testator gave his residuary estate, both real and personal, to his two sons, to be equally divided between them, "they jointly and severally paying to my two daughters . . . the sum of \$300 each, within one year after my decease," there being no gift or legacy to the daughters other than that contained in the clause above quoted, and no right created in their favor by the will, it was held that the devise to the sons was upon a condition precedent, failure to perform which within the time prescribed defeated the devise.

2. In *Nevius v. Gourley* (1880) 95 Ill. 206, a will by which testator provided that if his son H. W. N. "shall pay to [certain persons stated sums of money] (being the sums of money bequeathed to said [persons] in this will), out of his own private funds within one year from the date of my decease, and shall settle my estate without any other charge to said estate, then I give and bequeath to" such son certain

described land, and "if the said H. W. N. shall not fully comply with the foregoing conditions, he shall have no lien on the two lots of land last mentioned,"—was held to evince an intention on the part of the testator that the estate should not vest in his son unless the conditions were fully performed.

3. In *Jacobs v. Ditz* (1913) 260 Ill. 98, 102 N. E. 1077, where testator devised a farm to his son, adding, "But before he shall receive said farm under this will he shall pay to my daughter, Sophia Jacobs, as her share in said farm, the sum of \$1,000, and to my wife's son, William Ditz, the sum of \$500, . . . and upon my son filing the receipts of such payments to the county clerk of Whiteside county, Illinois, he shall have the above-described lands under this will," it was held that the language above quoted created conditions precedent to the vesting of the estate, and could not be overcome by any presumption against the intention to die intestate, or the possibility that the legacies might be lost to the legatees.

4. In *Erwin v. Erwin* (1894) 115 N. C. 366, 20 S. E. 520, where testator devised to a sister certain lands for life, with remainder after her death to a certain person and his children, "provided he pays to my estate the sum of \$2,000," it was held that the payment of such sum constituted a condition precedent to the devise, and not a charge upon the land. But in *Allen v. Allen* (1897) 121 N. C. 328, 28 S. E. 513, it is said that *Erwin v. Erwin* is in conflict with the other decisions of the North Carolina supreme court, and is purely dictum.

Provisions for care and support.

5. In *Irvine v. Irvine* (1891) 12 Ky. L. Rep. 827, 15 S. W. 511, where testator, after giving his wife all his property for life, went on to provide: "It is my will and desire that my son Richard Burton Irvine shall reside with me during my natural life, and after my death during the natural life of my wife, and to take charge of and support myself and wife during the time of our lives, and after the death of my wife I will and bequeath to my said son Richard Burton Irvine the tract of land on which I now reside in Hickman county, Kentucky, and all other property that may be on hand at the death of my said wife. I am owing a note to Mr. S. Morrow for about \$81, with about thirteen years' interest, which my son Richard is to pay off and satisfy. Now, the clear understanding and intent of this will is that my son Richard Burton Irvine is to take care of and support my wife and myself during our natural lives, said Richard to have the use of my land, stock, etc., during that time; and if he, my said son Richard, shall faithfully discharge that duty, and pay off the Morrow note, then, at the death of my said wife my son Richard is to have and to hold all the real and personal property of which I may die seised L.R.A.1917A.

and possessed of," and further provided that if the son should fail in the prescribed duties, or abandon his mother upon the farm, then she should have full power to sell and convey it or any of it as she might see proper for her support, it was held that, as the latter provision showed conclusively that the testator did not intend the right to vest in the son until the death of the mother, the support and care of both the father and mother during their lives were a condition precedent to the vesting of the estate in him.

6. In *Tilley v. King* (1891) 109 N. C. 461, 13 S. E. 936, where testator provided: "I give and bequeath to my wife . . . the tract of land whereon I now live, and if Powell H. Tilley stays with us until after our deaths and takes care of us, then I give and bequeath this tract of land to him forever," it was held that, irrespective of the circumstance that the words used by the testator are words of strict condition, it was clearly not the intention of the testator that any estate should vest in the devisee until after the death of testator's wife, and then only in the event of his having fully performed the conditions imposed, such intention being clearly emphasized by the use of the word "then," and by the further circumstance that the performance of the condition was in the nature of a consideration.

b. Cases in which the provision has been held not to create a condition precedent.

Under this head may be found only those cases which simply negative the contention that the provision under construction constitutes a condition precedent, without going further and characterizing it as a condition subsequent, or a charge. For instances in which the provision has been expressly held to create a condition subsequent rather than precedent, see subdiv. IV. throughout. Instances where it has been held to create a charge rather than a condition precedent are *Schrader v. Schrader* (1912) 158 Iowa, 85, 139 N. W. 160 (No. 59, infra); *Smith v. Smith* (1888) 48 Hun, 617, 15 N. Y. S. R. 893, 1 N. Y. Supp. 643 (No. 83, infra); *Woods v. Woods* (1853) 44 N. C. (Busbee, L.) 200 (No. 86, infra); *McNally v. McNally* (1901) 23 R. I. 180, 49 Atl. 699 (No. 117, infra); *Casey v. Casey* (1882) 55 Vt. 518 (No. 119, infra); *Toothman v. Barrett* (1878) 14 W. Va. 301 (No. 122, infra); *Korn's Will* (1906) 128 Wis. 428, 107 N. W. 659 (No. 125, infra); *Allen v. Allen* (1897) 121 N. C. 328, 28 S. E. 513 (No. 142, infra); *Low v. Ramsey* (1909) 135 Ky. 337, 135 Am. St. Rep. 459, 122 S. W. 167 (No. 159, infra).

Provisions requiring payment of money to legatee or to testator's estate.

7. In *Stark v. Smiley* (1845) 25 Me. 201, where testator devised all his lands to a son "upon conditions, reserving as follows," and then proceeded to make provision for

the support of his widow and for some of his children while unmarried, and for the payment of his debts, and gave legacies or made devises to his other children and to one other person named, it was held that, as there was no doubt of testator's intention that the devisee should immediately enter upon the enjoyment of the estate, and that some of the duties to be performed as a condition of that enjoyment were not expected to be performed until very many years afterward, and were of such a contingent character that it was uncertain whether performance would ever be required, performance of such duties was not a condition precedent to vesting, notwithstanding the testator concluded by saying: "Therefore as soon as Thomas Smiley, Jr., shall have paid all the lawful demands against my estate and the aforementioned sums to my children and Ebenezer Woodsum, or to their and his heirs, and otherwise fulfilled this my last will and testament, he shall by this instrument be entitled to all my real estate."

8. In *Pennington v. Pennington* (1889) 70 Md. 418, 3 L.R.A. 816, 17 Atl. 329, it was held that a provision in a will creating contingent remainders, that any child or person named taking the estate should pay out to brothers or sisters or their descendants a sum of money varying according to the number, could not be construed as constituting such payment a condition precedent to the vesting of the estate, whatever might be its effect as a condition to the possession or enjoyment of the property.

9. In *Newcomb v. Stebbins* (1845) 9 Met. (Mass.) 540, it was held, construing a devise to a son "to hold to him and his heirs forever all the rest and residue of my real and personal estate, subject to the following liens, payments, and charges. . . . the aforesaid liens and payments to be made one half in two years and one half in three years from my decease with interest from that event," that payment of such charges was not a condition precedent to the vesting of the devise.

10. In *Re Wagman* (1914) 163 App. Div. 127, 148 N. Y. Supp. 473, affirming (1913) 81 Misc. 469, 143 N. Y. Supp. 408, where a testatrix who had given a cousin a life annuity and a sister-in-law the sum of \$200, "to be paid at the end of two years after my decease, and out of the principal of my estate," and who had given a brother and sister each half the income of all her property, directed that after their death the property be divided between two brothers, and added, "But this devise and legacy to my two brothers . . . is made upon the express conditions that they pay each of the foregoing legacies," it was held to be clear that it was not the intention of the testatrix to make such payment a condition precedent to the vesting of the estate in the remaindermen.

11. In *Whitehead v. Thompson* (1878) 79 N. C. 450, where testator devised to two of his sons certain lands "on the following

conditions, provided that the said" sons each pay to other sons of testator a stated amount of money, it was held that such requirement did not constitute a condition precedent, since such construction might defeat testator's intention that the devisees should have the land.

12. In *Creswell v. Lawson* (1835) 7 Gill & J. (Md.) 227, where a testator who had bequeathed certain land in trust for the use of a woman and her children went on to state that he had done so "only upon condition that he [the trustee] or they [the beneficiaries] pay unto my executors such sum as shall be found due my estate from" the husband of such woman, it was held that, as there was no contingent limitation over of the property devised, nor any further disposition or mention made of it in the will, and no absence of other remedy to enforce the collection of the debt in question, from which it might be inferred that the testator intended its payment as a condition precedent, and as no disposition was made of the rents and profits in the meantime, such payment was not a condition precedent to the vesting of the title.

Provisions for care and support.

13. In *Winn v. Tabernacle Infirmary* (1910) 135 Ga. 380, 32 L.R.A. (N.S.) 512, 69 S. E. 557, where testatrix bequeathed to a charitable institution all the income of her estate, adding, "The consideration upon which this bequest is made, and a condition precedent to same, is that this institution shall maintain and care for my child [name] . . . during her natural life, giving her a home in said institution, and caring for her as comfortably as the facts and circumstances of the case will warrant, even to the extent of all the income from my estate if necessary. The performance of this obligation on the part of said institution shall commence at my death, or as soon thereafter as practicable," and further providing that upon the death of the child all the property should vest absolutely in such institution, provided the child should be given decent Christian burial, it was said that, as the duty imposed was a continuing one, and as from the entire will it was apparent that the estate was not intended to be left to the legatee upon a condition precedent properly so called, the title would be construed to have vested, and the condition for support made in connection with the bequest of the income would be held to be in the nature of a condition subsequent or of a charge upon the income, as the intent of the testatrix might appear to be.

14. In *Arnold v. Arnold* (1848) 8 B. Mon. (Ky.) 202, where a will contained the following clauses: "It is my will and desire, after my death, and that of my wife, that my son, William W. Arnold, who has been living with me for some years, and who has been laboring faithfully to assist me during that period, should have the plantation upon which I now reside, containing about 300 acres of land, be the same

more or less. It is my desire also, that my son should remain with me during my life, and during the life of his mother (should she survive me), for the purpose of taking care of both, as long as we live, and superintending the farm and all my business, in consideration of which, he is to have one third of all that is made upon the place, after supporting the family, until the death of myself and wife. And if he thinks proper to marry or settle himself before my death, or that of his mother, he is at liberty to build a house on any part of the place, and live in the same, and though he is to be considered the owner and proprietor of the place at my death, yet he is not to have the exclusive possession of it, or the dwelling house in which the family lives, until after the death of his mother, but he is to be permitted, as before stated, to cultivate the place and manage the business during the life of his mother, and is to have one third of the proceeds. 2d. I will and devise to my wife, the use of the plantation upon which I reside, during her life, to be under the management of my son, William W. Arnold, upon the terms and conditions already expressed and set forth,"—it was held that the estate taken by the son was not conditional upon his performance of the prescribed service in taking care of his father and mother during their lives, and therefore was not defeated by his death in the lifetime of his mother.

15. In *McCarty v. Fish* (1891) 87 Mich. 48, 49 N. W. 513, where a testatrix, after providing a life support for her husband from the income of her estate, and, if necessary, the right to use her entire estate, bequeathed to a niece the sum of \$500 "in consideration of her care and assistance toward myself and my said husband, to be performed by her to us during our natural lives," it was held that the provision quoted was not a condition precedent, but that, as the testatrix made no provision in the will for the share of the estate bequeathed to such niece should she fail to care for and assist the testatrix and her husband during their natural lives,—except by the residuary clause,—the legacy should be considered as vesting in the niece at once, subject to be divested if the husband's necessity should require the use of the entire principal sum.

16. In *Re Tisdale* (1906) 110 App. Div. 857, 97 N. Y. Supp. 494, where testator gave his widow, after the payment of certain legacies, the use for life of the remainder of his estate, subject to the maintenance of two persons named in the will and the education of one of them, it was held that the conditions with respect to such maintenance and education were not conditions precedent to the payment of the bequest of the widow, as the bequest was given to her subject to the performance of the conditions when she had received, under the provisions of the will, the moneys of the estate which would enable her to perform.

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17. In *McNeely v. McNeely* (1880) 82 N. C. 183, where testator devised lands to his wife for life, and then to his son "at the death of his mother by him seeing to her," it was held that the phrase quoted did not constitute a condition precedent to the vesting of the remainder.

18. In *Wellons v. Jordan* (1880) 83 N. C. 371, a will providing as follows: "I lend unto my grandson" certain described lands; "said Harry Ingram is to take care of his father and mother and to support their bodily needs as far as in his power, their lifetime, and to hold the foresaid property his lifetime, and if he does take care of his parents and support them as above prescribed, and has issue, said property shall be theirs and their heirs forever. But if he die without issue, then it shall descend to my daughters and their heirs forever, after a bodily support for his father and mother their lifetime, if the said Harry Ingram should de cease before they do," was held not to express an intent that the limitation over to the issue of Harry should be dependent on his taking care of and supplying the bodily wants of his parents, since the further contingent remainder is given to the testator's daughters only in event that Harry "dies without issue," and not also for want of the care and attention enjoined and expected; but at most to create a charge on the estate.

IV. Cases involving the question whether a condition subsequent was created.

Under this head may be found only those cases which hold that the provision under construction constitutes a condition subsequent, without going further and determining whether it also constitutes a charge upon the estate devised. For a citation of cases in which the provision in question has been held to constitute a charge as well as a condition subsequent, see footnote 3, *supra*. Instances in which a charge rather than a condition subsequent has been held to be created are *Prince v. Barrow* (1904) 120 Ga. 810, 48 S. E. 412 (No. 156, *infra*); *Spangler v. Newman* (1909) 239 Ill. 616, 88 N. E. 202 (No. 52, *infra*); *Ellis v. Dumond* (1913) 259 Ill. 483, 102 N. E. 801 (No. 53, *infra*); *Warner v. Bullen* (1905) 123 Ill. App. 138 (No. 54, *infra*); *Crawford v. Thompson* (1883) 91 Ind. 266, 46 Am. Rep. 598 (No. 57, *infra*); *Ditchey v. Lee* (1906) 167 Ind. 267, 78 N. E. 972 (No. 58, *infra*); *Woodward v. Walling* (1871) 31 Iowa, 533 (No. 151, *infra*); *Berry v. Headington* (1830) 3 J. J. Marsh. (Ky.) 315 (No. 158, *infra*); *Pearcy v. Greenwell* (1883) 80 Ky. 616 (No. 61, *infra*); *Low v. Ramsey* (1909) 135 Ky. 337, 135 Am. St. Rep. 459, 122 S. W. 167 (No. 159, *infra*); *Taft v. Morse* (1842) 4 Met. (Mass.) 523 (No. 72, *infra*); *Skillman v. Van Pelt* (1832) 1 N. J. Eq. 511 (No. 141, *infra*); *Fox v. Phelps* (1837) 17 Wend. (N. Y.) 293, affirmed in (1838) 20 Wend. 437 (No. 81, *infra*); *Hart v. Homiller*,

(1853) 20 Pa. 248 (No. 146, *infra*); Hanna's Appeal (1857) 31 Pa. 53 (No. 97, *infra*); Holliday v. Summerville (1832) 3 Penr. & W. (Pa.) 533 (No. 93, *infra*); McNally v. McNally (1901) 23 R. I. 180, 49 Atl. 699 (No. 117, *infra*).

Provisions for payment of legacies or to testator's estate.

19. In *Horsey v. Horsey* (1847) 4 Harr. (Del.) 517, where a testator devised certain land to a daughter in fee, on condition solely and specially that she should pay his debts and a legacy of \$200 to a granddaughter, it was held that the estate vested in the devisee immediately, and that the payment of debts and legacies was a condition subsequent.

20. In *Doe ex dem. Petro v. Cassiday* (1857) 9 Ind. 63, and in the same case upon a subsequent appeal (1859) 13 Ind. 289, where testator gave to his grandson, Phineas Cassiday, all his residuary estate after the death of testator's widow, to whom he had given all his property during her natural life, adding, "And further it is my will that he provide for and furnish her with food and raiment and all other necessary things suitable to her age during the term of her natural life. And further it is my will that the said Phineas Cassiday pay to" certain other grandchildren various sums of money within a specified period after the death of testator's widow, and further provided that "if the said Phineas Cassiday shall refuse or neglect to do all or any of the above-named items, that then my executor sell my real and personal property so bequeathed to him, at one year's credit, and pay said Phineas \$1,000 out of the same and divide the remainder among my living children," it was held that the devise to Phineas Cassiday was plainly upon condition subsequent, and that the estate vested in him immediately upon the death of the deviser, subject to be defeated if he refused or neglected to perform any of the conditions specified in the will.

21. In *Lindsey v. Lindsey* (1874) 45 Ind. 552, where testator, after directing that his wife "hold the possession of" his farm, and that she should receive annually one third of all the farm should produce so long as she should live, continued as follows: "I direct further that my son William shall remain and attend to my farm and transact all business connected therewith, as I myself would do if living, and that the said my son William shall pay to my two daughters, Julia Ann and Sarah Margaret, \$200 each; also, one bed and bedstead each. And I further direct that at the death of my said wife, the said farm, with all personal property and all appurtenances thereto belonging, shall accrue to my son William in fee simple. I further direct that the said my two daughters allow said William a reasonable time to pay the shares allotted to each, not less than five years nor more than seven," it was held that the provisions as to the payment of

the legacies to the testator's daughters created a charge upon the lands devised to William, and constituted conditions subsequent.

22. In *Duncan v. Prentice* (1862) 4 Met. (Ky.) 216, where testator devised land to his mother for life, remainder to his brother "upon the condition that he pay to my sister, Sarah A. Duncan \$1,000," it was held that, in the absence of extrinsic evidence, the most reasonable inference to be drawn from the provisions of the will was that the testator did not intend to require payment of the legacy until the termination of the life estate, and therefore that the condition as to payment was subsequent, and not precedent.

23. In *Leighton v. Leighton* (1870) 58 Me. 63, where testator, after devising his property to his wife for life, went on to provide: "After the death of my wife, Jane, it is my will that my son Reuel have all the property, both real and personal, which may then remain, by paying out [the following bequests] in six months after her death," it was held, in view of the fact that the payment was postponed, that the son took a vested remainder liable to be divested only by nonpayment of the legacies to the other children as a condition subsequent, and an actual entry on the part of those entitled to claim a forfeiture by reason of a breach of the condition.

24. In *Miller v. Negro Charles* (1829) 1 Gill & J. (Md.) 390, where testator directed that his negro Charles should be free on a certain day, "on condition that he, the said Charles, pay the sum of \$10 annually to my before-named sister . . . so long as he lives," it was held that the nature of the acts to be performed showed that the condition was not precedent.

25. In *Cheairs v. Smith* (1859) 37 Miss. 646, where testator gave his residuary estate to a nephew "on the uses and trusts following: to wit: I will that my mulatto boy Pillow and girl Mary are to be free, and are to have \$500 each when they arrive at the age of eighteen years; that they are to remain under the care of my brother Calvin until Lucius shall be of age; that they are never to leave the family, nor be subject to the control of overseers; and that Mary be made a seamstress, and Pillow a barber. I further will that the offspring of the girl Mary shall be free, and that my nephew Lucius shall take care of them during his lifetime. Now, if my nephew Lucius and his father shall do with the boy Pillow and the girl Mary as herein willed and expressed, the gift to him of my estate, as above specified, to be good and absolute; but should they fail and not comply with my request, the property so bequeathed to the said Lucius shall be equally divided between the heirs of Lemuel Smith and David B. Cheairs, they paying to the said Pillow and Mary the \$500, as before specified." it was held that, as the acts required to be done must necessarily be done in future, and were con-

tinuous in their nature, and if performed "the gift to him of the estate" was to be absolute, the performance of such acts was a condition subsequent, notwithstanding the estate was to go over to another legatee in the event of the nonperformance of such conditions by the original legatee.

26. In *Beck v. Montgomery* (1843) 7 How. (Miss.) 39, where testatrix bequeathed to a daughter certain slaves "under the following conditions; to wit, that the said Eliza Beck agrees to receive the above-named negroes mentioned in this section at the valuation last above mentioned, as her own property, and in consideration of which she the said Eliza agrees and becomes bound to pay to the guardian or guardians of the children of my late son John S. Norris, deceased, . . . the yearly sum of \$400 during the minority of said children, for the maintenance and education of said children. . . . And further, that at the majority of said children [naming them], or as each of them comes of age, the one-third part of the principal of \$4,000 shall be paid to them by said Eliza, her heirs, executors, etc.," it was held that the daughter took an estate upon a condition subsequent, upon failure to comply with which at the proper time the estate at law would be forfeited and vest in the infant legatees, but that the pecuniary legacy formed in equity also a charge upon the slaves, and constituted a lien upon them.

27. In *Birdsall v. Hewlett* (1829) 1 Paige (N. Y.) 32, 19 Am. Dec. 392, where testator devised certain real estate to his widow for life or widowhood, and after her death or marriage devised it to his nephew in fee, provided he paid the legacies mentioned in the will, and directed these several legacies to be paid by the nephew, his heirs, executors, or administrators whenever he or they should come into possession of the premises devised, it was held that the payment of the legacies was a condition of the devise.

28. In *Laurens v. Lucas* (1854) 6 Rich. Eq. (S. C.) 217, where testatrix devised a plantation to her grandson, to be taken by him at a certain valuation, and, for the purpose of equalizing distribution, directed that before taking such plantation he should execute bonds and a mortgage of the same to certain members of the family for certain proportionate parts of the valuation, it was held that, as the terms used did not necessarily import that the title should not vest until the condition should be performed, but, on the other hand, as the devise was first to the grandson in direct terms which, if the will had stopped there, would have constituted an absolute devise, and as the nature of the condition itself required that the devisee should have the title before performing the condition, the condition was a subsequent, and not a precedent, one.

29. In *Kennedy's Appeal* (1869) 60 Pa. 511, where testatrix devised a certain house "subject to a ground rent of \$500 per an-

num, to be paid in perpetuity to my trustees named for a purpose specified in another clause of this testament

If they will not consent to pay the ground rent of \$500 per annum to which I have subjected the bequest, then this devise shall become null and void, and the said property shall return to my estate and for the uses hereinafter specified," it was held that the charge of the ground rent was not by way of a precedent condition, since the operative words of the devise, being present, vested an immediate estate, while the words imposing the forfeiture for refusing consent to pay the rent imported a consequence taking effect after the devise.

30. In *Warner v. Bronson* (1908) 81 Vt. 121, 69 Atl. 655, testator, after referring to the fact that his son had carried on his farm under a contract for some time previously thereto, directed that he should continue to do so under the provisions of the contract so long as testator's widow should live, to whom he gave the use of all his real estate and stock and farming tools during her life for her support and for the support of their daughter, and then continued: "It is my will that upon the decease of my said wife and on the fulfilment of the aforesaid contract with said Asahel B. on his part to be performed as aforesaid, I give, devise and bequeath to my said son Asahel B. all of my real estate, . . . also the stock and farming tools upon said farm to be his and his heirs forever, upon the following conditions; to wit, that he pay to the legal heirs of my estate hereinafter named the sum of \$4,000." The will contained no residuary clause. It was held that, notwithstanding the form of expression, as the will created no residuary estate nor contained any provision looking to the happening of any contingency which in the mind of the testator would prevent the son from taking the property, the provision for the fulfilment of the contract under which the son was to carry on the farm during the term of the life estate was a condition subsequent.

31. In *Sherman v. American Cong. Asso.* (1902) 51 C. C. A. 329, 113 Fed. 609, affirming (1899) 98 Fed. 495, where testator directed his executors to pay over "to the American Congregational Association as soon as may be convenient after my decease the sum of \$10,000 . . . upon condition that said association agrees to pay to my wife in quarterly payments during her life the sum of \$400," it was held that the condition named was not precedent, but subsequent.

32. In *Re Oliver* (1890) 62 L. T. N. S. (Eng.) 533, where testator devised real estate to a nephew, "he also paying thereout the following legacies," to be paid within six months after the death of an annuitant whose annuity constituted a charge upon the property, it was held that the words quoted are *prima facie* words of condition, and that the postponement of payment showed the condition to be subsequent.

Provisions for support.

33. In *Jennings v. Jennings* (1862) 27 Ill. 518, where testator made the following disposition: "I will to my wife all my real estate and personal property, in a word all that belongs to me, to have the disposing of in any way that will best support her while she lives; but if my sons John and Thomas take good care of their mother during her lifetime they shall have the farm on which we live between them, but if they should fail to give her a good support she can sell the land or any part of it to support herself. But if John and Thomas comply with these conditions they can take possession of the land immediately after my death," it was held that the word "comply" was used in the sense of "assent," and therefore that the condition was subsequent rather than precedent, so that upon the sons' assenting to the terms of the will, and entering upon the execution of the condition, the property vested in them, subject, however, to the charge imposed, from which it could be relieved only by a performance of the condition.

34. In *Hoss v. Hoss* (1894) 140 Ind. 551, 39 N. E. 255, where testator, after making certain devises, went on to state: "The above gifts and devises are made to the said Eliza J. Hoss and Flora J. Hoss to enable them to support and care for my brother Benjamin Hoss, now insane, as long as he shall live, and these bequests are made upon the condition that the said Eliza J. Hoss and Flora J. Hoss will agree with my executor to do this," it was held that, as the condition requiring the devisees to enter into an agreement with the executor, which, if it stood alone, would be regarded as a condition precedent, was merely a collateral requirement to the condition for the support of the brother, which was a condition subsequent, the impossibility of performing such conditions, arising from the death of the brother in testator's lifetime, did not defeat the devise.

35. In *Hawkins v. Hansen* (1914) 92 Kan. 740, L.R.A.1915A, 95, 142 Pac. 280, where a will provided: "To Andrew Hansen, my son-in-law who for some time past has been taking care of myself and wife, I give, will and bequeath, after the death of myself and . . . my wife all our property herein described . . . provided he shall take as he has heretofore taken good kind and loving care of us, provided us with all necessities of every kind and nature during the remainder of our lives," it was held, as the performance of the condition did not necessarily precede the vesting of the estate, but might accompany or follow it, that it was a condition subsequent.

36. In *Bryant v. Dungan* (1892) 92 Ky. 627, 36 Am. St. Rep. 618, 18 S. W. 636, where testator, who had given to his wife 100 acres of land, went on to devise "the above 100 acres of land willed to my wife, Sarah, to go to my grandson, E. L. Dungan at the death of his grandma, Sarah L.R.A.1917A.

Bryant, upon the condition that he stays with her and supports her and cares for her until her death, then he is to have her part of said farm and homestead; otherwise to be void if he shall fail to perform my will," it was held that the conditions of the will requiring the grandson to live with his grandmother and support and care for her were not conditions preceding the investiture of title to the 100 acres, but that he took a vested remainder subject to be divested by nonperformance of such conditions.

37. In *Marwick v. Andrews* (1846) 25 Me. 525, where testator devised all his estate to his wife "to hold the same to her and her heirs forever. On condition, however, that my said wife shall support and maintain in a comfortable and suitable manner my much honored and now aged and infirm mother should my mother survive me," it was held that the devise to the wife was clearly upon a condition subsequent, and that it was subject to forfeiture for neglect to perform.

38. In *Birmingham v. Lesan* (1885) 77 Me. 494, 1 Atl. 151, where testator devised to his wife Catherine, all his real estate, "to hold the same during her life for her maintenance but not to sell the same, the said real estate to go to John Mehan at her death, if any remains, providing the said Mehan maintains and provides for the said Catherine decently from the proceeds of the farm or otherwise; and providing that if said Mehan fails to provide for the said Catherine then the said Catherine is empowered to call on the selectmen to provide for her in her own house. . . . I will that the said Mehan be allowed to use the place for the purpose of maintaining himself and my wife by farming the same," it was held that, as only what should remain at the wife's death was devised to Mehan, it was plain that the testator did not intend that he should take an absolute fee by implication in the remainder, with a charge upon him personally to support the life tenant, nor a life estate in the remainder with a like charge upon the estate devised; that the condition created could not be deemed a condition precedent, because Mehan was authorized by the express terms of the will to provide for the life tenant from the proceeds of the farm, which he could not sell unless he had at least the title on condition subsequent, and therefore that such provision operated as a condition subsequent. failure to perform which would be ground for forfeiture.

39. In *Morse v. Hayden* (1889) 82 Me. 227, 19 Atl. 443, where testator gave to his wife certain real and personal property "on condition that my wife, Lucretia, shall provide and maintain our son . . . until he shall attain his majority," it was held that the implication that the wife should have possession and control of the property for the purpose of fulfilling the condition indicated that it was a condition subsequent, and therefore, its performance having been rendered impossible by the death

of the son in the lifetime of the testator, that the devisee held the property by an absolute title.

40. In *Hammond v. Hammond* (1881) 55 Md. 575, it was held, construing a will by which testator bequeathed to his brother a sum of money "for that he, the said C. Lewis Hammond, shall look after and take care of our beloved brother Rezin while he shall live and bury him at his death," that the condition annexed to the bequest was, both in the collocation of its language and the order of events, so clearly posterior to the vesting of the legacy that it must be considered as a condition subsequent, the performance of which was dispensed with by the death of Rezin in testator's lifetime.

41. In *Merrill v. Emery* (1830) 10 Pick. (Mass.) 507, where testator bequeathed to his wife certain personal property "subject to the following conditions; viz., . . . that she educate and bring up my granddaughter, Mary L. Richards, until she arrive at the age of eighteen years, or is married, as the case may be," it was held that since the condition was to be performed for a time which might, and probably would, continue long after the legacy was to vest, it was clearly a condition subsequent, of which the legacy became discharged by the death of the wife.

42. And in *Richards v. Merrill* (1832) 13 Pick. (Mass.) 405, it was held that such a provision for the granddaughter was, in view of the phraseology employed, the circumstances of the case, the fact that other provision was made for the granddaughter, who was not left without means of support, and the smallness of the provision made for the widow, under all the circumstances of the estate, a personal obligation which terminated with the widow's life, and not a pecuniary charge upon the bequest made to her.

43. In *Putnam v. Emerson* (1843) 7 Met. (Mass.) 330, where testator, by an inartificially drawn will, gave and bequeathed to his two sisters the use and profit and benefit of all his real estate for the terms of their natural lives, "except such parts thereof as are specially disposed of hereafter," and gave to a nephew all his real and personal estate, to come into possession at the decease of the aforesaid sisters, "with the privilege to let the farm annually and sell my hill pasture (called 10 acres) with my stock, tools, hay, etc.; with the income of the farm; to pay my just debts if the income of the farm should be anything more than a comfortable support for my aforesaid sisters; the aforesaid privileges to come into possession at my decease; the said Jesse to come into possession of the whole estate at the decease of the aforesaid Lucy and Lois. But if the said Jesse Perkins shall neglect to provide for the said Lucy and Lois a comfortable support in sickness and in health, during their natural lives, then the said Lucy and Lois to have the improvement of the farm during their natural lives," it was L.R.A.1917A.

held that the whole estate passed to the nephew on the death of the testator, subject to a condition in favor of testator's sisters, by the nonperformance of which by the said nephew they would become entitled to the improvement and income of the farm.

44. In *Alexander v. Alexander* (1900) 156 Mo. 413, 57 S. W. 110, a devise to testator's son "provided he shall well and faithfully care for and support his mother as long as she shall live" was held to vest the fee to the land in the devisee immediately upon the death of the testator, the condition imposed being subsequent, but of a personal character, from which the devisee was absolved by his death in the lifetime of his mother. In this case, however, it appeared that such provision had been made for the devisee's mother that she was not dependent upon the son's performance of this obligation for support.

45. In *Wood v. Ogden* (1906) 121 Mo. App. 668, 101 S. W. 616, the court considered itself bound by *Alexander v. Alexander* (1900) 156 Mo. 413, 57 S. W. 110, to hold that a will by which testator devised to a son certain lands "upon consideration that he support and maintain my wife, Louisa Wood, during her natural lifetime," did not make the widow's maintenance a charge on the land, but simply imposed a condition subsequent, which, as such, became a purely personal obligation of the devisee, and in no sense imposed any limitation on the estate devised, which on the death of the devisee descended to his heirs unburdened with any charge.

46. In *Galbraith v. Pennington* (1914) 184 Mo. App. 618, 170 S. W. 668, where testator gave all his property to his wife during her life, and then to his two foster children, stating: "This property is thus willed to the above-named parties in consideration of their looking after and caring for the wants of" testator and his wife during their lives, it was held, in an action for contribution by the devisee who had performed the condition against the other, that the provision was in the nature of a condition.

47. In *La Chapelle v. Burpee* (1893) 69 Hun, 436, 23 N. Y. Supp. 452, it was held that a devise to a son "on condition" that he should live in the house with his mother and sister, and should supply firewood and comfortable board for them, was held, if upon condition, to be upon a condition subsequent.

48. In *Nunnery v. Carter* (1860) 58 N. C. (5 Jones, Eq.) 370, 78 Am. Dec. 231, where testator bequeathed certain personal property to his wife during her natural life, and then to his son, "provided he take care of his mother; if not, to be whose that does take care of her," it was held that, as the condition, though in form and appearance precedent, was in truth a continuing condition, which might require the performance of many acts during a long period of years, it was in reality and legal effect a subsequent condition, and as such

could not, by becoming an impossible one, prevent the legacy from taking effect.

49. In *Burdis v. Burdis* (1898) 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462, where testator devised to his wife his homestead during her natural life, "with the understanding that my son Albert will support and take care of her, and at her death said homestead and land shall return to my son Albert as compensation therefor. . . . I wish my son Albert to support and provide for his two sisters . . . as long as they remain single," it was held that, as the obligation imposed was of a continuing character, and as there was nothing in the will to indicate that the testator intended the devise to the son to remain in a state of contingency during the many years that he might have the support and care of his mother, the condition upon which the son was to take the estate was a condition subsequent, and not a condition precedent, so that, its performance having been rendered impossible by the death of testator's wife in his lifetime, the son held the estate by an absolute title.

V. Cases considering the question whether or not a charge was created.

a. Cases in which the provision has been construed as a charge.

Provisions for payment of legacies or annuities.

50. In *Daly v. Wilkie* (1884) 111 Ill. 392, it was held that under a devise to a son, "subject, however, to the terms and conditions herein limited," that he should within seven years pay to a sister a certain sum of money "for and on account of the above devise and bequest to him," the provision for the sister created a charge upon the land for the payment of the amount named.

51. In *Parsons v. Millar* (1901) 189 Ill. 107, 59 N. E. 606, construing a will by which testator devised to his son certain land, "provided that" he pay certain sums of money within a certain time to each of two daughters of the testator, who had bequeathed to them such sums in the preceding clauses of his will, it was held that the title to the land passed absolutely to the son, charged with the payment of the bequest to his sisters.

52. In *Spangler v. Newman* (1909) 239 Ill. 616, 88 N. E. 202, it was held that under a will by which testatrix devised to a son certain real estate "on the condition that he pay to" other children of testatrix a certain sum of money within one year after her death, the son took title to such real estate subject to the payment of the legacies, which constituted a charge thereon, rather than subject to a condition failure to perform which would defeat the devise.

53. In *Ellis v. Dumond* (1913) 259 Ill. 483, 103 N. E. 801, it was held that under a devise to a son in fee simple, "upon condition that he pay" certain amounts to the

wife and daughters of the testator, "the said amounts to be paid within three years after the probating of my will, without interest, and the said sums are made a lien upon the land until the same are paid," the children of the son (who had died in the testator's lifetime) took, under the statute preventing lapses, title to the land in question, subject to the payment of the legacies charged thereon.

54. In *Warner v. Bullen* (1905) 123 Ill. App. 138, where testator devised to a son certain realty "provided he pays to" another a certain sum of money, there being no other mention of the son or of such other person in the will, it was held that the provision for payment constituted a charge rather than a condition, and was not defeated by the refusal of the son to accept the devise.

55. In *Kakuska v. Roubyk* (1910) 155 Ill. App. 452, where testator devised to a son certain real estate, adding, "And at the time the said John Roubyk my son have to pay to my daughter, Anna Roubyk the sum of \$1,000 and to my daughter Mary Roubyk, the sum of \$200 as their inheritance," it was held that, as the provisions in the will for the payment of the sums of money to the daughters were in the same sentence which made the devise, and as there was nothing in the will itself to indicate a contrary intention on the part of the testator, the sums of money were charges upon the property devised.

56. In *Wilson v. Piper* (1881) 77 Ind. 437, where a testator devised to a son certain described lands, "also all my personal property of every name and character upon the following conditions: namely, that he pay to my granddaughter . . . when she arrives at the age of twenty-one years, or marries, the sum of \$1,000, but in case of the death of my granddaughter aforesaid before mature age or marriage it is my will and I direct that my executor shall pay said sum of money mentioned as her portion of my estate to my living children, share and share alike," it was held that the proper construction of the will indicated an intention on the part of the testator that the provision made for the granddaughter should constitute a lien upon the property devised to the son.

57. In *Crawford v. Thompson* (1883) 91 Ind. 266, 46 Am. Rep. 598, where testator gave the residue of his personal estate to his widow, "on the condition that she pay \$100 per year to my daughter, Martha Fox, as long as my said daughter shall live," and in the ensuing portion of the will spoke of the money to be paid to the daughter as a "legacy" to which she should have a "right" and to which she should be "entitled," and provided finally that when the daughter should have received an amount out of said personalty equal to three fourths thereof, she should not "be entitled to any more under said will, and the balance shall be retained by my said wife," it was held that, in view of such expressions, and the fact that the effect of

construing the provision for the daughter as a condition subsequent would, in the event of a breach, send the fund back into the estate and deprive the widow of the one fourth given her absolutely and the daughter of her legacy, such provision was not a condition subsequent, but was in the nature of a trust to be performed by the widow.

58. In *Ditchey v. Lee* (1906) 167 Ind. 267, 78 N. E. 972, where a will devised certain lands to testator's daughter on condition that she pay to her mother during life \$100 annually, the payment being made a charge upon the lands, and no provision was made for a forfeiture of the title, nor devise over made to the widow or to anyone else in the event of default in payment and forfeiture of the title by the daughter, it was held to be clear that the word "condition" was used in the will in the sense of consideration, and that the title devised was not conditional, but absolute, subject only to the specific lien charged against it; and that in case of default in payment the remedy would be a foreclosure of the lien, and not a forfeiture of the land.

59. In *Schrader v. Schrader* (1912) 158 Iowa, 85, 139 N. W. 160, where testator, after giving a life interest in all his real estate to his wife, went on to provide: "If my well-beloved wife Dora Schrader shall live after me, then it is further my will that on the death of said Dora Schrader my well-beloved son, George Schrader, shall become the sole, absolute, and unqualified owner, on the condition herein-after expressed, of the following described real premises [describing them]. It is the express condition that before George Schrader shall become the sole, absolute and unqualified owner of said real premises that he shall pay to my well-beloved son, Henry Schrader, the sum of \$500. And it is further my will that in the event my well-beloved wife, Dora Schrader, shall die before I do, that upon my death the said last above-described real premises shall pass to the sole, absolute, and unqualified ownership of my son George Schrader, upon condition that he, my son (George Schrader, shall pay to my son, Henry Schrader, the sum of \$500," it was held, having regard to the leaning of the courts toward vesting, the presumption that the provision in question was for the purpose of equalizing the distribution of testator's estate, the absence of a devise over, and the circumstance that the will fixed no time within which the payment was to be made, and there being nothing to suggest that the testator contemplated the possibility that the title of the ownership of the estate should be suspended or have no existence in anyone between the instant of the life tenant's death and the appearance of the remainderman with a tender of the money, that the payment was not a condition precedent to the acquirement by the devisee of any right to or interest in the land, but that the purpose was to make

the gift to the other son a charge upon the property.

60. In *Phillips v. Stites* (1865) 2 Duv. (Ky.) 313, where testator devised certain lands to his daughter "by paying" his two grandsons \$500, it was held that the legacy was a direct charge upon the land devised.

61. In *Pearcy v. Greenwell* (1883) 80 Ky. 616, where testator gave his entire estate for life, and went on to provide: "My will and desire is that all of my land on the west side of the road be equally divided between John Greenwell and Ralph Greenwell upon condition that they pay \$700 to my wife in one and two years, one half each year, to be her absolute property, and \$500 to the elder of this district of the Methodist Church," it was held, in view of the leaning of the courts toward vesting and the fact that there was no disposition of the estate by the will in the event they should fail to pay the several bequests charged upon it, that the devisees took a vested remainder subject to the sums named as a charge thereon.

62. In *Patrick v. Patrick* (1909) 135 Ky. 307, 122 S. W. 159, where testator willed all his property to a son, "provided he shall pay each one of my daughters [naming them] \$100. If any of my said daughters shall be dead at my death then the \$100 shall be paid to her bodily heirs, if any; if none the \$100 shall belong to said" son, and further made a provision for his wife which the court construed as giving her an equitable life interest, it was held that it was contemplated by the testator that the \$100 to each of his daughters should be paid by the son at testator's death, and that if not paid the amount due each would be a charge upon the son's remainder interest in the testator's estate.

63. In *Bugbee v. Sargent* (1843) 23 Me. 269, and *s. c.* subsequent appeal (1847) 27 Me. 338, a devise to certain persons upon condition that they should, within a certain time after coming into possession, pay a legacy given to another, was construed as creating a charge on the property devised in favor of the legatee.

64. In *Merrill v. Bickford* (1876) 65 Me. 118, where testatrix devised certain land with the direction that the devisee "shall pay or cause to be paid to" a brother a certain annuity, it was held that the annuity was a charge upon the land devised.

65. In *Merritt v. Bucknam* (1886) 78 Me. 504, 7 Atl. 383, where real estate was devised "upon conditions as follows: viz., that he pay annually the sum of \$50 to the Methodist E. Church in Columbia village, for the support of preaching the gospel, or if the said Hiram choose to pay the principal, of which the above sum is the interest, all at one time or in payments within—, then my executors hereinafter named shall give a good and sufficient deed to the said Hiram Coffin, his heirs, etc. . . . But if the said Hiram or his heirs fail in any way to perform the conditions above named, then I give and bequeath the

farm before named to the M. E. Church in Columbia village," it was held that the devise over to the church, although void as contravening the rule against perpetuities, evidenced an intention to bind the land to the payment of the legacy.

66. In *Whitehouse v. Cargill* (1893) 88 Me. 60, 29 Atl. 934, where a testator who by his will had devised certain land to a son, by a codicil referred to such devise and directed that the son should pay a sister the sum of \$500 when she should arrive at the age of eighteen, it was held that the legacy to the sister was a charge upon the land.

67. In *Spence v. Robins* (1834) 6 Gill & J. (Md.) 507, 26 Am. Dec. 587, where a testator devised land to a son "on his paying my three daughters \$3 per acre for all the said lands lying on the west side of the county road," it was held to be clear that the testator intended to make the gift to the daughters a charge on the land.

68. In *Lockett v. White* (1839) 10 Gill & J. (Md.) 480, it was held, construing a will by which testator devised to his oldest son certain lands, he paying to his younger brother a sum of money, that the legacy was a charge upon the lands thus devised, which a court of equity would enforce.

69. In *Crawford v. Severson* (1847) 5 Gill (Md.) 443, where testator devised to his son John a certain plantation, and to his son Samuel another plantation, of which they were to be given possession as they should severally arrive at the age of eighteen years, and then gave a daughter \$1,000 to be paid to her in manner following: \$600 of which is to be paid by my son John at the expiration of three years after my death, with two years' interest thereon, and the remaining \$400 is to be paid by my son Samuel three years after my death, on his attaining full possession, whichever may last happen, with two years' interest thereon," it was held that the legacy to the daughter constituted a charge upon the lands devised to the sons.

70. In *Buchanan v. Lloyd* (1898) 88 Md. 642, 41 Atl. 1075, a codicil by which a testator revoked a devise to his daughter, and in lieu thereof gave her a sum of money to be paid by his sons Daniel and Edward, and "in consideration of" such payment gave and devised to one of such sons the farm formerly devised to the daughter, and to the other son another farm, was construed as making the legacy to the daughter a charge upon the lands.

71. In *Ward v. Ward* (1835) 15 Pick. (Mass.) 511, it was held that a will by which testator devised to a son certain lands by said son "paying the other children towards their share of my estate \$300" created a charge upon the land.

72. In *Taft v. Morse* (1842) 4 Met. (Mass.) 523, it was held that under a will by which testator devised all his lands to his three sons upon their paying to his daughters a certain proportion of the net value of the estate out of such estate, the

sons took, not on condition, but an absolute estate in fee simple, charged with the payment of the legacies to the daughters.

73. In *Sherman v. Sherman* (1862) 4 Allen (Mass.) 392, where a testator, after devising certain property, stated: "This devise charged with this condition; namely, that the wife and sons of said Willard shall pay to all the daughters of said Willard \$200 each as they shall respectively arrive at the age of eighteen years," it was held that the legacies to the daughters were a charge upon the property devised.

74. In *Woods v. Gilson* (1901) 178 Mass. 511, 60 N. E. 4, 61 N. E. 58, a will by which testator devised to a daughter certain land "after paying" certain legacies theretofore given was held to constitute such legacies a charge upon the realty devised.

75. In *Smith v. Jackman* (1897) 115 Mich. 192, 73 N. W. 228, a will by which testator bequeathed to his wife \$3,000 "to be paid in accordance with the following provisions; to wit, . . . Second, I will and bequeath all the residue and remainder of my personal property, and all of my real estate (describing it), to my only child [name] for her sole use and benefit during her life, and at her death to her children (naming them): Provided that the aforesaid payment of \$3,000 be made to my wife, or the annual interest at the rate of 7 per cent annually, as she, my wife, may elect; and at any time when my wife may want any portion or the whole of said amount of \$3,000, it shall be paid to her on three months' notice, either verbal or written, or she may sell enough out of said real estate to pay said amount on the failure of my daughter to pay her after the aforesaid notice."—was held to constitute the provision made for the wife a charge upon the realty devised to the daughter.

76. In *Brooks v. Eskins* (1887) 24 Mo. App. 296, a will by which testator devised to a son certain lands, adding, "And it is further stipulated and required of my said son . . . in this bequeathal to him that he owe, he indebted and pay to my sons-in-law . . . the sum of \$1,000, to draw 10 per cent interest per annum from the death of my said wife until paid,"—was held to fix such legacy as an equitable charge or lien upon the land devised to the son.

77. In *Perry v. Hale* (1802) 44 N. H. 363, where a testator devised certain realty to his wife so long as she should remain his widow, and at her death to his son for his sole use and benefit forever, on condition that he should pay to testator's daughters certain specified amounts, it was held that the provision for the daughters was not dependent upon the son's acceptance of the devise, but constituted a charge upon the property.

78. In *Wallington v. Taylor* (1831) 1 N. J. Eq. 314, where testator, who had devised to his son a fee contingent on leaving issue, bequeathed to a daughter a sum of money to be paid to her by such son out of the estate given to him, in annual

payments of \$500 a year without interest, it was held that the legacy to the daughter was a charge upon the estate of the son, but not upon his person nor upon the land.

79. In *Horning v. Wiederspallen* (1877) 28 N. J. Eq. 387, where a testator gave certain realty to his son on condition that he pay a legacy of \$500 to testator's daughter within two years from the time of the testator's death, it was held that the legacy was charged on the land.

80. In *Kelsey v. Deyo* (1824) 3 Cow. (N. Y.) 133, where a testator who had given his wife all his personal estate, and after her death what should remain to be divided among his children, devised to a son all his real estate, adding, "And my will and desire is, and I do hereby order and direct, that my son Nathaniel Kelsey or his heirs pay the following legacies," it was clearly held to be testator's intention to charge such legacies upon the realty devised to the son.

81. In *Fox v. Phelps* (1837) 17 Wend. (N. Y.) 393, affirmed in (1838) 20 Wend. 437, where testator devised property without any qualification, but afterward directed that it should in a certain event be valued, and that the devisees "shall, and they are respectively required to, pay an equal part" to certain other persons, it was held that the devisees did not take an estate upon condition, but an absolute estate, with a personal charge on the devisees; and that if any devisee or his heirs should refuse to accept the devise and pay the legacies, the estate would descend to the heirs at law of the deviser, but would be chargeable in equity with the payment.

82. In *Loder v. Hatfield* (1877) 71 N. Y. 92, a will by which testator devised to his son certain property "on the following conditions and proviso," that he pay certain legacies, was held to make such legacies a charge upon the land devised.

83. In *Smith v. Smith* (1888) 48 Hun, 617, 15 N. Y. S. R. 393, 1 N. Y. Supp. 643, where testator devised lands to a daughter "subject to the condition that she fully pay and discharge all my funeral expenses and also pay to [another daughter] the sum of \$50; all such payments to be made within sixty days after my decease," it was held that payment of the debts was not a condition precedent to the vesting of the title and the enjoyment of the possession of the land, and that the premises in question were not devised upon condition, but were chargeable with the funeral expenses and the legacy.

84. In *Hutchins v. Hutchins* (1896) 18 Misc. 633, 42 N. Y. Supp. 601, a will by which testator devised to his wife and son Wallace P. Hutchins his home farm "during the lifetime of my said wife; at her decease then the same to go to Wallace P. Hutchins . . . said Wallace P. Hutchins to pay to each of the other heirs herein named the following sums . . . to be paid within five years after the decease of myself and wife, without interest," was held to evidence an intention to charge L.R.A.1917A.

the land devised with the payment of the legacies.

85. In *Aston v. Galloway* (1843) 38 N. C. (3 Ired. Eq.) 126, a will by which testator devised his plantation to a nephew after the death of his wife, "he paying to my two other nephews as they respectively arrive at the age of twenty-one years the sum of £100 each. And should it so happen that the said [nephews] should be of age before my nephew John should be in possession of the said plantation and land, in that case he, the said John, is not bound to pay the aforesaid sums of money finally under two years from the day of taking possession," was construed as making the legacies to the other nephews a charge upon the land.

86. In *Woods v. Woods* (1853) 44 N. C. (Busbee, L.) 290, where testator devised to a grandson certain lands "provided the said [grandson] shall pay to [another grandson] the sum of \$300," it was held that, as there was no devise over to a third person if the devisee should refuse to pay the \$300, and as it was impossible to suppose that it was the intention of the testator to deprive the devisee of the bounty intended for him if it should become impossible for him to pay the legacy by reason of the death of the legatee in the testator's lifetime, his estate vested immediately upon the death of the testator without being subject to any condition whatever, but was charged simply with the payment of the legacy.

87. In *Patterson v. Patterson* (1869) 63 N. C. 322, a will by which testator, who had given his wife certain lands during her life, devised them at her death to his son "provided he pays within two years from her death \$150 to the heirs of my son William," was construed as making such legacy a charge upon the lands.

88. In *Carter v. Worrell* (1887) 96 N. C. 358, 60 Am. Rep. 420, 2 S. E. 528, a will by which testator gave his land to his two sons, adding: "It is my request that the farm, with stock, etc., may all remain together, and to be worked in common for the support and maintenance of my two youngest children, Ida and Walter, and their mother, until they shall arrive at the years of accountability—that is, all that part of the farm on the north side of the road—and that a certain part be set aside each year, amounting to \$1,000, to give my daughter Mary Bishop, after taking out what I have already given her. It is my request that my son Charles shall have all the management of settlement of my estate, and to pay off the legacy above given to the best advantage; and that he also pay unto my daughter Ida \$500, after giving her a good English education, payable in instalments as he may think best," was held to disclose an intention that the provision for the daughters should be a charge on the land devised to his son Charles.

89. In *Decker v. Decker* (1827) 3 Ohio, 157, where testator devised land to his son "free and clear from any encumbrance except as hereinafter mentioned," in con-

sideration of which devise he required the son to pay various legacies to others of his children in instalments, and further provided that if the devisee "should die without issue that then the estate devised to [him] after the rest may have their legacies shall revert back to the rest of my children and their heirs to be equally divided among them," it was held that, the devisee having died without issue, the legacy should be considered not as a charge against him personally, but as a charge upon the land.

90. In *Clyde v. Simpson* (1854) 4 Ohio St. 445, where testator devised to a son certain real estate, and further provided: "My will is that after my and my beloved wife's decease the whole of my personal property shall pass to my son . . . with the real estate as above stated and that my son . . . shall pay to" certain persons named specified sums of money, "the one half of the above legacies to be paid to the above-named heirs by my son, in six months after my decease and the other half in six months after my wife's decease," it was held that the legacies were impliedly charged upon the land devised to the son.

91. In *Yearly v. Long* (1883) 40 Ohio St. 27, a will by which testator gave and bequeathed all his real and personal property to his son, he, however, to pay to testator's daughter the sum of \$1,500 in yearly instalments of \$100 each, was construed as making the legacy to the daughter an equitable charge upon the real estate.

92. In *Newell's Will* (1811) 1 Browne (Pa.) 311, where testatrix gave all her estate, real and personal, to her son David, "he paying thereout all my just debts and funeral expenses and also paying thereout unto my son William, in case he, my said son William, shall return to Philadelphia within ten years from the time of my decease, the sum of £50," it was held that the legacy to William was a charge upon the realty.

93. In *Holliday v. Summerville* (1832) 3 Penn. & W. (Pa.) 533, the estate taken by a devisee under a will by which testator gave his son a certain tract of land "provided he pays to my other three children [naming them] £300, to be paid in the following manner: £100 to be paid one year after my decease, and £200 to be paid one year after," was held to be not upon condition, but to be subject to a charge.

94. In *Re Tower* (1845) 9 Watts & S. (Pa.) 103, 42 Am. Dec. 319, where testator gave to a nephew all his estate, both real and personal, "he paying the legacies hereinafter mentioned," it was held that, as a result of the blending of the real and personal estate, the legacies were charged upon the land.

95. In *Solliday v. Gruber* (1848) 7 Pa. 452, where testator, who had devised land to his sons, Isaac and William, continued: "They, the said Isaac and William, shall pay unto my two daughters, or to their heirs and assigns," certain sums, "and the said Isaac and William shall take the same L.R.A.1917A.

(the land above devised to them) in possession one year after my death, and shall pay unto my wife \$100 yearly, . . . and after the decease of my wife, the said Isaac and William, or their heirs and assigns, shall pay to my two daughters, or to their heirs or assigns," a further sum, it was held that the death of one of the sons in testator's lifetime did not defeat the legacies pro tanto, they being a charge upon the lands.

96. In *Swoope's Appeal* (1856) 27 Pa. 58, where testator devised lands to his son "and to his heirs and assigns forever, he or they paying thereout unto my other children hereinafter named the several sums of money to them respectively bequeathed," it was held that the legacies were charged upon the land devised.

97. In *Hanna's Appeal* (1857) 31 Pa. 53, it is said that a devise to A and his heirs upon condition that he pay to the executors such sum as shall be necessary to pay certain legacies, authorizing the executors on default of payment to sell the whole or such part of the land as may be necessary to pay the legacies, there being no direction that on default of payment of the legacies the estate shall vest either in the heirs of the decedent or in his executors, conveys neither an estate upon condition nor imposes a conditional limitation, but simply constitutes such legacies a lien upon the land devised.

98. In *Fields's Appeal* (1859) 36 Pa. 11, where testator divided his estate among his children by directing that some of them should have their share in money and others in land, and that if the personal estate should not be sufficient to pay the money shares, those who should get land should make up the deficiency, in equal shares, it was held that the latter provision constituted a contingent charge upon the land devised.

99. In *McCredy's Appeal* (1864) 47 Pa. 442, where testator, who had given money legacies to each of his two daughters for life, with remainder to their children, "in order more effectually to secure" such legacies, expressly charged certain of his real estate therewith, and finally provided that "after the payment of my just debts and securing the payment of the sums aforesaid annually to my said daughters, and the principal hereby given to their children and their descendants upon their death, as to all the real and residue of my estate, real, personal, and mixed, and whosoever the same may be situated, I give, devise, and bequeath the same to my son, Thomas McCredy, and his heirs, and assigns," it was held that the legacies to the daughters and their children were charged upon all the testator's real estate, and not merely upon that specifically charged by him, the specific charge not being sufficient to overcome the manifest intention that the annuities and legacies should be paid at all events and that the son should have nothing except what remained after their payment was made or secured.

100. In *Gallagher's Appeal* (1864) 48 Pa.

121, where testator gave a daughter a legacy "to be paid by my son Joseph Gallagher within one year after my decease," and gave the residue of his estate, real and personal, with exception of a few small bequests, to his son Joseph Gallagher, whom he appointed sole executor, it was held that the residuary realty was charged with the payment of the legacy to the daughter.

101. In *Drake v. Brown* (1871) 68 Pa. 223, where testator devised to his wife "all my real and personal estate, to manage as she thinks best until my youngest child becomes of age, for the purpose of keeping my family together, and after she becomes of age, if my boys should both live, then that Daniel and Charles shall have all the real and personal estate at that time by paying to my three girls, Nancy, Sarah and Mary, each of them \$300, making \$900," it was held that the \$900 to the daughters was a charge upon the land.

102. In *Wert's Appeal* (1871) 69 Pa. 173, where testator gave and bequeathed his whole estate to his two sons, "subject, however, to the following reservations; to wit," and then proceeded to give various legacies, adding: "And I do order that all and every of the above-mentioned legacies be paid by my two sons . . . as soon as my youngest daughter . . . shall arrive at the age of twenty-one years," it was held that both the express words of the will and the blending of the real and personal estate together in the gift to the sons showed that the legacies were intended to be a charge upon the lands devised to them.

103. In *Pierce v. Livingston* (1875) 80 Pa. 99, where testator devised his real estate to his son "with the exceptions and on the conditions hereinafter mentioned," and, after directing the payment of certain legacies to daughters, provided: "I will that there remain in the hands of my executors to be paid by my son" a certain sum of money for the use of testator's widow, it was held that such sum was a charge upon the real estate devised.

104. In *Springer's Appeal* (1885) 111 Pa. 228, 2 Atl. 855, where testator devised to a son a certain farm "subject to the conditions hereinafter mentioned," one of which was contained in the following clause of the will: "Farther I will that my two sons Henry and Joseph pay to my wife delivered in the bushel one third of all the grain they raise on their farms during her lifetime, also, one third of the fruit," it was held that such a bequest was a charge on the farm devised to testator's sons to the extent that the latter were required to contribute in kind to the payment thereof.

105. In *Fryer v. Mark* (1880) 129 Pa. 529, 19 Atl. 805, where testator devised, at the death of his widow, his homestead farm to his son, "provided that the said Jesse A. J., his heirs, executors, or assigns, shall pay within five years after the death of my wife \$200 to each of my sons," it was held

that the legacies were a charge upon the lands.

106. In *Wise's Estate* (1898) 188 Pa. 258, 41 Atl. 526, where testator, who had directed his personal estate to be sold to pay his debts and funeral expenses, and who evidently believed that there would be no personal estate out of which his daughters could be paid their legacies, bequeathed to his son Joseph his homestead farm, and to his five daughters \$1,000 each, and then went on to provide: "My Said younger son Joseph Wise, Jr. is to pay in Consideration for the farm bequeath to him by me the balance to make the five Daughters above menched equal according to there out Setting of my Estate. I further bequeath to Said Elizabeth Mary ann Rebeca Maria and Barbary Hill five hundred Dollars Each over and above ther out Setting to be paid in two years after my Decease to them, which Joseph is to pay them being there full share of my Estate, being the ballance he is to pay for the farm which I have bequeath to Said Joseph Wise Jr. and my Executrix to deed the Said farm to him for Ever," it was held that the will sufficiently manifested an intention to make the legacies to the daughters a charge upon the lands devised to the son.

107. In *Lake's Estate* (1883) 2 Del. Co. Rep. (Pa.) 12, a devise to two sons of testator's real estate "by paying" certain pecuniary legacies was held to be charged with such legacies.

108. In *Barns v. Com.* (1855) 3 Pittsb. L. J. (Pa.) 309 (as reported in *Pepper & L. Dig.* col. 41.141), it appeared that land was devised to B, "the said B to pay the the several legacies hereinafter mentioned," including one to A. The land having been sold on execution against B, the sheriff refused to pay A her legacy. In an action by A on the sheriff's official bond, verdict directed for A. Judgment affirmed.

109. In *Phillips's Appeal* (1887) 17 Pittsb. L. J. N. S. (Pa.) 240, a charge on the land devised was held to be created by a will devising lands "provided" the devisee should pay certain legacies.

110. In *Re Burkhardt* (1888) 18 Pittsb. L. J. N. S. (Pa.) 213, where testator by the second clause of his will gave to his eldest daughter, Elizabeth, \$30 per year during her natural lifetime, "to be paid yearly thereafter by those who may hold and possess my real estate in Pine township," and by the fourth clause devised to a grandson a part of his farm in such township "by his paying his mother, Elizabeth MacDonald, \$15 per year during her natural lifetime, commencing at my decease," it was held that, though it was doubtful whether under the fourth clause of the will, standing alone, the annuity was charged upon the land devised, yet as, in the clause where the annuity was granted in the first instance, the direction to pay was given not to the devisee, but to those who may hold and possess the real estate, it was necessarily charged upon it.

111. In *Re Kleinhenz* (1897) 28 Pittsb. L. J. N. S. (Pa.) 306, where a testator bequeathed to his granddaughter Margaretha \$600, "provided, however, that the aforesaid Margaretha shall bear a child and heir, otherwise she is to receive lawful interest of the aforesaid sum for and during her natural life, and after her decease the aforesaid sum shall be divided equally to my children then living," and devised to his daughter Magdalena certain real estate, adding: "And my aforesaid daughter, Magdalena, shall pay to Margaretha, daughter of my deceased son, Andrew Kleinhenz, the aforesaid sum of \$600 by me bequeathed to the aforesaid Margaretha, provided the said Margaretha shall fulfil the conditions aforesaid," it was held that the legacy to Margaretha must by necessary implication be considered to have been made a charge on Magdalena's devise, the court saying: "It was of such a character that the probability of continuance of liability under the terms of the will beyond the life of Magdalena must be assumed. The legatee was an infant, and in the course of nature would long survive her aunt. If she should have issue the liability might soon end; but in the event of failure, the right to interest running during life, mere personal liability would be totally inadequate. If Magdalena should become insolvent, her whole estate, including this devise, might be swept away without a remedy to protect Margaretha or remaindermen from loss of this principal fund, its product. In order, therefore, to make the benefits intended for these parties reasonably secure, it is obviously essential to treat it as having been charged on the devise; and this is entirely consistent with the will. The direction to pay, immediately coupled as it is with the devise, shows that in testator's mind they were connected subjects, and one was intended to be the source of the other."

112. In *Re Hand* (1902) 33 Pittsb. L. J. N. S. (Pa.) 350, where testator devised to a son certain lands, and further gave a legacy "to be paid by my son John Hand out of his share," it was held that the words, "out of his share," made the legacy a charge upon the realty devised.

113. In *Sharp's Estate* (1898) 7 Pa. Super. Ct. Rep. 372, where testator, who had devised certain land to his daughter Ellen and her husband for life, with remainder to their issue, further directed that the son-in-law "pay to my wife, Antone Sharp, the sum of \$30 per year so long as they both shall live, and in case Ellen Sharp outlive her husband William, then and in that case Ellen Sharp shall pay to Antone Sharp the sum of \$30 per year as long as Antone Sharp shall live," it was held that the manner in which the testator apportioned the annuity bequeathed to his widow between his daughters to correspond to the share of the land devised to each, and his continuing the liability beyond the life of the son-in-law, showed a clear intention to create a charge upon the land devised. L.R.A.1917A.

114. In *Re Moran* (1900) 13 Pa. Super. Ct. 251, where testator devised lands to his son William "on condition that he pay . . . unto my son Patrick Moran the sum of \$1,000 without interest and the same to be paid twelve years after my decease," it was held to be clear that the legacy was a charge upon the land.

115. In *Gumaer's Estate* (1902) 19 Pa. Super. Ct. 621, where testator, after devising property to his sons, added: "I also direct that each of my sons [naming them], if they shall accept the above property, it shall be on condition that they shall each pay annually an equal portion to their mother . . . of 6 per cent interest on \$2,000, and, if needed for her support, also the principal, each paying one third," it was held that the provision made for their mother was a charge upon the lands devised.

116. In *Rutt's Estate* (1908) 35 Pa. Super. Ct. 522, a will by which testator devised realty "subject and liable also to the liens, legacies, and bequests, and payments to be made therefrom and thereout as hereinbefore and hereinafter made," was held to clearly evince an intention to charge the payment of legacies upon the lands.

117. In *McNally v. McNally* (1901) 23 R. I. 180, 49 Atl. 699, where testatrix gave various pieces of realty to divers of her children, "conditioned upon" their paying to other children specified sums within three years from the time of her decease, it was held that, as the will did not create a condition precedent,—the devise taking effect upon the death of the testatrix, while the payment was postponed for three years,—nor a condition subsequent, because there was nothing in the will to show an intention of the testatrix to subject the estate to forfeiture, and the payments were not for the benefit of her estate or of her heirs generally to whom a forfeiture would inure, but provided a mode of equalizing her gifts by requiring children to whom real estate was devised to make payments of money to other children who received no other gift from her, her intent was to make the payments a charge upon the estate devised.

118. In *Waddell v. Waddell* (1904) 68 S. C. 335, 47 S. E. 375, where testator, after devising lands to his children, went on to provide that it should be "distinctly understood that I will to each of my grandchildren \$20 to be paid to them by their parents when they become old enough to know the worth of money. This is a matter of trust and love for my grandchildren: of course the money to come out of my landed estate," it was held that the legacies to the grandchildren constituted a charge on the land devised to each parent.

119. In *Casey v. Casey* (1853) 55 Vt. 518, where testator devised certain premises to a son for life, with remainder to the son's children, "upon the express condition" that such son should pay to his brother \$700 on or before the 1st day of April after the testator's death, it was held that the payment of the sum named was not a

condition precedent to the vesting of the devise, since it could not have been the testator's intent that in case he had died on the last day of March and the devisee did not pay the \$700 the next day, he should lose all benefit of the gift, but that the provision in question simply created an equitable lien upon the property devised.

120. In *Warner v. Bronson* (1908) 81 Vt. 121, 69 Atl. 655, where testator gave his farm to a son "to be his and his heirs forever upon the following conditions; to wit, that he pay to the legal heirs of my estate hereinafter named the sum of \$4,000," it was held to be clear that the testator intended to make such payment a charge by way of an equitable lien on the property.

121-122. In *Toothman v. Barrett* (1878) 14 W. Va. 301, it is said that the mere addition of the words, "the said [devisee] paying \$461 in form and manner following," did not render the gift contingent, but simply created a charge.

123. In *Hogg v. Browning* (1899) 47 W. Va. 22, 34 S. E. 754, where testator, who had directed that his three sons should pay all his just debts and funeral expenses, and who had given to his wife apparently all or the greater part of his personal property, devised various tracts of land to his sons, and further directed that they, "in consideration thereof, pay the following legacies and bequests," which were to his daughter and the children of his deceased daughter, adding: "I direct that the county court appoint three disinterested freeholders to appraise the three proportions of land I have given to my sons, in order that they may each pay their due proportion of the debts, dues, demands, legacies, and bequests herein and above mentioned," it was held that, as no provision was made for the payment of the legacies to the daughter out of personalty, if there was any besides that given his wife, and as testator surely expected such legacies to be paid, such considerations, together with the clause requiring an appraisal of the value of the land to show the proportion of the debts and legacies each one should pay, indicated an intention that such legacies should constitute a charge upon the land.

124. In *Powers v. Powers* (1871) 28 Wis. 659, where testator, after devising land to a son, added: "And it is also understood that the said Enos R. Powers, is to pay or cause to be paid unto my said son, Orlin W. Powers, within one year after my decease, the sum of \$200," it was held that such sum was a charge upon the land devised.

125. In *Korn's Will* (1906) 128 Wis. 428, 107 N. W. 659, where testator, who had given to his widow the use and income of all his real estate during her life, further provided: "After the death of my said wife I dispose of my property as follows; to wit, Third, I will and devise and bequeath to my son William Korn my farm [describing it] upon the express condition however that he shall pay to my daughter Phillipina Steele the sum of \$5,000 within L.R.A.1917A.

one year after the death of my said wife, and which said sum of \$5,000 shall be the portion hereby devised and bequeathed to my said daughter Phillipina Steele as her share of my estate," it was held that, as the son was not required to make the payment until after taking possession, no condition precedent was intended, but that as there was no suggestion that his title should be divested upon breach of the condition, and no provision made for anyone else to take the land upon such breach, and the testator evidently did not mean the provision made for his daughter should be defeated by the son's inability to raise the money upon his limited estate in the land, or otherwise, the daughter was entitled to a lien or charge for the amount of her legacy upon the whole title.

126. In *Sadd v. Carter* (1691) Prec. in Ch. 27, 24 Eng. Reprint, 15, where lands were devised to one for life, remainder to such child or children as should be living at his death, he, the life tenant, paying a certain sum of money at a certain time, it was held that the money devised was a charge upon both the estate for life and the remainder.

127. In *Miles v. Leigh* (1738) 1 Atk. 673, 26 Eng. Reprint, 360, where testator, who had given his personal estate absolutely and entirely to his widow, devised certain lands to her for life, and then to his son Robert and his heirs, and gave a legacy of £160 to be paid within twelve months' time after his son Robert should come to enjoy the premises, and if Robert should die before his mother, then that Henry, another son, coming to the possession thereof and surviving his mother, should pay the legatee £200, it was held the payment of the legacy was a condition annexed to the estate devised, and constituted a charge thereon.

128. In *Wigg v. Wigg* (1739) 1 Atk. 382, 26 Eng. Reprint, 244, where testator devised lands to his son Thomas upon condition that he or his heirs should pay and satisfy to his six grandchildren (the children of the said Thomas) the sum of £90, to be equally divided among them, and in default of payment there was a clause of entry and distress, it was held that the condition was not personal to the devisee, but that the legacies were a continuing charge upon the lands devised.

129. In *Abrams v. Winshup* (1827) 3 Russ. Ch. 350, 38 Eng. Reprint, 607, it was held that under a devise of lands to one "for paying his son £50 when at the age of twenty-one years," the devisee took a fee charged with the payment of the £50.

130. In *Hodge v. Churchward* (1847) 16 Sim. 71, 60 Eng. Reprint, 799, where testator devised realty to a son for life, and after his decease to his first and other sons, "paying" to certain persons specified sums of money, it was held that the word "paying" created not a trust, but a charge or condition.

131. In *Wright v. Wilkin* (1860) 2 Best & S. 232, 121 Eng. Reprint, 1060, where testatrix, after making certain legacies,

gave to a certain person all her real and personal estate "upon this express condition, that, if my personal estate should be insufficient for the purpose, he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed," adding: "And I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid, and I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid several legacies and bequests," it was held that although the words, "upon this express condition," had they stood alone, might be regarded as indicating an intention to create a condition, the nonperformance of which should work a forfeiture of the estate, yet in view of the words which follow, and the absence of a gift over in case the condition should not be performed, the gift was not upon condition, but subject to a trust which the devisee was bound in equity to perform. And this decision was affirmed in the exchequer chamber in (1862) 2 Best & S. 259, 121 Eng. Reprint, 1070, 10 Week. Rep. 403, 31 L. J. Q. B. N. S. 196.

132 A devise "on condition of well and truly paying or causing to be paid the several legacies herein directed" creates a charge rather than a trust. *Cunningham v. Foot* (1874) L. R. 3 App. Cas. (Eng.) 974, 38 L. T. N. S. 889, 26 Week. Rep. 859.

133. In *Re Oliver* (1890) 62 L. T. N. S. (Eng.) 533, where testator devised real estate to a nephew, "he also paying thereout the following legacies," which were to be paid six months after the death of an annuitant whose annuity was a charge upon the property, it was held that such provision created a charge rather than a trust for the benefit of the legatees.

134. In *Re Coreoran* [1913] 1 I. R. (Ir.) 1, where testator devised property "on condition of paying £10 yearly to" a nephew, it was held that a trust was created by the provision for the nephew.

135. In *Clark v. Clark* (1870) 17 Grant, Ch. (U. C.) 17, where a testator, after devising a portion of his real estate to his widow and eldest son, James, giving James an estate in fee in one moiety and the widow an estate during widowhood in the other, with remainder to James, added: "(My son James Clark, aforesaid will pay to my daughters [naming them] \$200 each when they become of the age of twenty-one years. . . . My son James Clark is to pay the sum above named to each of my daughters aforesaid because I have given him a more valuable property than any of my children," it was held that the legacies to the daughters were a charge upon the corpus of the estate devised to James.

136. In *Robson v. Jardine* (1875) 22 Grant, Ch. (U. C.) 420, where testator, who had given all his estate to his wife for life, gave his real estate to a son and daughter, and the personal estate to the daughter, and made several pecuniary bequests, adding: "All of the above payments L.R.A.1917A.

or legacies to be paid to the respective parties by my daughter Annabella and my son Dugald to whom my real estate aforesaid is bequeathed, and the said payments I hereby desire shall be made at the rate of 10 per cent yearly and not to become due or payable until one year after my wife Mary's decease, or until one year after my children Annabella and Dugald shall have come into possession," it was held that the legacies were a charge upon the land.

137. In *Gray v. Richmond* (1892) 22 Ont. Rep. 256, where a testator, after a devise to a son, added: "And I direct that my said son, James Richmond, do pay one half of the sums hereinafter bequeathed to each of my said daughters as soon as my son David Richmond [to whom other property had been devised and who was directed to pay at the same time the other half of such sum] attains the age of twenty-one years," it was held that the legacies were charged upon the lands devised.

Devises of property at a valuation.

138. In *Ridgeway v. Manifold* (1872) 39 Ind. 58, where testator devised to an infant eight years old at his death, whom he had taken into his family when a baby, a hundred acres of land, "for which there is to be a charge made against him of \$1,000 to be by him paid into my estate two years from the time of his arriving at the age of twenty-one years," with an alternative provision in case he should not elect to take the land, it was held that, looking at the whole will and regarding the circumstances surrounding the testator, it was his intention to give the devisee a present estate in the land subject to the payment of the \$1,000 in two years after his majority.

139. In *Reynolds v. Bond* (1882) 83 Ind. 36, where testator provided: "It is my will that my son Jesse should have" certain lands "by paying \$50 an acre, and to pay \$1,000 a year, the first payment to be due twelve months from the time of my death, then \$1,000 each year after until paid, and the money to be divided equally between" persons named, it was held, in an action to have such legacies declared a lien, that a conditional fee passed, and that the performance of the condition was made a charge upon the land.

140. In *Re More* (1914) 179 Mich. 237, 146 N. W. 319, a devise of certain realty, "subject, however, to the payment of" a sum of money set apart for the care and ornamentation of testatrix' grave, was held to constitute such sum an express charge upon the realty.

141. In *Skilman v. Van Pelt* (1832) 1 N. J. Eq. 511, where testator devised to his two sons his farm, "provided they or their heirs shall pay or cause to be paid to my executors hereinafter named the sum of \$3,500 . . . within eighteen months after my decease," it was held that the sons took an estate in fee charged with the payment of the sum mentioned, and not subject to a

condition on the breach of which a right vested in the executors to sell.

142. In *Allen v. Allen* (1897) 121 N. C. 328, 28 S. E. 513, a will by which testator provided: "Whereas it is my desire that one of my sons should live at my old residence who bears my family name, in order therefore to place it in their power to do so, I make the following provision in will: If my son R. J. Allen will agree to live at my old residence that I have left my wife during her life, at her death, if my son R. J. Allen shall think proper to pay \$2,000 for all the land and residence that I left to my wife during her life, he shall have the privilege of doing so, and he shall have a fee simple right and title to it to him and his heirs forever," was held, in view of the leaning of the court toward the vesting of estates and the circumstance that there was no devise over to any other person in case the son should not pay the amount named, to create not a condition precedent to vesting, but a charge upon the devise to the son.

143. In *Nellons v. Truax* (1856) 6 Ohio St. 97, where testator, who had secured to his wife during her life one third of his land and personal property, and made provision for her maintenance on the farm, which seems to have composed the principal part of his estate, devised to his son all his real estate "by his paying the valuation of \$2,000, which \$2,000 after the decease of my wife is to be equally divided among" testator's children, it was held that the \$2,000 was a charge on the realty which might be enforced against subsequent purchasers thereof.

144. In *Ruston v. Ruston* (1796) 2 Dall. (Pa.) 243, 1 L. ed. 365, 1 Am. Dec. 283, where testator devised all his real estate to his eldest son provided he pay to the executor £3,000 by annual instalments, and directed that in case of his son's failing to make these payments within three months after the time limited for them respectively, his executors should sell and convey particular parts of his real estate, it was held that such sums constituted an equitable charge upon the real estate devised to the son.

145. In *Hoover v. Hoover* (1847) 5 Pa. 351, where testator devised a tract of land to his son David, "yielding and paying out of the same" a sum of money, in instalments to be paid from time to time, some of which were devoted to the payment of legacies and the balance was given with the residue of the estate, it was held that such sum was a charge upon the lands devised.

146. In *Hart v. Homiller* (1853) 20 Pa. 248, and a c. subsequent appeal (1854) 23 Pa. 39, where testator devised realty to a son at a valuation, the amount of which fell within the residuary estate, which was to be divided among his six children, it was held that the devise to the son was not upon a condition, but was subject to a charge for the amount of the valuation.

147. In *Newman's Appeal* (1860) 35 Pa. 339, a will in which testator, after devising

a farm, added: "Which said farm and premises hereinbefore devised shall be subject to and chargeable with the payment of the sum of \$2,500 . . . to be paid by the said devisee in five equal annual payments after my decease unto the person who shall or may be intrusted with the execution of this my will," was held to constitute the sum named a charge upon the realty devised.

148. In *Baker's Appeal* (1868) 59 Pa. 313, a will providing as follows: "I direct that my aforesaid son, Joseph E. Baker, is to have my farm upon which I now reside at my death, for \$6,000 in gold or its equivalent in lawful money of the United States; upon payment of the same as hereinafter stated, I direct that my said executors shall make him a deed for the same," which further provided that the devisee should "be allowed a fair and reasonable time to pay the several heirs their respective shares, with interest from the time of my death, should he accept or purchase my farm upon the terms set forth in this my will. Should he refuse to purchase or accept my farm, then I direct my executors, as soon as convenient after my decease, to sell and convey the same," was held to evince an intention to charge the legacies upon the farm.

149. In *Knecht's Appeal* (1872) 71 Pa. 333, an intention to charge the land was held to be manifested by a will by which testator devised land to his son, Christian, "under and subject nevertheless to the payment of \$7,000 in ten equal instalments without interest until due: The first instalment thereof to be paid one year after the decease of my wife and the second two years after her decease, and so on yearly," but gave such son no share of the residuary estate for the reason that "he is made equal with my other children in the devise of my plantation to him, that is to say, in the consideration he pays for the same," and by a codicil in which he referred to such devise and to the payment of the consideration money by the devisee "for the more equalizing my said children and grandchild's shares."

150. In *Gilbert's Appeal* (1877) 85 Pa. 347, where testator devised certain lands to a son "at \$33 per acre, and the proceeds thereof to be divided into eight equal shares, including his own, and distributed equally among my sons and daughters," it was held to be the intention of the testator that the land should be charged with the amount named.

151. In *Weiler's Estate* (1895) 169 Pa. 66, 32 Atl. 101, a will by which testator provided: "First I give and bequeath unto my beloved wife Mary Weiler All Raile Estate and Peronel property Dureing Hor Life time Item I give and bequeath to my Son George and son Siles Weiler All my Raile Estate for the sum of tow thousand five Hundred Dollars and After Hor Decese that is to Say my wife Mary Weiler then After All funeral Expence is paid then all my pernel property to be Sold and All Detes

Paid then All what is Left to be Devided Equilly Amongst my teen Childriñ or to there Airs or asinges," was held, in view of the disposition made by the testator of the money which formed part of the estate for the purposes of distribution, and which was to be equally divided among his ten children, which number included the devisees, to evince an intention to charge the lands with the payment of the amount named.

152. In *Hammond's Estate* (1900) 197 Pa. 119, 46 Atl. 935, where testator devised to a son all his interest in certain realty "subject to the following payments and conditions to be paid and fulfilled by my said son, Henry K. Hammond, . . . the said Henry K. Hammond to pay my executor hereinafter named the sum of \$2,500 to be distributed as hereinafter directed as part of my estate," it was held that the sum mentioned was a charge upon the lands devised.

153. In *Fishburn's Appeal* (1881) 10 W. N. C. (Pa.) 489, where testator devised a farm to his sons "at such valuation as shall be put upon it by three disinterested persons chosen by the sons or a majority of them, he paying such valuation to my executors," it was held that, until said, that price or valuation was a charge on the land.

154. In *Weaver's Estate* (1899) 2 Dauphin Co. Rep. (Pa.) 84, where testator devised a tract of land, adding: "For which the said [devisee] is to pay the sum of \$4,000 in manner following to my executor hereinafter named; to wit, the sum of \$500 in one year after my death and the like sum of \$500 yearly thereafter until the full sum of \$4,000 shall have been paid," and further directed that each instalment should be equally divided into eight shares and paid each year to certain persons named in the will, it was held that the legacy of \$4,000 to the eight persons was charged upon the land devised.

155. In *Seybert's Estate* (1890) 6 Kulp (Pa.) 141, where testator devised land to a son, directing that such son should pay a certain amount in instalments according to a fair valuation and that the purchase money arising from such valuation, as also from a sale of all his other real estate, should be divided among his ten children in equal shares, it was held that the amount due remained a lien on the land until actually paid.

155½. In *Shobe v. Carr* (1811) 3 Munf. (Va.) 10, where testator devised to his sons various tracts of land, "the above-mentioned lands to be rated at £1,600; the possessors of said land, after a division being made, shall be allowed four years to pay off the other legatees," it was held that the sum named constituted a charge upon the land.

Provisions for support.

156. In *Prince v. Barrow* (1904) 120 Ga. 810, 48 S. W. 412, where testator devised and bequeathed his whole estate to his wife for life, "with the condition" that "she shall

apply" a designated portion of the annual income thereof to her own use, and the residue of it, so far as might be necessary, to the support of testator's sisters, and, as might seem proper, to the assistance of the children or grandchildren of such sisters, the remainder to be divided into three equal parts for distribution between testator's two living children and the children or descendants of a deceased son, it was held, in view of the evident purpose of the testator to provide for his sisters, that such provision was not dependent upon the widow's accepting the provision made for her in the will, but that the bequest to the widow was one upon trust for the purposes specified.

157. In *Woodward v. Walling* (1871) 31 Iowa, 533, where testatrix devised certain lands to a son, "provided, however, that the said Elisha Jennings shall provide a home for his sister, Oriel Zerna, till her marriage, and then to give her an outfit equal to what her sisters have received at their marriage, provided, however, that if the said Elisha Jennings does not accept of the provisions of this will within eighteen months from the date of this, then said property to revert to his sister, Oriel Zerna," it was held that, as the devise over was so intimately and entirely coupled with the words of the last condition that it would be a grave violence to the rules of language to make it extend to the first, and as the testatrix, while declaring that the nonperformance of the second condition should defeat the estate, expressed no such intention with reference to the other, such provision should be regarded as creating a trust or charge upon the land, to be enforced as other trusts and charges, and not as a limitation upon the estate devised.

158. In *Berry v. Headington* (1830) 3 J. J. Marsh. (Ky.) 315, it was held that a devise of testator's entire estate to his wife, "on these conditions" (which were that the wife should maintain, clothe, and educate their children in a manner specified), concluding, "These two conditions are annexed to the said devise to my said beloved wife, Maria, and shall be fulfilled and complied with by her, her heirs or assigns," it was held that the condition imposed was not technically one upon the non-performance of which the estate should be forfeited, but simply created a charge upon the estate devised.

159. In *Low v. Ramsey* (1909) 135 Ky. 337, 125 Am. St. Rep. 459, 122 S. W. 167, where testatrix devised her residuary estate to a son "with the understanding that he is to take and raise my children, Harry and Josie, until they are fifteen years old," it was held that the provision quoted was neither a condition precedent nor a condition subsequent, but created a lien upon the land in favor of such infant children.

160. In *Emery v. Swasey* (1902) 97 Me. 136, 53 Atl. 992, where testator devised to a sister and her husband his homestead farm, "to hold the same to them and to the survivor of them for and during their natural lives and the life of such survivor,

subject, however, to the obligation to furnish a comfortable home and maintenance for my sister, Eliza W. Steele during her natural life," and upon the decease of the survivor gave the same property to several other relatives in succession, it was held that the obligation to furnish a comfortable home and maintenance for his sister Eliza was a charge upon the property, and not upon the primary devisee.

161. In *Gardenville Permanent Loan Assn. v. Walker* (1879) 52 Md. 452, a will by which testator devised to his son a farm "upon condition that if my wife [name] should survive me, that he, my said son, shall keep provide for and support her during her natural life and allow her to dwell and reside on said property with him and his family free of expense during her lifetime," was held to charge the farm with the wife's reasonable support and maintenance.

162. In *Thayer v. Finnegan* (1883) 134 Mass. 62, 45 Am. Rep. 285, where testator constituted his elder son, Thomas, his executor, and gave and bequeathed to him all his real and personal property, adding: "Said Thomas C. to pay all the debts then outstanding at my decease, and also to pay the school expenses of my son John F. Coleman until through college," it was held that the provision made for the younger son was a charge upon the realty.

163. In *Veazey v. Whitehouse* (1839) 10 N. H. 409, where testator gave to his son and executor his farm, farming tools, stock, and buildings on the farm, excepting certain portions of the buildings which he reserved for the use of his daughters while unmarried, adding: "And the said Levi, his heirs and assigns are to support for said daughters one cow Winter and Summer and they are to have one-sixth part of the profit of the orchard and to have each of them one sheep kept on said farm so long as they or either of them shall remain unmarried," it was held that, as it was clear that the father designed to provide a home for the daughters upon the farm so long as they remained unmarried, and as it was expressly stipulated that the son, "his heirs and assigns," should be holden for the fulfillment of the above requirements, the provision for the daughters was not a mere legacy for which the executor would be liable solely on his bond, but was designed to be connected with and appurtenant to the land devised to the son.

164. In *Fox v. Phelps* (1837) 17 Wend. (N. Y.) 393, affirmed in (1838) 20 Wend. 437, where a testatrix, after devising certain property to her two sons, proceeded as follows: "But on this condition, that after my decease the said premises and every part and parcel thereof, shall be let, and the moneys arising therefrom I do will and order shall go and be applied by my executors hereinafter named, for the maintenance, support and education of my two children Thomas and Abigail" for limited periods, it was held that this provision was a charge on the land in the hands of the devisees.

vision was a charge on the land in the hands of the devisees.

165. In *Lang v. Everling* (1893) 3 Misc. 530, 23 N. Y. Supp. 329, a will by which testator devised and bequeathed to his wife all his estate during life or widowhood, "upon the express condition, however, that she shall out of such income maintain and educate my children during their minority," it was held that the life estate devised to the widow was chargeable with the maintenance and education of the children.

166. In *Misenheimer v. Sifford* (1886) 94 N. C. 592, where testator devised to a son his plantation and appurtenances, "provided he maintain his mother during life comfortably," it was held that, in consonance with the evident general purpose of the testator in making provision for the support of his surviving wife, such provision should be considered as fixing a charge upon the land.

167. In *Outland v. Outland* (1896) 118 N. C. 138, 23 S. E. 972, where testator devised certain lands to two of his sons, and added: "In consideration of the property I have given to Elijah and Cornelius they are to have the care of and support Thomas [who was an imbecile son of the testator, and not otherwise provided for] and it is my will that he should have his choice which of them he will live with, and the other pay half the expense," it was held that the lands devised to the two sons were charged with the support of Thomas.

168. In *Ripple v. Ripple* (1829) 1 Rawle (Pa.) 386, where testator devised certain premises to his son Phillip, adding: "My son Phillip is to keep and provide for my beloved wife and my two eldest daughters, Katherine and Elizabeth during their natural lives," it was held that the gift to Phillip was on a condition which, in consequence of its very nature, adhered to the land and constituted a charge thereon.

169. In *Walter's Estate* (1901) 197 Pa. 555, 47 Atl. 862, where testator gave to his son all his estate, both real and personal, "upon the following conditions, namely, it is my will that the said B. F. Walters and his heirs pay all my just debts and my funeral expenses, also to pay" to testator's other children certain legacies, "and further Lucinda H. Walters [who was one of the legatees] to have her living in the old homestead so long as she remains unmarried and does not charge wages for services rendered," it was held that, as it was clear that the pecuniary legacies were charged on the land by reason of the blending of the real and personal estate, the words used by the testator in providing for the support of his daughter put both legacies on the same plane, and made the provision for her support not a personal obligation merely, but a condition of the devise of the land to the son.

170. In *Isner v. Kelley* (1902) 51 W. Va. 82, 41 S. E. 158, a will by which testator devised to the two sons of his daughter Caroline certain lands "upon the following conditions; viz., The said Jacob and Hardy

Isner are to take care of and provide for all of the reasonable wants of my daughter Caroline Isner during her lifetime," was held to make the support of the daughter a charge upon the realty devised.

171. In *Sands v. Champlin* (1840) 1 Story, 376, Fed. Cas. No. 12,303, where testator, who had bequeathed to his wife annual supplies of produce and other articles produced on a farm, devised certain lands to one "and his heirs and assigns, with such reservations as I shall hereafter make, and one express condition," afterward adding, "These bequests are to him, his heirs and assigns forever, with the conditions that will be hereafter expressed," and further, "in consideration of the devises and bequeaths to" such person, he should supply testator's widow with all the articles bequeathed to her, and certain other things, it was held that the provision for the wife was a charge upon the realty as well as upon the devisee personally.

171½. In *Cool v. Cool* (1904) 3 N. B. Eq. 11, where testator gave all his real and personal estate to his son upon condition that he would maintain and support the testator's wife and daughters during their natural life, or until they should marry and leave home, it was held that, as the testator had blended the real and personal property into one fund for a common purpose, the effect of the language was to charge both with the support and maintenance provided for by the will.

b. Cases in which the provision has been held ineffectual to create a charge.

Provisions for payment of legacies.

172. In *Brandt's Appeal* (1839) 8 Watts (Pa.) 198, where testator devised land to his sons absolutely, and in a subsequent clause, after making sundry other provisions on different subjects, gave certain legacies to his widow and daughters, to be paid by his son after his debts were paid, it was held that, although the sons, upon accepting the devise, became personally liable for the legacies, such legacies were not a continuing lien on the lands devised.

173. In *Montgomery v. M'Elroy* (1842) 3 Watts & S. (Pa.) 370, 38 Am. Dec. 771, where testator, who had devised his plantation among his widow and daughters, went on to provide, "But in case my daughter, Sarah Cook, should have no heir of her own body at my decease, then I do allow and it is my will that her share of my plantation shall go to her sisters, . . . them paying her in lieu thereof the sum of \$800," it was held that as Sarah would still have an interest in the land if it should be considered as bound by or charged with the payment thus directed to be made, whereas she was by the will to have a sum of money in lieu of and in exclusion of it, and as in other parts of the will it was apparent that the testator knew well how to charge a legacy on land when such was his

intention, such payment did not constitute a charge upon the land.

174. In *Dewitt v. Eldred* (1842) 4 Watts & S. (Pa.) 414, where testator, after devising land to his son, by a subsequent and distinct clause simply bequeathed a legacy to his daughter to be paid to her by the son, it was held that, in the absence of anything more (such as a direction that it could be paid out of the land devised), the legacy must be considered as a charge on the devisee in respect to the land devised to him, and not a charge upon the land itself.

175. In *Hackadorn's Appeal* (1849) 11 Pa. 86, where testator, after making provision for his wife, directed that the residue of his personal property should be appraised and sold, and the proceeds thereof be equally divided among his six daughters, after paying all his just debts, funeral and other expenses, and then proceeded to divide his real estate among his seven sons, adding: "And it is my will and I do order that my seven sons do choose three or five good substantial and intelligent man to appraise the several messuages or pieces of land heretofore bequeathed to them by this my last will, . . . and those of my sons whose lot is the most valuable to pay in proportion to my daughters so as to make my sons and daughters share and share alike, excepting \$25 which I allow each of my sons to have more than my daughters—the divide that my daughters may have received out of the proceeds of my personal estate to be counted to them out of their share, and it is my will that my sons be not compelled to pay anything to my daughters until two years after my decease, and then not more than \$25 a year until all is paid," it was held that, although the will evinced a design to divide the estate equally, as near as might be, between the testator's children, and explicitly pointed out the mode by which this object might be effected, there was nothing in the plan of the will, its scope or language, to indicate an intention to charge the share of the daughters on the lands devised to the sons.

176. In *Wright's Appeal* (1849) 12 Pa. 256, where testator devised his land to his son Thomas, who, if he chose to accept it, was to pay \$1,700 to different persons, and if he would not accept the land, it was devised to the testator's sons, Isaac and Thomas, share and share alike, who were to pay certain sums to legatees, it was held that there was nothing in the will to evince an intention that the sum to be paid by Thomas should be a charge upon the land.

177. In *Schryer's Estate* (1868) 2 Brewst. (Pa.) 526, 7 Phila. 477, where testator gave and devised to A for life one half of the rent of certain real estate, and also gave and devised the real estate in question to B, subject to the payment of one half the income to A, it was held that this was not the case of a legacy charged upon or payable out of real estate, but a devise of the income or profits of land, and consequently a devise of the land itself.

178. In *Okeson's Appeal* (1868) 59 Pa. 99, where testator bequeathed to his son Samuel his land and certain specific personal property, and to a daughter \$300, "to make her equal to what I gave the rest," it was held that there was nothing to indicate an intention on the part of the testator to make the legacy to the daughter a charge upon the land devised to the son, or upon the devisees in respect to the land.

179. In *Hamilton v. Porter* (1869) 63 Pa. 332, a will containing the following provision: "And further I will that Simeon H. Hamilton is to take the within mentioned 100 acres of land . . . at my death and pay \$700 to each of my within named heirs," was held not to disclose any intention to make the legacy a charge on the real estate.

180. In *Buchanan's Appeal* (1872) 72 Pa. 448, a will by which testator devised to his son certain lands, "he paying the legacies hereinafter enjoined on him to pay," was held not to constitute such legacies a charge upon the land.

181. In *Re Furst* (1879) 2 Pearson (Pa.) 492, where testatrix, in a will evidently drawn by a very ignorant and unlearned person, provided: "If my husband, Thomas Harper, should remain to be my widower during my lifetime, he shall be kept and supported out of my estate, if he remained on my place or home, or with my son, Simon P. Harper, for he shall take possession of all of my real estate soon after my death; he, the said Simon Harper, is not to pay any money to his brothers and sisters until after the death of my beloved husband; but after his death one year he shall pay to my daughter Mary \$50 without interest," etc., it was held that, as there was no more than a mere direction to pay, the legacies to the other children did not constitute a charge upon the lands devised to the son.

182. In *Cable's Appeal* (1879) 91 Pa. 327, where testator devised to his two sons a farm, "to them so long as they do live and after their death to their children. But the said John and Edward Cable is to pay to my four daughters as follows," it was held that, there being nothing in any other part of the will to throw any light upon the question, there was not sufficient evidence of an intention to charge such legacies upon the land.

183. In *Walter's Appeal* (1880) 95 Pa. 305, where testator first gave various pecuniary legacies to several of his children and devised his farm to his two sons, directing "that my said son, John M. Walter pay to my several before-mentioned heirs the sum of \$3,000, and I direct that my son James H. Walter pay to my several before-mentioned heirs the sum of \$1,400," following this with a provision that his two sons should come into possession of the farm when they should respectively arrive at the age of twenty-one years, and that his widow should have control of the farm until such time, it was held that the will failed to disclose the least evidence of an

intention on the part of the testator to charge the lands devised to the sons with the payment of the sum in question.

184. In *Van Vliet's Appeal* (1883) 102 Pa. 574, where testator devised to his son Charrick certain lands, adding, "I charge my son Charrick with the sum of \$1,000 to be paid in the following manner," and also devised to his son Richard other lands with a similar provision, and gave certain legacies evidently calculated to be paid out of the money, which his sons were directed to pay, and further gave to such sons all his personal property of all kinds, adding, "And they shall pay my honest debts and funeral expenses," it was held that the testator failed to use any language sufficient to charge upon the land devised to the sons the legacies given to the daughters.

185. In *Smith v. Carroll* (1886) 112 Pa. 390, 4 Atl. 24, no charge upon the land devised was held to be imposed by a will by which testator devised land to his son Owen, adding: "The said Owen is hereby enjoined and required to pay to my estate the sum of \$500 to enable my executors to pay off the legacies bequeathed to my daughters as before stated."

186. In *Schmehl v. Bickel* (1887) 5 Sadler (Pa.) 486, 8 Atl. 874, where testator gave a son certain lands "as his own property," adding: "But my said son, David shall keep my dear wife, Mary as long as she lives or pay to her annually \$72, and my said David must after my wife's death pay to my daughter, Esther the sum of \$1,200," it was held that the legacy to Esther was not a charge on the land devised, either by express words or necessary implication.

187. In *Sauer v. Mollinger* (1890) 138 Pa. 338, 22 Atl. 89, a will in which testator, after a devise of certain property to a daughter, added: "And as the value of the property so bequeathed to her exceeds the value of the property by me bequeathed to my daughter Katherine, I direct that my said daughter, Margatha shall pay to my said daughter Katherine, the sum of \$300," was held not to create a charge upon the land.

188. In *Rowson's Estate* (1897) 6 Pa. Dist. R. 61, where testator gave all his estate to his son "provided and upon condition that he will pay to" decedent's children and grandchildren a stated amount, in the shares and at times indicated, and that if the said son should "from any cause be unable or unwilling to comply with the above-named conditions," the entire estate bequeathed to him should go to all testator's children and grandchildren, it was held that, as there was no evidence of an intention to charge the legacies upon the land, but, on the contrary, a limitation over in case of the devisee's failure to pay, such legacies did not constitute a charge upon the land.

Devises at a valuation.

189. In *Knaub's Estate* (1891) 144 Pa. 322, 22 Atl. 814, where testator, by a will

evidently drawn by an illiterate person, devised to his son John a certain farm "at \$2,650 with intrest as long as his mother lives and after her death the one half of the intrest aforesaid are to go to Levi and the other half to John," and devised to his son Levi another farm "at \$5,000," it was held that, as the testator, though stating the value of each farm, did not direct its payment, or make any disposition of it, and did not appear to aim at equality among his children, nor to attempt more than an approximation toward it between his sons, and as his bequest to his daughter and her husband was expressly declared to be "in full of their share," there was nothing from which a purpose to charge the payment of such sums upon the land might be implied.

190. In *Shenk v. Shenk* (1892) 150 Pa. 521, 24 Atl. 680, a will by which testator devised to a grandson certain real estate, "subject and charged, however, with the rights, gifts, and bequests made to my said wife as aforesaid," adding: "And I value and appraise the same to him, the said Samuel Shenk, at and for the sum of \$2,000, and it is my will that in case my said grandson, Samuel Shenk, sells the above property, . . . he shall give his brothers and sisters the first offer to buy the same, . . . and he shall let him, her,

or them have it upon the same conditions and for the same price at which it was hereby valued and devised to him," was held not to evince an intention to charge the sum of \$2,000 upon the real estate devised to the grandson.

Provisions for support.

191. In *Haworth's Appeal* (1884) 105 Pa. 362, where testator provided: "It is my will, and I do hereby order, give, and bequeath unto my granddaughter Marion Dover, a child of my daughter Lydia, all the remainder of my real estate that may be left unsold or remains by my wife, Mary, after her decease, to her forever, . . . and said Marion shall support and maintain her said mother during her natural life if she should come into circumstances that she cannot support or provide for herself; and further, in case the said Marion shall die without lawful heirs, then the above said mentioned real estate shall go to her lawful brothers and sisters, and he or they shall his or their mother on the above said support or maintenance provided for her," it was held that there was not sufficient in the will to show an intention on the part of the testator to create a charge running with the land.

E. S. O.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

J. C. BERG, Appt.,

v.

JOHN ERICKSON.

SAME, Plff. in Err.,

v.

SAME.

(234 Fed. 817.)

Agistment — contract to furnish pasture — breach.

1. E., a resident of Kansas, in April, 1913, showed to B., a resident of Texas, who had had no experience of Kansas grass, or of the effects upon it of droughts, which were not unusual in some parts of Kansas, certain pastures in which he proposed to put, and in which he afterwards did put, B.'s cattle. Thereupon, on April 16, 1913, E. made a written contract with B. to furnish about 1,000 of his cattle plenty of good grass, salt, and water during the grazing season of 1913, and B. agreed to pay him therefor \$7 a head. An act of God—the worst drought that had ever been known in

Kansas,—made it impossible for E. to furnish plenty of good grass in July, August, September, and October of that year, to the damage of B. in the sum of \$20,000, but did not prevent him from furnishing plenty of good grass during May and June, and sufficient grass to keep the cattle alive and maintain their weight during the remainder of the season. Held, E. was not absolved from his liability to furnish plenty of good grass, or to pay the damages for his failure so to do, by the act of God,—the unprecedented drought.

For other cases, see *Agisters; Contracts, IV. b, 2, in Dig. 1-52 N. 8.*

Contract — breach — act of God — effect.

2. Where an obligation or a duty is imposed upon a person by law, he will be absolved from liability for nonperformance of the obligation if his performance is rendered impossible without his fault by an act of God, or an unavoidable accident. But this rule is not generally applicable to contract obligations. Whether or not one who, by contract, imposes upon himself an obligation or duty, is absolved from liability for its nonperformance by a subsequent impossibility of performance without his fault, caused by an act of God or an unavoidable accident, depends upon the true construction of his contract.

For other cases, see *Contracts, IV. b, 2, in Dig. 1-52 N. 8.*

Same — absolution.

3. The general rule is that one who makes a positive agreement to do a lawful act is

Headnotes by SANBORN, Circuit Judge.

Notc. — The intervening impossibility of performance of a contract as a defense is discussed at length in the annotation to *Runyan v. Gulver*, L.R.A.1916F, 3, which cites and discusses *BERG v. ERICKSON*, L.R.A.1917A.

not absolved from liability for the failure to do it by a subsequent impossibility of performance, caused by an act of God or an unavoidable accident, for the reason that he voluntarily contracts to perform it, without reservation or exception, which, if he desired, he could make in his agreement, thereby induces the other contracting party, in consideration of his positive agreement, to enter into and become bound by the contract, and while courts may enforce, they may not avoid, contracts, in the absence of fraud or some similar ground.

For other cases, see Contracts, IV. b, 2, in Dig. 1-52 N. S.

Same — implied condition for continuance of life.

4. Where it clearly appears, from the situation of the parties at the time they made their contract and from its terms, that they must have known that its performance would be impossible unless a person or persons, as in a contract of marriage, or in a contract for personal service, as of a singer or artist, should be living at the time for the performance of the contract, and there is no express or implied warranty of his life, a condition is implied that the contractor shall be absolved from liability if performance becomes impossible without his fault by the death of the indispensable person. A like condition is implied in a contract for the delivery of a specific animal under like conditions.

For other cases, see Contracts, IV. b, 2, in Dig. 1-52 N. S.

Same — continued existence of thing.

5. There are authorities to the effect that, where it clearly appears from the situation of the parties and their contract that they must have known when they made it that its performance would be impossible unless a thing, or a condition of things, then in existence, should continue until the time of performance, or unless an indispensable thing, or condition of things, not then in existence, should come into existence before and be in existence at the time of performance, there also, in the absence of an express or implied warranty of the existence of the indispensable thing or condition at the time of the performance, there arises an implied condition that if that thing or condition is destroyed or prevented without fault of the obligor by the act of God, or by unavoidable accident, the obligor shall be absolved from liability for his failure to perform.

For other cases, see Contracts, IV. b, 2, in Dig. 1-52 N. S.

Same — rule of Federal courts.

6. The decisions of the Federal courts do not go so far. The rule declared by the Supreme Court is that, although general words which cannot be reasonably supposed to have been used with reference to the possibility of an event may not be held to bind one, yet where one, at the time of making his contract, must have known, or could have reasonably anticipated, and in his contract could have guarded against, the pos-

sible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so, or pay the damages resulting from his failure so to do.

For other cases, see Contracts, IV. b, 2, in Dig. 1-52 N. S.

(July 8, 1916.)

A PPEAL by plaintiff from a judgment of the District Court of the United States for the District of Kansas (Pollock, District Judge), in favor of defendant in a replevin action brought to recover possession of certain cattle and to recover damages for breach of a contract to furnish good grass to the cattle; and error to review a decree in favor of complainant in an equity suit for the establishment of an agister's lien on the cattle. Reversed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and Reed and Booth, District Judges.

Messrs. J. D. Houston and C. H. Brooks, for appellant and plaintiff in error:

Where a person creates a charge or obligation upon himself by express contract, he will not be permitted to excuse himself therefrom by pleading an act of God, rendering performance impracticable. A distinction is drawn between obligations created by express contract and obligations or duties imposed by the law.

Paradine v. Jane, Aleyn, 27, 82 Eng. Rep. 897; *Mill Dam Foundry Co. v. Hovey*, 21 Pick. 441; 1 Am. & Eng. Enc. Law, p. 588, note 2; *Middlesex Water Co. v. Knappman-Whiting Co.* 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 695; *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371; *Steele v. Buck*, 61 Ill. 343, 14 Am. Rep. 60; *The Harriman*, 9 Wall. 161, 19 L. ed. 629; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. 441; *Mitchell v. Hancock County* (*Mitchell v. Weston*) 91 Miss. 414, 15 L.R.A. (N.S.) 834, 124 Am. St. Rep. 706, 45 So. 571; *Isaacson v. Starrett*, 56 Wash. 18, 104 Pac. 1115; *Phoenix Bridge Co. v. United States*, 38 Ct. Cl. 492; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 527, 40 L. ed. 524, 16 Sup. Ct. Rep. 379; *Dermott v. Jones* (*Ingle v. Jones*) 2 Wall. 1, 17 L. ed. 762; 9 Cyc. 627; *Anderson v. May*, 50 Minn. 280, 17 L.R.A. 555, 36 Am. St. Rep. 642, 52 N. W. 530; 2 Chitty, Contr. 1047; *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373; *M'Gehee v. Hill*, 4 Port. (Ala.) 170, 29 Am. Dec. 277; *Huyett & S. Mfg. Co. v. Chicago Edison Co.* 167 Ill. 233, 59 Am. St. Rep. 281, 47 N. E. 384.

Even where impossibility to perform ex-

cuses, it cannot be held equivalent to performance, so as to sustain affirmative relief in favor of the person who failed to perform.

Remy v. Olds, — Cal. —, 21 L.R.A. 645, 34 Pac. 216; Kein v. Tupper, 52 N. Y. 550; Smoots Case, 15 Wall. 36, 21 L. ed. 107; Dermott v. Jones, 23 How. 220, 16 L. ed. 442; Huyett & S. Mfg. Co. v. Chicago Edison Co. 50 Am. St. Rep. 282, note; Taulbee v. McCarty, 144 Ky. 199, 36 L.R.A.(N.S.) 43, 137 S. W. 1045, Ann. Cas. 1913A, 456; Krause v. Crothersville, 162 Ind. 278, 65 L.R.A. 111, 102 Am. St. Rep. 203, 70 N. E. 264, 1 Ann. Cas. 460.

Under the evidence and the rules and practice in equity, final judgment should be rendered for appellant on his counterclaim for the amount of damage proven.

Royal Union Mut. L. Ins. Co. v. Wynn, 177 Fed. 289; Caldwell v. Schmulbach, 175 Fed. 429; Springfield Mill. Co. v. Barnard & L. Mfg. Co. 26 C. C. A. 389, 49 U. S. App. 438, 81 Fed. 261; Simkins, Fed. Eq. Suit, p. 475.

Messrs. W. P. Hackney, Aikman & Aikman, L. D. Moore, and J. T. Lafferty, for appellee and defendant in error:

Under the circumstances and the nature of the thing contracted for, the failure of the rains to come was a thing for which Erickson was not responsible, and relieved him from any liability to Berg.

Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. Rep. 779; Pittsburg, Ft. W. & C. R. Co. v. Brigham, 29 Ohio St. 374; Wells v. Sutphin, 64 Kan. 873, 68 Pac. 648; 9 Cyc. 631; Taylor v. Caldwell, 3 Best & S. 826, 122 Eng. Reprint, 309, 32 L. J. Q. B. N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726, 6 Eng. Rul. Cas. 603; Womack v. McQuarry, 28 Ind. 103, 92 Am. Rep. 306; Jamieson v. Indiana Natural Gas & Oil Co. 128 Ind. 555, 12 L.R.A. 652, 3 Inters. Com. Rep. 613, 28 N. E. 76; Lord v. Wheeler, 1 Gray, 282; Schwartz v. Saunders, 46 Ill. 18; Walker v. Tucker, 70 Ill. 527, 8 Mor. Min. Rep. 672; Lorillard v. Clyde, 142 N. Y. 456, 24 L.R.A. 113, 37 N. E. 489; Niblo v. Binsse, 1 Keyes, 476; Brumby v. Smith, 3 Ala. 123; Cook v. McCabe, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; Haynes, S. & Co. v. Second Baptist Church, 88 Mo. 285, 57 Am. Rep. 413; Hall v. School Dist. 24 Mo. App. 213; Anglo-Egyptian Nav. Co. v. Renne, L. R. 10 C. P. 271, 44 L. J. C. P. N. S. 130, 32 L. T. N. S. 467, 23 Week. Rep. 626; Platt, Covenants, 582; Butterfield v. Byron, 163 Mass. 517, 12 L.R.A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; Howell v. Coupland, L. R. 1 Q. B. Div. 258, 46 L. J. Q. B. N. S. 147, 33 L. T. N. S. 832, 24 Week. Rep. 470; Baily v. De Crespigny, L. R. 4 Q. B. 180, L.R.A.1917A.

38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Stewart v. Stone, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595; Dolan v. Rodgers, 149 N. Y. 489, 44 N. E. 167; Krause v. Crothersville, 162 Ind. 278, 65 L.R.A. 111, 102 Am. St. Rep. 203, 70 N. E. 264, 1 Ann. Cas. 460; Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762; United States v. Gleason, 175 U. S. 588, 44 L. ed. 284, 20 Sup. Ct. Rep. 228; Pasquotank & N. River S. B. Co. v. Eastern Carolina Transp. Co. 166 N. C. 582, 82 S. E. 956; Zanello v. Smith & W. Iron Works, 62 Or. 213, 124 Pac. 660; Stees v. Leonard, 20 Minn. 494, Gil. 448; Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co. 134 Cal. 21, 53 L.R.A. 681, 86 Am. St. Rep. 231, 66 Pac. 28.

The agister, Erickson, was entitled to compensation for the benefits received by Berg for the pasturage and care of his cattle during the months of May and June.

9 Cyc. 686, 688, 689; Young v. Chicopee, 186 Mass. 518, 72 N. E. 63; Butterfield v. Byron, 153 Mass. 517, 12 L.R.A. 571, 25 Am. St. Rep. 654, 27 N. E. 667; Cleary v. Sohler, 120 Mass. 210; Lord v. Wheeler, 1 Gray, 282; Todd v. Huntington, 13 Or. 9, 4 Pac. 295; Gove v. Island City Mercantile & Mill. Co. 19 Or. 363, 24 Pac. 521; Cook v. McCabe, 53 Wis. 250, 40 Am. Rep. 765, 10 N. W. 507; Hollis v. Chapman, 36 Tex. 1; Clark v. Franklin, 7 Leigh, 1; Powell v. Howard, 109 Mass. 192; Moore v. H. Gaus & Sons Mfg. Co. 113 Mo. 98, 20 S. W. 975; Wadleigh v. Sutton, 6 N. H. 15, 23 Am. Dec. 704; Rawson v. Clark, 70 Ill. 656; Pinches v. Swedish E. L. Church, 55 Conn. 183, 10 Atl. 264; Escott v. White, 10 Bush, 169; White v. Oliver, 36 Me. 92; Kelly v. Bradford, 33 Vt. 35; Hargrave v. Conroy, 19 N. J. Eq. 281.

Sanborn, Circuit Judge, delivered the opinion of the court:

John Erickson, a resident of Kansas, made a written contract with J. C. Berg, a resident of St. Francis, Texas, on April 16, 1913, to pasture for him 1,000 steers and to "furnish plenty of good grass, water, and salt during the grazing season of 1913" to them for \$7 per head, which Berg agreed to pay. Erickson furnished the grass, water, and salt to them during May and June, but the most severe drought which had been known in that part of Kansas subsequently prevailed, and on account of that drought it was impossible for Erickson to furnish, and he failed to furnish, plenty of good grass for the cattle during July, August, and September, to the damage of Berg in the sum of about \$20,000;

and the main question in this case is whether Erickson is liable to pay these damages to Berg on account of his breach of his contract, or is absolved from liability for them by the impossibility of performance which resulted from the drought after the contract was made. The question was presented in this way: At the end of the grazing season Erickson claimed an agister's lien on the cattle for the agreed price of the pasturing, \$7 per head, and refused to deliver them until that price was paid. Thereupon Berg replevied the cattle upon a complaint in which he alleged his ownership and right to the possession of them, and that by the failure of Erickson to furnish the agreed grass the cattle were worth \$33,000 less than they would have been if Erickson had performed his contract. Erickson denied liability for the damage to the cattle, on the ground that it was caused by the drought, an act of God, and pleaded his agister's lien and his right to the possession of the cattle thereunder. He also brought a suit in equity against Berg, in which he set forth and prayed the adjudication of his agister's lien for the \$7 a head, and asked further relief. Berg, in his answer to this complaint, denied the existence of any agister's lien, alleged Erickson's breach of his contract, and his damage in the sum of \$33,000, pleaded a counterclaim for these damages, and asked a judgment for their recovery.

The action in replevin and the suit in equity were tried together by the court below without a jury, by consent of the parties. The court decided that Erickson had an agister's lien upon the cattle for the value of the grass furnished in the months of May and June, and for certain expenses which he incurred and the value of certain services which he rendered in caring for the cattle when they were ill, and in feeding them at the end of the grazing season, to the amount of \$2,999.41, and rendered a judgment in the action in replevin for the return to him of the cattle, or for the payment to him of that amount. The court also held that Erickson was absolved from liability for his breach of his contract to furnish plenty of good grass by the unusual drought and it rendered a decree in the suit in equity that Berg was indebted to Erickson in the sum of \$2,999.41, that Erickson should have judgment for this amount in his action in replevin, and that Berg should take nothing on account of the damages he sustained by reason of Erickson's breach of his contract. Berg challenges the judgment by writ of error, and the decree by an appeal.

Erickson agreed to furnish plenty of good grass to the cattle throughout the grazing

season of 1913. He failed to perform this contract, to the damage of Berg in the sum of \$20,000, because the unprecedented drought made it impossible for him so to do. Did this impossibility of performance, which arose subsequent to the making of the contract, out of the unusual drought, the act of God, relieve Erickson from liability for the damages inflicted upon Berg by his failure to perform his contract?

An examination of the authorities and reflection have satisfied that the answer to this question must be deduced from a correct construction of the agreement of these parties under the following principles of law, which, notwithstanding the fact that there are confusing and conflicting decisions on cognate questions in the books, are established by the more convincing reasons and the greater weight of authority:

Where an obligation or a duty is imposed on a person by law, he will be absolved from liability for nonperformance of the obligation if his performance is rendered impossible without his fault, by an act of God or an unavoidable accident. But this rule is not generally applicable to contract obligations.

Whether or not one who, by contract, imposes upon himself an obligation or duty, is absolved from liability for his nonperformance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable accident, depends upon the true construction of his contract. The general rule is that one who makes a positive agreement to do a lawful act is not absolved from liability for a failure to fulfil his covenant by a subsequent impossibility of performance, caused by an act of God, or an unavoidable accident, because he voluntarily contracts to perform it without any reservation or exception, which, if he desired, he could make in his agreement, thereby induces the other contracting party, in consideration of his positive covenant, to enter into and become bound by the contract, and while courts may enforce, they may not avoid, such contracts in the absence of fraud or some similar defense. 9 Cyc. 627, ¶ 5; *Paradine v. Jane*, Aleyn, 26, 82 Eng. Reprint, 897; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (C. C.) 31 Fed. 440, 441; *Robson v. Mississippi River Logging Co.* (C. C.) 61 Fed. 893, 900; *Anderson v. May*, 50 Minn. 280, 17 L.R.A. 555, 36 Am. St. Rep. 642, 52 N. W. 530; *Stees v. Leonard*, 20 Minn. 494, Gil. 448; *M'Gehee v. Hill*, 4 Port. (Ala.) 170, 29 Am. Dec. 277, 278; *School Dist. v. Danchy*, 25 Conn. 530, 68 Am. Dec. 371, 372, 374; *Dermott v. Jones* (Ingle v. Jones) 2 Wall. 1, 7, 8, 17 L. ed. 762, 764; *The Harriman*, 9 Wall. 161, 172, 173, 19

L. ed. 629, 633; *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 14, 15, 37 L. ed. 625, 629, 630, 13 Sup. Ct. Rep. 779; *Jones v. United States*, 96 U. S. 24, 29, 24 L. ed. 644, 646; *Jacksonville, M. P. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 528, 40 L. ed. 515, 524, 16 Sup. Ct. Rep. 379; *Northern P. R. Co. v. American Trading Co.* 195 U. S. 439, 466, 467, 49 L. ed. 269, 281, 25 Sup. Ct. Rep. 84; *Link Belt Engineering Co. v. United States (C. C.)* 142 Fed. 243, 247; *Meriweather v. Lowndes County*, 89 Ala. 362, 7 So. 198, 199; *Ferguson v. Omaha & S. W. R. Co.* 142 C. C. A. 145, 227 Fed. 513, 523; *Hoy v. Holt*, 91 Pa. 88, 91, 92, 36 Am. Rep. 659; *Adams v. Nichols*, 19 Pick. 275, 277, 278, 31 Am. Dec. 137; *Rowe v. Peabody*, 207 Mass. 226, 93 N. E. 604, 605, 606; *Beach v. Crain*, 2 N. Y. 86, 93, 49 Am. Dec. 369; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

But where it clearly appears, from the situation of the parties at the time they made their contract and from its terms, that they must have known that its performance would be impossible unless a person or persons, as in a contract of intermarriage, or in a contract for the personal service of an artist, such as a singer, should be living at the time for the performance of the contract, and there is no express or implied warranty of his life, a condition is implied that the contractor shall be absolved from liability if performance becomes impossible without his fault, by the death of the indispensable person. A like condition is implied in a contract for the delivery of a specific animal under like condition.

There are authorities to the effect that, where it clearly appears from the situation of the parties and their contract, that they must have known when they made it that its performance would be impossible unless a thing, or a condition of things, then in existence, should exist at the time of performance, or unless an indispensable thing or condition of things not then in existence should come into existence before and remain in existence at the time of performance, there also, in the absence of an express or implied warranty of the existence of the indispensable thing or condition at the time of performance, there arises an implied condition of the contract that, if that thing or condition is destroyed or prevented from coming into existence before the time for the performance of the contract, without fault of the obligor, either by the act of God, or by an unavoidable accident, the obligor shall be absolved from liability for his failure to perform. 9 Cyc. 631, 632, 633; *Taylor v. Caldwell*, 3 Best & S. 826, 833, 839, 122 Eng. Reprint, 309, 32 L. J. Q. B. L.R.A.1917A.

N. S. 164, 8 L. T. N. S. 356, 11 Week. Rep. 726, 6 Eng. Rul. Cas. 603; *Howell v. Coupland*, 1 Q. B. Div. 258, 46 L. J. Q. B. N. S. 147, 33 L. T. N. S. 832, 24 Week. Rep. 470; *Baily v. De Crespigny*, L. R. 4 Q. B. 180, 185, 38 L. J. Q. B. N. S. 98, 19 L. T. N. S. 681, 17 Week. Rep. 494, 15 Eng. Rul. Cas. 799; *Dexter v. Norton*, 47 N. Y. 62, 64, 65, 7 Am. Rep. 415; *Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co.* 134 Cal. 21, 53 L.R.A. 681, 86 Am. St. Rep. 231, 66 Pac. 28, 29, 30; *Stewart v. Stone*, 127 N. Y. 500, 14 L.R.A. 215, 28 N. E. 595, 596; *Wells v. Sutphin*, 64 Kan. 873, 68 Pac. 648; *Krause v. Crothersville*, 162 Ind. 278, 65 L.R.A. 111, 102 Am. St. Rep. 203, 70 N. E. 264, 267, 1 Ann. Cas. 460. But no decision of the Supreme Court or of any Federal court to this effect has been cited or discovered which goes so far, and the rule adopted by the Supreme Court, which must prevail here, is otherwise.

It is that, although general words, which cannot be reasonably supposed to have been used with reference to the possibility of an event, may not be held to bind one, yet, where one, at the time of making his contract, must have known or could have reasonably anticipated, and in his contract could have guarded against, the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so or pay the damages for his failure.

Thus, in *Jones v. United States*, 96 U. S. 24, 29, 24 L. ed. 644, 646, a contractor agreed to deliver a certain kind and quantity of cloth to the United States in specified instalments at fixed times. After he had delivered some of the instalments, the factory which was making the cloth burned without his fault, and this made it impossible for him to deliver the remainder of the cloth at the specified times, although he, at great expense, caused it to be manufactured and tendered it to the government later. The government refused to accept it, because it came too late. The market price of cloth had fallen, and the contractor sued the United States for the damages he sustained, on the ground that he was absolved from performance at the times specified by the act of God,—the unforeseen fire. The Supreme Court denied a recovery and said: "Impossible conditions cannot be performed, and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it

was not foreseen by the party, nor was within his control. *Chitty, Contr.* 663; *Jervis v. Tompkinson*, 1 Hurlst. & N. 208, 156 Eng. Reprint, 1173, 26 L. J. Exch. N. S. 41, 4 Week. Rep. 683."

In *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, at page 14, 37 L. ed. 625, 629, 13 Sup. Ct. Rep. 784, the Supreme Court states the rule on this subject in this way: "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to, the possibility of the particular contingency which afterwards happens."

In *Northern P. R. Co. v. American Trading Co.* 195 U. S. 439, 466, 467, 49 L. ed. 269, 281, 25 Sup. Ct. Rep. 84, the railway company, during the Chinese-Japanese War, made a contract with a shipper to carry from Newark, New Jersey, to Japan, by a specific steamer leaving Tacoma at a certain day, 2,000 tons of lead, which was contraband of war. Time was of the essence of this contract. The company carried the lead to Tacoma and put it in the steamship in time, but the subcollector of the port unlawfully refused to give the ship its clearance on the ground that the lead was contraband, and the master unloaded it, took his clearance, and sailed. The result was that the lead did not reach Japan until six weeks after it would have arrived there, if it had gone on the specified ship. When it arrived, the war had ceased and the price of lead had fallen. The shipper sued for damages, and the defense was that the railway company was absolved from liability by the unforeseen impossibility of performance caused without its fault by the act of the subcollector. The Supreme Court construed the contract to have been an unqualified undertaking to ship the lead by the steamship named, and held the railway company liable for the damages which resulted from the unauthorized and unforeseen act of the subcollector. It said: "This contract, in view of all the facts, we think was made in contemplation of trouble arising from the character of the lead as contraband of war. . . . Under these cir-

cumstances it ought not to be held that the mistaken action of the deputy collector in refusing to give the clearance should operate as an excuse for the nonperformance of the contract, which was not thereby rendered illegal. It cannot be affirmed that such possible refusal was not within the contemplation of the contracting parties when the contract was made. Many causes, it was known, might operate to obstruct the transportation of articles contraband of war. This particular form of impediment may not have been actually within the minds of the parties to the contract; but there was, as the agreed facts show, present to their minds the fact that there might be trouble in procuring the transportation of the lead because of its character as contraband of war, and in the light of those facts the contract was made, and in substance ratified after it was made. The railroad receivers took the risk of this, as of other obstructions, in making the contract, and they ought to be held to it."

In the light of these principles of law and authorities, the decisive question in this case becomes: Was the contract of these parties an absolute agreement by Erickson to furnish plenty of good grass to the cattle during the grazing season of 1913, or a contract to furnish good grass unless, by an unprecedented drought, it should become impossible for him to do so? Basic rules for the construction of contracts are: The purpose of every agreement is to record the intention of the parties when their minds met, and the object of all construction is to ascertain and enforce that intention. The court should, so far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then, from a consideration of the writing itself, of its purpose, and of the circumstances which condition its making, endeavor to ascertain what they intended to agree to do,—upon what sense and meaning of the terms they used their minds actually met. *Accumulator Co. v. Dubuque Street R. Co.* 12 C. C. A. 37, 41, 42, 27 U. S. App. 364, 64 Fed. 70, 74; *Salt Lake City v. Smith*, 43 C. C. A. 637, 643, 104 Fed. 457, 462; *Fitzgerald v. First Nat. Bank*, 52 C. C. A. 276, 284, 114 Fed. 474, 482; *American Bonding Co. v. Pueblo Invest. Co.* 9 L.R.A. (N.S.) 557, 80 C. C. A. 97, 107, 150 Fed. 17, 27, 10 Ann. Cas. 357. Where, in the application of a contract to its subject matter, an ambiguity or uncertainty arises, which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made, and of statements made in the negotiations which preceded it, may be admitted to resolve the ambiguity and to prove the real

intention of the parties. *Kilby Mfg. Co. v. Hinchman-Renton Fire Proofing Co.* 66 C. C. A. 67, 71, 132 Fed. 957, 961; *Stoops v. Smith*, 100 Mass. 63, 66, 67, 1 Am. Rep. 85, 97 Am. Dec. 76; *Foster v. Woods*, 16 Mass. 116, 117; *Sargent v. Adams*, 3 Gray, 72, 77, 63 Am. Dec. 718; *Mumford v. Gething*, 7 C. B. N. S. 305, 321, 141 Eng. Reprint, 834, 29 L. J. C. P. N. S. 105, 6 Jur. N. S. 428, 1 L. T. N. S. 64, 8 Week. Rep. 187; *First Nat. Bank v. North*, 2 S. D. 480, 486, 51 N. W. 96; *Herring v. Boston Iron Co.* 1 Gray, 134, 138; *Hinnemann v. Rosenback*, 39 N. Y. 98, 101, 102; *Proctor v. Hartigan*, 139 Mas. 554, 556, 2 N. E. 99; *Thorington v. Smith*, 8 Wall. 1, 13, 19 L. ed. 361, 364; *Loneragan v. Buford*, 148 U. S. 581, 588, 37 L. ed. 569, 572, 13 Sup. Ct. Rep. 684.

Let us apply these rules to the interpretation of this contract. On its face it is free from ambiguity. By it Erickson agrees, without exception or qualification, to furnish plenty of good grass for the cattle during the grazing season of 1913. His counsel argue that his real agreement was that he would furnish plenty of good grass during the season unless an unprecedented drought should make it impossible for him so to do, and that in that case he should be absolved from liability to perform; and they appeal to the oral testimony to import this exception into the contract. That testimony disclosed these facts: The contract was made on April 16, 1913. Berg was a resident of St. Francis, Texas. He had never had any experience of Kansas grass. He sought pasturing for 1,000 cattle. He went from Texas to Kansas and applied to Erickson for this pasturing. Before the contract was made Erickson showed him the pastures into which he proposed to put the cattle and into which they were subsequently driven. Berg looked at the pastures and made no objection to them. Erickson told him he would guarantee the pastures. After this inspection and conversation Erickson made the contract to furnish plenty of good grass to the cattle during the grazing season of 1913. Droughts are not, and have not been for many years unusual in parts of Kansas. There had been many before the drought of 1913. It is common knowledge that droughts decrease the production of grass in varying amounts, according to their severity and the character of the land they affect. The drought of 1913 was the most severe ever known in the region where these pastures are. There was no rain from May until September, but it did not prevent the growth of all grass on the pastures. They produced sufficient to keep the cattle alive, and at the end of the season, when they

were taken out in November, they weighed as much as, or even more than, when they were placed in the pastures; but the cattle failed to make the gain in flesh and weight which they would have made if Erickson had furnished them plenty of good grass.

In view of these facts, the situation of these parties when this contract was made, the circumstances surrounding them, and the unqualified undertaking of Erickson, expressed in the agreement, converge with compelling power to force the mind to the conclusion that the minds of these contracting parties met in the intention that Erickson should, and that he did, guaranty plenty of good grass for these cattle in these pastures where he put them during the entire grazing season, without exempting or intending to exempt himself from liability in the case of any impossibility of performance that might result from unprecedented drought, fire, or other act of God or accident. It was common knowledge that droughts were not unusual in Kansas. It was common knowledge that they decreased the growth of grass. It was common knowledge that one could not tell by the examination of pastures in Kansas, of which he had no previous knowledge, in the spring of the year before the 13th of April, whether or not they would produce sufficient grass for 1,000 cattle throughout the coming summer. Berg knew nothing of their productive capacity; Erickson knew all about it. The question whether or not the pastures would produce plenty of grass for 1,000 head of cattle throughout the season, and whether or not the droughts that visited some parts of Kansas would be so severe as to prevent such production, could not have failed to be present in the minds of each of these parties when they made this contract. Those were the crucial questions before them, and the unprecedented drought which prevented the performance of the contract—"the event," in the words of the Supreme Court, "which causes the impossibility—might have been anticipated and guarded against in the contract." Erickson inserted no provision in the contract exempting himself from liability on the happening of that event, but, on the other hand, promised Berg that he would guarantee the pastures before the written contract was signed, and then made the unqualified undertaking therein to furnish plenty of good grass to the cattle throughout the grazing season. What is more natural or probable than that Erickson, who knew the climate, the pastures, and their productivity, induced Berg, who knew nothing upon this subject and could learn little by an inspection of the pastures in April, to agree to pay the \$7 a head for the pas-

turing of the cattle by making this absolute covenant that he would furnish plenty of good grass to the cattle throughout the season? The proof in this case has satisfied that it was the intention of the parties to this contract that Erickson should thereby make, and that he did make, an absolute covenant with Berg to furnish plenty of good grass for the cattle throughout the entire grazing season without exempting himself from liability in case of drought, fire, or other act of God or accident that might make his performance impossible; that he took the risk of such an event (195 U. S. 467, 49 L. ed. 281, 25 Sup. Ct. Rep. 84), and that he is not absolved from liability for the damages which Berg sustained by reason of Erickson's failure to perform his covenant, although that failure was caused by the unprecedented drought which made his performance impossible.

This conclusion makes it unnecessary to consider or decide the question, discussed in the arguments and the briefs, whether or not, if Erickson was absolved by the act of God from this liability on account of his failure to furnish plenty of grass in July, August, September, and October, he could recover compensation for furnishing it in May and June; for on the next trial he will be credited with the entire contract price of the pasturing, because the measure of Berg's damages is the difference between the value of his cattle as they would have been at the end of the grazing season, if Erickson had furnished plenty of good grass, less the contract price he would have been required to pay, and their value as they actually were at that time. Erickson will also be entitled to an allowance for those expenses he incurred and those serv-

ices he rendered caring for and feeding the cattle, which his contract to furnish plenty of good grass and his duty to prevent, as far as possible, damages on account of his failure so to do, did not require him to incur or render.

Counsel for Berg argue that this court should find these amounts from the evidence before it and render a judgment for the proper amount in his favor. It is not denied that, as the action at law and the suit in equity were tried together by the court without a jury, under a stipulation waiving the latter, this court may have the power as a court of equity so to do. But it is certain that it has the power to direct a new trial of the action at law, and that it ought to do so, because all the evidence upon the amount of Berg's damages appears from the record in hand to have been introduced on his behalf. The court announced its decision that Erickson was absolved from liability for Berg's damages by the drought while Berg was introducing his evidence, and the record fails to show that Erickson presented any evidence upon the question of the amount of the damages. The reason why he did not do so may have been, and probably was, that he was led to refrain from producing evidence upon that subject because the court had ruled that it was immaterial; and, if so, an assessment of Berg's damages on the evidence before the court at this time might be, and probably would be, inequitable.

The judgment in the action at law and the decree in the suit in equity must therefore be reversed, with costs against Erickson, and the case must be remanded to the court below, with directions to grant a new trial; and it is so ordered.

NEW YORK COURT OF APPEALS.

ELIZA HEINRICH, Exrx., etc., of Jacob Heinrich, Deceased, Resp.,
v.

FIRST NATIONAL BANK OF MIDDLE TOWN, NEW YORK, Appt.

(— N. Y. —, 113 N. E. 531.)

Bank — crediting check as money — loss in mail.

1. The loss in the mail of a check forwarded by a bank for collection after crediting it as money to the account of the depositor upon his unrestricted indorsement falls upon the bank unless it takes steps to charge him as indorser.

For other cases, see *Banks*, IV. b, 1, in *Dig.* 1-52 N. S.

Note. — As to loss of check after it had been credited to depositor's account, see annotation following this case, post, 658. L.R.A.1917A.

Same — lost paper — failure to collect — effect.

2. The right of a bank to charge against its depositor's account a dishonored check which it has credited thereto does not extend to checks lost in the mail when forwarded by the bank for collection after it has credited them as money to the depositor's account, and payment of which it has made no attempt to enforce.

For other cases, see *Banks*, IV. b, 1, in *Dig.* 1-52 N. S.

(July 11, 1916.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Orange County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover an alleged balance due

upon a deposit made by plaintiff's assignor in the defendant bank. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas Watts, Elbert N. Oakes, and John Bright, for appellant:

Plaintiff's assignor was a debtor of the defendant on June 6, 1912, to the extent of \$3,000, and the charging of that indebtedness against the interest account was right.

Kummel v. Germania Sav. Bank, 127 N. Y. 488, 13 L.R.A. 786, 28 N. E. 398; Central Trust Co. v. West India Improv. Co. 169 N. Y. 314, 62 N. E. 387; Marsh v. Oneida Central Bank, 34 Barb. 298; Tufts v. People's Bank & T. Co. 59 N. J. L. 380, 35 Atl. 792; Morse, Banks & Bkg. § 183; Re Franklin Bank, 1 Paige, 249, 19 Am. Dec. 413; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Meyers v. New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504; People v. St. Nicholas Bank, 44 App. Div. 313, 60 N. Y. Supp. 719; Delahunty v. Central Nat. Bank, 63 App. Div. 177, 71 N. Y. Supp. 416; Wilcox v. National Shoe & Leather Bank, 67 App. Div. 466, 73 N. Y. Supp. 900; Davison v. City Bank, 57 N. Y. 81; Thornton v. Wynn, 12 Wheat. 183, 187, 6 L. ed. 595, 596; Brooklyn Bank v. Waring, 2 Sandf. Ch. 1; Scott v. Meeker, 20 Hun, 161; People ex rel. Port Chester Sav. Bank v. Cromwell, 102 N. Y. 477, 7 N. E. 413; McIntosh v. Tyler, 47 Hun, 99; Turner v. Bank of Fox Lake, 4 Abb. App. Dec. 434; Indig v. National City Bank, 80 N. Y. 100.

Neither the crediting of the checks of Smith & Company to the account of plaintiff's assignor nor any of the bank's actions with respect thereto relieved him from liability upon his notes.

Allen v. Fourth Nat. Bank, 5 Jones & S. 137, affirmed in 59 N. Y. 12; Oddie v. National City Bank, 45 N. Y. 737, 6 Am. Rep. 160; Stein v. Empire Trust Co. 148 App. Div. 850, 133 N. Y. Supp. 517; Balbach v. Frelinghuysen, 15 Fed. 675; Drovers' Nat. Bank v. Anglo-American Packing & Provision Co. 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; First Nat. Bank v. Fourth Nat. Bank, 6 C. C. A. 183, 16 U. S. App. 1, 56 Fed. 967.

A depositor has no right of action for a deposit until demand has been made.

Wasserstrom v. Public Bank, 123 N. Y. Supp. 55; Newburger v. State Bank, 70 Misc. 46, 127 N. Y. Supp. 956.

Messrs. Abram F. Servin and Rosslyn M. Cox, for respondent:

The notes were paid, canceled, and extinguished as obligations in April, 1912, and the defendant thereafter had no right to charge them to the special account of plain- L.R.A.1917A.

tiff's assignor; his liability, if any, was solely as indorser of the checks of Smith & Company. This liability defendant has not pleaded; and had it done so, it would have been defeated by its own negligence.

Brightson v. H. B. Claflin Co. 180 N. Y. 76, 72 N. E. 920; Farmers' Loan & T. Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358; Jaffe v. Weld, 155 App. Div. 110, 139 N. Y. Supp. 1101; Lyons v. Union Exch. Nat. Bank, 150 App. Div. 493, 135 N. Y. Supp. 121; Shipsey v. Bowery Nat. Bank, 59 N. Y. 485; Jacks v. Darrin, 3 E. D. Smith, 548; Clinton Nat. Bank v. Stiger, 67 N. J. Eq. 522, 58 Atl. 1055; Barclay v. Lehigh Coal & Nav. Co. 33 Pa. Super. Ct. 214; First Nat. Bank v. McConnell, 103 Minn. 340, 14 L.R.A. (N.S.) 616, 123 Am. St. Rep. 336, 114 N. W. 1129, 14 Ann. Cas. 396.

The defendant in any event would have no right to make a charge of this nature against the account in the special interest department.

Smith v. Sanborn State Bank, 147 Iowa, 640, 30 L.R.A. (N.S.) 517, 140 Am. St. Rep. 336, 126 N. W. 779; Duncan v. Brennan, 83 N. Y. 487; Wyckoff v. Anthony, 90 N. Y. 442; Straus v. Tradesmen's Nat. Bank, 122 N. Y. 379, 25 N. E. 372; Meyers v. New York County Nat. Bank, 36 App. Div. 482, 55 N. Y. Supp. 504; People v. St. Nicholas Bank, 44 App. Div. 313, 60 N. Y. Supp. 719; Wilcox v. National Shoe & Leather Bank, 67 App. Div. 466, 73 N. Y. Supp. 900; Delahunty v. Central Nat. Bank, 63 App. Div. 177, 71 N. Y. Supp. 416.

The action was not prematurely brought.

Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Wyckoff v. Anthony, 90 N. Y. 442.

Cardozo, J., delivered the opinion of the court:

In April, 1912, the plaintiff's assignor, Charles Hagen, was a customer of the defendant, the First National Bank of Middletown, New York. He had two accounts, one a general account, in which the deposits were subject to payment by check, and the other an account in the "Interest Department," in which deposits drew interest, and were subject to rules similar to those that are common in savings banks. On April 21 and 22, 1912, two checks, one for \$1,001 and the other for \$2,002, in all \$3,003, drawn by Gouverneur E. Smith & Company to the order of Charles Hagen, and indorsed without restriction by the payee, were received by the defendant and credited to the customer's general account. Promissory notes for like amounts had been drawn by Hagen and made payable at defendant's bank. On April 23d the notes were presented for payment. The defend-

ant did not own them. It received them from other banks for collection. Through the credit of the two checks the account was provided with the requisite funds, and the defendant applied the deposit to the discharge of the notes. It marked the notes paid, canceled them with a perforating stamp, and debited the depositor on its books with the amount of the payment. This it had the right to do. A depositor who makes a note payable at a bank by implication authorizes the bank to pay the note and charge it to his account. *Neg. Inst. Law*, § 147; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 88, 7 Am. Rep. 314; *Baldwin's Bank v. Smith*, 215 N. Y. 76, 80, L.R.A.—, —, 109 N. E. 138. But the checks which had supplied the requisite credits had not yet been collected. The defendant mailed them on April 23, 1912, to its correspondent, the Market Street National Bank of Philadelphia, Pennsylvania, for presentation to a bank in Riverhead, Long Island, on which they were drawn. The checks, though mailed, were not received. The envelop containing them was mislaid through the negligence of employees of the postoffice. About ten months later, in February, 1913, it was found behind a radiator in the postoffice in Philadelphia.

The loss of the checks became known to the defendant on May 3, 1912. It waited till May 8th, and then gave notice to its depositor. It requested him to procure duplicate checks from *Gouverneur E. Smith & Company*, the makers, and inclosed a letter to be forwarded to the makers for that purpose. On May 15 *Gouverneur E. Smith & Company* wrote that they had stopped payment of the checks, and that, on learning from their bank that the checks had not come in, they would sign and forward duplicates. They did not keep their promise. The defendant made no attempt to enforce payment. Its officers told *Hagen* two or three times that he would have to get duplicate checks, but beyond that they did nothing. They say they also told him, and in effect with his assent, that, in default of duplicates, they would charge the checks back to his account, but this he denies. Since a motion for the direction of a verdict was made by both sides, we must accept as true the evidence most favorable to the plaintiff. He promised to use his efforts to save the defendant from loss. He did not promise, if the efforts failed, to bear the loss himself. *Aebi v. Bank of Evansville*, 124 Wis. 73, 79, 68 L.R.A. 964, 100 Am. St. Rep. 925, 102 N. W. 329.

On June 5, 1912, the makers of the checks became bankrupt. Up to that time their bank account had been sufficient to enable

the checks, if presented, to be paid. The defendant, on learning of the bankruptcy, charged the checks against the interest account of its depositor. It selected the interest account, rather than the general account, because the latter had been reduced by drafts. *Hagen*, when notified of the charge, made prompt protest that it was unauthorized. The question now is whether the bank or the depositor is to bear the loss.

We think the loss has been rightly cast upon the bank. The checks were credited as money, and were indorsed by the payee without restriction. The defendant did not hold them as a mere agent for collection. It held them as owner. *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530; *Burton v. United States*, 196 U. S. 283, 302, 304, 49 L. ed. 482, 488, 489, 25 Sup. Ct. Rep. 243; *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 387. In transmitting them for collection, it was acting in its own behalf, and not in behalf of its depositor. It adopted the postoffice as one of the agencies for transmission, and through the negligence of the postoffice, the checks were lost. The consequences of that negligence are not to be visited on the depositor any more than if the loss had occurred through the negligence of a messenger. *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L.R.A. 241, 27 N. E. 849; *Moore v. Riverside Bank*, 25 Misc. 720, 55 N. Y. Supp. 615; *Aebi v. Bank of Evansville*, supra. The case last cited discloses a situation identical in all essentials with the case at hand.

The defendant argues that there is evidence of a course of dealing by which the checks, if presented and dishonored, could, after due notice to the indorser of nonpayment, have been charged back to his account. That would have been the bank's right irrespective of any custom. The dishonor of the check after presentation to the makers would have permitted the defendant, upon due notice, to charge its depositor as an indorser. *Aebi v. Bank of Evansville*, supra; *Burton v. United States*, 196 U. S. at page 304, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 52 N. E. 387. But neither the custom nor the rule of law is applicable to the situation now before us. The checks were not dishonored. They remained good for six weeks after they were credited to the plaintiff. There was no attempt to collect them as lost paper. *Neg. Inst. Law*, § 268 (*Consol. Laws*, chap. 38); *Code Civ. Proc.* § 1917; *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485, 491; *Aebi v. Bank of Evansville*, 124 Wis. at page 78, 68 L.R.A. 964,

109 Am. St. Rep. 925, 102 N. W. 329. There was neither demand upon the makers for payment nor notice to the indorser of non-payment. It is not because the checks were worthless that the defendant has suffered loss. The fact is that they were not worthless. If presented with reasonable diligence, they would have been paid. The defendant has suffered loss because checks which it was collecting in its own behalf, as owner,

and not as agent, miscarried in the mails, and because, after notice of the mishap, it slept upon its rights.

The judgment should be affirmed with costs.

Willard Bartlett, Ch. J., and Chase, Collin, Cuddeback, Hogan, and Seabury, JJ., concur.

Annotation—Loss of check after it had been credited to depositor's account.

In general.

The question whether title to a check indorsed in blank and deposited by the payee or holder passes to the bank or remains in the depositor, the bank being his agent for collection, is not within the scope of this note, but is covered by the note to *Fayette Nat. Bank v. Summers*, 7 L.R.A.(N.S.) 694, supplemented by the note to *Plumas County Bank v. Bank of Rideout*, 47 L.R.A.(N.S.) 552. The court in *HEINRICH v. FIRST NAT. BANK*, ante, 655, makes a strong point of the fact that title had passed to the bank. The point is important in determining the form of action when the check has been charged back against the depositor's account, as well as in deciding the theory upon which the case should be tried.

Where title had passed.

If title has passed to the bank and the amount has been charged back, the depositor should, of course, sue upon the deposit; and it becomes necessary for the bank, if it wishes to avoid liability, to show that the depositor was liable as an indorser of the unpaid check. *HEINRICH v. FIRST NAT. BANK*; *Aebi v. Bank of Evansville* (1905) 124 Wis. 73, 68 L.R.A. 964, 109 Am. St. Rep. 925, 102 N. W. 329. In both cases the courts seem to assume that mere loss of the check before presentation would not, if the bank took prompt action, release the indorser; but in each there was unjustifiable delay in giving notice of the loss, which delay resulted in injury to the indorser; and this, it would seem, is what released him. Just what action should be taken in order to avoid the release of the indorser is not entirely clear. In the *Aebi* Case the court said: "Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least, for the purposes of immediate presentment, defendant had the opportunity and owed the duty to at once make substituted presentment and demand by means of a L.R.A.1917A.

copy or sufficient description of the check, and in case of nonpayment to give notice to the indorser. 1 *Parsons, Bills & Notes*, 368, 448, 530; 2 *Parsons, Bills & Notes*, 260, 261; 2 *Edwards, Bills & Notes*, §§ 672, 697; *Smith v. Rockwell* (1842) 2 Hill (N. Y.) 482; *Hinsdale v. Miles* (1824) 5 Conn. 331; *Neg. Inst. Law*, § 1681-17." The effect of loss of check upon right of holder to recover against maker without presentment is discussed in note to *First Nat. Bank v. McConnell*, 14 L.R.A.(N.S.) 616.

Where title had not passed.

When it is admitted or held that title to the check did not pass to the bank when the deposit was made, the bank being merely the collecting agent of the holder, the action should be for damages for the injury caused by the negligence of the bank in the performance or nonperformance of its duties. *German Nat. Bank v. Burns* (1889) 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714; *Spooner v. Bank of Donaldsonville* (1915) 144 Ga. 745, 87 S. E. 1062; *American Nat. Bank v. Savannah Trust Co.* (1916) — N. O. —, 90 S. E. 302. But from these cases it would seem that while the form of the action is important, bringing the action in the wrong form would probably not be fatal. In the *Colorado* case, the cause of action was stated in both ways; i. e., alleging an unconditional credit for the check as a deposit, and that the check had been deposited for collection, with an allegation of negligence. The court held that the check had been received for collection, and dismissed the count alleging an unconditional credit, but proceeded upon the other count.

In the *Georgia* case the action was brought upon the theory that title to the check passed, and the court held that the check had been left for collection, conceded, for the sake of the argument only, that the action could have been sustained on the other theory if the evi-

dence had been sufficient, but dismissed the action on the ground that plaintiff had failed to prove injury from the negligent acts of defendant. And in the North Carolina case the court apparently was willing to sustain an action for a deposit on proof of negligence of defendant, causing injury to the plaintiff.

A bank may lose the check in a negligent manner; but more frequently the negligence that creates the liability consists in failure to discover the loss and report it to the owner of the check. The question whether actual damage must be proved as part of plaintiff's case in actions of this character is discussed in the note to *Jefferson County Sav. Bank v. Hendrix*, 1 L.R.A. (N.S.) 246.

In *Moldawer v. Trust Co. of N. A.* (1914) 57 Pa. Super. Ct. 66, second appeal in (1915) 59 Pa. Super. Ct. 156, it was held that a bank having a promissory note for collection and credit was guilty of negligence that would make it liable for whatever injury resulted when it neglected for months to notify the owner of the note that the same had been lost, although it was not guilty of negligence in losing the note. The note was lost by a reputable and competent notary to whom the bank had intrusted it for presentation to the makers and for protest on nonpayment. The notary immediately notified the bank of the loss, but it did not notify the owner until he inquired, on balancing his account, why the amount of the note had not been credited. But the measure of damages is not necessarily the face of the note, and plaintiff must prove the amount of his injury due to the bank's negligence. This annotation is not exhaustive of cases involving lost notes, but is confined to lost checks.

In *First Nat. Bank v. First Nat. Bank* (1878) 4 Dill. 290, Fed. Cas. No. 4,810, it was held that a bank was guilty of negligence in failing for more than a month to inquire about a sight draft which it had sent by mail to the drawee bank, from which it had received no acknowledgment, and in failing to inform of the loss of the draft the drawer thereof, who had made it payable to defendant bank from funds which the drawer had in the drawee bank, and had sent it to the defendant bank for collection and credit; and that the defendant bank was liable to the drawer for all the damages caused by such negligence. The drawee bank had failed some nineteen days after the draft was mailed, and the judgment was for the full amount of the draft, but permitted the defendant to claim from

the estate of the bankrupt drawee whatever dividends might be declared upon the fund represented by the draft.

In *Shipsey v. Bowery Nat. Bank* (1875) 59 N. Y. 485, reversing (1873) 4 Jones & S. 501, where the check indorsed by the payee was left by him with defendant bank for collection, credited to his account, and later charged back against it, the court, in holding defendant liable, said: "It employed the means of the public mails. It was not negligent in so doing. They are the customary agency in such matters, and are mostly efficient. Hence the loss of the check was not chargeable to the defendant, as the result of its careless act. But it was negligent in not sooner knowing that the check had been lost, and in not sooner notifying the plaintiff thereof. It is shown that if the letter mailed on the 2d of the month had reached Portchester on that day, as it should have done, an answer should have been mailed from there on the 3d, and should have reached the defendant on the 4th. It did not so turn out. The defendant was without information from the 4th until the 16th of the fate of this check, and it made no effort at specific information concerning it during that time. As a consequence it gave no notice to the plaintiff. It is not necessary to decide in this case whether, after the loss of the check was discovered, the defendant had not the further duty of making presentment of the check as a lost instrument, with a tender of indemnity, and thus demanding payment and giving notice of nonpayment. There was negligence, as we have shown. If the plaintiff sustained loss thereby, the defendant is liable to him, and must respond if not excused in some way known to the law. It cannot be questioned that the plaintiff sustained damage from the negligence of the defendant. Had he known, on the 4th of the month, of the loss of the check and of its nonpayment, he could have taken steps to avoid loss; and from the condition of the drawer of the check and the state of his bank account about that time, the presumption is that the plaintiff could have obtained payment of the check. If the defendant had learned of the loss on the 4th, and given the plaintiff at once an unconditional notice thereof, he would have been in a position to have averted loss; but it gave him no notice until the 18th, and then in such manner as to induce belief on his part, that it was still proceeding to perform its agreement to collect, and to warrant reliance by him thereon. It is

possible that, had the plaintiff been informed by the defendant on the 18th that he must protect himself, he might then have done it. The drawer of the check had with the drawee, until the morning of the 20th, funds enough to meet it. But the credit of the plaintiff with the defendant for the amount of the check was still kept up, and he allowed to draw down his account below that amount; and the intimation to him of a resort to his liability for the reimbursement of the defendant was that, in a reasonable time after the 18th, it should ask him for a duplicate of the check. The presumption is from the testimony that at no time after the 20th was the drawer of the check solvent. . . . The next position taken is, that though the lost check has never been presented, yet Merritt [the drawer] has never been discharged from his liability upon it, and that the plaintiff, at any time after notice of the loss, might have made presentment of it as a lost instrument, and, on refusal of payment, have had his action. As Merritt, very soon after the notice was given to the plaintiff, became insolvent, an action would have been bootless. Besides, as has been already noticed, the action of the defendant toward the plaintiff was such as to induce in him inaction and a reliance upon the measures for collection which it was taking, and a belief that it did not look to the plaintiff for reimbursement. It is true, the lack of presentment and protest did not discharge Merritt, he having withdrawn all his funds from the [payee bank] drawer. His liability still remained, and so far the plaintiff was not harmed. But the relations of the plaintiff and defendant were such as that more prompt notice and a more decided position was due from the latter if the former was to be charged with the duty of affirmative action. And the plaintiff was harmed by the want of it, if he is now to be held liable for the check."

In *American Nat. Bank v. Savannah Trust Co.* (1916) — N. C. —, 90 S. E. 303, it was held that the bank was negligent in not discovering for a month that a draft which it had sent by mail had been lost, when the letter containing the draft should have reached the collecting bank in two days at most; also that it was negligent in failing to notify the owner that the draft had been lost; and that, upon proof of injury to plaintiff, caused by the negligence, there could be a recovery. The court said: "In any view of the evidence as now presented, we think plaintiff was negligent. It re-

ceived the draft November 23, 1912, and forwarded it by mail to the drawee, the Bank of Swansea, the same day for payment. Plaintiff never heard from the Swansea bank until December 24, 1912, when, in response to telegraphic inquiry, the latter replied, in substance, that plaintiff's letter and draft was never received. There is no evidence before us that plaintiff made inquiry of the Swansea bank, after mailing the draft, until December 24, 1912. There is no evidence that plaintiff notified the defendant of the loss of the draft in the mails, and that it had not been paid, until over a month after plaintiff had received it and credited defendant with it. We think, in any view of the evidence, plaintiff was guilty of negligence in not notifying the defendant of the loss of the draft as soon as it had reason to believe it was lost. The evidence is that a letter mailed at Wilmington, North Carolina, in the morning, should reach Swansea, South Carolina, the following day. Not hearing from the Swansea bank, plaintiff should have made inquiry of it at once, and in due time have notified the defendant, in order that the latter or its customer, the payee, might take immediate steps to protect themselves. Not to do so for one month after receiving the draft was negligence."

But it has been held that a bank is not negligent, so as to be liable for the amount of a note, in sending the note for collection by mail to the address (contained in the body of the note) of the bank at which it was payable, the address being incorrect and the note being lost in the mails, unless the proper address or some instruction was furnished to the bank by the owners of the note. *Chapman v. Union Bank* (1864) 32 How. Pr. (N. Y.) 95. The annotation does not deal generally with cases of lost notes.

And in *Spooner v. Bank of Donaldsonville* (1915) 144 Ga. 745, 67 S. E. 1062, where it was held that the bank held the check for collection and was perhaps negligent in notifying the plaintiff of the loss of the check, the plaintiff failed to recover for the reason that he did not prove that he had suffered any injury that had been caused by this negligence. On the necessity of proving injury, see note to *Jefferson County Sav. Bank v. Hendrix*, 1 L.R.A. (N.S.) 246.

In *German Nat. Bank v. Burns* (1889) 12 Colo. 539, 13 Am. St. Rep. 247, 21 Pac. 714, the negligence consisted in sending the certificate of deposit which the defendant bank held for collection

directly to the bank that had issued it; and the decision turned upon the question of fact as to whether that bank had received the certificate while it was a going concern, since the determination of this fact would be decisive of the question whether or not the defendant's negligence caused the injury. The certificate had been mailed, and the bank denied that it had been received at all;

hence there is an implication that defendant would not have been liable if the certificate had really been lost in the mails, as it was not negligent in notifying plaintiff of the loss. But the implication is not a strong one. On the question of sending check directly to the drawee bank, see note to Winchester Mill. Co. v. Bank of Winchester, 18 L.R.A.(N.S.) 441. J. W. M.

OHIO SUPREME COURT.

FRANK CROWLEY, Plf. in Err.,

v.

STATE OF OHIO.

(— Ohio St. —, 113 N. E. 658.)

Criminal law — conviction of lesser offense — bar of greater.

1. An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense.

For other cases, see Criminal Law, II. g, 2, in Dig. 1-52 N. S.

Same — assault and rape.

2. Where a person has been in jeopardy on the charge of assault and battery upon an affidavit filed with the mayor of a city, the plea of such jeopardy is insufficient as a bar to a prosecution by indictment for assault with intent to commit rape, although the facts alleged in the indictment, if proven to be true, would have warranted a conviction on the charge made in the affidavit.

For other cases, see Criminal Law, II. g, 2, in Dig. 1-52 N. S.

(February 29, 1916.)

ERROR to the Court of Appeals for Fairfield County to review a judgment affirming a judgment of the Court of Common Pleas, convicting defendant of assault with intent to commit rape. Affirmed.

Statement by the Court:

Plaintiff in error, Frank Crowley, at the January, 1915, term of the court of common pleas of Fairfield county, was indicted for assault with intent to commit rape on one N. F., on the 4th day of November, 1914. To this indictment was filed a plea in bar, in which it was alleged, in sub-

stance, that the state of Ohio had therefore procured and had a judgment of conviction and sentence pronounced against plaintiff in error for the same act, the same assault, and the same offense mentioned in said indictment, in this, to wit: That on the 5th day of November, 1914, the state of Ohio prosecuted him on the complaint by the affidavit of the said N. F., she being the same person charged in the indictment to have been so assaulted by him, duly made and verified by her before the mayor of the city of Lancaster, for the offense of unlawfully committing an assault and battery upon her person and unlawfully striking and wounding her, on the said 4th day of November, 1914; that upon the filing of said affidavit plaintiff in error was arrested, taken before the mayor, arraigned on the charge made against him in said affidavit, pleaded guilty, and was sentenced to imprisonment in the Zanesville workhouse for the period of one hundred and twenty days, and that he pay the costs of prosecution, and that, in pursuance of said judgment, he was imprisoned and confined in the workhouse for the period of one hundred and thirty-one days, when he was lawfully discharged therefrom; that the offense charged and alleged against him in the indictment was the same act, the same assault, and the same offense so charged against him in said complaint. The state challenged the sufficiency of the plea in bar by a demurrer, which was sustained. The case was thereupon tried to a jury, resulting in a verdict of guilty as charged in the indictment. A motion for new trial was overruled, and the plaintiff in error was sentenced to imprisonment in the Ohio penitentiary for not less than one year nor more than fifteen years. Error was prosecuted to the court of appeals, and the judgment of the court of common pleas was affirmed. On leave first had, plaintiff in error filed a petition in error in this court, in which he asks for a reversal of the judgment of the court of appeals, affirming the judgment of the court of common pleas, and that he be discharged from further prosecution under said indictment.

Headnotes by the Court.

Note.—The plea of former jeopardy in cases of sexual offenses is treated in the note to State v. Rose, L.R.A.1915A, 256. L.R.A.1917A.

Messrs. M. A. Daugherty and M. A. Daugherty, Jr., for plaintiff in error.

Messrs. T. T. Courtright and James A. Tobin, for defendant in error:

If the mayor, who tried the accused on the first charge, had no jurisdiction to try him on the charge laid in the indictment, then the claim of twice in jeopardy must fail.

Diaz v. United States, 223 U. S. 442, 56 L. ed. 500, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138; *State v. Rose*, 89 Ohio St. 383, L.R.A.1915A, 256, 106 N. E. 50; *Morey v. Com.* 108 Mass. 433; *Gavieres v. United States*, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421; *Hilands v. Com.* 114 Pa. 372, 6 Atl. 267; *Freeland v. People*, 16 Ill. 380; *State v. Inness*, 53 Me. 536; *Koch v. State*, 53 Ohio St. 433, 41 N. E. 689; *Louie v. United States*, 134 C. C. A. 58, 218 Fed. 36; *Carter v. McClaughry*, 183 U. S. 365-394, 46 L. ed. 236-250, 22 Sup. Ct. Rep. 181; *State v. Ross*, 2 Ohio N. P. 368, 4 Ohio S. & C. P. Dec. 5; *Beamer v. State*, 10 Ohio C. C. N. S. 131, 29 Ohio C. C. 578; *Arrington v. Com.* 87 Va. 96, 10 L.R.A. 242, 12 S. E. 224; 1 Whart. Crim. Law, 11th ed. § 393; *Morgan v. Devine*, 237 U. S. 632, 50 L. ed. 1153, 35 Sup. Ct. Rep. 712; *State v. Littlefield*, 70 Me. 452, 35 Am. Rep. 335; 3 Greenl. Ev. § 36; 1 Chitty, Crim. Law, 452-456; *Bishop*, Crim. Law, 8th ed. § 1053.

Newman, J., delivered the opinion of the court:

Counsel base their right to a reversal of the judgment of the court of appeals upon the sole ground that there was error in holding that the demurrer to the plea in bar was properly sustained. There is therefore but one question for our consideration: Could plaintiff in error avail himself of the constitutional guaranty in § 10, art. 1, of the Constitution, providing: "No person shall be twice put in jeopardy for the same offense?"

It is conceded that the offense of assault and battery, to which he entered a plea of guilty before the mayor, is an offense included in the one charged in the indictment, and of which he was subsequently found guilty by the jury. Counsel, in support of their contention, invoke the rule announced in *Price v. State*, 19 Ohio 423, and followed and approved in *Mitchell v. State*, 42 Ohio St. 383: "On a plea of autrefois acquit, the true test to determine whether the accused has been put in jeopardy for the same offense is whether the facts alleged in the second indictment, if proven to be true, would have warranted a conviction on the first indictment."

This test has been applied in cases where the accused had been convicted or acquitted L.R.A.1917A.

of an offense lesser than and included in the offense subsequently charged, but in practically every case the court in which the conviction or acquittal was had was a court having jurisdiction to try the accused on a charge for the greater offense, had the same been made. We do not think this test should be applied here.

In this case, the mayor, concededly limited in his jurisdiction in criminal matters, was wholly without jurisdiction to try one charged with a felony, and consequently could not have tried plaintiff in error on the charge of assault with intent to commit rape. In *State v. Rose*, 89 Ohio St. 383, L.R.A.1915A, 256, 106 N. E. 50, this court held that the offense charged in the information was not the same offense, and did not include the offense charged in the indictment, and that therefore the defense of jeopardy must fail. While the case under consideration here differs from that case, in that the offense charged in the indictment here does include the offense charged in the affidavit filed with the mayor, yet the following language from the opinion in the *Rose Case* is pertinent here: "The probate court was wholly without jurisdiction to try the charge of rape. Hence the defendant could never have been in jeopardy on the charge of rape in the probate court; for to be in jeopardy there must not only be a sufficient legal charge, but a sufficient jurisdiction to try the charge."

So, in the instant case, before plaintiff in error could be in jeopardy on the charge of assault with intent to commit rape, it must have been in a court with jurisdiction to try the charge.

It is claimed by counsel that there is only one exception to the rule contended for by them, and that is in those cases of assault where the injuries result in death after conviction for the assault. The case of *Diaz v. United States*, 223 U. S. 442, 56 L. ed. 500, 32 Sup. Ct. Rep. 250, Ann. Cas. 1913C, 1138, is one of that kind, where it was held that a person convicted in the Philippine Islands of assault before the death of the injured person was not put in second jeopardy within the meaning of § 5 of the Philippine Act of 1902 by being placed on trial for homicide after the death of the person assaulted, as a consequence of the assault. But it is to be observed that in that case it is also laid down as a proposition of law in the syllabus that jeopardy cannot extend to an offense beyond the jurisdiction of the court in which the accused is tried, and Mr. Justice Van Devanter in the opinion, at page 449, of 223 U. S., uses this language, which is in point here: "Besides, under the Philippine law, the justice of the peace, although possessed of jurisdiction to try the

accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction."

We subscribe to this doctrine and adopt it as the law applicable to the present case, and hold that jeopardy incident to the proceedings before the mayor did not extend to

an offense beyond his jurisdiction. Plaintiff in error, therefore, when he was indicted for assault with intent to commit rape, could not successfully make the claim that he had been in jeopardy for that offense.

Judgment affirmed.

Wanamaker, Jones, and Matthias, JJ., concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

COAL & COKE RAILWAY COMPANY

v.

BUCKHANNON RIVER COAL & COKE COMPANY, Plff. in Err.

(— W. Va. —, 87 S. E. 376.)

Carrier — consignor's liability for freight.

1. A consignor who signs a bill of lading on his own account, and not as agent for the consignee, is liable to the carrier for the freight, although title to the goods passed to the consignee on delivery to the carrier. *For other cases, see Carriers, III. c, in Dig. 1-52 N. S.*

Same — relief by contract.

2. Neither the words, "Freight collect from consignee," written on the face of a bill of lading, nor a printed condition on the back thereof, stating, "The owner or consignee shall pay the freight," are alone sufficient to relieve the consignor from liability. Such provisions are for the benefit of the carrier, and do not constitute a special contract with the consignor. *For other cases, see Carriers, III. c, in Dig. 1-52 N. S.*

Same — delivery without payment — effect.

3. The carrier does not, by waiving its lien and delivering the goods to the consignee before payment of freight, release the consignor from liability. In the absence of a special contract, both consignor and consignee, who has accepted the goods, are liable to the carrier.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

Same — reconsignment of goods.

4. After a sale and delivery to the carrier by the consignor, the owner may reconsign the goods without releasing the consignor, provided his liability is not thereby increased.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

Headnotes by WILLIAMS, J.

Note. — As to liability of consignor for freight, see annotation following this case, post, 665.
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Same — bond of consignee.

5. The consignee's being under bond to the terminal carrier to pay the freight does not affect the consignor's liability on his contract with the initial carrier for the joint freight charges.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

(December 7, 1915.)

ERROR to the Circuit Court for Upshur County to review a judgment in plaintiff's favor in an action brought to hold defendant liable for the freight on certain carloads of coal sold by it and shipped over plaintiff's road. Affirmed.

The facts are stated in the opinion.

Mr. J. M. N. Downes for plaintiff in error.

Messrs. Young & McWhorter, for defendant in error:

The carrier may collect of either the shipper or consignee, and the insertion in the bill of lading of the words, "Collect freight from J. K. Dimmick & Company," did not relieve the shipper of his primary liability to pay the freight.

Hutchinson, Carr. § 810; 4 Elliott, Railroads, § 1559; 6 Cyc. 500, § 5; Grant v. Wood, 21 N. J. L. 292, 47 Am. Dec. 162; Wooster v. Tarr, 8 Allen, 270, 85 Am. Dec. 707; Hayward v. Middleton, 3 M'Cord, L. 121, 15 Am. Dec. 615; Union Freight R. Co. v. Winkley, 159 Mass. 133, 38 Am. St. Rep. 398, 34 N. E. 91; Collins v. Union Transp. Co. 10 Watts, 384; Layng v. Stewart, 1 Watts & S. 222.

The so-called "diversion," or direction for the change of the ultimate consignee, of three of the cars in question, did not affect the shipper's liability.

Lewis v. Galena & C. U. R. Co. 40 Ill. 281; Strahorn v. Union Stock Yard & Transit Co. 43 Ill. 424, 92 Am. Dec. 142.

Williams, J., delivered the opinion of the court:

This writ of error is to a judgment recovered against the Buckhannon River Coal & Coke Company by the Coal & Coke Railway Company in an action of assumpsit for the freight on ten carloads of coal. De-

fendant is a corporation engaged in mining coal and manufacturing coke. R. J. Humphreys, its general manager, sold the ten carloads of coal to Hite & Rafetto, of Fairmont, West Virginia, brokers, and at their request billed it to J. K. Dimmick & Company, Curtis Bay Piers, Maryland. The bills of lading contained the following written words, "Freight collect from J. K. Dimmick & Company," and were signed by defendant in the following manner: "B. R. C. & C. Co., per R. J. H.," and by P. A. Darnell as agent for the railroad company.

Defendant insists that § 8 of the printed conditions on the back of the bill of lading provides for payment of freight by the consignee, and thereby relieves it from liability therefor. That section is as follows: "The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Counsel contends that the words "owner" and "consignee" are synonymous terms and refer to the consignee, who is generally also the owner. We do not think it necessary to construe those terms, for, if it be granted that the construction contended for is correct, it was not the purpose of that section to relieve the consignor from liability on his contract. The bill of lading, together with the tariff schedule approved by the Interstate Commerce Commission, constitutes the contract, which was executed by defendant on its own account. It does not purport to be made by defendant as agent for the consignee. That section does not constitute the bill of lading a special contract relieving the shipper who signed it from liability for the freight charges. It was inserted for the carrier's benefit and is intended as notice to shippers of the carrier's legal rights. Regardless of that clause, the consignee, if owner, is bound by accepting the goods to do all that clause requires him to do. But the carrier's right to collect from the consignee does not imply a release of the consignor, in the absence of a special contract exonerating him. The carrier may collect from either. Nor did the carrier's waiver of its lien by delivery before payment of the freight release the consignor, there being no special contract. *Wooster v. Tarr*, 8 Allen, 270, 85 Am. Dec. 707; 2 Hutchinson, Carr. § 810. Both consignor and consignee were bound to plaintiff for the freight, the former on its express contract, and the latter on its promise implied by its ownership and acceptance of the coal.

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It is next contended that the words, "Freight collect from J. K. Dimmick & Co.," written in the bills of lading, released defendant from payment of the freight and bound plaintiff to collect it from the consignee. We do not so understand the law. The authorities uniformly hold that such words inserted in a bill of lading are for the benefit of the carrier, and not for the relief of the shipper or consignor. *Collins v. Union Transp. Co.* 10 Watts, 384; *Layng v. Stewart*, 1 Watts & S. 222. The mere statement, "Collect freight from consignee," in a bill of lading signed by the consignor, is not alone sufficient to overcome the presumption that the consignor is bound to pay the freight. *Wooster v. Tarr*, supra. Appropos to the question, see also *Union Freight R. Co. v. Winkley*, 159 Mass. 133, 38 Am. St. Rep. 398, 34 N. E. 91: "Where the consignor of goods on his own account contracts with a common carrier for their transportation, such consignor is prima facie liable to pay the charges of transportation, and the mere fact that the charges are left unpaid by the consignor, and are to be collected from the consignee at destination, does not discharge the consignor from liability to the carrier." *Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575. To the same effect are the following decisions: *Grant v. Wood*, 21 N. J. L. 292, 47 Am. Dec. 162; *Portland Flouring Mills Co. v. British & F. M. Ins. Co.* 65 C. C. A. 344, 130 Fed. 860; *Union Freight R. Co. v. Winkley*, supra; and 2 Hutchinson, Carr. § 810. Delivery of the coal to the consignee, although a waiver of its lien for the freight by the carrier, did not exempt the consignor from liability for the freight. Authorities above cited.

Counsel for defendant insist that in no event is it liable for the freight on three cars, because they were diverted while in transit. There was no means of weighing the coal at defendant's mine, and coal loaded there is weighed at Belington, and is then billed out from there. Hite & Rafetto first directed defendant to bill the three cars to them, and later reconsigned them to J. K. Dimmick & Company in order to make up the lot of ten carloads. Defendant sold the coal to Hite & Rafetto, and admits that title passed to them when the coal was delivered to the railroad company. Hence, being the owners, they had a right to reassign it, so long as they did not increase defendant's liability. *Lewis v. Galena & C. U. R. Co.* 40 Ill. 281; *Strahorn v. Union Stock Yard & Transit Co.* 43 Ill. 424, 92 Am. Dec. 142; *Ryan v. Great Northern R. Co.* 90 Minn. 12, 95 N. W. 758; and Hutchinson, Carr. § 660. They notified defendant by letter, on the 11th of January, that the reassignment

would be made, and it did not object; and the amount of freight was not thereby increased.

Plaintiff was the initial, and the Baltimore & Ohio Railroad Company the terminal, carrier; and the court refused to permit defendant to prove by witness John Y. Hite, of the firm of Hite & Rafetto, that it was the custom of the Baltimore & Ohio Railroad Company to collect the freight from the consignee, and this is assigned as error. Granting that such had been the custom of the Baltimore & Ohio Railroad Company, its failure to observe it in this instance could not affect defendant's liability on its contract with the initial carrier; and, for the same reason, its liability was not affected by the fact that J. K. Dimmick & Company were under bond with security to the Baltimore & Ohio Railroad Company to pay the freight on all consignments delivered to them. That arrangement was for the convenience of the railroad company, and gave it additional security, but did not release the consignor. It was, therefore, not error to reject testimony relating to the alleged custom of the Baltimore & Ohio Railroad Company to deliver coal and col-

lect the freight from J. K. Dimmick & Company, nor concerning the fact that they were under bond to pay the freight. It is proven that they failed in business and did not pay it; that the Baltimore & Ohio Railroad Company exhausted its remedy on the bond, and still held an unpaid freight account against J. K. Dimmick & Company, amounting to more than \$7,000, including the freight bill now in suit. It is also proven that plaintiff, being under contract to do so, paid to the Baltimore & Ohio Railroad Company its proportion of the joint freight charges, and is now entitled to the whole thereof, and our conclusion is that it is entitled to recover it from the consignor.

The court gave four instructions asked for by plaintiff and refused to give seven instructions asked for by defendant, but we find no error in the court's rulings in respect thereto. Inasmuch as our conclusion is to affirm the judgment, it is not necessary to discuss them, they being in harmony with this opinion.

The judgment will be affirmed.

Lynch, J., absent.

Annotation—Liability of consignor for freight.

For liability of shipper for freight and demurrage upon refusal of consignee to accept goods, see the note to *Baltimore & O. R. Co. v. Luella Coal & Coke Co.* 52 L.R.A.(N.S.) 398.

For right of carrier to recover difference between rate charged shipper and proper rate, see the note to *Central R. Co. v. Mauser*, 49 L.R.A.(N.S.) 92.

For right of shipper where carrier negligently misquotes rate which has been filed or published as required by statute, see the note to *Schenberger v. Union P. R. Co.* 33 L.R.A.(N.S.) 391.

For effect of provisions of Interstate Commerce Act against rebates upon contracts prescribing rates less than those established in accordance with the act, see the notes to *Armour Packing Co. v. United States*, 14 L.R.A.(N.S.) 400, and *Atchison, T. & S. F. R. Co. v. Bell*, 38 L.R.A.(N.S.) 351.

Cases are excluded where the consignor expressly covenanted to pay the freight, whether by charter party or otherwise: also cases where the consignor and consignee were the same, and cases between successive carriers.

The consignor or shipper is ordinarily bound to the carrier for the hire or freight of the goods. *Story*, Bailm. § 589; *Domett v. Beckford* (1833) 5 Barn. & Ad. 521, 110 Eng. Reprint, 883, 2 Nev. L.R.A.1917A.

& M. 374, 3 L. J. K. B. N. S. 10; *Moore v. Wilson* (1787) 1 T. R. 659, 99 Eng. Reprint, 1306, 1 Revised Rep. 347; *Fox v. Nott* (1861) 6 Hurlst. & N. (Eng.) 630, 30 L. J. Exch. N. S. 259, 7 Jur. N. S. 663; *Great Western R. Co. v. Bagge* (1885) L. R. 15 Q. B. Div. (Eng.) 625, 54 L. J. Q. B. N. S. 599, 53 L. T. N. S. 225, 34 Week. Rep. 45; *Cincinnati, N. O. & T. P. R. Co. v. Vredenburg Saw Mill Co.* (1915) 13 Ala. App. 442, 69 So. 228; *Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co.* (1911) 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; *Holt v. Westcott* (1857) 43 Me. 445, 69 Am. Dec. 74; *Wooster v. Tarr* (1864) 8 Allen (Mass.) 270, 85 Am. Dec. 707; *Grant v. Wood* (1848) 21 N. J. L. 292, 47 Am. Dec. 162; *Gilson v. Madden* (1869) 1 Lans. (N. Y.) 172; *Spencer v. White* (1840) 23 N. C. (1 Ired. L.) 236; *Collins v. Union Transp. Co.* (1840) 10 Watts (Pa.) 384; *Layng v. Stewart* (1841) 1 Watts & S. (Pa.) 222; *Hayward v. Middleton* (1817) 1 Mill, Const. (S. C.) 186 (new trial to allow proof of usage (1819) 2 Nott & M'C. 9, 10 Am. Dec. 554) see also (1825) 3 M'Cord, L. 121; *COAL & COKE R. CO. v. BUCKHANNON RIVER COAL & COKE CO.* ante, 663. See also *Baltimore & O. R. Co. v. Luella Coal Co.* (1914) 74 W. Va. 289, 81 S. E. 1044; and cases in the note thereto in 52

L.R.A.(N.S.) 398; also discussion in note in 49 L.R.A.(N.S.) 96.

See also, as recognizing the rule, *Perkins v. Hill* (1846) 2 Woodb. & M. 158, Fed. Cas. No. 10,987; *Central of Georgia R. Co. v. Birmingham Sand & Brick Co.* (1913) 9 Ala. App. 419, 64 So. 202; *Finn v. Western R. Corp.* (1873) 112 Mass. 524, 17 Am. Rep. 128; *Hatch v. Tucker & Co.* (1880) 12 R. I. 501, 34 Am. Rep. 707; *Chicago, R. I. & G. R. Co. v. Floyd* (1913) — Tex. Civ. App. —, 161 S. W. 954.

In *Blanchard v. Page* (1857) 8 Gray (Mass.) 281, an action by consignors, not the owners, to recover of the shipowners for damages to the goods, Shaw, Ch. J., discussed at length the question of the shipper's liability for freight, and said: "It seems to be thus well established that a bill of lading is a written simple contract, between a shipper of goods and a shipowner, the latter to carry the goods and the former to pay the stipulated compensation for that service."

Where the shipper sued the carrier, alleging that the defendant undertook, etc., for a certain hire and reward, to be paid by the plaintiff, and it appeared that the consignee had agreed with the plaintiff to pay the carriage, it was held that there was no variance, as the consignor was by law liable for the freight. *Moore v. Wilson* (1787) 1 T. R. 659, 99 Eng. Reprint, 1306, 1 Revised Rep. 347.

By the common law a carrier has both a lien and an action against the consignor, and where an owner delivered goods consigned to his factor, and they were delivered to the factor without collecting the freight, it was held that the shipowner had an action against the consignor for the freight. *Hayward v. Middleton* (1817) 1 Mill, Const. (S. O.) 186. (It does not appear whether there was a bill of lading or not.) A new trial was granted (1819) 2 Nott & M'C. 9, 10 Am. Dec. 554, because of the refusal of the trial court to allow proof of a custom and usage of the river trade whereby the carrier undertook to look to the produce and the consignee for the freight. But after a new trial and verdict for the defendant, the court set aside the verdict on the ground that no such usage had been proved. (1825) 3 M'Cord, L. 121.

(It may be noted that it was held in *Pennsylvania R. Co. v. Reifel* (1915) 90 Misc. 696, 154 N. Y. Supp. 203, that where the bill of lading does not provide that the consignee is to pay the freight charges, it is error to admit evidence

that the carrier took the goods on that condition, as this would be contradicting the bill of lading; but it was also held there was no evidence of any such parol condition.)

It was held in *St. Louis Southwestern R. Co. v. Gramling* (1911) 97 Ark. 353, 133 S. W. 1129, that where the consignor is owner, he is liable for the freight.

Right to demand freight in advance.

Common carriers have the right to demand of the consignor their transportation charges in advance. *A. G. Russell Co. v. Miller* (1910) 98 Miss. 185, 53 So. 495.

"A carrier has the right to exact payment in advance for his services, and if the person who employs the carrier pays the carriage in advance, he cannot be required to pay it over again because another party, without his authority, performs the service." *Nordemeyer v. Loescher* (1857) 1 Hilt. (N. Y.) 499 (obiter).

In *Allen v. Cape Fear & Y. Valley R. Co.* (1888) 100 N. C. 397, 6 S. E. 105, the court seemed to recognize the right of a common carrier to demand freight in advance, and said: "The statute recognizes the right, for it compels the company to furnish transportation, not generally, but 'on due payment of the freight or fare legally authorized therefor.'"

Where the contract between the consignor and the consignee is that the consignee is to pay the freight, if the consignor nevertheless pays it, he is not a mere volunteer, but can recover it, for payment of the freight may be demanded by the carrier in advance. *Keeling v. Walter Connally & Co.* (1913) — Tex. Civ. App. —, 157 S. W. 232 (where it does not appear, at least, as to a part of the freight, that there was any demand for advance payment by the carrier).

In *Little Rock & M. R. Co. v. St. Louis Southwestern R. Co.* (1894) 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775, a case between connecting carriers, the court said: "Usually, no doubt, railroad companies find it to their interest, and most convenient, to collect charges from the consignee; but we cannot doubt their right to demand a reasonable compensation in advance for a proposed service, if they see fit to demand it." This is quoted in *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.* 21 L.R.A. (N.S.) 982, 94 C. C. A. 217, 168 Fed. 161, 16 Ann. Cas. 613.

Rule not dependent on consignor's ownership.

The rule does not depend upon the consignor's ownership of the goods. *Laying v. Stewart* (1841) 1 Watts & S. (Pa.) 222 (infra in this note); *Shaw, Ch. J., in Blanchard v. Page* (1857) 3 Gray (Mass.) 281, supra; *Wooster v. Tarr* (1864) 8 Allen (Mass.) 270, 85 Am. Dec. 707 (infra in this note); *Fox v. Nott* (1861) 6 Hurlst. & N. (Eng.) 630, 30 L. J. Exch. N. S. 259, 7 Jur. N. S. 663; *Dickenson v. Lano* (1860) 2 Post. & F. (Eng.) 188; *Lidgett v. Perrin* (1862) 2 Post. & F. (Eng.) 763.

Where the bill of lading issued in Liverpool recited the receipt from A, "agent," and the goods were to be delivered "unto order or to its assigns, he or they paying freight," it was held that A was liable for the freight, although he was but the agent of the owner of the shipment, and before the shipment the owner had borrowed of the shipowners, and agreed to indorse to them a bill of lading of the goods, wherein the freight should be payable in England, and A had assigned the bill of lading to the owner of the goods. It was claimed by the shipowners, the plaintiffs, that they did not know that A was the agent of the owner of the goods until they received the bill of lading, as the matter had been attended to by their agent in Liverpool, who had only a general authority as to agreements for freight. *Fox v. Nott* (1861) 6 Hurlst. & N. (Eng.) 630, 30 L. J. Exch. N. S. 259, 7 Jur. N. S. 663.

— judicial explanations of the rule.

Where the same concern was consignor and consignee the court said: "The rule is that the consignor is the party primarily liable for the payment of the freight, and this rule is enforced, independent of the question whether the consignor is the owner, and regardless of the question whether the payment of freight is secured by a lien on the cargo, because the consignor is the party for whom the service is performed." *Portland Flouring Mills Co. v. British & F. M. Ins. Co.* (1904) 65 C. C. A. 344, 130 Fed. 860.

Where the consignee refused to accept the goods, the court said: "The appellee was neither the owner nor the consignee of the shipment, but was the shipper or consignor; and while the bill of lading contained no express stipulation on the part of the consignor to pay the freight, there was an implied contract that it would, as the L.R.A. 1917A.

shipper, who had on its own account engaged the services of the plaintiff as a carrier, pay the legally established transportation charges if the consignee should refuse to accept the shipment and pay the lawful charges;" and judgment was reversed. *Cincinnati, N. O. & T. P. R. Co. v. Vredenburg Saw Mill Co.* (1915) 13 Ala. App. 442, 69 So. 228, where the court said, in response to the claim that the consignor, who had taken the bill of lading in his own name, was acting as the agent of the consignee: "Where, as here, the carrier receives the shipment from the consignor without knowledge or notice that he or it is acting as the agent of another, it will be held that the carrier received the shipment on the faith of an implied promise on the part of the consignor to pay the lawful freight charges in the event the consignee refuses to accept the shipment and pay the charges, and the consignor cannot escape liability therefor by subsequently informing the carrier, after the consignee has refused to accept the shipment, that he was not acting in his own behalf and on his own account, but was acting as the agent, or in behalf of another in making the shipment; in other words, the consignor cannot change or escape his liability as such after entering into the contract of shipment, and dealing with the carrier as the consignor, by notifying the carrier, after his shipment has been carried to its destination and rejected by the consignee, that he was acting merely as the agent of the true consignor, when that fact was not previously disclosed in the transaction."

In *Central R. Co. v. MacCartney* (1902) 68 N. J. L. 165, 52 Atl. 575, an action against the consignee, who had been charged less than the usual freight, the court said: "The mere existence of the relation of carrier and consignee is not enough to establish an obligation upon the latter to pay the transportation charges. Prima facie, the consignor of freight who contracts with the carrier for its shipment is liable to pay the charges of transportation. It is by him that the engagement is made with the carrier; it is for him that the service is performed. The question of his liability, however, is in each instance dependent upon the terms of the agreement actually made between him and the carrier. Whether the consignor is shipping for his own account or as agent of another; whether he is owner of the goods; whether by the agreement between him and the consignee the title to the goods

passes to the latter at the time of delivery to the carrier or upon delivery to the consignee; these and other like circumstances have been discussed in the adjudicated cases as evidential upon the question of consignor's liability to the carrier for the freight. In the present case the facts leave no room to doubt the consignor's original liability. . . . But acceptance by the consignee, although accompanied by an undertaking to pay the charges, does not discharge the consignor from liability to the carrier. The two contracts are held to be independent, and not inconsistent one with the other."

—carrier's knowledge of agency.

Where the carrier is aware at the time of shipment that the consignor is merely the agent of the consignee, who is the owner of the goods, the consignor is not liable for the freight. *Chicago, R. I. & G. R. Co. v. Floyd* (1913) — *Tex. Civ. App.* —, 161 S. W. 954 (where the court approved the general rule that the consignor in general is liable for the freight, whether he is the owner or not).

Where there was no bill of lading or receipt signed by the carrier and accepted by the shipper, but there was a waybill, and it did not appear that the name of the shipper was in it, and the freight charges were made in every instance to the consignee, and the bills for the freight were sent to him, it was considered that there was some evidence that the carrier understood that the consignee was to pay the freight, and that the carrier could not recover the freight of the shipper. *Union Freight R. Co. v. Winkley* (1893) 159 *Mass.* 133, 38 *Am. St. Rep.* 398, 34 *N. E.* 91, where the court said: "In this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be sent at his risk and on his account, he also may be held liable, as the real principal in the contract. . . . But whether the presumption be one way or the other, it is a matter of inference from the particular cir-

cumstances of the case, and the question which is always to be considered is the understanding of the parties."

Where an agent having cotton of his principal in his possession without any orders as to what to do with it sent it to New Orleans, taking a bill of lading showing that the shipment had been made by the owner, and making an arrangement that the cost of the freight should be allowed by the agent to the carrier, who was indebted to the agent, it was held that the carrier could not recover the freight of the owner. *Wayland v. Mosely* (1843) 5 *Ala.* 430, 39 *Am. Dec.* 335 (the agent also testified that he had thereafter purchased the cotton from the owner, and he held himself liable for the freight).

Effect of stipulation for delivery to consignee, "he paying freight," etc.

Statements in a bill of lading that the goods are to be delivered to the consignee, "he paying freight," or stipulations of a like character, are for the benefit of the carrier, and delivery in such case to the consignee without collection of the freight will not release the liability of the consignor for freight. *Domett v. Beckford* (1833) 5 *Barn. & Ad.* 521, 110 *Eng. Reprint*, 883, 2 *Nev. & M.* 374, 3 *L. J. K. B. N. S.* 10; *Great Western R. Co. v. Bagge* (1885) *L. R.* 15 *Q. B. Div. (Eng.)* 625, 54 *L. J. Q. B. N. S.* 599, 53 *L. T. N. S.* 225, 34 *Week. Rep.* 45; *Holt v. Westcott* (1857) 43 *Me.* 445, 69 *Am. Dec.* 74 (where there was a charter party, but its terms do not appear); *Wooster v. Tarr* (1864) 8 *Allen (Mass.)* 270, 85 *Am. Dec.* 707; *Grant v. Wood* (1848) 21 *N. J. L.* 292, 47 *Am. Dec.* 162; *Gilson v. Madden* (1869) 1 *Lans. (N. Y.)* 172; *Spencer v. White* (1840) 23 *N. O. (1 Ired. L.)* 236; *Collins v. Union Transp. Co.* (1840) 10 *Watts (Pa.)* 384; *Layng v. Stewart* (1841) 1 *Watts & S. (Pa.)* 222 (referring to the clerical error in the *Collins Case*); *COAL & COKE Co. v. BUCKHANNON RIVER COAL & COKE Co.* ante, 663. See also *New York cases infra*.

This was held—

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—where the defendant delivered an article to a railroad company for transportation, the contract containing after the clause "who pays carriage," the word "consignee," and the consignee, on receiving the article, refused to pay the freight on the ground that, as between the consignor and himself, it was the consignor's duty to pay, which seems to have been the fact, *Great Western R. Co. v. Bagge* (1885) L. R. 15 Q. B. Div. (Eng.) 625, 54 L. J. Q. B. N. S. 599, 53 L. T. N. S. 225, 34 Week. Rep. 45;

—where goods were delivered to the master of a ship by the defendant, "to be delivered to the consignee or to his assigns, he or they paying freight for the same," and the consignee, when settling for the freight, withheld a portion of the freight money and informed the shipmaster that he, the consignee, was merely the agent of the consignor, *Spencer v. White* (1840) 23 N. O. (1 Ired. L.) 236;

—where goods were to be delivered to the consignee "on presenting this receipt and payment of freight," although the consignor had paid the consignee for the freight. *Collins v. Union Transp. Co.* (1840) 10 Watts (Pa.) 384.

Where the owner of goods when shipped took a bill of lading providing that they would be delivered to the consignee paying the freight for the said goods, and the proceeds of the goods, when sold by the consignee, were insufficient to pay the freight, it was held that an action would lie by the owner of the ship against the shipper for the balance of the freight. *Grant v. Wood* (1848) 21 N. J. L. 292, 47 Am. Dec. 162.

Where an agent, contrary to the orders of his principal, delivered goods to a carrier, it not appearing that he was not the principal, with instructions to deliver them on payment of carriage, and the carrier delivered them without payment of the carriage, it was held that the carrier might recover the freight of the agent. *Layng v. Stewart* (1841) 1 Watts & S. (Pa.) 222, where the court said: "The cases everywhere show that the clause, 'he paying freight,' is introduced for the benefit of the carrier, not of the consignor; no case has shown that the master is to keep his ship and sailors at expense in a foreign port, or a

wagoner is bound to stay with his team, or hire a house in a distant town, until he tries a lawsuit. There may be cases in which he cannot recover against his consignor; but this is not one of them."

—New York cases.

That the New York cases are not to be taken as limiting the general rule appears from the decision in *Gilson v. Madden* (1869) 1 Lans. (N. Y.) 172, where the earlier cases are reviewed. In the *Gilson* case the bill of lading provided that the captain of a canal boat was to collect freight and charges, but he delivered to the consignee without collecting the freight, and the consignor was held liable for the freight, nothing appearing in the bill of lading to show that he was not the owner.

In *Barker v. Havens* (1819) 17 Johns. (N. Y.) 234, 8 Am. Dec. 393 (referred to in the *Gilson* Case), the shipper, who was the owner of the goods when shipped, was held liable to the carrier for the freight in a case where the bill of lading stated that the goods were to be delivered to the consignee, he paying the freight, as specified, but delivery was made without payment of the freight. *Spencer, J.*, in delivering the opinion of the court, said: "I should clearly be of opinion that if it appear that the goods were not owned by the consignor, and were not shipped on his account and for his benefit, that the carrier would not be entitled to call on the consignor for freight; and I should incline to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee."

The consignor was also the owner in *Jobbitt v. Goundry* (1859) 29 Barb. (N. Y.) 509 (also referred to in the *Gilson* Case), where it was held that a statement in the bill of lading that the property is to be delivered to the consignee, he paying the freight, does not exonerate the consignor, so that if the carrier delivers the goods to the consignee without collecting the freight, he can nevertheless recover of the consignor. The court said: "It was held, in *Shepard v. De Bernales* (1811) 13 East 565, 104 Eng. Reprint, 490, 12 Revised Rep. 442, that the usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, he or they paying freight for the goods, is introduced for the benefit of the master only, and not for the benefit of the consignor; and that therefore the master is not bound to the consignor to withhold the delivery of the goods,

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In *Barker v. Havens* (1819) 17 Johns. (N. Y.) 234, 8 Am. Dec. 393 (referred to in the *Gilson* Case), the shipper, who was the owner of the goods when shipped, was held liable to the carrier for the freight in a case where the bill of lading stated that the goods were to be delivered to the consignee, he paying the freight, as specified, but delivery was made without payment of the freight. *Spencer, J.*, in delivering the opinion of the court, said: "I should clearly be of opinion that if it appear that the goods were not owned by the consignor, and were not shipped on his account and for his benefit, that the carrier would not be entitled to call on the consignor for freight; and I should incline to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee."

The consignor was also the owner in *Jobbitt v. Goundry* (1859) 29 Barb. (N. Y.) 509 (also referred to in the *Gilson* Case), where it was held that a statement in the bill of lading that the property is to be delivered to the consignee, he paying the freight, does not exonerate the consignor, so that if the carrier delivers the goods to the consignee without collecting the freight, he can nevertheless recover of the consignor. The court said: "It was held, in *Shepard v. De Bernales* (1811) 13 East 565, 104 Eng. Reprint, 490, 12 Revised Rep. 442, that the usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, he or they paying freight for the goods, is introduced for the benefit of the master only, and not for the benefit of the consignor; and that therefore the master is not bound to the consignor to withhold the delivery of the goods,

passes to the latter at the time of delivery to the carrier or upon delivery to the consignee; these and other like circumstances have been discussed in the adjudicated cases as evidential upon the question of consignor's liability to the carrier for the freight. In the present case the facts leave no room to doubt the consignor's original liability. . . . But acceptance by the consignee, although accompanied by an undertaking to pay the charges, does not discharge the consignor from liability to the carrier. The two contracts are held to be independent, and not inconsistent one with the other."

— carrier's knowledge of agency.

Where the carrier is aware at the time of shipment that the consignor is merely the agent of the consignee, who is the owner of the goods, the consignor is not liable for the freight. *Chicago, R. I. & G. R. Co. v. Floyd* (1913) — **Tex. Civ. App.** —, 161 S. W. 954 (where the court approved the general rule that the consignor in general is liable for the freight, whether he is the owner or not).

Where there was no bill of lading or receipt signed by the carrier and accepted by the shipper, but there was a waybill, and it did not appear that the name of the shipper was in it, and the freight charges were made in every instance to the consignee, and the bills for the freight were sent to him, it was considered that there was some evidence that the carrier understood that the consignee was to pay the freight, and that the carrier could not recover the freight of the shipper. *Union Freight R. Co. v. Winkley* (1893) 159 **Mass.** 133, 38 **Am. St. Rep.** 398, 34 **N. E.** 91, where the court said: "In this commonwealth, when the vendor of goods delivers them to a railroad to be carried to the purchaser, although the title passes to the purchaser by the delivery to the railroad company, and the name and address of the consignee, who is the purchaser, is known to the company, the vendor is presumed to make the contract for transportation with the company on his own behalf, and is held liable to the company for the payment of the freight. This presumption, however, is a disputable one, and may be rebutted or disproved by evidence; and if the vendee has ordered the goods to be sent at his risk and on his account, he also may be held liable, as the real principal in the contract. . . . But whether the presumption be one way or the other, it is a matter of inference from the particular cir-

cumstances of the case, and the question which is always to be considered is the understanding of the parties."

Where an agent having cotton of his principal in his possession without any orders as to what to do with it sent it to New Orleans, taking a bill of lading showing that the shipment had been made by the owner, and making an arrangement that the cost of the freight should be allowed by the agent to the carrier, who was indebted to the agent, it was held that the carrier could not recover the freight of the owner. *Wayland v. Mosely* (1843) 5 **Ala.** 430, 39 **Am. Dec.** 335 (the agent also testified that he had thereafter purchased the cotton from the owner, and he held himself liable for the freight).

Effect of stipulation for delivery to consignee, "he paying freight," etc.

Statements in a bill of lading that the goods are to be delivered to the consignee, "he paying freight," or stipulations of a like character, are for the benefit of the carrier, and delivery in such case to the consignee without collection of the freight will not release the liability of the consignor for freight. *Domett v. Beckford* (1833) 5 **Barn. & Ad.** 521, 110 **Eng. Reprint**, 883, 2 **Nev. & M.** 374, 3 **L. J. K. B. N. S.** 10; *Great Western R. Co. v. Bagge* (1885) **L. R.** 15 **Q. B. Div. (Eng.)** 625, 54 **L. J. Q. B. N. S.** 599, 53 **L. T. N. S.** 225, 34 **Week. Rep.** 45; *Holt v. Westcott* (1857) 43 **Me.** 445, 69 **Am. Dec.** 74 (where there was a charter party, but its terms do not appear); *Wooster v. Tarr* (1864) 8 **Allen (Mass.)** 270, 85 **Am. Dec.** 707; *Grant v. Wood* (1848) 21 **N. J. L.** 292, 47 **Am. Dec.** 162; *Gilson v. Madden* (1869) 1 **Lans. (N. Y.)** 172; *Spencer v. White* (1840) 23 **N. O. (1 Ired. L.)** 236; *Collins v. Union Transp. Co.* (1840) 10 **Watts (Pa.)** 384; *Layng v. Stewart* (1841) 1 **Watts & S. (Pa.)** 222 (referring to the clerical error in the *Collins Case*); *COAL & COKE Co. v. BUCKHANNON RIVER COAL & COKE Co.* ante, 663. See also *New York cases infra*.

This was held—

—where goods belonging to the defendant were shipped on board the plaintiff's ship, the bill of lading stating that the shipment was by A on account of defendant, to be delivered to B & C "or to their assigns, paying freight" at a certain rate, *Domett v. Beckford* (1833) 5 **Barn. & Ad.** 521, 110 **Eng. Reprint**, 883, 2 **Nev. & M.** 374, 3 **L. J. K. B. N. S.** 10;

—where the goods were consigned to

A & B or "to their assigns, he or they paying freight for said goods," etc., although the goods were no longer the property of the consignors, but this fact was not known to the carrier, *Wooster v. Tarr* (1864) 8 Allen (Mass.) 270, 85 Am. Dec. 707;

—where the defendant delivered an article to a railroad company for transportation, the contract containing after the clause "who pays carriage," the word "consignee," and the consignee, on receiving the article, refused to pay the freight on the ground that, as between the consignor and himself, it was the consignor's duty to pay, which seems to have been the fact, *Great Western R. Co. v. Bagge* (1885) L. R. 15 Q. B. Div. (Eng.) 625, 54 L. J. Q. B. N. S. 599, 53 L. T. N. S. 225, 34 Week. Rep. 45;

—where goods were delivered to the master of a ship by the defendant, "to be delivered to the consignee or to his assigns, he or they paying freight for the same," and the consignee, when settling for the freight, withheld a portion of the freight money and informed the shipmaster that he, the consignee, was merely the agent of the consignor, *Spencer v. White* (1840) 23 N. O. (1 Ired. L.) 236;

—where goods were to be delivered to the consignee "on presenting this receipt and payment of freight," although the consignor had paid the consignee for the freight, *Collins v. Union Transp. Co.* (1840) 10 Watts (Pa.) 384.

Where the owner of goods when shipped took a bill of lading providing that they would be delivered to the consignee paying the freight for the said goods, and the proceeds of the goods, when sold by the consignee, were insufficient to pay the freight, it was held that an action would lie by the owner of the ship against the shipper for the balance of the freight, *Grant v. Wood* (1848) 21 N. J. L. 292, 47 Am. Dec. 162.

Where an agent, contrary to the orders of his principal, delivered goods to a carrier, it not appearing that he was not the principal, with instructions to deliver them on payment of carriage, and the carrier delivered them without payment of the carriage, it was held that the carrier might recover the freight of the agent, *Layng v. Stewart* (1841) 1 Watts & S. (Pa.) 222, where the court said: "The cases everywhere show that the clause, 'he paying freight,' is introduced for the benefit of the carrier, not of the consignor; no case has shown that the master is to keep his ship and sailors at expense in a foreign port, or a L.R.A.1917A.

wagoner is bound to stay with his team, or hire a house in a distant town, until he tries a lawsuit. There may be cases in which he cannot recover against his consignor; but this is not one of them."

—New York cases.

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In *Barker v. Havens* (1819) 17 Johns. (N. Y.) 234, 8 Am. Dec. 393 (referred to in the *Gilson* Case), the shipper, who was the owner of the goods when shipped, was held liable to the carrier for the freight in a case where the bill of lading stated that the goods were to be delivered to the consignee, he paying the freight, as specified, but delivery was made without payment of the freight. *Spencer, J.*, in delivering the opinion of the court, said: "I should clearly be of opinion that if it appear that the goods were not owned by the consignor, and were not shipped on his account and for his benefit, that the carrier would not be entitled to call on the consignor for freight; and I should incline to the opinion that in all cases the captain ought to endeavor to get the freight of the consignee."

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unless the consignee or his assigns pay the freight. And it seems to be established that a clause in a bill of lading which directs the carrier to collect the freight of the consignee of the goods, on delivery, does not, in case of the carrier's neglect to collect of him, discharge the consignor's liability to pay the same. *Collins v. Union Transp. Co.* (1840) 10 Watts (Pa.) 384. Angell, Carr. § 397. It follows that the delivery of the defendants' goods to Dorr, by the plaintiffs, without requiring him to pay the freight thereon, or the neglect or failure of the plaintiffs to collect such freight of him, does not affect the defendants' liability to them for it; and that such facts constitute no defense to this action." (In *Shepard v. De Bernales* there was a charter party containing an express covenant by the defendant to pay the freight.)

—judicial statements and explanations.

In *Wooster v. Tarr* (1864) 8 Allen (Mass.) 270, 85 Am. Dec. 707, *supra*, the court said: "The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The dictum of Bayley, J., in *Moorson v. Kymer* (1814) 2 Maule & S. 318, 105 Eng. Reprint, 395, 3 Campb. 549, note, 15 Revised Rep. 261, subsequently repeated by Lord Tenterden in *Drew v. Bird* (1828) *Moody & M. (Eng.)* 156, that, in the absence of an express contract by the shipper to pay freight, when the goods are by the bill of lading to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law. . . . The usual clause in bills of lading, that the cargo is to be delivered to the person named or his assignees, 'he or they paying freight,' is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight; but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains."

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In *Holt v. Westcott* (1857) 43 Me. 445, 69 Am. Dec. 74, where there was a charter party, but the terms of it do not appear, it was said and held that "in all cases where goods are shipped by a consignor under a contract, or for his benefit, he is originally liable for freight; and that the insertion in a bill of lading of a provision that the goods are to be delivered to the consignee, etc., 'he or they paying freight,' will not, of itself, relieve him from that liability; that provision being designed for the benefit of the carrier, he may waive it if he choose so to do, and resort to his employer, the consignor, for his freight, unless there is some special stipulation by which that employer is to be exonerated."

In *Domett v. Beckford* (1833) 5 Barn. & Ad. 521, 110 Eng. Reprint, 883, Parke, J., in his opinion, said: "As soon as these goods (which were the property of the defendant) were shipped in the plaintiff's ship, to be carried from Jamaica to London, the defendant, even before any bills of lading were signed, became liable by law to pay freight, unless that liability be controlled by special custom, and of that there is no proof. From the fact that the goods were laden on a ship to be conveyed from Jamaica to London, the law will imply a contract by the owner of those goods to pay for the carriage. The only difference between the present case and *Shepard v. De Bernales (Eng.) supra*, is, that in this case a contract to pay freight is implied by law from the fact of the defendant having shipped his goods on board the plaintiffs' ship, to be carried from Jamaica to London. In the other case, there was an express contract by charter party."

The theory that the clause as to the consignee paying the freight was for the benefit of the carrier seems to have arisen out of the situation of a ship, which could not be expected to be delayed owing to any controversy with the consignee as to the freight. In *Spencer v. White* (1840) 23 N. O. (1 Ired. L.) 236, *supra*, the court, in following the rule as settled law, said: "Hence it might well seem that while this clause of the contract [as to the consignee paying the freight], authorized the master, for the benefit of his owner, to retain the goods until the freight was paid, it also, for the benefit of the shipper, imposed on him the obligation to do so."

—cases distinguished.

In *Thomas v. Snyder* (1861) 39 Pa. 317, it was held that the usual rule that

the clause as to delivery on payment of freight was not for the benefit of the consignor would be overturned where there was added to the words in a bill of lading by canal boat, "he or they paying freight for said coal at the rate of \$1.90 per ton" (referring to the consignee), the words "freight payable to P. D. Thomas," who was not the master, but the owner of the canal boat, and these words were inserted at his particular direction. The court considered that these circumstances took the case out of the general rule, and that, on the delivery of the goods without payment of freight, Thomas, the owner of the canal boat, could not recover of the consignor, it appearing that the plaintiff had no person at the time and place of delivery ready to receive the freight. (This would seem to be a distinction without a difference.)

In *Drew v. Bird* (1828) 1 Moody & M. (Eng.) 156, where a bill of lading stated that goods were shipped by the consignor, to be delivered to E. G. "for the Imperial Distillery Company, or to his assigns, he or they paying freight for the same," and the goods were delivered to E. G. without freight, it was held that, on the face of the bill of lading, there could be no recovery against the consignor for the freight. The counsel for the defendant stated that, in the case of *Penrose v. Wilks* (Eng.) Abbott, Shipping, 281, 5th ed. and that class of cases, there was a charter party as well as bills of lading, but here there was no charter party. There was, however, a subsequent promise by letter to pay on the part of the defendant, and under this it seems there was a verdict for the plaintiff.

In *Grant v. Wood* (1848) 21 N. J. L. 292, 47 Am. Dec. 162, the court comments on the bill of lading in *Drew v. Bird* (Eng.) supra, and says: "By the case it is manifest that Bird was not the owner of the goods, but the mere consignor, or agent of the owner; he shipped them to Griffith for the Imperial Distillery Company, at London,—they, of course, were the owners, liable for freight, and, according to the principles of common carriers, must have prosecuted in their names for any loss or damage to the cargo,—the consignor being the mere agent of the consignee, or owner, in whom the property exists. . . .

This was clearly the understanding of Lord Tenterden, when he says there was nothing in the bill of lading to charge Bird, the defendant, and the mere delivery of the goods by the captain to the consignee, without receiving the freight, could not raise a new charge against Bird, who was not before responsible. Now, according to all the cases on the subject, when the owner ships goods on board a vessel, he is liable. He is originally liable in assumpsit either on the special contract, or the quantum meruit; and wherever the question has arisen, it has not been one of original liability, but as to what will discharge from that liability." The court seems to consider that *Drew v. Bird* is to be distinguished on this ground, but it seems clear that any such distinction is very unsatisfactory. The court, however, goes on to say that the subsequent case of *Domett v. Beckford* (Eng.) supra, decided five years after *Drew v. Bird*, settled the question. B. B. B.

TENNESSEE SUPREME COURT.

T. D. TRAVIS et al.
v.
P. T. SITZ et al., Appts.

(— Tenn. —, 185 S. W. 1075.)

Husband and wife — separate estate — form of conveyance.

1. A conveyance to grantor's unmarried daughter to have and to hold to herself and her heirs, free from any debts of her husband if she should marry, and not to be sold for his debts and liabilities, creates in her

a separate estate; and it is immaterial that by statute the wife cannot be dispossessed of her estate during her life by either a voluntary or involuntary conveyance by him, but he can only rent it for the benefit of the family.

For other cases see *Husband and Wife*, II. d, in *Dig.* 1-52 N. S.

Same — restraint on alienation — effect of removal of disability.

2. A provision in a deed conveying a separate estate to a woman in fee, restraining its alienation by her, is valid even though the statutes have removed her disabilities. For other cases see *Covenants and Conditions*, II. d, in *Dig.* 1-52 N. S.

Judgment — review — interference with rights of purchaser.

3. The rights of an innocent purchaser under a decree cannot be interfered with

Note. — As to validity of limitation upon power of alienation imposed upon grant or devise of equitable estate to married woman, see annotation following this case, post, 679 L.R.A.1917A.

by an original bill in the nature of a bill to review such decree, or by a bill of review for error apparent in the decree.

For other cases see Review, in Dig. 1-52 N. S.

Judgment — fictitious proceeding — effect.

4. A decree annulling a clause restraining alienation in a deed creating a separate estate in a woman, procured by the woman and her husband in a suit against her children, who on the face of the bill have no interest in the controversy, is inoperative.

For other cases see Judgment, II. a, in Dig. 1-52 N. S.

Pleadings — former action pending — demurrer.

5. The defense of pendency of a former action for the same cause cannot be raised by demurrer, but the remedy is motion to elect.

For other cases see Pleading, VIII. d, in Dig. 1-52 N. S.

Abatement — former action — lost record.

6. An action in which the record has been lost cannot be pleaded in abatement of a subsequent suit for the same cause.

For other cases, see Abatement and Revival III. in Dig. 1-52 N. S.

Rescission — conveyance by married woman — refunding of purchase money.

7. Refunding of purchase money paid is not a condition to disaffirmance of a conveyance by a married woman of her separate estate in violation of a restraint on alienation in the deed to her.

For other cases, see Contract, V. c, 2, in Dig. 1-52 N. S.

Husband and wife — conveyance by married woman — recovery of rents.

8. Heirs at law of a married woman who conveyed her separate estate in violation of a clause in restraint of alienation in the deed to her cannot recover the rents accruing from the grantee down to the time of her death.

For other cases see Descent and Distribution, I. a, in Dig. 1-52 N. S.

Curtsey — in wife's separate estate.

9. Curtsey may be claimed by the husband of a woman to whom has been granted a separate estate with restraint on her alienation during life, where there is issue capable of inheriting, although the word "assigns" is not used in the deed, which runs to the woman and her heirs free from the debts of her husband, the words, "heirs and assigns," being under the statute not necessary to carry the estate.

For other cases, see Curtsey, in Dig. 1-52 N. S.

Same — proportional part of estate.

10. Curtsey cannot be limited to the proportion of the estate represented by the ratio which the children of the marriage with the claimant bear to the total number

of children of decedent, but the right extends to the whole estate.

For other cases see Curtsey, in Dig. 1-52 N. S.

(May 17, 1916.)

APPEAL by defendants from a decree of the Court of Civil Appeals affirming a decree of the Chancery Court for Franklin County in plaintiffs' favor in a suit to review a former decree concerning the invalidity of a restraining clause in a certain deed. Affirmed.

The facts are stated in the opinion.

Messrs. Floyd Estill, Frank Lynch, and Felix Lynch for appellants.

Messrs. Robinson & Fancher for appellees.

Neill, Ch. J., delivered the opinion of the court:

The first question for determination is whether the following instrument created a separate estate in Laura Hudgins: "For the love and affection I have for my daughter Laura Hudgins, I, James A. Hudgins, do hereby transfer and convey unto my said daughter Laura Hudgins, to take effect, and with the restrictions hereinafter, a tract of land situated in civil district No. 2, Franklin county, Tennessee. . . . To have and to hold said tract of land to the said Laura Hudgins and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry. . . . But this deed is not to take effect until the death of my wife, and my death, as the use of the place during my life and the life of my wife, Elizabeth Hudgins, is herein and hereby expressly reserved. My clear intention is to give the said land to my daughter Laura Hudgins at the death of my wife and myself, without power of disposal in any way, and not to be liable to be sold for her debts, or the debts or liabilities of any husband she may have if she ever marries. This 4th day of October, 1879."

We are of the opinion that a separate estate was created by the words: "To have and to hold said tract of land to the said Laura Hudgins and her heirs, free from the debts, liabilities, or contracts of her husband if she should ever marry, . . . and not to be liable to be sold for . . . the debts or liabilities of any husband she may have if she ever marries."

We have in this state no direct authority in any published case, but in the second volume of King's Digest, p. 1275, § 68, there is a reference to an unreported decision, *Blackwell v. Blackwell*, rendered at Brownsville in 1860, which seems to be authority on the point. In that case the conveyance

contained the clause: "None of the property shall ever be subject to the debts of the husband, and that the husband be permitted, during the joint lives of himself and wife, to use, control, work, manage, and direct all the said property as he may judge best, receiving and applying the earnings, proceeds, and profits to the joint use and benefit of himself and wife, for the support, maintenance, and education of the issues of the intended marriage, if any there be."

It was held, according to Mr. King's report of the case, that this language created a separate estate in the wife as to the corpus, and a joint estate as to the income and earnings.

In *Grotenkemper v. Carver*, 9 Lea, 280, the language of the instrument was: "To her sole and separate use, and to be held by her free from the debts, liabilities, and contracts of her present husband, William H. Carver, or any future husband she may have."

The court said that the words "to her sole and separate use" were sufficient to create a separate estate, and that the residue of the sentence, though being in accordance with an established legal usage, "was intended to make assurance doubly sure by expressing the grantor's object in a different form." The same form, substantially, appears in *Molloy v. Clapp*, 2 Lea, 586, and *Wood v. Polk*, 12 Heisk. 220; but these cases went off on other points.

The precise point, however, arose in *Young v. Young*, 56 N. C. (3 Jones, Eq.) 216, 219. The language there considered was, immediately following the bequest of a slave to testator's married daughter Anna Young: "And not to be subject to any debt or debts which Jesse Young may contract, or [may] have contracted." The court said: "Here is a plain and manifest intention on the part of the donor that the slave Mariah shall be for the sole and separate use of the wife and her children. The husband, Mr. Young, has no interest in the slave."

To the same effect is *Martin v. Bell*, 9 Rich. Eq. 42, 70 Am. Dec. 200. The language there under examination was: "The property, real or personal, that my three daughters [naming them] may or do receive by this my will, I hereby settle it on them and the lawful issue of their bodies forever, and I do declare that it shall in no wise be subject the debts of their husbands in no case whatsoever." It was held the daughters took separate estates.

The matter for ascertainment in all cases of this nature is whether it was the intention of the settlor to exclude the husband. In addition to the words, to the "sole and separate use" of the wife which are universally held to create a separate estate, the

following have in England been held sufficient evidence of the purpose; namely "For her livelihood" (*Darley v. Darley*, 3 Atk. 399, 26 Eng. Reprint, 1029; *Cape v. Cape*, 2 Younge & C. Exch. 543, 1 Jur. 307; *Lee v. Prieaux*, 3 Bro. Ch. 383, 29 Eng. Reprint, 596); "that she may receive and enjoy the profits" (*Tyrrell v. Hope*, 2 Atk. 558, 26 Eng. Reprint, 735); "to be at her own disposal" (*Prichard v. Ames*, Turn. & R. 222, 24 Revised Rep. 31, 37 Eng. Reprint, 1083; *Kirk v. Paulin*, 7 Vin. Abr. 96); "to be by her laid out as she shall think fit" (*Atcherly v. Vernon*, 10 Mod. 531, 88 Eng. Reprint 839); "for her own use independent of the husband" (*Wagstaff v. Smith*, 9 Ves. Jr. 520, 32 Eng. Reprint, 704; *Dixon v. Olmius*, 2 Cox, Ch. Cas. 414, 30 Eng. Reprint, 191; *Simmons v. Horwood*, 1 Keen, 9, 48 Eng. Reprint, 209; *Tullett v. Armstrong*, 1 Beav. 1, 48 Eng. Reprint, 838, 8 L. J. Ch. N. S. 19, 2 Jur. 912, 3 Eng. Rul. Cas. 215); "not subject to his control" (*Bain v. Lescher*, 11 Sim. 397, 59 Eng. Reprint, 926); "to her own use and benefit independent of any other person" (*Margetts v. Barringer*, 7 Sim. 482, 58 Eng. Reprint, 922); "to receive the rents while she lives, whether married or single" (*Goulder v. Camm*, 1 De G. F. & J. 146, 45 Eng. Reprint, 315, 6 Jur. N. S. 113, 1 L. T. N. S. 224, 8 Week. Rep. 156); "her receipt to be a sufficient discharge" (*Lee v. Prieaux*, 3 Bro. Ch. 381, 382, 29 Eng. Reprint, 591, 596; *Tyler v. Lake*, 2 Russ. & M. 188, 39 Eng. Reprint, 366); "to be delivered to her on demand" (*Dixon v. Olmius*, 2 Cox, Ch. Cas. 414, 30 Eng. Reprint, 191).

We have, in our reports, many cases on the subject. The few which we cite will perhaps give a fair general view of our law in respect of the matter in its varied aspects. *Powell v. Powell*, 9 Humph. 477; *Barnum v. Le Master*, 110 Tenn. 638, 69 L.R.A. 353, 75 S. W. 1045; *Williford v. Phelen*, 120 Tenn. 589, 113 S. W. 365; *Mitchell v. Chattanooga Sav. Bank*, 126 Tenn. 669, 150 S. W. 1141; *Hamilton v. Bishop*, 8 Yerg. 33, 29 Am. Dec. 101; *Beaufort v. Collier*, 6 Humph. 487, 44 Am. Dec. 321; *Loftus v. Penn*, 1 Swan, 445; *Gardenhire v. Hinds*, 1 Head, 402; *Pearson v. Davis*, 1 Heisk. 593; *Eaves v. Gillespie*, 1 Swan, 128; *Woods v. Sullivan*, 1 Swan, 507; *Houston v. Embry*, 1 Sneed, 480; *Meredith v. Owen*, 4 Sneed, 223.

It may be said of the language in the deed now before us that it is difficult to conceive of the husband (without the intervention of some form of trust) owning property which is not at all liable for his debts, nor subject to his contractual powers. So, by exclusion of the legal incidents that attend the right of property, it is clear on principle

that the language could have no other meaning than an intention to exclude the husband.

We do not think any strength is added to this conclusion by the clause restraining alienation, as insisted by learned counsel. *Baggett v. Meux*, 1 Colly. Ch. Cas. 138, 63 Eng. Reprint, 355; 13 L. J. Ch. N. S. 228, 8 Jur. 391; *Tullett v. Armstrong*, 1 Beav. 1, 48 Eng. Reprint, 371, 8 L. J. Ch. N. S. 19, 2 Jur. 912, 3 Eng. Rul. Cas. 215; *Stogdon v. Lee* [1891] 1 Q. B. 661, 60 L. J. Q. B. N. S. 669, 64 L. T. N. S. 494, 39 Week. Rep. 467, 55 J. P. 533. In the case last cited it is said that to infer the existence of a separate estate from the mere fact of a restraint on alienation would result in the plainly unsound conclusion that that which is a mere accessory to the separate use for the purpose of rendering it effectual ought, standing alone, to compel an implication of that separate use to which it is only an accessory.

Before leaving this branch of the case, it is well to note a question debated at the bar and in the briefs; that is, whether our Act of 1849-50 (Shannon's Code, §§ 4234, 4235) has any bearing on the controversy. The substance of that statute, as construed by our cases, is that, not only can there be no dispossession of the husband and wife, or either of them, on a sale under execution of the husband's interest in the wife's general real estate, during the life of the wife, but it cannot during her life be aliened by the husband voluntarily in such way as to dispossess her, or, if dispossessed, she may recover possession by suit through a next friend, making her husband a defendant. *Coleman v. Satterfield*, 2 Head, 259, 264, 265; *Lucas v. Rickerich*, 1 Lea, 728; *Garth & Buckman v. Fort*, 15 Lea, 683, 687, 688; *Key v. Snow*, 90 Tenn. 663, 18 S. W. 251; *McCallum v. Petigrew*, 10 Heisk. 394; *Corley v. Corley*, 8 Baxt. 7; *Bryant v. Freeman*, 131 Tenn. 87, L.R.A.1915D, 996, 173 S. W. 863. By Acts 1879, chap. 141, the rights of the husband in the wife's land, as tenant by the curtesy initiate, were so reduced that he was left only the privilege of renting out the land as governor of the family, and of collecting the rents for the benefit of the family. *Parlow v. Turner*, 132 Tenn. 339, 347, 178 S. W. 766; *Ables v. Ables*, 86 Tenn. 333, 9 S. W. 692. Would the meager nature of the husband's interest have any bearing on the inferences to be drawn from the language of the deed in question, which we have just held showed an intention to create a separate estate in the wife? It would not. In the discovery and determination of a purpose to create a separate estate, the inquiry is not necessarily confined to property in which the hus-

band would have an interest but for the existence of such separate estate. *Price v. Planters' Nat. Bank*, 92 Va. 468, 32 L.R.A. 214, 23 S. E. 887.

We may add that a trustee is not essential to the creation of a separate estate (*Hamilton v. Bishop*, 8 Yerg. 33, 42, 29 Am. Dec. 101), and that "property may be given to a woman to her sole and separate use while she is single, and not in contemplation of any particular intended marriage, and the gift is valid in that form, but the peculiar qualities of the separate estate do not and cannot exist until she is married." 3 Pom. Eq. Jur. 3d ed. § 1109.

The restraint on alienation contained in the deed to *Laura Hudgins* was valid. *Baggett v. Meux*, 1 Colly. Ch. Cas. 138-153, 63 Eng. Reprint, 355-362, 13 L. J. Ch. N. S. 228, 8 Jur. 391, 1 Phill. Ch. 627, 41 Eng. Reprint, 771, 15 L. J. Ch. N. S. 262, 10 Jur. 213; *Clive v. Carew*, 1 Johns. & H. 199, 70 Eng. Reprint, 719, 28 L. J. Ch. N. S. 685, 5 Jur. N. S. 487, 7 Week. Rep. 433; *Sheriff v. Butler*, 12 Jur. N. S. 329, 14 L. T. N. S. 510, 14 Week. Rep. 629; *Bateman v. Faber*, 67 L. J. Ch. N. S. 130 [1898] 1 Ch. 144, 77 L. T. N. S. 576, 14 Times L. R. 81, 46 Week. Rep. 215; *Stanley v. Stanley*, L. R. 7 Ch. Div. 589, 47 L. J. Ch. N. S. 256, 37 L. T. N. S. 777, 26 Week. Rep. 310; *Richards v. Chambers*, 10 Ves. Jr. 580, 32 Eng. Reprint, 970.

In *Baggett v. Meux* supra, the testator, having created a separate estate in his daughters, used with respect thereto the following language: "I hereby declare that neither of my said daughters shall sell, charge, mortgage, or encumber the estates or property by me given, devised, and bequeathed to them." This was held a valid restriction. "Now, it being clear and admitted on all hands," said the vice chancellor, "that with respect to a life interest given to a married woman for her separate use, she may be effectually restrained from doing during her coverture, any act of alienation, total or partial (without any clause of forfeiture, and without any limitation over taking effect upon such an act), it being clear, as I apprehend, that a clause prohibiting alienation or anticipation by a married woman of her separate estate (when there is no such provision of forfeiture or limitation over), however the prohibition may be expressed, whether in terms confining it to a period of coverture, or in terms general and undefined, or in terms distinctly expressing a period beyond as well as during coverture, has by law validity allowed to it, as to a life interest, at least, but that this validity is by the same law (whatever the expressions) not permitted to extend to a period beyond coverture (that

is, the law of its own force preventing the restriction from operation or effect as to any act done when coverture does not exist), . . . I am at a loss to discover any sufficient reason why that which holds good as to a life interest should not equally hold good as to an absolute estate. Why should there be any difference?"

This was subsequently affirmed in 1 Phill. Ch. 627, 41 Eng. Reprint, 771, the lord chancellor saying: "The object of the doctrine" establishing separate estates "was to give to married women the enjoyment of property independent of her husband; but to secure that object it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal; but a court of equity, having created in both a new species of estate, may in both cases modify the incidents of that estate."

And see the great case of *Tullett v. Armstrong*, 4 Myl. & C. 377, 41 Eng. Reprint, 147, 9 L. J. Ch. N. S. 41, 3 Eng. Rul. Cas. 215, in which the subject was fully discussed by Lord Chancellor Cottenham.

The validity of the restraint on alienation in such cases has been recognized in this country in several states, Arkansas, Florida, Georgia, Kentucky, North Carolina, South Carolina, Texas, Virginia, and West Virginia, and in the Federal courts. See *Hauser v. St. Louis*, 28 L.R.A. (N.S.) 426, and note (96 C. C. A. 82, 170 Fed. 906).

In this state we have perhaps no direct decision on the point, but the principle is clearly recognized in *Pooley v. Webb*, 3 Coldw. 599; *Young v. Young*, 7 Coldw. 461, 476; *Hix v. Gosling*, 1 Lea, 560; *Eckerly v. McGhee*, 85 Tenn. 664, 4 S. W. 386; *Webster v. Helm*, 93 Tenn. 322, 24 S. W. 488; *Bank of Shelby v. James*, 95 Tenn. 8, 30 S. W. 1038. And see *Robinson v. Queen*, 87 Tenn. 445, 3 L.R.A. 214, 10 Am. St. Rep. 690, 11 S. W. 38, where our statute is referred to, which also recognizes the principle. Before passing from this branch of the case, it may be proper to note, in view of our Acts 1913, chap. 26, removing the disabilities of coverture in respect of married women, and practically making their estate separate, that under the authorities such acts do not interfere with or disturb the creation or operation of the equitable separate estate so long and so beneficently enforced and protected in courts of chancery; and therefore parents and others, desiring to provide for wives or children, may, by restraints on alienation

in such settlements, still throw around them the safeguards devised by the wisdom of the great equity judges. *Musson v. Trigg*, 61 Miss. 172, 182-184; *Hooks v. Brown*, 62 Ala. 258; *MacConnell v. Lindsay*, 131 Pa. 476, 19 Atl. 306; *Hays v. Leonard*, 155 Pa. 474, 26 Atl. 664; *Holliday v. Hively*, 198 Pa. 342, 47 Atl. 988. And as to the necessity for such protection we cannot refrain from quoting the following from *MacConnell v. Lindsay*, 131 Pa. 476, 19 Atl. 306: "Neither has the Act of 1848 or the act of 1887, nor both of them together, dispensed with the necessity which originally gave rise to this equity. Heretofore a married woman was protected from her own improvidence, as well as the improvidence of her husband, by her disabilities; and, as these disabilities are now to a great extent removed, the necessity is increased, rather than diminished. Her disabilities, her want of power to yield to her husband's solicitations, or to give way to her own sympathies, have always been supposed to afford her the highest protection. Complete protection, as the law now stands, therefore, is found only in a trust for her separate use."

As said in *Hays v. Leonard*, 155 Pa. 474, 26 Atl. 664: "An act of assembly cannot prevent the wife from yielding to over-persuasion or coercion. It can declare that her estate shall not be encumbered or conveyed by her husband or seized for his debts, but so long as she has the power to encumber or to convey, she may be plied with entreaty or argument or threats, until her will is overcome and her property encumbered or lost. To protect her from herself the separate use trust has an important place to fill, and has not been rendered useless by the legislation referred to."

The remaining questions arise out of the facts now to be stated: Laura Hudgins intermarried with one Sanders, by whom she had four children, three of whom are still living. After the death of Sanders she intermarried with the defendant P. T. Sitz, who survived her. By this last marriage she had one child, Turney Sitz, who also survived his mother. James A. Hudgins and his wife, the parents of Laura Hudgins, died prior to the intermarriage of Laura and the said P. T. Sitz. On February 28, 1901, Sitz and wife filed their bill in the chancery court of Franklin county against her children by the Sanders marriage for the purpose of having the restraint on alienation in the above-mentioned deed declared void, because repugnant to the estate granted. The bill in that case charged that the deed conveyed an absolute estate in fee simple; that the clause in restraint

of alienation was repugnant thereto, and hence void. The defendants were all minors and nonresidents. Publication was made for them, however, and a guardian ad litem appointed, who filed an answer insisting that Laura Sitz, the mother of the defendants to that bill, had only a life estate and possessed no power or right to have the land sold. The chancellor rendered a decree declaring the clause in question repugnant to the granting clause, and void, and that Sitz and wife had the right to dispose of the land as fully as if the restraining clause had never been written into the deed. Subsequently Sitz and wife executed a deed in trust on the land to J. R. Clark, trustee, to secure the Union Central Life Insurance Company for a loan of \$1,000. Later Sitz and wife attempted to convey the land to one P. A. Shadow, a defendant in the present proceeding, for the consideration of \$3,000, \$2,000 of which was paid in cash, and the remaining \$1,000 by Shadow's assumption of the debt due the insurance company. This deed was executed on August 21, 1903. On April 2, 1904, Shadow executed a mortgage on the land to the same trustee Clark, to secure a loan of \$2,000 made to him by the same insurance company. On January 13, 1906, Mrs. Laura Sitz died. On August 27, 1906, the present complainants, being all of the children of Mrs. Sitz by both marriages, brought their suit in equity to recover the land as heirs at law of Mrs. Sitz. After that suit was brought Shadow conveyed the land to defendant J. H. Collins for the consideration of \$7,000, of which \$1,000 was paid in cash, \$3,000 by the assumption of the mortgage debts, and the residue in equal instalments, payable during the years 1910, 1912, and 1913. That bill was filed for the purpose of reviewing the former decree concerning the invalidity of the clause in restraint of alienation. That bill never came to a hearing, was pending when the present bill was filed, but the record was lost, and could not be found. The present bill was filed June 3, 1911. This bill recites the matters previously stated, avers the validity of the restraining clause in the Hudgins deed, attacks the decree of the chancery court declaring that clause void, charges that the decree itself was void on the ground that the court had no power to make it, but, if not void, sought to have it reviewed and set aside. The bill alleged the ages of the complainants as follows: Lizzie Travis (formerly Sanders), twenty-three; Mattie Ray (formerly Sanders), twenty; Willia Sanders, eighteen; and that Turney Sitz was a minor of tender years, all of which was sustained by the evidence. The defendants filed a demurrer to the bill, which was L.R.A.1917A.

sustained by the chancellor, but on appeal to the court of civil appeals that decree was reversed, and the cause remanded for answer and a hearing on the merits. Defendant Collins answered, admitting in substance the allegations of the bill so far as we have recited them, but denying the validity of the clause in the deed against alienation, or any error in the decree in respect thereof; averring that the proceeding was instituted at the instance of Mrs. Sitz, that the consideration paid by Shadow was a fair one, that it was paid directly to Mrs. Sitz, and that the deed to Shadow was made according to her own will and wish; averring that defendant Collins had paid to Shadow all of the consideration promised except \$1,000; pleading that he (Collins) is a bona fide purchaser of the land, without notice of any coercion, practised by Sitz upon his wife, if any such was practised; that the bill filed by complainants on August 27, 1906, against Shadow, had been abandoned when he (Collins) purchased from Shadow; that the complainants were estopped by the fact that their mother, Laura Sitz, had filed the bill of February 28, 1901, making the allegations contained therein, and that such proceedings were had in that cause as that the clause against alienation was declared void, and that she took an absolute estate under the deed, and by the fact that she and her husband executed the mortgage to the insurance company, and made the deed to Shadow; that "respondent relied upon, and acted upon, the conduct of the said Laura Hudgins Sitz in filing said bill and procuring said decree, as well as her conduct in the execution of said mortgage to the Union Central Life Insurance Company, and the conveyance to P. A. Shadow; and respondent is advised and avers that her conduct in that behalf estops her and those claiming under her, and respondent pleads it as an estoppel;" that at all events, P. T. Sitz having survived his wife and there having been a child of the marriage, he was entitled to an estate by the curtesy in the land, and this estate if no more, passed to defendant Collins by the deed which Shadow made to him. P. A. Shadow filed an answer containing the same defenses. P. T. Sitz filed an answer in full accord with the answers just referred to.

The evidence fails to show that Mrs. Sitz was coerced into filing the bill to have the clause against alienation declared void, or into subsequently mortgaging the land to the insurance company, or into thereafter selling the land to defendant Shadow; but it also fails to show that she received the money arising from the loan. The weight of the evidence is to the effect that Sitz

himself received the money borrowed from the insurance company. The \$2,000 purchase money arising from the sale to Shadow was paid by his check, which was received and indorsed by Mrs. Sitz. The evidence fails to show that the price paid by Shadow was, at the time, a full and fair price for the tract. *

The bill in the present case is in substance and legal effect an original bill in the nature of a bill of review. That such a bill may be filed by minors to question matters adjudged against them is well settled. *Livingston v. Noe*, 1 Lea, 63, 64; *McCown v. Moores*, 12 Lea, 635, 637 et seq. But, whether treated as an original bill in the nature of a bill of review or simply as a bill of review for error apparent, the rights of innocent purchaser under a decree could not thereby be interfered with. *Winchester v. Winchester*, 1 Head, 460, 500; *Livingston v. Noe*, 1 Lea, 55, 66; *Anderson v. Ammonett*, 9 Lea, 1, 11-13; *Greenlaw v. Greenlaw*, 16 Lea, 435, 441; *Wilson v. Schaefer*, 107 Tenn. 300 and 330 et seq. 64 S. W. 208. And see *Stephens v. Porter*, 11 Heisk. 341, 344, and *Puckett v. Wynns*, 132 Tenn. 513, 522 et seq. 178 S. W. 1184.

But although the defense of innocent purchaser was made in the answers, yet little evidence seems to have been submitted thereon, except the fact that Shadow had paid \$2,000 of the purchase money to Mrs. Sitz; nor is there any error assigned under that defense, the parties appearing to have proceeded in the actual conduct of the case as if the question were a matter of original litigation on the merits of the clause in restraint of alienation. Nor are we prepared to say that they did not act correctly in so doing, since under the deed the children of Mrs. Sitz had no interest, and could have none save as her heirs at law. The bill, then, filed by Sitz and wife, was in substance an *ex parte* proceeding to obtain the opinion of the chancellor as to the validity of the restraining clause. If it had been filed directly for the purpose of obtaining leave of the chancellor to violate that clause, he would have been without jurisdiction of the subject-matter, and his decree would have been inoperative. *Hix v. Gosling*, 1 Lea, 560. So a collusive decree between husband and wife can be treated, as to third parties, only as a deed between them. *Old Folks Soc. v. Millard*, 86 Tenn. 657, 8 S. W. 851. The same would be true of a decree obtained by husband and wife concerning the validity of a deed, or any clause thereof, filed against persons who on the face of the bill had no interest in the controversy.

The errors assigned by the defendants are L.R.A.1917A.

that the court of civil appeals erred (1) in overruling the demurrer to the bill; (2) in holding that the clause in restraint of alienation was valid; (3) in holding that Collins was not entitled to restitution of the purchase money paid by Shadow to Mrs. Sitz for the land in controversy.

The case was first before the court of civil appeals on bill and demurrer. That court overruled the demurrer, and remanded the case to the chancellor for answer and further proceedings. That decree was not questioned in the supreme court by certiorari, and so the case went back for trial. It was then tried in the chancery court, a final decree rendered, an appeal prayed again to the court of civil appeals, a decree by that court, and the cause was then brought to this court. Now, assuming, without deciding, that this court could, under such a state of the record, review the action of the court of civil appeals on the demurrer, we say that the only point relied on in the brief accompanying the assignment of errors is the pendency of a prior suit on the same matter. That would not be ground of demurrer, but for a motion to elect. The authority cited to sustain the ground of demurrer stated (*Clark v. Garrett*, 6 Lea, 262) does not sustain the point, although there is an erroneous statement to that effect in the syllabus. However, there can be nothing in the suggestion, because the bill states that the record in the old case had been lost and could not be found.

The point contained in the defendants' second assignment of error, as to the validity of the clause restraining alienation, the commanding question in the case, is disposed of in the outset of this opinion.

The third of defendants' assignments will now be considered.

The general rule undoubtedly is that a married woman will not be permitted, in a court of equity, to disaffirm a voidable sale made by her, the consideration of which has been paid directly to her, except on condition that she refund the purchase money, or that it be declared a lien upon the property. *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 323, 37 S. W. 88; *Cox v. Building & Loan Asso.* 101 Tenn. 490, 48 S. W. 220; *Harris v. Smith*, 98 Tenn. 286, 39 S. W. 343; *Pilcher v. Smith*, 2 Head, 208; *Aiken v. Suttle*, 4 Lea, 103. This rule, however, does not apply where the sale has been made in violation of a clause in restraint of alienation, and the reason is that the imposition of such a condition would render the clause nugatory, destroy the settlement, and so set at naught the purpose of the settlor in creating it. *Bank of Shelby v. James*, 95 Tenn. 8, 30 S. W. 1038; *Sheriff v. Butler*,

12 Jur. N. S. 329, 14 L. T. N. S. 510, 14 Week. Rep. 629; *Bateman v. Faber*, 67 L. J. Ch. N. S. 130 [1898] 1 Ch. 144, 77 L. T. N. S. 576, 14 Times L. R. 81, 46 Week. Rep. 215; *Stanley v. Stanley*, L. R. 7 Ch. Div. 589, 47 L. J. Ch. N. S. 256, 37 L. T. N. S. 777, 26 Week. Rep. 310; *Clive v. Carew*, 1 Johns. & H. 199, 70 Eng. Reprint, 719, 28 L. J. Ch. N. S. 685, 5 Jur. N. S. 487, 7 Week. Rep. 433, and see *Richards v. Chambers*, 10 Ves. Jr. 580, 32 Eng. Reprint, 970, on the general principle.

It may be found useful to refer more particularly to one or two of these English cases. In *Sheriff v. Butler*, the facts were that a trustee, holding in trust certain old bank shares under a marriage settlement, accepted an allotment of new shares in the same bank, which afterwards failed. The settlement contained a clause against anticipation. The cestui que trust, a married woman, urged the trustee to take the new shares, and she herself sent to the bank the form filled up by him. In the suit a call as to the old shares was directed to be paid out of the trust estate, but as to the new shares it was held the trustee could not be indemnified. In *Stanley v. Stanley*, the case was this: A wife, having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage upon the property, concealing the restraint on anticipation. The mortgagee, having discovered the fraud, obtained from the married woman a warrant of attorney, entered up judgment thereon, and afterwards obtained a charging order on a dividend due to her the very day it became due. It was held that this was a mere device to make her future income a security for the mortgage debt, and an attempt to do indirectly what could not be done directly, and that such charging order must be discharged, because in no case and by no device could the restraint on anticipation be evaded. And so in *Bateman v. Faber* it was held that the doctrine of estoppel could not be so used as to enable a married woman to deprive herself of income settled to her separate use with a restraint on anticipation; that she could not by an admission raise an estoppel against herself so as to bind her interest.

The defendants' third assignment must, for the reasons stated, be overruled. To sustain it would be but the approval of a device for the evasion of the restraint on alienation.

Next in order is the complainants' assignment to the effect that the court of civil appeals erred in refusing to give complainants a recovery for the rents which accrued from the date of the conveyance to

Shadow down to the death of Mrs. Sitz, their mother, if the court should be of opinion that an estate by the curtesy survived in Sitz, and, if not, then all rents that accrued from the date when Sitz and wife surrendered possession. If Mrs. Sitz were suing, we are unable to see how, on the principles already stated, a recovery could be denied her; but she is dead, and her administrator is not before the court. Complainants, suing merely as heirs at law, cannot recover rents that became due to the decedent. However, laying out of view the existence of a tenancy by the curtesy in the surviving husband, they could recover for rents not in arrears at her death. *Rowan v. Riley*, 6 Baxt. 67; *Smith v. Thomas*, 14 Lea, 324; *Combs v. Combs*, 131 Tenn. 66, 173 S. W. 441.

This brings us to the question whether the court of civil appeals erred in holding that P. T. Sitz was entitled to a tenancy by the curtesy. In this we are of the opinion there was no error. All of the elements of the estate existed,—marriage, birth of issue capable of inheriting, seisin in the wife, and death of the wife. There is no language in the deed cutting off the husband's marital rights beyond the death of the wife. Such intention must be clearly expressed. *Carter v. Dale*, 3 Lea, 710, 31 Am. Rep. 660; *Frazer v. Hightower*, 12 Heisk. 94; *Bingham v. Weller*, 113 Tenn. 70, 69 L.R.A. 370, 106 Am. St. Rep. 803, 81 S. W. 843.

We are referred to *Monroe v. Van Meter*, 100 Ill. 347, as authority for the proposition that there can be no tenancy by the curtesy when the conveyance is to the feme free from the debts and liabilities of the husband. That case does so hold, but its authority is much impaired by the fact that at the time curtesy did not exist, in Illinois, as shown in the opinion, it having been abolished by statute, and the evidence failing to show that the issue was born before the passage of the act, it also appearing in that case that the wife left a will by which she disposed of the property, and the two grounds mentioned were held to furnish a basis for the decision that there was no curtesy. What was said on the third ground, that there could be no curtesy where the conveyance was to be free of the husband's debts, was merely in passing, and can be of little weight as authority. However, in all three of our own cases cited the conveyance excluded the husband's debts. We quote the language of the last only: "To Mrs. Caroline Isabella Weller and her bodily heirs, forever, a certain piece or parcel of land on Market street, in Memphis, Tennessee, to be held by her to her own

bodily heirs, free from the debts and liabilities of her husband, Jacob Weller." *Birgham v. Weller*, *supra*.

It was held that the husband had, under this deed, a tenancy by the curtesy; his wife having died after having had issue capable of inheriting.

It is insisted for complainants that the failure to use the word "assigns" in the deed has some bearing on the question. We are unable to see how. The words, "heirs and assigns," are customary in deeds, but in this state, under our statute (*Shannon's Code*, § 3672), wholly unnecessary. However, it has been held that the use of the word "assigns" indicates an intention to give the grantee the power of sale. *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484; *Kendall v. Clapp*, 163 Mass. 69, 39 N. E. 773; *Goetz v. Ballou*, 64 Hun, 490, 19 N. Y. Supp. 433; *Johnson v. Morton*, 28 Tex. Civ. App. 296, 67 S. W. 790, 791. It was therefore a very appropriate precaution to omit that word in a deed restraining alienation.

It is insisted that the expression, to "Laura Hudgins and her heirs free from the debts," etc., imports a purpose to cut off the curtesy. The argument is that the use of the word "heirs" was necessary to carry a fee under our statute, that every word in a deed must be given some meaning, and that the only meaning that could be imputed would be the cutting off of the curtesy, since the heirs would take no interest under the deed free from the debts of the husband, unless the curtesy should be denied. It is enough to say that in the three cases we have cited (*Carter v. Dale*, *Frazer v. Hightower*, and *Bingham v. Weller*) the same term occurred, and in all of

them curtesy was allowed notwithstanding. No importance was attached to the term, as indeed none should have been. Old forms of expression linger in the minds of draftsmen of deeds and other instruments, and importance should not be attached to them, when under the law they do not necessarily show a purpose to qualify estates granted under statutory forms of expression likewise used, where such statutory expressions are themselves sufficient to carry an estate.

Lastly, it is insisted for complainants that, inasmuch as there were four children by the first marriage and only one by the last, the surviving husband, P. T. Sitz, should have a curtesy interest in only an undivided one fifth of the land. The argument is that, inasmuch as the curtesy was conceded to the husband originally because of his duty to support the children of the marriage, the reason fails in the case of stepchildren, and therefore the estate should cease in proportion. Whatever may have been the original reason, it has long since become a rule of property that the estate exists when the four requisites which we have recited exist. So, even if all the children should die in early infancy, leaving the father wholly unburdened with the duty of supporting any child, and he should survive his wife, he would under the law be entitled to curtesy, if the other requisites existed. This was the case of *Templeton v. Twitty*, 88 Tenn. 595, 606, 14 S. W. 435, in which it was held the husband was entitled to curtesy. This assignment must therefore be overruled.

The result is that, for the reasons herein stated, the decree of the Court of Civil Appeals is in all things affirmed.

Annotation—Validity of limitation upon power of alienation imposed upon grant or devise of equitable estate to married woman.

The question above stated is covered by a note to *Hauser v. St. Louis*, 28 L.R.A.(N.S.) 426, to which the present note is supplemental.

TRAVIS v. SITZ, ante, 671, in upholding the validity of a restraint upon alienation imposed upon the separate equitable estate of a married woman, notwithstanding the existence of a married woman's enabling act, is at variance with the cases cited in the note referred to, as well as with a decision handed down since the compilation of such note, *Cropper v. Bowles* (1912) 150 Ky. 393, 150 S. W. 380, in which it was held that the Kentucky Act of March 15th, 1894 (Ky. Stat. art. 3, chap. 66), abolishing the distinction which previously existed between the separate and general estates of

married women, and in effect making all property of a married woman separate estate, had the effect of removing the disabilities adhering to a separate estate; and therefore that a provision in a deed whereby property was conveyed to a married woman "to be her sole and separate estate, free from the debts and control of her husband, or any husband she may ever have, with the right to dispose of the same by last will and testament or writing in the nature thereof, but without power to mortgage or otherwise to encumber or to sell or convey the same during her life," was an unreasonable restraint upon the inherent and inseparable right of alienation appurtenant to every vested estate in fee.

It may be pointed out that the question under discussion never can arise in Pennsylvania, the courts of which hold that a married woman has no powers over her separate estate except such as are given by the trust instrument, and that even these must be strictly con-

strued; and, further, that such powers are not enlarged by the married women's enabling acts. See *MacConnell v. Lindsay*, (1890) 131 Pa. 476, 19 Atl. 258; *Holliday v. Hively* (1901) 198 Pa. 335, 47 Atl. 988. E. S. O.

KANSAS SUPREME COURT.

LUCY J. PHILLIPS, Clerk of the District Court of Woodson County.

v.

A. H. GILLIS, Receiver of Yates Center National Bank, Appt.

(98 Kan. 383, 158 Pac. 23.)

Bank — public funds — special deposit.

1. Where deposits in a bank are made from time to time to the credit of a depositor as a public officer, entry thereof being made in a pass book, and checks are drawn and paid in the ordinary course of business, monthly statements being rendered, testimony that it was the purpose of the depositor that the funds should be kept separate, and should be always there so that they could be checked out at any time, affords no basis for regarding the amount on hand as a special deposit.

For other cases, see Banks, IV. a, 1, in Dig. 1-52 N. S.

Same — priority.

2. The claim of an officer for funds deposited by him in a bank which has become insolvent is entitled to no priority of payment merely because of their public character.

For other cases see Banks, V. in Dig. 1-52 N. S.

Same — trust.

3. Where public funds are deposited in violation of law in a bank which has knowledge of the facts, the title does not pass, and a trust results which, in case of insolvency, may be enforceable against the receiver.

For other cases see Banks, V. in Dig. 1-52 N. S.

Same — deposit by clerk of court.

4. In the absence of a statute either expressly allowing or expressly forbidding it, the act of the clerk of the district court in placing the funds in his official custody on general deposit in a bank, to his credit as such officer, is not illegal, and therefore the title passes and no trust results.

For other cases see Banks, V. in Dig. 1-52 N. S.

(June 10, 1916.)

Headnotes by MASON, J.

Note. — For preference in respect to public fund in bank which subsequently becomes insolvent, see annotation following this case, post, 683. L.R.A.1917A.

APPEAL by defendant from a judgment of the District Court for Woodson County in plaintiff's favor in an action brought to recover the amount deposited in an insolvent bank by plaintiff to her credit as clerk of the district court. Reversed.

The facts are stated in the opinion.

Mr. Altes H. Campbell, for appellant: The deposit was a general, and not a special, deposit.

State ex rel. Coleman v. Dickerson, 71 Kan. 769, 81 Pac. 497; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 775, 86 N. W. 21; McLain v. Wallace, 103 Ind. 562, 5 N. E. 911; Alston v. State, 92 Ala. 124, 13 L.R.A. 659, 9 So. 732; Butcher v. Butler, 134 Mo. App. 61, 114 S. W. 564; Koetting v. State, 88 Wis. 502, 60 N. W. 822; Warren v. Nix, 97 Ark. 374, 135 S. W. 896; Mutual Acci. Asso. v. Jacobs, 141 Ill. 261, 16 L.R.A. 516, 33 Am. St. Rep. 302, 31 N. E. 414; Young v. Bundy, — Tex. Civ. App. —, 158 S. W. 566; Minard v. Watts, 186 Fed. 245; Fletcher v. Sharpe, 108 Ind. 276, 9 N. E. 142; Brown v. Sheldon State Bank, 139 Iowa, 83, 117 N. W. 289; Bradley v. Chesebrough, 111 Iowa, 126, 82 N. W. 472; Jones v. Chesebrough, 105 Iowa, 303, 75 N. W. 97; Paul v. Draper, 158 Mo. 197, 81 Am. St. Rep. 296, 59 S. W. 77; People v. California Safe Deposit & T. Co. 168 Cal. 241, L.R.A.1915A, 299, 141 Pac. 1181.

A national bank is without power to assume the attitude of a bailee or trustee of a special deposit.

Hawkins v. Cleveland, C. C. & St. L. R. Co. 32 C. C. A. 198, 60 U. S. App. 561, 89 Fed. 271; Easton v. Iowa, 188 U. S. 220, 237, 238, 47 L. ed. 452, 459, 23 Sup. Ct. Rep. 288, 12 Am. Crim. Rep. 522; Lucas County v. Jamison, 170 Fed. 345.

Mr. G. R. Gard also for appellant.

Messrs. Lamb & Hogueland and George R. Stephenson for appellee.

Mason, J., delivered the opinion of the court:

The Yates Center National Bank became insolvent. At the time it closed its doors Lucy J. Phillips, the clerk of the district court of Woodson county, had on deposit to her credit as such officer the sum of \$2,703.76. She brought an action against the receiver for this amount, on the theory that

it constituted a trust fund. She recovered a judgment, and the defendant appeals.

1. The contention is made in behalf of the plaintiff that she placed the funds which she held as clerk in the bank as a special deposit. It was shown that for a time she deposited money received in her official capacity, together with that belonging to herself, in her name individually, without anything to indicate its character. Within a few months, however, she changed this practice and caused the funds in her official custody to be transferred to her account as clerk, thereafter making deposits and checks by that designation. A running account was kept and deposits were made and checks drawn in the usual course of business, for a period of over four years, an ordinary pass book being used and monthly statements being rendered. She testified concerning the transfer: "I told Mr. Ricker [the president of the bank] the most of the money on deposit was held by me as clerk of the court, and wanted it arranged so that it would show that it was office money, and not a personal account, and he suggested that I deposit it in this way so that it would show kept separate. . . . Told him I wanted to change it and put the clerk's money to a deposit so it would be separate."

The question was asked: "But your idea was that you would separate your personal funds from those others; that is right?" She answered: "Yes; well, I wanted my personal funds separate from the others, and I also wanted it so it would be there and could be checked out at any time."

It is clear that the deposit was general. To have made it special the arrangement must have contemplated the safe-keeping and return of the very money left with the bank. The manner in which the business was conducted, the use of the pass book, the issuance and payment of checks, the balancing of the account, all indicate the ordinary relations between banker and depositor. *State ex rel. Coleman v. Dickerson*, 71 Kan. 769, 81 Pac. 497; 3 R. C. L. 518, 519, 522. The purpose of the plaintiff that the money should "be there," so that it could be checked out at any time, is one which actuates most depositors, and does not imply an understanding that the bank was to keep and return the identical bills and coins left with it.

2. The claim of an officer for funds deposited by him in a bank which has thereafter become insolvent is entitled to no priority of payment merely because of their public character. 3 R. C. L. 644; note in 8 Ann. Cas. 116; 5 Cyc. 514. And with respect to a national bank probably no state law could create a preference on that L.R.A.1917A.

ground. *Davis v. Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502.

3. But where public funds are deposited in violation of law, in a bank which has knowledge of the facts, the title does not pass, and a trust *ex maleficio* results which in case of insolvency may be enforced against the receiver or other custodians, so far at least as they have come into his hands, and in some jurisdictions to the extent by which the assets under his control have been thereby increased. 3 R. C. L. 555; notes in 5 L.R.A.(N.S.) 886; and 16 L.R.A.(N.S.) 918.

4. Therefore the question to be determined is whether the clerk of the district court may lawfully place on general deposit to his credit as such officer the funds that come into his hands in that capacity. There is no statute which expressly allows or expressly forbids such course. His bond is conditional for the payment to the proper person of all moneys received in his official capacity, and the faithful discharge of his duties. Gen. Stat. 1909, § 2245. His duties are described as those required by law or the rules and practice of the courts, including the safe-keeping of papers, and awards. Gen. Stat. 1909, § 2246. A public officer or other custodian who holds money not his own merely for safe-keeping until occasion shall arise for lawfully paying it out has, of course, no right to use it in his own business, or to permit its use by others. This is not merely because of the risk of loss, for all risk cannot be avoided, and such a disposition in a particular case might be the safest course that could be adopted to prevent loss. But to part with the title and right of possession amounts to a conversion, and is under the condemnation of the law whether a loss results or not. The placing of funds on general deposit in the bank involves the consent to its using them in its business. If the transaction is taken out of the general rule which forbids a mere custodian to part with the title to the specific money intrusted to him, it is because the commercial world recognizes the putting of funds in a bank as the natural, usual, and proper way of keeping and taking care of them, because of its obligation, enforced by governmental supervision, to have on hand at all times the cash to meet any call for a deposit, notwithstanding its relation to its depositors is technically that of a debtor to creditors.

In two Kansas cases the deposit of public funds by a treasurer (of a board of education and a city respectively) has been treated as wrongful, but in each he was the manager and cashier of the bank, and the illegality of the transaction was not de-

nied; the question in dispute being the extent to which the trust fund could be traced. *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263, 32 Pac. 658; *Larned v. Jordan*, 55 Kan. 124, 39 Pac. 1030. It has also been held that the statute forbidding a county treasurer to permit any corporation or individual to use public money under his control prevents his lawfully depositing it in a bank, except by express statutory authority; this interpretation being affected by other legislation on the subject. *State ex rel. Roberts v. Lawrence*, 80 Kan. 707, 103 Pac. 839. The case just cited notes the difference of judicial opinion as to whether a general deposit in a bank is within a prohibition against the "loan" of public funds. See also *First Nat. Bank v. Lanier*, 11 Wall. 369, 20 L. ed. 172; *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896; *Ricks v. Broyles*, 78 Ga. 610, 6 Am. St. Rep. 280, 3 S. E. 772; *State v. Rubey*, 77 Mo. 610, 619; *State ex rel. First Nat. Bank v. Bartley*, 39 Neb. 353, 23 L.R.A. 67, 58 N. W. 172; *State v. Hill*, 47 Neb. 456, 66 N. W. 541.

The supreme court of Iowa, in overruling an earlier decision which gave an affirmative answer to the question, said: "The contention of appellee is that the law forbids such an officer [a school treasurer] from making a general deposit of public money, even though in his name as such, for the reason that thereby the title to the fund passes to the bank, and a technical conversion results, and that any contract having a tendency to induce an officer to swerve from the line of duty is, of necessity, inimical to the principles of sound public policy. Were this position correct, it would be a matter of profound regret, for nearly every county, city, and school district treasurer in the state has interpreted the law otherwise, and, according to this view, placed the funds of the public in jeopardy, and exposed himself to criminal prosecution. For, if depositing with a bank for safe-keeping amounts to conversion, they would seem to be open to the charge of embezzlement, and might have difficulty in regaining the moneys from the depositories participating in the wrong by receiving the funds. Common prudence seems generally to have dictated the deposit of public moneys with solvent banking corporations for safe-keeping. To require the officer to retain these in his personal custody would impose an exceedingly onerous burden, so out of keeping with what is deemed essential for the safety of the funds that one so proposing would experience difficulty in procuring sureties on his official bond. . . . If that decision [*Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049] L.R.A.1917A.

is to be adhered to, then the hundreds of public officials of this state who have placed the moneys coming into their hands as such in the solvent banks of the state for safe-keeping, in pursuance of a custom prevailing since the formation of this commonwealth, and in harmony with business usages of the commercial world, must be denounced as embezzlers. . . . We are not ready to so declare. Better that *Lowry v. Polk County*, in so far as holding the general deposit of money a loan, be overruled. It has been disregarded, because of business necessity and prudence, ever since announced. It is unsound in principle and contrary to authority." *Hunt v. Hopley*, 120 Iowa, 695, 697, 702, 95 N. W. 207.

The supreme court of Wisconsin used this language in the course of an opinion determining that the state treasurer violated no law in making general deposits of public funds in banks, notwithstanding statutes requiring him to "pay out . . . the same moneys received and held by him by virtue of his office," and providing for examiners to "see that all the money appearing by the books . . . belonging to the several funds is in the vaults of the treasury."

"These deposits were made in the name of the treasurer, in his official capacity as such. No time of credit was given upon them, but they were payable whenever required by the treasurer, and they could only be drawn on the official draft or check of the treasurer. They were made in accordance with the usual and long-continued course of business in that department of the state government. . . . Under these circumstances it is reasonable to hold that the state treasurers were justified in transacting the business of their department as they did transact it, and as such business is almost invariably conducted in the commercial world, unless those methods were prohibited by some statute of the state." *State v. McFetridge*, 84 Wis. 473, 507, 508, 20 L.R.A. 223, 54 N. W. 1.

It is held in this state that the bondsmen of a township treasurer are not exonerated by the fact that the money in his hands has been lost through the insolvency of a bank in which he had deposited it. *Rose v. Douglass Twp.* 52 Kan. 451, 39 Am. St. Rep. 354, 34 Pac. 1046. However, the fact that the law countenances deposit in a bank as one of the methods that an officer may select for the care of money held in his official capacity does not imply that by pursuing that course he can relieve himself from liability for its loss. Note in 36 L.R.A. (N.S.) 287. In Wyoming it has been held that the title to moneys deposited by an officer in that capacity remains in the pub-

lie. *State v. Foster*, 5 Wyo. 199, 29 L.R.A. 226, 63 Am. St. Rep. 47, 33 Pac. 926.

In view of the manner in which business in this country is ordinarily conducted, the natural course to be pursued by the custodian of a fund to which additions are continually being made, and from which payments may be demanded at any time, is to place it on general deposit in a bank and check upon it as occasion arises. A special deposit is not necessarily any safer than a general one, and is usually regarded as more hazardous. To keep the money in his personal possession would often involve an unreasonable risk, and to place it in a safety deposit box, where that is available, involves too cumbersome a method of disbursement to be at all in keeping with mod-

ern customs. We do not think the legislature must be regarded as intending that all funds in the hands of custodians charged with their safe-keeping must be withdrawn from circulation, unless the statute expressly authorizes their deposit in a bank. We conclude that the clerk of the court acted lawfully in placing in the bank the money in her official charge, and therefore that the title passed and no trust resulted. This conclusion makes it unnecessary to consider any question as to the tracing of the funds into the hands of the receiver.

The judgment is reversed, and the cause remanded, with directions to render judgment for the defendant.

All the Justices concur.

Annotation—Right to preference in respect to public fund in bank which subsequently becomes insolvent.

Earlier cases considering the question under annotation will be found in notes to *Page County v. Rose*, 5 L.R.A.(N.S.) 886, and *Watts v. Cleveland County*, 16 L.R.A.(N.S.) 918.

The question whether the ability to trace or identify the funds is a condition of the right to a preference is, of course, not distinctive to the subject of preference in respect of deposit of public funds, and is alluded to only incidentally in these notes. The question is treated generally and exhaustively in the annotation in L.R.A.1916C, 21, under the title, "Identifying misapplied trust funds, to follow and recover them."

The general rule as shown by the cases collected in this and in the previous notes is that public moneys wrongfully deposited by a public officer are impressed with a trust in favor of the public, and upon the insolvency of the bank are entitled to a preference over the claims of general creditors.

Thus, in *Re Bank of Nampa* (1916) — *Idaho* —, 157 Pac. 1117, it was held that under a statute which required that public money be deposited on special deposit, money deposited by the treasurer of an irrigation district on a general deposit became a trust fund, and no part of the funds of the bank, and so, in case of the insolvency of the bank, such fund must be treated as the property of the true owner.

So, also, the act of a county treasurer in keeping public funds on deposit without the security required by statute is wrongful, and on the insolvency of the bank such funds are entitled to preference in payment out of the bank's as-

sets. *Yellowstone County v. First Trust & Sav. Bank* (1912) 46 Mont. 439, 128 Pac. 596.

On the other hand, where a deposit is authorized, or at least where it is not wrongful, the general rule is that, in the absence of statute, there is no right to preference in respect of public funds in a bank which subsequently becomes insolvent.

So, in *Hanson v. Roush* (1908) 139 Iowa, 58, 116 N. W. 1061, it was held that a deposit by a school treasurer in a private bank was not wrongful so that the banker became a trustee ex maleficio, and so upon the insolvency of the bank there was no preference in respect to such funds. In order to establish a trust character with reference to these funds, the court stated that it must appear, by presumption or otherwise, that the funds so deposited were preserved in the hands of the administrators, and that, while it was not incumbent to identify the particular funds, which would be practically impossible, it must appear that the assets of the bank had been increased by the trust deposit, and that they might be taken therefrom without prejudice to the rights of other creditors, and this the court stated was impossible in the instant case, as the evidence showed that the bank had been hopelessly insolvent for a long time and that the moneys had been dissipated without adding to the assets which had come into the administrator's hands, and so under such circumstances it would be inequitable to other creditors to give such funds a preference. And see *PHILLIPS v. GILLIS*, ante, 680.

And in *Smith v. Arnold* (1915) 165 Ky. 214, 176 S. W. 983, funds deposited by the master commissioner or receiver of the circuit court in the designated depository, in obedience to statute, were not entitled to priority on the bank subsequently becoming insolvent. The court stated that the statute not only authorized, but required, the master commissioner and the receiver of the court to deposit the funds held by them as such in the bank designated by order of the court, and that a bond is provided for the purpose of securing such deposits. The court added that the law and sound public policy would not favor preferences in the liquidation of an insolvent bank, and that, in the absence of statutory provisions to the contrary, it could see no reason why the funds deposited in the designated depository should stand on any higher ground than the funds of other depositors; that it was to protect the funds so deposited that the bond was required of the bank; and that an effort to relieve this bond by an attempt to obtain a priority in the disbursements of the bank's assets, to the prejudice of other depositors, would not be countenanced.

Mississippi Code 1906, § 3485, which was a re-enactment of Code 1892, § 3077, provides that all money deposited in a bank or with any other depository, by or for a tax collector or other officer having the custody of public funds, state, county, municipal, or levee boards, whether the same be deposited in the name of the officer as an individual or as officer, or in the name of any other person, is *prima facie* public money and a trust fund, and is not liable to be taken by the general creditors of the depository. So public funds deposited by a sheriff were held in *Metcalf v. Merchants & Planters' Bank* (1906) 89 Miss. 649, 41 So. 377, to be a trust fund under § 3077, Code of 1892, and so entitled to priority of payment out of the assets of the bank.

Also, under § 3485, Code of 1906, public funds deposited in a bank which became insolvent, by one as sheriff and tax collector, were held to be a trust fund and entitled to priority of payment as against general creditors out of the assets of the bank acquired and paid for prior to the deposit of such funds. *Green v. Cole* (1911) 98 Miss. 67, 54 So. 65.

But funds deposited by a board of drainage commissioners are not within the protection of this statute, and so are not entitled to priority. *United States L.R.A.* 1917A.

Fidelity & G. Co. v. First State Bank (1912) 103 Miss. 91, 60 So. 47. The court stated that this statute is in derogation of the common law, and gives the public extraordinary privileges at the expense of the citizens of the state and other persons who may be creditors of the depositaries of public money, and should therefore be strictly construed; and that, as the statute specifically designated "state, county, municipal, or levee board," it should not be construed as including a board of drainage commissioners. As to the contention that such funds were municipal funds within the meaning of such statute, the court said that it was of the opinion that the legislature, by the use of the word "municipal," intended to embrace only that character of municipal corporations represented by cities, towns, and villages, because county and levee boards are also municipal corporations in the broader sense of the term, and it was therefore unnecessary to mention either in this act, if the legislature intended the word "municipal" to be interpreted in its most comprehensive sense; but that it seemed clear that the legislature did not intend to include within the meaning of such section any public funds except the funds of the state, the county, the city or town, and the levee boards.

A county which has designated a county depository in accordance with chap. 194 of the Act of 191 was held, in *Powell v. Tunica County* (1914) 107 Miss. 410, 65 So. 499, Ann. Cas. 1916B, 1262, not entitled to priority under § 3485, Code 1906, as to funds deposited up to the amount of the security required, but was entitled to priority as to any amount in excess of such security.

But in *Levee Comrs. v. Powell* (1915) 109 Miss. 415, 69 So. 215, it was held, reversing the same case in (1915) 109 Miss. 154, 68 So. 71 (the court being differently constituted), that the board of levee commissioners, which had designated a levee depository in accordance with chap. 97 of the Laws of 1908, was entitled to the protection of § 3485 of the Code, and so had a priority of payment as to all funds deposited, the court pointing out that chap. 97 of the Laws of 1908, as was not the case in chap. 194 of the Acts of 1912, contained the provision that the requiring of security should not be construed as a waiver of any right to benefits or privileges conferred by law upon the commission in the matter of recovering public money or trust funds from banks in which they may have been de-

posited, and construing this section of the provision as not doing away with the protection afforded by § 3485 of the Code.

The claims of a state for money deposited in a bank have, under a constitutional provision abrogating only such parts of the common law as are repugnant to the Constitution, priority in case of the bank's insolvency over those of private depositors having no specific lien, even though the money belongs to special funds, if it is the property of the people. *Re Carnegie Trust Co.* (1912) 206 N. Y. 390, 46 L.R.A.(N.S.) 260, 99 N. E. 1096. See note attached to this case in 46 L.R.A.(N.S.) 260, on common-law priority of the state or the United States in payment from assets of debtor, which contains several cases in point with the question under annotation, attention being particularly called to *American Bonding Co. v. Reynolds* (1913) 203 Fed. 356, which held that the state had priority as a prerogative rule of the common law; to *Booth v. State* (1908) 131 Ga. 750, 63 S. E. 502, and *Central Bank & Trust Corp. v. State* (1912) 139 Ga. 54, 76 S.

E. 587, which held that the statutory priority of the state is declaratory of the common law; and to *Potter v. Fidelity & D. Co.* (1911) 101 Miss. 823, 58 So. 713, which adopted the theory of no common-law priority, holding that in the absence of statutory or constitutional authority a state has no sovereign right to priority.

So, also, the prerogative right of the Crown to priority in payment of public money deposited in a bank which subsequently became insolvent was upheld in *Provincial Government v. Maritime Bank* (1888) 27 N. B. 379, the court stating that § 79 of the Bank Act, providing that "the payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency," did not interfere with the prerogative of the Crown to priority of payment, such section being intended to apply to claims of priority between subjects only.

And to the same effect, see *Reg. v. Bank of Nova Scotia* (1885) 11 Can. S. C. 1, and *Reg. v. Maritime Bank* (1889) 17 Can. S. C. 657. J. H. B.

MINNESOTA SUPREME COURT.

DANIEL E. EYRE, Exr., etc., of John Kennedy, Deceased,
v.

CITY OF FARIBAULT.

(121 Minn. 233, 141 N. W. 170.)

Executor and administrator — right to condemnation award.

1. Since, under our statutes, an executor has the right to the possession of his testator's lands without regard to the sufficiency of the personal assets to pay debts, and since the damages in condemnation proceedings stand in the place of the land, where the damages upon the condemnation of certain property were paid into court, an executor, claiming that the property belonged to his testator's estate at the time of its taking, had the right to sue, as for money had and received, a party who had obtained such money out of court, and this without regard to the financial status of the estate.

For other cases, see Eminent Domain, III. c, 2, in Dig. 1-52 N. S.

Appeal — evidence — sufficiency.

2. Findings of the trial court upon an is-

Headnotes by PHILIP E. BROWN, J.

Note. — For conclusiveness of judgment or order in condemnation proceedings as a settlement of rival claims to the award, see annotation following this case, post, 690. L.R.A.1917A.

sue of title by adverse possession, claimed by the defendant to have been perfected by it prior to the condemnation proceedings, held sustained by the evidence.

For other cases, see Evidence, XII. c, in Dig. 1-52 N. S.

Judgment — eminent domain — award — determination of claimant.

3. Where it appeared from the petition in condemnation proceedings that the title to the land was in doubt, and it did not appear from the order appointing commissioners to assess damages that such doubt had been settled thereby, and thereafter the damages assessed, the same being in gross and purporting to cover any and all interests in the property taken, were paid into court pursuant to Gen. Stat. 1894, § 2649, and no judgment such as that prescribed by § 2615 was ever entered upon the assessment, the condemnation proceedings did not, under the doctrine of *res judicata*, preclude the real owner of the land from asserting his ownership of the fund so deposited, as against a party who had obtained the same out of court, though the report of the commissioners undertook to award the damages to such party.

For other cases, see Judgment, II. d, 2, in Dig. 1-52 N. S.

Same — order of distribution.

4. Nor did a subsequent order, made upon an application under Gen. Stat. 1894, § 2650, and based solely upon *ex parte* affidavits, and of which the plaintiff, who made no appearance thereto, had no notice, directing

the fund to be paid over to the defendant, bar the plaintiff's claim of ownership thereof.

For other cases, see Judgment, II. c, 2, in Dig. 1-52 N. S.

Assumpsit — defense — wrong remedy.

5. There was no merit in the defendant's contention that the plaintiff's only remedy was by an action against the condemning corporation for his damages.

For other cases, see Assumpsit, II. in Dig. 1-52 N. S.

Appeal — evidence — sufficiency.

6. The defendant's claim, made for the first time in this court, that the plaintiff was estopped by reason of delay in the assertion of the title to the land, and that the plaintiff was also barred by laches, held not sustained by the evidence.

For other cases, see Evidence, XII. c, in Dig. 1-52 N. S.

Eminent domain — improvements — rival claimants — want of evidence.

7. Refusal of the trial court to allow the defendant's claim for improvements made prior to the condemnation proceedings, as an offset against the plaintiff's recovery, sustained for lack of evidence upon which a severance of the benefits conferred upon the entire property taken could be made as between the portion of the property to which the defendant succeeded in establishing title by adverse possession and the part thereof as to which its claim of title failed.

For other cases, see Appeal and Error, VII. l, 3, in Dig. 1-52 N. S.

(April 25, 1913.)

CRoss APPEALS from a judgment of the District Court for Rice County in favor of plaintiff in an action brought to recover money which had been paid to defendant in a proceeding to condemn certain real estate for railroad purposes; defendant appealing from so much of the judgment as recognized plaintiff's claim to the fund, and plaintiff appealing from so much as refused to recognize a part of his claim. Affirmed.

The facts are stated in the opinion.

Messrs. S. R. Child and Benjamin Drake, for plaintiff:

The plaintiff is, as against the heirs of the deceased, if there be such, the owner of this fund, and entitled to its possession.

Rev. Laws, § 3706; Miller v. Hoberg, 22 Minn. 249; Wellner v. Eckstein, 105 Minn. 444, 117 N. W. 830; Kern v. Cooper, 91 Minn. 121, 97 N. W. 648; Re Scheffer, 58 Minn. 29, 59 N. W. 956; Moritz v. St. Paul, 52 Minn. 409, 54 N. W. 370; Lewis, Em. Dom. §§ 881, note 85, 894; Boutelle v. Minneapolis, 59 Minn. 493, 61 N. W. 554; Lumbermen's Ins. Co. v. St. Paul, 82 Minn. 497, 85 N. W. 525; Obst v. Covell, 93 Minn. L.R.A.1917A.

30, 100 N. W. 650; Smith v. St. Paul, 65 Minn. 297, 68 N. W. 32; North Coast R. Co. v. Hess, 56 Wash. 335, 105 Pac. 853.

Plaintiff was a stranger to the condemnation proceedings, not having been made a party, and is not therefore bound thereby.

2 Dunnell's Dig. §§ 5162, 5163; 23 Cyc. 1237, 1253b; 24 Am. & Eng. Enc. Law, 2d ed. 724; Herman, Estoppel & Res Judicata, § 133; Kanne v. Minneapolis & St. L. R. Co. 33 Minn. 419, 23 N. W. 854; Lohman v. St. Paul, S. & T. F. R. Co. 18 Minn. 174, Gil. 157.

The order turning over the money was without jurisdiction and is therefore subject to collateral attack.

State ex rel. Erickson v. West, 42 Minn. 147, 43 N. W. 845; Jewett v. Iowa Land Co. 64 Minn. 531, 58 Am. St. Rep. 555, 67 N. W. 639; Sache v. Wallace, 101 Minn. 169, 11 L.R.A.(N.S.) 803, 118 Am. St. Rep. 612, 112 N. W. 386, 11 Ann. Cas. 348; Mueller v. Reimer, 46 Minn. 314, 48 N. W. 1120; Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559; Kanne v. Minneapolis & St. L. R. Co. 33 Minn. 419, 23 N. W. 854.

In condemnation proceedings the question of title or ownership of the award is not determined.

St. Paul & S. C. R. Co. v. Matthews, 16 Minn. 341, Gil. 303; Lefevre's Appeal, 32 Cal. 565; Re Williams Street, 19 Wend. 678; Brandon v. Brandon, 2 Drew. & S. 305, 11 Jur. N. S. 30, 34 L. J. Ch. N. S. 333, 11 L. T. N. S. 658, 13 Week. Rep. 251.

Mr. J. W. Le Crone also for plaintiff.

Mr. E. H. Gipsen, for defendant:

This is a collateral attack upon a judgment of this court, which cannot be maintained.

Black, Judgm. § 252; 23 Cyc. 1062; Gullickson v. Bodkin, 78 Minn. 35, 79 Am. St. Rep. 352, 80 N. W. 783; Lewis, Em. Dom. § 606.

If the executor was a party to this action, or if the heirs or devisees of the plaintiff's testate were parties properly brought into court by service of process, they are bound by all the proceedings.

Lumbermen's Ins. Co. v. St. Paul, 82 Minn. 497, 85 N. W. 525; State ex rel. Norris v. District Ct. 52 Minn. 283, 53 N. W. 1157; Voorhees v. Jackson, 10 Pet. 449, 9 L. ed. 490; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Hilton v. Bachman, 24 Neb. 490, 39 N. W. 419; 21 Am. & Eng. Enc. Law, 277; Fuller v. Eastman, 81 Me. 284, 17 Atl. 67; Bigelow v. Winsor, 1 Gray, 299; McCoy v. McCoy, 29 W. Va. 794, 2 S. E. 809; Wayne County v. Kennicott, 94 U. S. 498, 24 L. ed. 260; Chouteau v. Gibson, 76 Mo. 38.

If title has been determined, no subsequent suit for damages will lie.

Roberts v. Heim, 27 Ala. 678.

The doctrine of estoppel should apply in this case, and bar plaintiff, if he is not barred in any other way, from prosecuting his suit.

Strosser v. Ft. Wayne, 100 Ind. 443; Mariner v. Milwaukee, 146 Wis. 605, 131 N. W. 442; Leeds v. Amherst, 2 Phill. Ch. 123, 10 Jur. 956; Fowler v. Parsons, 143 Mass. 401, 9 N. E. 799; Hall v. Fisher, 9 Barb. 31; Storrs v. Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316; Carlisle v. Cooper, 21 N. J. Eq. 591; American Exch. Bank v. Webb, 15 How. Pr. 198; Ross v. Elizabeth Town & S. R. Co. 2 N. J. Eq. 422; Hulme v. Shreve, 4 N. J. Eq. 116; Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 531.

If the right to compensation in condemnation proceedings accrued to the decedent during his lifetime, it passes to his personal representative, otherwise to his heir or devisee.

Church v. Grand Rapids & I. R. Co. 70 Ind. 161; Neal v. Knox & L. R. Co. 61 Me. 298; Whitman v. Boston & M. R. Co. 3 Allen, 135; St. Albans v. Seymour, 41 Vt. 579.

The doctrine of equitable estoppel and laches should apply to the executor as well as to creditors.

Gibson v. Brennan, 46 Minn. 92, 48 N. W. 460; Hill v. Nichols, 47 Minn. 382, 50 N. W. 367.

The title in this case has ripened by adverse possession.

Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Ewing v. Burnet, 11 Pet. 41, 53, 9 L. ed. 624, 629; Clark v. Campau, 92 Mich. 573, 52 N. W. 1062; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Bazille v. Murray, 40 Minn. 48, 41 N. W. 238; Washburn v. Cutter, 17 Minn. 361, Gil. 335; Wood v. Springer, 45 Minn. 299, 47 N. W. 811; Mattson v. Warner, 115 Minn. 520, 132 N. W. 1127.

Philip E. Brown, J., delivered the opinion of the court:

Action for money had and received, to recover \$4,000, with interest from May 28, 1901. The cause was tried to the court without a jury. Findings were made awarding the plaintiff \$2,000, with interest from May 8, 1907. Judgment was subsequently rendered thereon, and both parties appealed.

We will briefly recite the main facts necessary to an understanding of the controversy, leaving other facts specially material upon the several branches of the case, both admitted and disputed, to be stated L.R.A.1917A.

when we come to consider the point to which they relate.

In 1856 one John Kennedy became the owner of lot 2, block 32, in the city of Faribault. This lot, prior to 1871, with the exception of a few feet of its west end, remained vacant and unoccupied. The lot was low, being largely in the river channel, and was subject to annual overflows. The soil was sandy, and the lot, in its natural state, was unsuitable either for habitation or cultivation. Its dimensions were, and still are, 66 by 165 feet, the longest dimension being from west to east. In 1871 one Patrick Reardon and Rose Ann, his wife, became the owners of lots 9 and 10 in the same block. These lots were the same size as lot 2, lot 9 being immediately west thereof and lot 10 south of lot 9. In the same year, and during each year thereafter until 1878, Reardon and his wife had a garden on lot 9, which extended for a few feet over upon the west end of lot 2 the entire width thereof, and during the years mentioned they deposited and superintended the deposit of refuse and soil east of the garden, thus making the part of lot 2 so filled suitable for cultivation for some 80 feet towards the east. In 1878 the Reardons constructed a fence along the north line of lots 9 and 2 as far as the land was tillable, and planted a garden upon all the land suitable therefor, and continued to maintain such fence and cultivation until 1888. In that year Patrick died, and his wife, succeeded to whatever interest he had in the lots mentioned, continued the cultivation referred to until 1890, but not thereafter. In 1893 she conveyed all of the property mentioned to the city, which took and held possession thereof until 1901. No one occupied lot 2 or exercised any acts of ownership thereover for thirty years prior to 1901, except the Reardons and the city. In April of that year a railway company instituted proceedings to condemn lot 2 for railway purposes, and thereafter such steps were taken that \$4,000 was assessed as damages and paid into court, and the railway company took possession of the property. Subsequently, and on July 19, 1901, the city, upon an order of court, obtained such sum out of court, and has since retained the same. In 1882 John Kennedy died testate, his wife, Jennie, surviving him. The will contained no specific devise of lot 2, but Jennie McEwen was named as residuary legatee. In 1883 the plaintiff qualified as executor, and thereafter, in 1907, brought the present action, in which the ultimate claim of both parties is to the ownership of the entire fund mentioned.

1. The city, as a preliminary claim, urges that this action should have been dismissed,

because the complaint contains no cause of action, inasmuch as it fails to allege what interest the plaintiff has in the fund, and also because it fails to set forth the amount of assets in Kennedy's estate, the proven debts against it, the deficit of assets, and the amount necessary to settle the unpaid claims, and, further, for the reason that all claims against the Kennedy estate were barred by limitation at the time of the bringing of this action, and likewise on the ground that the plaintiff is not the real party in interest. In connection with these points, the record discloses that the executor of the Kennedy estate rendered a final account showing that he had paid the funeral charges and costs of administration, and that thereupon, on November 7, 1883, the probate court made its order reciting the ascertainment and adjustment of the debts of the deceased and the examination and passing of the executor's account, from which it appeared that he had for distribution \$1,817.45, the same being insufficient fully to pay the ascertained debts. It also appears that the court directed pro rata distribution, which left a deficit of \$771.39. Upon this showing, and in connection with the city's point that this action should be dismissed, it is argued that in no event could the plaintiff be entitled to any more of the fund in controversy than enough to pay such deficit.

We cannot sustain these contentions. As suggested by the chief justice upon the oral argument, the objections urged, save only those to the jurisdiction of the court and the sufficiency of the facts to constitute a cause of action, were waived under Rev. Laws, 1905, § 4129; the same appearing upon the face of the complaint, and not having been raised by demurrer or answer. We think, also, that the plaintiff's right of action is unquestionable. As executor he had the absolute right to the possession of the land without regard to the sufficiency of the personal assets to pay debts (Rev. Laws, 1905, § 3705; *Miller v. Hoberg*, 22 Minn. 249; 1 Dunnell, Minn. Dig. § 2722), and such right continues until the estate is finally settled (*Re Scheffer*, 58 Minn. 29, 59 N. W. 956). Since, therefore, the plaintiff has never been discharged as executor, and as the fund involved stands in the place of the land (*Smith v. St. Paul*, 65 Minn. 297, 68 N. W. 32), he likewise has the right, as executor, to reduce such fund to possession, and this without regard to the financial status of the estate.

2. The city claims that it became the owner of the whole of lot 2 by adverse possession, while the plaintiff contends that no such title was established, either to the lot in its entirety or to any part thereof. L.R.A.1917A.

The court sustained the city's claim as to the west half of the lot, denying it as to the other half, and both parties assign error upon such holding. It would be idle to recite the voluminous testimony on the question thus raised. It has been considered, and when the nature and situation of the lot, and the uses to which it was adaptable during the period of its occupancy (see *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Costello v. Edson*, 44 Minn. 135, 46 N. W. 299), are kept in mind, we find no difficulty in reaching the conclusion that the finding of the trial court referred to must be sustained as against the attack made thereupon by both of the parties to this action. In reaching this conclusion we have not overlooked the plaintiff's contention as to the quantum and character of proof necessary to establish title by adverse possession, and in deference thereto we again reiterate that "the rule guiding this court in the consideration of the question whether the findings of the trial court are sustained by the evidence remains the same whether the fact found be required to be established by a preponderance of the evidence, or by clear, convincing, or satisfactory evidence. The evidence must be clearly against the findings in either case to justify a reversal." *Oertel v. Pierce*, 116 Minn. 266, 133 N. W. 797, Ann. Cas. 1913A, 854. See also *Holien v. Slee*, 120 Minn. 261, 139 N. W. 494. The constituents of title by adverse possession have been so frequently stated in our reports that repetition thereof here would be supererogation, and it is sufficient to say, applying the rule of appellate procedure announced above, that upon each and all of them the findings of the trial court must be sustained.

3. The city contends that the plaintiff's claim is barred under the doctrine of res judicata, insisting that its title to lot 2 was conclusively adjudicated in the condemnation proceedings, and that its right to the fund in question was established by the court's order, of date July 19, 1901, directing the same to be paid over to it. Taking up these contentions in order, let us examine the nature of condemnation proceedings, laying aside for the moment the plaintiff's point that he is not bound thereby, or by the order mentioned, because he was not a party to and had no notice of either the condemnation proceedings or the application pursuant to which such order was made, and made no appearance in or to either. The General Statutes of 1894, which were in force at the time of the condemnation of lot 2, provide, so far as here material, as follows:

Section 2604 confers upon railway corporations the right to condemn lands: § 2605

relates to the petition, and provides that it shall state the "property and estate which it will be necessary to appropriate," and shall set forth "the name of each and every owner, encumbrancer, or other person interested in the same or any part thereof, so far as the same can be ascertained by the public records, and by view of the premises or other inquiry touching the occupation thereof," and shall pray for the appointment of commissioners "to ascertain and determine the compensation to be made to such owner or owners respectively, for the taking," etc.; § 2606 provides for service of notice of the petition, and requires service upon "each and every person named therein," etc.; § 2608 provides that "at the time and place appointed for hearing said petition, . . . upon the presentation of such petition, with satisfactory proof that all the parties therein named have been duly served with said notice as hereinbefore prescribed, the court shall proceed to hear and determine the same," and that all or any of the persons whose lands, property, estates or interests are to be affected by the proceedings may show cause against the prayer of the petition, and may disprove any of the facts alleged in it, and, further, that if the court shall be satisfied that the taking of the land is proper, etc., it shall appoint commissioners "to ascertain and determine the amount to be paid by such corporation, to each of such owners or persons interested, as compensation for his or her damages by reason of the taking," etc.; § 2609 relates to the powers of the commissioners, and provides that they "shall hear the proofs and allegations of all persons interested," and shall "make in each case a separate assessment of the damages which will result to any person, company, or corporation by reason of . . . the taking, . . . and award the same to the owner or owners or persons interested therein respectively;" § 2611 provides for payment of the damages assessed; § 2615 prescribes the judgment to be entered upon the assessment, the same being that as against the parties interested therein the title to the property shall be in the corporation; § 2649 provides for the payment of the amount assessed into court in case of doubt as to the parties entitled thereto, and upon the corporation's affidavit to such effect; and § 2650 provides that any person claiming to be entitled to any of the money so paid into court "may apply to the court therefor, and, upon furnishing evidence satisfactory to the court that he is entitled to the same, the court shall make an order directing the payment to such claimant of the portion of such money as he shall be found entitled to, but if, upon such appli-

cation, the court should determine that the title to the tract or tracts specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such real estate determined according to law."

From the above résumé of the statutes, it will at once be noted that it is in § 2609 alone that any suggestion is made from which it might be inferred that the titles of claimants as between themselves are to be determined in the condemnation proceedings. It is true that it was held in *Brisbane v. St. Paul, & S. C. R. Co.* 23 Minn. 114, 128, under a statute making no provision for notice of the application to condemn, that "whenever, . . . either by an indefinite statement in the petition as to the interest of the claimant in the property, or by one not accepted by him as true before the commissioners, it becomes necessary for them to inquire into and decide the question of title or interest as incidental to the question of damages, it is proper matter for their consideration, and their decision thereon is reviewable, upon appeal, in the district court." It is also true that, where jurisdiction has attached, the award of the commissioners as to each claimant is conclusive as between the corporation and all parties claimant and their privies (*Trodden v. Winona & St. P. R. Co.* 22 Minn. 198), and that it has been held that, as between the corporation and the claimant, the latter's title is determined by the court at the time of the appointment of the commissioners (*St. Paul & S. C. R. Co. v. Matthews*, 16 Minn. 341, Gil. 303). Yet, in view of the nature of condemnation proceedings, the same being essentially in rem (*Smith v. St. Paul*, 65 Minn. 297, 68 N. W. 32; 15 Cyc. 805), it would seem that it was not intended by the statutes that conflicting claims to the land, and thus to the award, should be in issue or determined in the condemnation proceedings, either by the court or the commissioners, except as between the corporation and the claimants. Certainly, where it appears from the condemnation petition, as it does here, that the title to the property is in doubt, and it does not appear from the order appointing the commissioners that such doubt has been settled thereby, and thereafter the damages assessed, the same being in gross and purporting to cover every and all interests in the property, are paid into court pursuant to § 2649, and furthermore, where, as here, no judgment such as that provided for by § 2615 has been entered (see *Fletcher v. Chicago, St. P. M. & O. R. Co.* 67 Minn.

339, 347, 69 N. W. 1085), it cannot be held that, as between conflicting claims of ownership, the title to the property was adjudicated in the condemnation proceedings so as to preclude the real owner from asserting his ownership of the fund so deposited. See 15 Cyc. 894, 895. The provisions of § 2650 are, alone, practically conclusive against such a contention; otherwise we would have the unthinkable anomaly of the court, upon subsequent application to pay over the money, being empowered or required to readjudicate that which it has already finally determined.

And if the title as between the parties to this action was not in issue in the condemnation proceedings, we cannot hold that it was put in issue by or upon the city's application to the court for the fund, pursuant to which the order of July 19th was made; the same having been upon *ex parte* affidavits and without further notice to anyone. The rule against collateral attack has no application to such an order, and we hold, therefore, that, notwithstanding the very broad provision of § 2650, the plaintiff is not concluded by such order. In this view of the case it is not necessary to pass upon the question as to whether the notice in the condemnation proceedings, to the residuary legatee, constituted, in any sense or for any purpose, notice to the executor.

But the city contends that if the executor is not bound, so far as concerns his claim to the fund in controversy, by the condemnation proceedings or by the order of July 19th, then his rights are in no way affected, and hence he still has his remedy against the railway company, and cannot maintain his present action. We cannot so hold. The report of the commissioners assessed the \$4,000 in controversy as "the damages which will result to any person, company, or corporation by reason of the construction of such branch railroad and the taking" of the property for such purpose, and the statute (§ 2649, above cited) under which the railway company paid the money into court expressly provides that where, as was done in this case, the railway company files an affidavit of doubt as to who is entitled to the damages, then "upon making such payment into court of the damages assessed, . . . such railroad company shall be released and discharged from any and all further liability

therefor," unless the damages are increased upon an appeal, etc. In other words, the report of the commissioners, though undertaking to award the damages to the city, nevertheless purported to and did assess the damages of any and all persons interested in the lot, and not merely the damage to the city's interest, if any, therein. The very purpose, therefore, of the statute, would be defeated, if it were to be held that the real owner of the fund, if the city be not such, could not pursue the same in the hands of the city, but must bring an action against the railroad company for further damages. Furthermore, it is settled in this state that the damages assessed stand in the place of the property taken (*Moritz v. St. Paul*, 52 Minn. 409, 414, 54 N. W. 370; *Boutelle v. Minneapolis*, 59 Minn. 493, 61 N. W. 554; *Smith v. St. Paul*, 65 Minn. 297, 68 N. W. 32; *Lumbermen's Ins. Co. v. St. Paul*, 82 Minn. 497, 503, 85 N. W. 525; *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853; 2 *Lewis, Em. Dom.* § 894), and that the real owner thereof may sue as for money had and received to recover the same from anyone into whose hands they may come, without regard to any remedy he may have against the corporation for which the property was taken (*Smith v. St. Paul*, 65 Minn. 297, 68 N. W. 32).

4. The city's claim, made for the first time in this court, that the plaintiff was estopped by reason of his and his testator's failure sooner to assert title to the property, cannot be sustained, for we find nothing in the evidence to sustain it. *Dimond v. Manheim*, 61 Minn. 183, 63 N. W. 495. Nor do we find any merit in the city's claim of laches.

5. As to the city's contention that the court erred in refusing to allow its claim for improvements, this also, assuming that it was in issue, must be overruled. It is true that there was evidence tending to show that the city, by various betterments, increased the value of lot 2 in a considerable sum; but there was no evidence upon which a severance of the benefits thus conferred upon the whole lot could be made as between the west half, to which the city established its title, and the east half, as to which the city's claim of title failed. We cannot, therefore, overturn the decision of the trial court on this point.

Judgment affirmed.

Annotation—Conclusiveness of judgment or order in condemnation proceedings as a settlement of rival claims to the award.

This note does not cover the substantive question as to rights of different L.R.A.1917A.

classes of rival claimants to the funds arising from the condemnation of prop-

erty,¹ but is limited to the question as to what kind of judgment or judicial order in condemnation proceedings is binding upon the parties so as to be a bar to subsequent litigation.^{1a}

For the purpose of demonstration, some cases in which the question of the finality or binding force of a judgment was not directly passed upon by the court, for example, cases in which the court reviewed an award on appeal, are cited herein, but the note is not exhaustive of such cases. The only cases clearly within its scope are those in which an attempt was made to recover in a proceeding subsequently to the order or judgment in the condemnation proceeding.

Generally speaking, a judgment or order in condemnation proceedings is conclusive if the court making it had jurisdiction and the issue was directly before the court. As may be seen from the decision in *Eyre v. Faribault*, ante, 685, and other decisions cited herein, the wording of the particular statute, whether all the parties were before the court,

whether the proceedings were regular, and whether the particular question was directly or only indirectly passed upon when the judgment or order was entered, are some of the elements that must be considered in order to determine how to apply the general rule.

Obviously, the question whether or not a particular order or judgment made in connection with condemnation proceeding is *res judicata* as between rival claimants of the fund or part thereof, when questioned in the same or in a subsequent action, cannot be decided upon any fixed rule of law. Such judgment or order, like any other judgment, may be attacked even collaterally for lack of jurisdiction, and since jurisdiction in condemnation proceedings is purely statutory, very much will depend upon the particular statute as well as upon the facts that show compliance or non-compliance with the statute. So, where a party in interest is not named in the petition for condemnation of land by the petitioner, the proceeding is not binding upon him,² unless the omitted party in

¹ On right of mortgagee of premises taken by eminent domain, see note to *Goodrich v. Atchison County*, 18 L.R.A. 113; and on rights of tenants and reversioners of property taken by eminent domain, see note to *Corrigan v. Chicago*, 21 L.R.A. 212.

^{1a} As to attack on a judgment collaterally for insufficiency of pleadings, see note in L.R.A.1916E, 316.

² *Calumet River R. Co. v. Brown* (1891) 136 Ill. 322, 12 L.R.A. 84, 26 N. E. 501; *Chicago & N. W. R. Co. v. Miller* (1911) 251 Ill. 58, 95 N. E. 1027; *North Coast R. Co. v. Hess* (1909) 56 Wash. 335, 105 Pac. 853.

Where a levee board, in taking lands for the construction of a levee, awarded the damages to the owner of the fee, and the award recited: "To the mortgagee, G. Wiborn, we award nothing, as his security for his debt is ample," and it turned out that the amount of the mortgage debt was more than the value of the whole property including the award, it was held in *Levee Comrs. v. Wiborn* (1896) 74 Miss. 396, 20 So. 861, that the mortgagee could maintain an action against the board of levee commissions for the amount of the award, although they had paid the same to the mortgagor. In this case the wording of the award showed that the board knew of the mortgage, and its jurisdiction was probably not the same as that of a court.

The confirmation of a report awarding the amount to the owner of the fee does not bar a mortgagee of the land from claiming the award to the amount of the mortgage debt, if he acts, before the money is actually paid to the mortgagor or his assignee, and the assignee has no higher standing than the mortgagor had, and the L.R.A.1917A.

mortgage was recorded, and the assignment made before the report was confirmed. *Re Woods Run Ave.* (1910) 43 Pa. Super. Ct. 475.

Where a mortgage on property part of which is taken by a city for street uses is on record, the condemner is presumed to have notice thereof, and if it pays the mortgage debt out of the award, although the award is made to the mortgagor, the latter cannot maintain a separate action against it for the whole award, but is limited to the statutory remedy of asking for a fair distribution of the fund. This was a holding by way of argument only, in *Patterson v. Binghamton* (1895) 88 Hun. 272, 34 N. Y. Supp. 416, second appeal in (1897) 154 N. Y. 391, 48 N. E. 739.

But where the statute provides that a petition in the condemnation proceedings shall describe the property with reasonable certainty, and contain "the name of each and every owner, encumbrancer, or other person or party interested in the same or any part thereof, so far as the same can be ascertained from the public record," the condemnation proceedings with final order and payment will protect the condemner against lessees who are not made parties or formally notified of the proceedings, if they hold under an unrecorded lease. Their remedy is against the fund or the parties receiving it. In this case the lessees had been present at the condemnation proceedings, but that fact was treated only as an additional reason for the holding. *State ex rel. Long v. Superior Ct.* (1914) 80 Wash. 417, 141 Pac. 906.

Where one was in possession of land in which he had an interest, and some of the land was condemned by the county for

some way waives the point by taking care of his interest without objection to the omission.³

If, on the other hand, the proceedings are regular and the money paid into court, the condemner is not subject to additional liability to any claimant who has been brought into court in the proceeding, whatever may be the rights of the claimants among themselves.⁴

Some statutes make provision for the manner in which issues as to title and other issues between the claimants in condemnation proceedings shall be tried.⁵ When such a statute is followed strictly, there can be no doubt that the question of title was in issue and was decided by the court, so that that question is res judicata.

In some statutes the condemnation proceeding is not designed to be used to determine rival claims, and provision is made for payment into court whenever there are more than one claimant, and the court may in a separate proceeding finally determine the rights of the respective claimants.⁶ Of course, under such a statute an order of the court in the condemnation proceeding making a

distribution of the fund would not be final. In some cases the issues between rival claimants have been raised by interpleader before the fund is paid out,⁷ and while the courts, perhaps, have not been called upon to decide the question of finality of the judgment in such cases, there can be no doubt that all matters thus at issue which have been decided are res judicata. And it has been held that in the absence of a statutory provision the courts should permit anyone claiming an interest in the fund to intervene by petition or interpleader and have his rights determined.⁸ This would bring the issues clearly before the court, and if the court has jurisdiction its judgment would no doubt be binding upon the parties regularly before it.

Aside from the question of jurisdiction, much depends upon the intent of the court and parties as shown by all the circumstances; i. e., whether or not in the mind of the court and of the parties the question as between the claimants really was an issue. For example, where there was at the time of the award an appeal pending in another court on a suit to try title, and the court ordered

road purposes, and the award paid him, it was held in *New Madrid County v. Phillips* (1894) 125 Mo. 61, 28 S. W. 321, that the fact that the county found it necessary to acquire the interest of the other owners did not enable it to recover from him the money it had paid him in the condemnation proceedings, in an action for money had and received.

It was held in *Wood v. State Hospital* (1891) 16 Pa. Co. Ct. 667, that, after judgment is entered in favor of the owner by name, it is too late for the condemner to exercise the right to pay the money into court and for the other claimants to press their claims for a share of the award, for the judgment establishes its liability to the person named, and it makes no difference whether it be understood as deciding that the person named was the sole owner of the land, or that such interest as he did own was valued at the amount of the award. It will be noted that the right of the rival claimant to maintain an action, either against the condemner or against the recipient of the award, was not involved in this holding.

³ *Chicago v. Pick* (1911) 251 Ill. 594, 96 N. E. 539.

⁴ *Carton v. Seattle* (1913) 74 Wash. 375, 133 Pac. 596, where the court quotes from its former decision in the same case, found in (1911) 66 Wash. 447, 120 Pac. 111, as follows: "If the court inadvertently, or as the result of fraud practised upon it, omits the names of some of the proper parties from the verdict, or makes payment to the wrong party, it does not make the L.R.A.1917A.

city liable beyond the terms of the statute, or deprive the parties claimant of any rights or obligations inter sese." No doubt, there are other cases upon this point, but it is not here annotated exhaustively.

⁵ *Lefevre's Appeal* (1867) 32 Cal. 565. This case and other cases like it that might be cited are, of course, not conclusive on the main question here annotated.

⁶ *New York C. & H. R. R. Co. v. Mathews* (1911) 144 App. Div. 732, 120 N. Y. Supp. 828, affirming (1911) 70 Misc. 567, 128 N. Y. Supp. 138. The court said: "At the same time, it is not the legitimate province of a proceeding for the condemnation of real property to take up the question of disputed titles; the scheme of the law clearly does not contemplate this, for it is provided in § 3378 of the Code of Civil Procedure that 'if there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.'"

⁷ *Clark v. Meyerdirck* (1907) 107 Md. 63, 68 Atl. 141; *Hilton v. St. Louis* (1889) 99 Mo. 199, 12 S. W. 657; *Kansas City & A. R. Co. v. Smith* (1900) 156 Mo. 608, 57 S. W. 555; *Pollock v. Morris* (1887) 106 N. Y. 676, 12 N. E. 179.

⁸ *Dye v. Midland Valley R. Co.* (1908) 77 Kan. 488, 94 Pac. 785.

the money to be held pending the determination of that appeal,⁹ there was no doubt that the matter was in issue, and the money was held until the question was settled by another court. But if it turns out that the judgment of the other court is not *res judicata* as between the rival claimants,—that court having passed upon only the legal title to the land, excluding all evidence of equitable claim,—the order in the condemnation proceeding based upon the judgment is not *res judicata*, and does not prevent an action by the equitable owner for money had and received against the holder of the legal title, who has received

the proceeds under the order in the condemnation proceedings.¹⁰ And it has been held that a lessee may maintain an action for money had and received against his lessor for his share of the proceeds (after deducting his pro rata share of the expenses incurred by the lessor in prosecuting the claim for damages), where the whole amount of damages was paid the lessor, the lessee having made no claim at all in the proceeding to assess the damages to the real estate taken by the city in widening a street.¹¹

And where a statute gives any interested party the right to sue the party

⁹ *San Francisco & S. J. R. Co. v. Mahoney* (1865) 29 Cal. 112; *Chicago use of Schools v. Gage* (1915) 268 Ill. 232, 109 N. E. 28.

¹⁰ *Major v. Owen* (1914) 126 Minn. 1, 147 N. W. 662, Ann. Cas. 1915D, 589. In this case the plaintiffs, being financially embarrassed, conveyed their property to trustees for the payment of debts, the balance, if any, to be returned to plaintiffs. The trustees as such conveyed one piece of land, which was heavily encumbered with liens, to the defendant, and plaintiffs brought a statutory action against defendant to determine adverse claims, claiming to be the owners in fee. While this action was pending the land in question was condemned by a railway company, and the final order of distribution reserved to await the outcome of the action. The court in this action excluded all evidence of equitable title and entered judgments for the defendant. Whereupon the court in the condemnation proceedings ordered the balance over and above the liens to be paid to the defendant, and he received the money. The action for money had and received was instituted, and it was held that it could be maintained. The court said: "Defendant also insists that the order made in the condemnation proceedings, directing that the money in controversy be paid to him, conclusively determined his right thereto, and bars plaintiffs from asserting the claim which they now present. But it does not appear that the issues now presented were presented, considered, or determined in that proceeding. The decision made upon a motion or a summary application is not *res judicata*; at least unless it appears that a full hearing was had and that the issue in controversy was actually considered and determined therein."

¹¹ *Harris v. Howes* (1883) 75 Me. 436. The court in this case said: "By the fault or mistake of both of the present parties, one award only was made. The plaintiff mistook in not claiming, and the defendants in not disclaiming, the right to recover the lessee's damages. We do not see why a bill in equity would not lie to rectify the mistake, nor why the present action cannot be sustained for such purpose. Certainly, the defendants have money in their hands

which equitably and fairly belongs to the plaintiff. There can really be no more difficulty for this court to determine the relative sums belonging to the parties, than for county commissioners to work out the result. The duty of the commissioners would have been first to ascertain the entire damages and then apportion them. Nor is it unusual in such proceedings in many of the states, for an award to be made in gross, and the division to be made afterwards according to ownerships. *Wilson v. European N. A. R. & Co.* (1877) 67 Me. at p. 363. The present Massachusetts statutes furnish a mode of proceeding similar to that. *Mass. Gen. Stat. chap. 4, Boston v. Robbins* (1879) 126 Mass. 384. Proceedings have been sustained where only the quantum of damages was found and awarded to 'owners unknown.' *Com. v. Great Barrington* (1810) 6 Mass. 492; *Re 11th Ave.* (1880) 81 N. Y. 436. See *Com. v. Coombs* (1807) 2 Mass. 489, and *Brown v. Essex County* (1846) 12 Met. (Mass.) 209. Of course, the plaintiff should not recover an amount exceeding his relative share of the whole amount awarded, less a pro rata proportion of the costs and expenses which the defendants were subjected to in obtaining the award. Had there been a contest before the commissioners as to title, and the whole title been awarded to the defendants, perhaps the plaintiff should not recover anything. But the plaintiff's title was in no wise contested. The damages seem to have been awarded to the title as an entirety, without regarding the minor ownership. There was no decision that the plaintiff was not entitled to damages. The plaintiff and the defendants could have joined in one complaint for the prosecution of their claims. The law finds some privity of contract from this relationship or alliance of parties. This case belongs to the class of cases in which, under Lord Mansfield's rule adopted in this state, not adopted in all the states, the law forcibly implies the privity, if need be, because equitable. *Keene v. Sage* (1883) 75 Me. 138, and cases cited; *2 Wharton Contr. 722.*"

And see cases cited under footnote 12 and 13, *infra*.

to whom the award was paid, an interested party is not compelled to await the payment and then sue under the statute, but may, as soon as the award is made, sue both the condemner and the one to whom the award was made, and the award, although confirmed by the court, has no binding force on the question of distribution; but if the fund has been

paid out, those interested should sue the one to whom it was paid,¹² for they cannot on motion have the whole proceedings opened. An action against the one who has received the fund, for money had and received, appears to be the proper procedure, even in the absence of such a statute.¹³ And it has been held that a separate action in which the condemner

¹² *Re New York* (1899) 42 App. Div. 198, 58 N. Y. Supp. 1029.

It appears that an early New York statute (2 Rev. Laws 1813, § 184, p. 419) provides that where an award is made and paid to one not equitably entitled thereto, the party who is so entitled may recover the same in an action against him. It was held in *De Peyster v. Mali* (1882) 27 Hun, (N. Y.) 439, reversed in (1883) 92 N. Y. 262, however, that it was not enough in such action for the plaintiff to prove that the defendant was not entitled to the award, but he must also assume the burden of proving that he, the plaintiff, was equitably entitled thereto, although plaintiff owned the fee in the land taken and the award was made for the fee, and the defendant owned only an easement, which was not taken. The higher court reversed this holding on the ground that the award was final and plaintiff was entitled to it, even though the city could have resisted payment successfully, but that it was not final on the question of rival claims to the award as between the claimants.

Walker v. Mueller (1914) 160 App. Div. 704, 145 N. Y. Supp. 797, is decided upon the assumption that § 18, chap. 724, of Laws of 1905, gives a claimant who has not received his share of an award in condemnation proceedings an action for money had and received against the claimant who has received the whole award by order of court.

Where a statute provides that a party in interest may maintain an action for money had and received against one to whom an award in condemnation proceedings has been paid by order of court, it is error for the court to vacate its order and open the whole proceedings to determine rival claims a year after the order was entered and the award paid. *Re New York* (1913) 209 N. Y. 127, 102 N. E. 638.

In *Youngs v. Stoddard* (1898) 27 App. Div. 162, 50 N. Y. Supp. 476, the court said: "The order confirming the commissioners' report is undoubtedly final and conclusive upon all parties interested; that is, as to the essential features of the proceeding. Thus, it is conclusive as to the condemnation of the land and the amount of the award. *Re Public Parks* (1878) 73 N. Y. 565. It also binds the city to pay the awards to the persons to whom they are specifically given. But even this latter obligation is limited to payments made without notice of adverse claims. Where such notice has been given, the city is not bound to pay the award to the person named in the commissioners' report. Indeed, it does

so at its peril. *Hatch v. New York* (1880) 82 N. Y. 436. Its duty in that case is to interplead the rival claimants, or, if sued by the person named in the report, to move to substitute the adverse claimant as a party defendant, upon payment of the amount in dispute into court, as where an award is made to unknown owners. *Barnes v. New York* (1882) 27 Hun, (N. Y.) 236. The right to the award, as between rival claimants thereto who have not appeared before the commissioners, or there litigated their adverse claims, is a subsidiary incident to the main proceeding, but is not of its essence. All parties, whether they appeared or not, are undoubtedly foreclosed as to the amount of the award; but no one is foreclosed as to his right thereto unless he has actually submitted his claim to the arbitration of the commissioners and the action of the court thereon. The governing principle is the same whether the commissioners make the award to an unknown owner or to one whom they name as owner. That it was not the intention, as between the real owner and the person named as such in the commissioners' report, to finally foreclose the former, is apparent when we see that the statute itself confers a right of action upon the person to whom the award of right belongs, to recover from its actual recipient the amount paid to the latter by the city, as so much money had and received for the real owner's use. Laws 1882, chap. 410, § 993. These views are supported by the cases already cited, and still more directly by *Spears v. New York* (1882) 87 N. Y. 372; *Cassidy v. New York* (1891) 62 Hun, 358, 17 N. Y. Supp. 71; and *Countant v. Catlin*, 2 Sandf. Ch. (N. Y.) 485."

¹³ In *Tamm v. Kellogg* (1871) 49 Mo. 118, where a city had condemned real property claimed by two persons, and paid the whole award to one, it was held that the other could maintain an action for money had and received and recover the whole amount on proof of ownership, even though the condemnation proceedings might have been attacked for irregularity. The decision turned upon the question of plaintiff's right to waive the irregularity in the proceedings and recover from the other claimant, and the question of the finality of the award was not given consideration.

Where both the lessee and the owner of the reversion were made parties to the condemnation proceedings, and the commissioners assessed the whole damages in a lump sum, and awarded it to "John H. Reel or owner," and the whole was paid to him, it was held in *McAllister v. Reel* (1893) 53

has no interest should be brought by the rival claimants.¹⁴

In some states the practice is to determine the title as a preliminary question before the jury in the condemnation proceeding is sworn;¹⁵ the sole duty of the jury in the proceeding proper being to assess the amount of damages to each claimant according to his interest as previously determined. Where this preliminary is omitted, the money should be paid to the treasurer of the county and title tried upon issues framed for the purpose.¹⁶

Mo. App. 81, that the lessee could recover his proportionate share of the award from the owner of the reversion in an action for money had and received.

It has been held that, since money awarded for the taking of land for a road is not really due until the road is actually opened, it should be paid to the vendee of the land, and not to the vendor, where the sale took place after condemnation and award, but before the road was opened; hence the vendee can recover from the vendor where the latter was paid after the opening of the road, although the award was made directly to the vendor prior to the sale. *Meginnis v. Nunamaker* (1870) 64 Pa. 374.

Cotenants not named in a condemnation proceeding, and not in possession of the lands part of which is condemned and taken by a railroad company, have a right to treat the proceedings as valid and require their cotenant, who was in possession and who received the award, to account to them for their share, irrespectively of the question whether or not the proceedings in condemnation were binding upon them. *Legg v. Legg* (1904) 34 Wash. 132, 75 Pac. 130.

And where land was taken for a road and the commissioners paid to one supposed to be the owner in fee, but who really owned only a life estate, the whole award, and were compelled later to proceed anew to acquire the fee, they could, it was held in *Horney v. Coldbrook* (1896) 65 Ill. App. 477, after paying the new award to the owners of the fee, recover from the owner of the life estate the amount paid her less the amount awarded her in the second proceedings.

But it was held in *Turner v. Williams* (1833) 10 Wend. (N. Y.) 139, that a report of the commissioners awarding a certain amount to the lessor and a fixed amount to the lessee, for land taken in a condemnation proceeding for the widening of a street in New York city, is, when confirmed absolutely, binding between the two claimants, at least to the extent that the lessee cannot prove by parol in a suit against the lessor that \$500 of the latter's amount was intended by the commissioners for the lessee, L.R.A.1917A.

Where the statute providing for the publication of notice of a condemnation proceeding is complied with, and the mortgagee of the land taken does not intervene, claiming a share in the funds, he cannot, after the treasurer has paid them out to the mortgagor under the order of the court, hold the treasurer and his bondsman liable for the amount of the mortgage;¹⁷ nor can he in such a case evict the condemner by ejectment proceedings,¹⁸ from the land of which it has taken possession.

to repay him for the expense of making some changes in the building that were made necessary by the widening of the street.

¹⁴ *Davidson v. Texas & N. O. R. Co.* (1902) 29 Tex. Civ. App. 54, 67 S. W. 1092. The court in this case said: "The petition discloses that this suit is a collateral attack on the validity of condemnation proceedings mentioned therein as pending and undisposed of. Hence it follows that such questions as could be disposed of in those proceedings, and which involve mere irregularities, cannot be determined on this appeal. The matters involved in appellant's third and fourth propositions are of this nature. So, also, is the complaint that the court failed to apportion the sum adjudged between the appellant, his lessee, and the other claimants. In proceedings instituted by railway companies for the condemnation of land, there can be but two issues: First, the right to condemn; second, the amount of compensation. The judgment in such a proceeding would be *res judicata* of these issues. If the trial court in disposing of them committed errors, appellant has his remedy by appeal. Such errors would not render the judgment void, and unless corrected by appeal or writ of error the judgment or pendency of the proceedings would be a complete bar to an action of this sort unless for some other reason the proceedings were open to collateral attack. These principles are too well settled to require extended discussion or citation of authority in their support."

¹⁵ *Metropolitan West Side Elev. R. Co. v. Eschner* (1908) 232 Ill. 210, 83 N. E. 809; *Chicago & N. W. R. Co. v. Chicago Mechanics' Institute* (1909) 239 Ill. 197, 87 N. E. 933; *Chicago v. Pick* (1911) 251 Ill. 594, 96 N. E. 539; *Illinois C. R. Co. v. Roskemmer* (1914) 264 Ill. 103, 105 N. E. 695.

¹⁶ *Metropolitan West Side Elev. R. Co. v. Eschner* (1908) 232 Ill. 210, 83 N. E. 809.

¹⁷ *Armstrong v. Moore* (1895) 1 Kan. App. 450, 40 Pac. 834.

¹⁸ *Chicago, K. & W. R. Co. v. Selders* (1896) 4 Kan. App. 497, 44 Pac. 1012.

J. W. M.

KANSAS SUPREME COURT.

CITIZENS' STATE BANK OF CHAUTAUQUA, KANSAS,

v.

FIRST NATIONAL BANK OF SEDAN, KANSAS, Appt.

(— Kan. —, 157 Pac. 392.)

Bank — preference — prohibition.

1. Section 499 of the General Statutes of 1909, as amended by § 1 of chapter 65, Laws of 1911, which prohibits a bank from giving a preference to any depositor or creditor by pledging the assets of the bank, applies only to a bank which is insolvent. *For other cases, see Banks, V. in Dig. 1-52 N. S.*

Same — agreement for additional security.

2. An agreement in a promissory note executed by a solvent bank by which it agrees to give additional securities in the future upon demand of the lender is a valid agreement only so long as the borrowing bank remains in a solvent condition. The collateral agreement is limited by the statute (Gen. Stat. 1909, § 499, as amended by Laws 1911, chap. 65, § 1), which forbids a bank to give a preference to any depositor or creditor.

For other cases, see Banks, V. in Dig. 1-52 N. S.

Same — effect of insolvency.

3. A solvent bank borrowed \$10,000 from another bank, and gave its promissory note, pledging at the same time certain of its assets as collateral security. The note contained an agreement to give additional security upon notification by the holder. Subsequently, when the borrowing bank was insolvent, its officers, at the demand of the holder, turned over additional assets of the bank to secure the indebtedness. Upon these facts it is held that the previous agreement did not create an equitable lien on the assets subsequently turned over, and that replevin will lie at the suit of the borrower to recover the assets turned over in violation of the statute.

For other cases, see Banks, V. in Dig. 1-52 N. S.

Same — right of creditor.

4. Notwithstanding the statute which prohibits banks from preferring creditors contains no declaration that any act in violation thereof shall be void, it is held that a creditor who accepts a preference from an insolvent bank will not be permitted to retain the benefits of the transaction.

For other cases, see Banks, V. in Dig. 1-52 N. S.

Replevin — return of securities.

5. On the facts stated in the opinion it is

Headnotes by PORTER, J.

Note. — For pledge of securities by insolvent bank as an unlawful preference, see annotation following this case, post, 701. L.R.A.1917A.

held that it was not a condition precedent to the plaintiff's right to maintain the action of replevin that it tender back certain securities surrendered by the defendant at the time the additional securities were turned over.

For other cases, see Replevin, I. a, in Dig. 1-52 N. S.

(May 6, 1916.)

APPEAL by defendant from a judgment of the District Court for Chautauqua County in plaintiff's favor in an action brought to recover possession of certain notes, mortgages, and other evidences of debt, or their value. Affirmed.

The facts are stated in the opinion.

Messrs. Sanford B. Ladd, Charles E. Small, and A. M. Jackson, for appellant: Preferences of creditors are lawful in Kansas.

Randall v. Shaw, 28 Kan. 420; Tootle v. Coldwell, 30 Kan. 125, 1 Pac. 329; Bailey v. Kansas Mfg. Co. 32 Kan. 73, 3 Pac. 756; Cooper v. First Nat. Bank, 40 Kan. 5, 18 Pac. 937; DeFord v. Nye, 40 Kan. 665, 20 Pac. 481; Arn v. Hoerseman, 26 Kan. 413; Bliss v. Couch, 46 Kan. 400, 26 Pac. 706; Connor v. Hardwick, 53 Kan. 60, 35 Pac. 777; Clement v. Hartzell, 57 Kan. 482, 46 Pac. 961; Kennedy v. Powell, 34 Kan. 22, 7 Pac. 606; Miller v. Krueger, 36 Kan. 344, 13 Pac. 641.

The giving and taking of the securities on January 26, 1915, did not constitute a preference.

Sabin v. Camp, 98 Fed. 974; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Humphrey v. Tatman, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; Sexton v. Kesler & Co. 40 L.R.A. (N.S.) 639, 97 C. C. A. 161, 172 Fed. 535; Re Automobile Livery Service Co. 176 Fed. 792; Gay v. Hudson River Electric Power Co. 190 Fed. 773; Paulding v. Chrome Steel Co. 94 N. Y. 334; Burke v. German-American Bank, 79 App. Div. 419, 79 N. Y. Supp. 444; Dodd v. Hills, 21 Kan. 707; Mathews v. Hardt, 79 App. Div. 570, 80 N. Y. Supp. 462; American Pig Iron Storage Warrant Co. v. German, 126 Ala. 194, 85 Am. St. Rep. 21, 28 So. 603; Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781.

Even if the transaction of January 26, 1915, did constitute a preference, it was not void.

Union Nat. Bank v. Matthews, 98 U. S. 621, 625, 627, 629, 25 L. ed. 188-190; National Bank v. Whitney, 103 U. S. 99, 101, 102, 26 L. ed. 443, 444; Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240, 251, 36 L. ed. 956, 961, 13 Sup. Ct. Rep. 66; Kerfoot v. Farmers' & M. Bank, 218 U. S. 291,

286, 288, 54 L. ed. 1042, 1044, 31 Sup. Ct. Rep. 14.

Plaintiff, before the commencement of this suit, should have returned, or offered to return, to the Traders' National Bank, the securities it received from that bank on January 26, 1915.

Jeffers v. Forbes, 28 Kan. 174; *Bell v. Keepers*, 39 Kan. 105, 17 Pac. 785; *State ex rel. Lewis v. Dennis*, 39 Kan. 509, 18 Pac. 723; *State ex rel. Lewis v. Williams*, 39 Kan. 517, 18 Pac. 727.

No relief will be granted by a court to either of the parties to an illegal contract which has been executed.

Setter v. Alvey, 15 Kan. 157; *Equitable Life Assur. Soc. v. Wetherill*, 62 C. C. A. 579, 127 Fed. 947; *Solinger v. Earle*, 82 N. Y. 393; *Ward v. Hartley*, 178 Mo. 135, 77 S. W. 302; *Ullman v. St. Louis Fair Asso.* 167 Mo. 273, 56 L.R.A. 606, 66 S. W. 949; *Norris v. Norris*, 9 Dana, 318, 35 Am. Dec. 138; *Watkins v. Nugen*, 118 Ga. 375, 45 S. E. 260; *Branham v. Stallings*, 21 Colo. 211, 52 Am. St. Rep. 213, 40 Pac. 396; *Mathews v. Wayne Junction Trust Co.* 197 Fed. 237.

Messrs. S. N. Hawkes, John L. Hunt, and W. H. Sproul for appellee.

Porter, J., delivered the opinion of the court:

The action in the district court was to recover possession of certain notes, mortgages, and other evidences of debt, or their value. The plaintiff prevailed, and the defendant appeals.

The First National Bank of Sedan is merely a nominal defendant, holding the securities in controversy for collection as the agent of the real defendant, the Traders' National Bank of Kansas City, Missouri. At the time the action was brought, the Citizens' State Bank of Chautauqua, hereinafter referred to as the Chautauqua bank, was insolvent and in the hands of the state banking department. From August, 1911, this bank and the Traders' National Bank, which will be referred to as the Kansas City bank, were correspondents; the Chautauqua bank keeping an account with the Kansas City bank, against which it frequently issued exchange. It had borrowed \$10,000 from the Kansas City bank, evidenced by two notes which were due February 1, 1915. On January 26, 1915, it owed on one of these notes \$5,000, and on the other \$3,000. The money had been borrowed long before, and the notes had been renewed from time to time. The original and the renewals were in the same form and contained the following provision: "And being desirous of securing this note and all other liabilities to said bank, now existing or

which may hereafter arise, we hereby pledge and deliver for that purpose, to said bank and its indorsees and assigns as collateral security for the payment of said note and said other liabilities, present and future, sundry notes, being all those hereto attached and all additions to them and all substitutions for them in the course of business, and we agree to give additional security to keep up the present margin should the market value of the above securities decline, upon notification to us by the holder of said note or liabilities or any of them, within twenty-four hours after receipt of said notice."

From October, 1914, until the time of the transaction in controversy, the Kansas City bank had complained that the Chautauqua bank had not remitted promptly the proceeds of collections sent by the Kansas City bank, and there was considerable correspondence over the matter. The Chautauqua bank had recently sent about \$10,000 additional security, but the Kansas City bank had become suspicious as to the character of some of the collateral. Because of this, on January 23, 1915, it sent Mr. Alexander, its assistant cashier, to Chautauqua for the purpose of obtaining additional collateral. He took with him the collateral which the bank held (the face value of which amounted to about \$25,000), and called the attention of Turner, cashier of the Chautauqua bank, to the appearance of some of it. Turner's explanations were not satisfactory, and Alexander informed him that he intended to stay until he got other collateral. Turner failed to keep an appointment with Alexander at the bank Saturday afternoon, and left town. On Monday, Alexander, in company with a banker from Bartlesville, Oklahoma, who came to Chautauqua in the interest of the Kansas City bank, went to the Chautauqua bank and found Mrs. Turner in charge. She informed them that she had heard nothing from her husband, but that she supposed he would be back. They asked her to turn over to them other collateral security and explained that the Kansas City bank had a right to it, and that when the \$8,000 was paid the surplus collateral would be returned. Mrs. Turner then turned over to them for examination all the notes and securities which the bank had in its vault. Later in the day J. R. Dominick, president of the Kansas City bank, came to Chautauqua. J. M. Vandeverter was president of the Chautauqua bank, but was not active in its management. He lived on a farm and came to the bank once or twice a week. On the afternoon of Monday, January 26th, Alexander sent for him, and when he arrived the parties went to the bank and examined the securities which had been selected. About that time a letter arrived

from Turner, addressed to Mr. Vandeventer, containing a statement that some of the notes held by the Kansas City bank and other banks as collateral were forged by him, but that the money obtained thereby had all been used for the benefit of the bank, and not for himself. While the officers of the Kansas City bank were there they learned from Mrs. Turner that the bank had only about \$30 in currency on hand. It was apparent that Turner had absconded, and that the bank was insolvent. Under these circumstances, the president of the Chautauqua bank, at the request of the officers of the Kansas City bank, turned over and indorsed to the latter notes and other evidences of debt, the face value of which was \$38,000, and which constituted substantially all the assets and securities of the bank. At the same time the Kansas City bank turned back the former securities held by it. In explanation of the action of the Kansas City bank in insisting upon such a large amount of collateral security, it is said that, by reason of the confessions of Cashier Turner, the Kansas City bank was unable to ascertain at that time how much of the collateral could be depended upon as genuine. The Kansas City bank immediately placed the collateral in the hands of the First National Bank of Sedan, with instructions that when the \$8,000 had been collected, the remaining securities were to be turned back to the Chautauqua bank. After Mr. Dominick left Sedan, he stopped at Topeka and informed the bank commissioner of the transaction.

The jury by its verdict found for the plaintiff, and found that the value of the collateral still in the hands of defendant was \$6,694.91. The judgment rendered upon the verdict was for the return of the securities and moneys collected, or, in lieu of such return, a money judgment for their value.

Plaintiff bases its right to recover largely upon the provision of the banking law (Laws 1911, § 1, chap. 65), which reads: "No bank, bankers, or bank officer shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security: . . . Provided, that any bank may borrow money for temporary purposes not to exceed in amount 50 per cent of its paid-up capital, and may pledge assets of the bank not exceeding 20 per cent in excess of the amount borrowed, as collateral security therefor. . . ."

The first question to determine is whether the transaction of January 26, 1915, is a preference prohibited by this statute. The defendant claims that in this respect the giving of the securities did not constitute a preference for the reason that they were

turned over in pursuance of a promise made long prior thereto, and that the transaction was merely the consummation of an arrangement made at the time the notes were executed. It is said that by virtue of the terms of the previous agreement the Kansas City bank had possessed in equity and good conscience a lien which developed into actual possession when the securities were turned over; and that whether it was a preference depends not solely upon the transaction of January 26th, but the original promise.

Conceding that the agreement in the note is a valid one, it must be held, we think, that it is limited by the statute which expressly prohibits the giving of collateral so as to create a preference. The provision in the note reads: ". . . And we agree to give additional security to keep up the present margin should the market value of the above securities decline, upon notification to us by the holder of said note or liabilities or any of them, within twenty-four hours after receipt of said notice."

This is no more than an agreement to give additional security in the future in case it is demanded. If the demand or request had been made at a time when the bank was entirely solvent, the agreement could have been lawfully complied with, provided the amount of collateral deposited was not more than 20 per cent in excess of the debt. So long as the bank continued solvent it was a valid agreement, and no longer. One of the principal cases relied upon by defendant is *Sexton v. Kessler & Co.* 225 U. S. 90, 98, 56 L. ed. 995, 1000, 32 Sup. Ct. Rep. 657. There the bankrupts, more than four months before the petition in bankruptcy was filed, placed in their own vaults a separate package containing securities, marked: "Escrow for account of Kessler & Co. Ltd., Manchester." At the same time they wrote Kessler & Company, "this escrow is intended as a protection against our long drafts against your good selves." Later, at the request of the creditor, they sent a certificate describing the particulars as to the nature and character of the securities, and thereafter notified the creditor from time to time of substitutions made. Within four months of the time the debtor became bankrupt it turned over the securities to an agent of the creditor. It was held that the possession of the securities was taken pursuant to a pre-existing right supported by equitable principles. The distinction between the situation there and a case like the present one is stated in the opinion in the following language: "So a general promise to give security in the future is not enough. But the present was a more limited and cautious dealing. It

was confined to *specific identified stocks and bonds on hand*, and purported to give an absolute present right, qualified only by possible substitution and perhaps by a right of partial withdrawal if the remaining securities had risen sufficiently in value. It purported *not to promise, but to transfer*." 225 U. S. 98. (*Italics ours.*)

It is quite apparent, we think, that *Sexton v. Kessler*, *supra*, cannot be relied upon by the defendant, because it recognizes that a mere promise to give additional security without something equivalent to a setting aside of particular collateral is not enough. That the subsequent delivery of additional securities under a mere general promise made prior thereto will not relate back so as to render the transaction free from the prohibition of a somewhat similar statute was decided in *Torrance v. Winfield Nat. Bank*, 66 Kan. 177, 71 Pac. 235. In that case § 67a of the Bankruptcy Law of 1898 (Act July 1, 1898, chap. 541, 30 Stat. at L. 564, Comp. Stat. 1913, § 9651), was under consideration. The statute reads: "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

The syllabus in *Torrance v. Winfield Nat. Bank*, *supra*, reads: "An agreement made, while negotiating for a loan, to make repayment out of a certain fund, or the proceeds of a particular enterprise, does not create a lien on the fund or the proceeds of the enterprise, and where repayment is made out of the designated fund within four months of the proceedings in bankruptcy, such payment shall be deemed to be preferential and voidable at the suit of a trustee."

The opinion quotes with approved *Re Sheridan* (D. C.) 98 Fed. 406, in which the syllabus reads: "An agreement to pledge personal property as security for a debt is not executed where the goods are not delivered to the creditor, nor set apart and treated as his property; and, where the creditor takes possession of the property a few days before the filing of a petition in bankruptcy against the debtor, the transaction is voidable as a preference, notwithstanding that the original agreement was made more than four months before that time."

The agreement in the notes was a mere promise to give additional security whenever called for. There was no setting apart of any particular collateral, nor did the agreement identify any particular collateral. We think it is quite obvious that it did not create an equitable lien upon the securities in controversy, and that the promise was necessarily limited by the statute.

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The word "preference" has often been defined by courts: "The common definition of 'preference,' as found in law dictionaries, is the paying or securing to one or more of his creditors, by an insolvent debtor, the whole or a part of their claims, to the exclusion of the rest." 6 Words & Phrases, 5494.

For reasons of public policy the legislature saw fit to safeguard the interests of depositors and other creditors of banks by enacting regulations controlling the operation of banks and limiting their power to prefer one creditor over another at a time when the bank is insolvent. Section 1 of chapter 65, Laws of 1911, prohibits a bank from giving preference to any depositor or creditor by pledging the assets of the bank, with a provision that the bank may borrow money for temporary purposes, not to exceed in amount 50 per cent of its paid-up capital, and may pledge as collateral security therefor the assets of the bank, not exceeding 20 per cent of the amount borrowed.

It is unnecessary to determine the question discussed in both briefs as to the authority of the president of the bank to indorse and turn over the securities in controversy. If it had been the cashier who acted, and the board of directors had authorized and directed the securities to be indorsed and delivered to the Kansas City bank, the latter would have acquired no right to retain them, for the reason that the Chautauqua bank was insolvent and the transaction was prohibited by the statute. Nor is it necessary to consider previous decisions upon which defendant relies in which it has been held that a debtor has a right to prefer one creditor over another so long as he maintains the *jus disponendi* of his property. The statute lays down a different rule for a bank, and declares that "no bank shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security."

Defendant makes the further contention that even if the transaction of January 26th constituted a preference, it was not void for the reason that the statute nowhere declares that an act done in violation of the prohibition shall be void, and it is argued that the only effect of the statute is to authorize the banking department of the state to commence proceedings against the bank for the appointment of a receiver and for winding up its affairs. It is insisted that this proposition is settled by the highest authorities. The cases relied upon are those where a national bank had made loans on real estate. The National Banking Act, except by implication, does not prohibit national banks from making loans of this

character. These cases hold that Congress never intended that the stockholders and creditors of a national bank should be punished by permitting the borrower to escape liability on the mortgage and retain the proceeds of his loan. These cases and the present case are wholly dissimilar. To permit one who has obtained money from a national bank on real estate security to retain the money and the security too, would be abhorrent to all ideas of justice and equity. The law was not enacted for his benefit, but for the protection of the bank, its stockholders, creditors, and depositors. In prohibiting banks from giving a preference, the legislature certainly never intended that the party accepting it should be permitted to retain the benefits of the unlawful transaction, even though it might call for the entire assets of the bank and result in depriving other creditors of any security. From the time a bank becomes insolvent, all creditors stand on an equal footing as to assets on hand. Those creditors who were diligent when the bank was solvent are permitted to retain the benefits of securities surrendered then. The moment a bank becomes insolvent its assets become a trust fund for the pro rata payment of the claims of all its creditors. The defendant concedes that the facts known to its officers at the time of the transaction were sufficient to put it upon inquiry as to the solvency of the bank. We think the facts show conclusively that defendant knew the bank had not only failed to keep its legal reserve, but that its cash was gone; and the officers of the defendant carried away with them substantially all the securities and assets of the bank except those it returned.

Having defined "insolvency" and stated the conditions which will render a bank insolvent, the instructions charged that, for the purpose of securing an actual loan, the bank had the right to assign its securities to the Kansas City bank, and that, under the provisions in the note, the latter had the right to require the plaintiff to exchange or supplement such collateral at any time it became dissatisfied with the security, and that plaintiff by its officers had the right to furnish other and additional security "so long as plaintiff was solvent, or so long as the Kansas City bank did not know or have reason to believe it was insolvent;" but if the jury found from the evidence that the securities in controversy were turned over to the Kansas City bank for an indebtedness already in existence at a time when the plaintiff was insolvent, and the Kansas City bank knew or had reason to believe it was insolvent, then under those circumstances and conditions the Kansas City bank could not hold them and thus become to that ex-

tent a preferred creditor. Complaint is made of these instructions because the words "have reason to believe it was insolvent" do not appear in the statute, and it is insisted that the instructions presented an issue in no way involved in the case. The Kansas City bank concedes that it had reason to believe the plaintiff was insolvent, but insists that the fact is wholly immaterial. On this particular phase the instructions were too favorable to defendant. If the bank was insolvent on January 26, 1915, that fact was sufficient to render the transaction obnoxious to the statute. The court gave the defendant the benefit of the qualification as to its knowledge or notice, and it has no reason to complain. The instructions clearly defined and applied the law governing the rights of the parties, and, with the slight exception noted, we approve the construction given by the learned judge of the trial court to the statute prohibiting banks from preferring one creditor over another.

One other contention remains. It is urged that plaintiff cannot maintain this action without first tendering back the securities formerly held by the Kansas City bank, and which were turned over to the plaintiff as part of the same transaction. There are two reasons why the contention cannot be sustained:

First, there is not the slightest evidence to show that the other collateral was surrendered in consideration of the giving of the new. The position taken by the Kansas City bank at the trial and before this court has been consistent. It is, that it was entitled, under the agreement in the notes, to demand and receive additional collateral, and that its right to do so did not depend upon any contract or arrangement entered into on January 26, 1915. Defendant's right to the possession of the securities in controversy is the only thing directly involved in this action, and all that plaintiff was required to show is, that it was entitled to possession. An offer to return a portion of the other securities equal to 20 per cent above the lawful amount the plaintiff bank was permitted to borrow would have been entirely proper and equitable. But it cannot be held that such an offer was a condition precedent to the plaintiff's right to maintain this action.

Second, that is an action in replevin; the sole question is the right to the possession of certain securities. Replevin is strictly a law action. Cobbey, Replevin, § 257. There are cases which hold that where a vendor has received notes for the purchase price and desires to rescind the sale for fraud and sue in replevin for the property, he must first return the notes or other con-

sideration. *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. 500; *Parrish v. Thurston*, 87 Ind. 437. But this is because he is not entitled to possession until he has rescinded, and the right to rescission does not ripen until tender of the consideration. In *Rucker v. Donovan*, 13 Kan. 251, 19 Am. Rep. 84, a constable who had paid the freight charges took possession of goods from a carrier. It was held that until he was reimbursed for the freight charges replevin would not lie against him by one having the right to possession. There are a few well-considered cases which show a tendency of the courts to give the action of replevin such flexibility as to adjust in that action all equities arising between the parties and growing out of the same transaction. *Workman v. Warder*, 28 Mo. App. 1; *Babb v. Talcott*, 47 Mo. 343; *McIntire v. Eastman*, 76 Iowa, 455, 41 N. W. 162; *Cobbey, Replevin*, § 794. Thus, in *Boutell v. Warne*, 62 Mo. 350, it was held that, in replevin based on a claim of purchase, where the jury find the right of possession to be in defendant, and it appears that plaintiff paid part of the consideration, it was error to render judgment for the defendant for the full value of the property. The opinion cites *Dilworth v. McKelvy*, 30 Mo. 149, where it was said: "The judgment in each case must be modified by the circumstances, so that the merits of the controversy may be settled in one action. The statute is a general one, designed to meet all the exigencies which the old action of replevin did, and the equity of its provisions will embrace these qualifications of the forms in which judgments should be entered."

In *Hickman v. Dill*, 32 Mo. App. 509, the

Kansas City court of appeals said: "Suits in replevin are said to be, in some respects, *sui generis*; and the inclination of the courts of this state has been to give to them a flexibility sufficient to meet exigencies and adjust all equities arising in such actions." Syl.

However much we might feel inclined to favor the extension of the remedy in replevin actions to include an adjustment of all equities between the parties that arise out of the controversy, and thus prevent a multiplicity of actions, it is apparent that this is not a case where the court would be justified in doing so. Although the answer mentions the fact that the Kansas City bank "surrendered the collateral first given," nowhere in the answer does the defendant ask that the court require the plaintiff to restore any portion of the collateral surrendered. Nor was that equitable claim presented to the trial court. It is conceded by the attorney general, who appears for the state banking department in charge of plaintiff bank, that the loan represented by the note was valid to the extent of \$5,000, which was one half the bank's capital stock, and that the Kansas City bank had a right to retain collateral of the face value of \$6,000. We cannot, however, in this action, determine what, if any, equitable rights the Kansas City bank may have to a portion of the securities which it turned back to the plaintiff on January 26, 1915. That is a matter which can be adjusted by agreement or tried out in another action.

The judgment is affirmed.

All the Justices concur.

Annotation—Pledge of securities by insolvent bank as an unlawful preference.

Under the provisions of the National Bank Act and analogous state statutes which provide in substance that any transfer of property by a bank, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the distribution of its assets as provided by law, or with a view to prefer one creditor over another, shall be null and void, a transfer by an insolvent bank of evidences of indebtedness as collateral for an existing

indebtedness, both the debtor and the creditor knowing that the insolvency and the transfer are with a view to prefer the transferee to other creditors, is void and confers no shadow of title upon the preferred creditor.¹ So, any pledge of collaterals, made to secure an antecedent indebtedness, constitutes a preference where the pledgee bank is legally in contemplation of insolvency when the pledge is made.² And under such acts a pledge by an insolvent bank to secure an

¹ *Brighton v. White* (1891) 128 Ind. 320, 27 N. E. 620, construing and applying Ind. Rev. Stat. 1881, § 2697; *Penney v. Haugan* (1895) 61 Minn. 279, 63 N. W. 728, applying the Minnesota Insolvent Law of 1881; *Mahoney v. Hale* (1896) 66 Minn. 463, 69 N. W. 334, applying Minn. Gen. Stat. 1894, § 4243; *Leavitt v. Tyles* (1843) 1 Sandf. L.R.A.1917A.

Ch. (N. Y.) 207, applying 1 Rev. Stat. 591, §§ 8 and 9; *Slack v. Northwestern Nat. Bank* (1899) 103 Wis. 57, 74 Am. St. Rep. 841, 79 N. W. 51.

² *Stapylton v. Stockton* (1899) 33 C. C. A. 542, 63 U. S. App. 412, 91 Fed. 326 (bank officials had no reasonable expectation of being able to extricate it from its

apprehensive depositor and to avoid paying him the amount due constitutes a void preference even though the bank officers hope by so doing indefinitely to postpone the failure, and possibly to prevent failure, where, upon reasonable contemplation, they should, from the present financial condition of the bank, realize that the bank is hopelessly insolvent and that ultimate failure is inevitable, they being presumed to intend the natural and probable consequences of their own act, which in such case would be an unequal

distribution of assets, in violation of the scheme of the act and of the intent of Congress.³

And as the National Bank Act does not make the transferee's knowledge or want of knowledge of the debtor's condition or of the intentions or purposes of its officers in making the transfer elements of a preference, the existence or nonexistence of knowledge thereof is quite immaterial;⁴ but the contrary is true under the Federal Bankruptcy Act and under many state insolvency laws.⁵

difficulties); *Ball v. German Bank* (1911) 109 C. C. A. 498, 187 Fed. 750, certiorari denied in (1912) 225 U. S. 709, 56 L. ed. 1267, 32 Sup. Ct. Rep. 840 (bank officers knew at the time the collateral was transferred that the bank would not open its doors for business again); *Bradner v. Woodruff* (1899) 52 Hun, 214, 5 N. Y. Supp. 207 (assignment clearly made in contemplation of insolvency); *Burrell v. Bennett* (1899) 20 Wash. 644, 56 Pac. 375 (both bank officers and creditor should have known of insolvent condition of bank). And see *Citizens' L. Ins. Co. v. Owensboro Sav. Bank & T. Co.* (1912) 146 Ky. 118, 142 S. W. 376, wherein securities were pledged to secure previous deposits.

³ *Roberts v. Hill* (1885) 23 Blatchf. 312, 24 Fed. 571, overruling on rehearing (1885) 23 Blatchf. 191, 23 Fed. 311, in which the court had laid down the rule that if the pledge was made to prevent failure, and with the expectation of preventing failure, it would not constitute a void preference within the meaning of the National Bank Act; *Penney v. Haugan* (1895) 61 Minn. 279, 63 N. W. 728; *Mahoney v. Hale* (1896) 66 Minn. 463, 69 N. W. 334. And that where the officers know that the bank cannot again open its doors for business, they are charged with knowledge of the necessary consequence of their acts, which is that the pledgee would get a preference over other creditors, see *Ball v. German Bank* (Fed.) supra. And see also *Burrell v. Bennett* (Wash.) supra, and *Slack v. Northwestern Nat. Bank* (1899) 103 Wis. 57, 74 Am. St. Rep. 841, 70 N. W. 51.

In this connection the court, in *Penney v. Haugan* (Minn.) supra, said: "Upon the familiar principle that a man is presumed to intend the natural consequences of his own acts, it is difficult, if not impossible, to conceive that Nelson, a business man and banker, in turning out these collaterals to defendant under these circumstances, did not intend to give him a preference over other creditors, and did not understand that this was the necessary effect of the transaction. Making due allowance for the fact that failing debtors frequently indulge in false hopes, and that Mr. Nelson did not then foresee, to its full extent, as we now see, the utter and hopeless insolvency of his bank, yet, as a man of common sense, he must have known that the bank had not sufficient assets to pay its other creditors, L.R.A.1917A.

or even to secure them as he had secured the defendant; and, if so, then he must have known that he was giving the defendant a preference. It is urged that the securities were turned out to defendant upon the understanding that he would not withdraw his balance, and that the object was not to give him a preference, but to enable the bank 'to pull through,' and go on in business; and much stress is laid upon the facts that defendant did not draw out his balance and that the bank continued open for two days, doing business in the ordinary way, as tending to prove that there was no intent on the part of the bank to give defendant a preference. Neither of these facts is, under the circumstances, of any particular weight. If defendant had demanded payment, he could not have obtained it, except in part; and he could not have obtained even that except by the bank's exhausting every available dollar, either in its vaults, or in the hands of its correspondents, and then immediately closing its doors,—a transaction so palpably in violation of the insolvency law that no man of ordinary intelligence could for a moment suppose it would stand. Giving to this excuse or explanation its utmost weight, all that it amounts to is that the cashier had some hope that, by giving defendant a preference, the bank might perhaps pull through, and be able to continue in business. . . . But as intent can only be determined from a man's act, and as every man must be presumed to intend the natural consequences of his own acts, it follows that, where the necessary consequence of a conveyance or transfer is to give a preference, the intent must be inferred. Such an intent must always be presumed when an insolvent debtor pays or secures one of his debtors when he has not the means to pay or secure the others, unless . . . peculiar or exceptional facts are proven which rebut that presumption, and take the case out of the general rule."

⁴ *Ball v. German Bank* (Fed.) supra.

⁵ See *Penney v. Haugan* (1895) 61 Minn. 279, 63 N. W. 728, holding that reasonable cause upon the part of a creditor to believe that the bank was insolvent at the time he received the securities was an essential to avoidance of the transfer as a preference under the Minnesota Insolvency Law of 1881; and *Mahoney v. Hale* (1896) 66 Minn. 463, 69 N. W. 334.

The naked fact that a bank is insolvent at the time it pledges its securities does not imply that the transfer of securities is made in contemplation of insolvency, or with a view of a preference to the pledgee over its other creditors.⁶ And the same is true of the fact that a preference to the creditor has ultimately resulted by the pledge of securities, if the transfer was not made with that intent.⁷

But the provisions of the banking acts above set out are directed to preferences of pre-existing indebtedness, and not to the giving of security to protect a loan made at the time to meet conditions which the officers reasonably expect the bank to survive.⁸ And this has been held true although the bank was legally in contemplation of insolvency when the advances and pledge was made,⁹ and the pledgee knew that the bank was embarrassed and in need of assistance.¹⁰ And even were good faith upon the part of the creditor necessary, the mere fact that a bank needs to borrow money would not put all who are able and willing to aid it upon notice that it is in contemplation of insolvency in such a sense and to such an extent as to deprive the bank of capacity to bind itself, and them of capacity to take security from it.¹¹ And the rule is not changed by the

fact that, as a part of the same transaction, it was agreed that the securities should also stand as security for an antecedent indebtedness, where the creditor acted in good faith and in the belief, reasonably entertained, that the bank was solvent.¹²

And for perhaps a better reason the hypothecation of collateral by a bank to secure future loans and indebtedness does not constitute a preference given to secure a pre-existing debt, since such future loans, etc., are for a present consideration existing at the time of making thereof.¹³

And statutes declaring that transfers of evidences of indebtedness by a bank, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets to the proper payment of its just liabilities, or with a view to the preference of one creditor over another, shall be null and void, have been held not to render void as a preference a transfer by a bank of collateral, made pursuant to an agreement entered into contemporaneously with the loan, to turn over collateral security whenever the creditor should require same, although the transfer is not made until after the bank becomes insolvent.¹⁴ On the other

⁶ *Armstrong v. Chemical Nat. Bank* (1890) 6 L.R.A. 226, 41 Fed. 234.

⁷ *Penney v. Haugan* (Minn.) *supra*.

⁸ *Armstrong v. Chemical Nat. Bank* (Fed.) *supra*, holding that such was the law although the bank was in fact insolvent at the time the loan and pledge were made, and the creditor had reason to believe that such was the fact; *Casey v. Credit Mobilier* (1874) 2 Woods, 77, Fed. Cas. No. 2,496, holding that a pledge of securities for a present loan is in effect an exchange of values, rather than the giving of a preference to the creditor; *Booth v. Atlanta Clearing House Asso.* (1909) 132 Ga. 100, 63 S. E. 907, holding that, under the Georgia statute (Civil Code 1895, § 1979) making any transfer in contemplation of insolvency or after insolvency, except for the benefit of all creditors, fraudulent and void, which statute was intended to prohibit preferences by a bank insolvent at the time or in contemplation of insolvency, a deposit of collateral to secure a present loan does not constitute such a preference as is inhibited (in this case the transaction was in the nature of a loan rather than a strict loan, the collateral having been deposited to secure notes given for a clearing-house certificate, the consideration being a present one).

⁹ *Stapylton v. Stockton* (1899) 33 C. C. A. 542, 63 U. S. App. 412, 91 Fed. 326.

¹⁰ *Casey v. Credit Mobilier* (Fed.) *supra*.

¹¹ *Stapylton v. Stockton* (Fed.) *supra*. L.R.A.1917A

In this connection the court said that, were it otherwise, it would be difficult for a bank ever to borrow money.

¹² *Stapylton v. Stockton* (Fed.) *supra*, holding that the creditor was entitled to hold the securities to the extent necessary to protect present advances.

¹³ *Corporation Commission v. Bank of Jonesboro* (1913) 164 N. C. 205, 80 S. E. 152.

¹⁴ *Harris v. Randolph County Bank* (1901) 157 Ind. 120, 60 N. E. 1025. In this connection the court said: "Appellant's bank, by the assignment and transfer to appellee of the note in suit, was simply performing that which it had agreed and obligated itself to do in order to induce appellee, in the first instance, to loan it the money. The promise or agreement to assign these notes as collaterals was made before appellee had actually become a creditor of the Citizens Bank; hence the action of the latter in assigning and transferring these collaterals to appellee in no sense can be said to be or have resulted in an unlawful preference within the meaning of the statute, although the Citizens Bank was insolvent at the time the collaterals were assigned. By this action of the bank, under the circumstances, there was no attempt on its part to prefer appellee as a creditor over others. The bank was simply carrying out its promise and obligation, by which it, in the first instance, induced appellee to become its creditor. Again, if we take

hand, however, it has also been held that an agreement by an insolvent bank to give additional securities in future upon demand of the lender is valid only so long as the borrowing bank remains solvent; that such an agreement is limited by a statute forbidding a bank to give a preference to any depositor or creditor by pledging the assets of the bank as collateral security, and therefore that a pledge of collaterals by an insolvent bank, in compliance with a demand made

pursuant to such a prior agreement, constitutes a preference within the meaning of the statute.¹⁵

A pledge of collateral by an insolvent bank to secure a present loan does not create a trust within the meaning of a statute making a transfer by an insolvent debtor void where any trust or benefit is reserved to him, although the amount of the collaterals exceeds the amount of the loan they are given to secure.¹⁶

an equitable view of this feature of the case, it may be asserted that the assignment and transfer of the notes, under all of the circumstances, ought to be regarded as though the same had been actually made for the purpose of securing said loan at the time the money was obtained from the bank, for the reason that 'equity regards and treats that as done which in good conscience ought to have been done.'

¹⁵ CITIZENS' STATE BANK v. FIRST NAT. BANK, ante, 696. And see SEXTON v. KESSLER

& Co. (1912) 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. Rep. 657, as set out in the CITIZENS' STATE BANK CASE, and in which it was held that, under the Federal Bankruptcy Act, "a general promise to give security in the future is not enough" to save a subsequent delivery of securities by an insolvent bank from constituting a preference.

¹⁶ Booth v. Atlanta Clearing House Asso. (1909) 132 Ga. 100, 63 S. E. 907. G. J. C.

KANSAS SUPREME COURT.

RALPH BENJAMIN

v.

WELDA STATE BANK, Appt.

(98 Kan. 361, 158 Pac. 65.)

Fraud — payment of proceeds to stranger — recovery.

1. Money which has been obtained by fraudulent means cannot be reclaimed after its payment to one receiving it without notice of the fraud, although it is applied upon a pre-existing debt without the surrender of any security.

For other cases, see *Fraud and Deceit, VIII. in Dig. 1-52 N. S.*

Check — fraud — proceeds — payment of debt.

2. Where one who has fraudulently obtained a check or draft delivers it to his creditor, although without indorsement, to be applied upon an existing debt, its proceeds when collected and so applied are subject to the same rule.

For other cases, see *Bills and Notes, III. d. and V. b, 5, in Dig. 1-52 N. S.*

Evidence — fraud — sufficiency.

3. The circumstances held not such as to charge a bank with notice that a draft delivered to it had been obtained by fraud.

For other cases, see *Bills and Notes, V. b, 2, in Dig. 1-52 N. S.*

(June 10, 1916.)

Headnotes by MASON, J.

Note. — As to title of one who takes money from a thief or embezzler, see annotation following this case, post, 707. L.R.A.1917A.

APPEAL by defendant from a judgment of the District Court for Anderson County in favor of plaintiff in an action brought to recover an amount paid in settlement of a mortgage claim on cattle purchased by plaintiff, a draft for the payment of which had been deposited in the defendant bank. Reversed.

The facts are stated in the opinion.

Messrs. A. E. Crane, E. D. Woodburn, and F. T. Woodburn, for appellant:

Before plaintiff could pursue the draft he gave, or its proceeds, it was incumbent upon him to rescind the purchase of the cattle from Lockner; and it was incumbent upon the plaintiff, in order to effect such rescission, to place both Lockner and the defendant bank in statu quo.

Henderson v. Gibbs, 39 Kan. 679, 18 Pac. 926; Schulein v. Hainer, 48 Kan. 250, 29 Pac. 171.

A person defrauded cannot follow a check (or money) into the hands of any person who receives it in payment of a valid debt, without actual notice of the fraud by which the check (or money) was obtained.

Rawlins County State Bank v. Walters, 92 Kan. 391, 140 Pac. 864; Walker v. Conant, 69 Mich. 321, 18 Am. St. Rep. 391. 37 N. W. 292.

Mr. J. G. Johnson, for appellee:

A tender is not necessary where useless. Ellsworth v. Trinkle, 96 Kan. 666, 153 Pac. 543.

The rule requiring the tender before a rescission can be had has no application where the party defrauded seeks redress from a third person, and especially in the

case where the fund has been appropriated by a simple entry on the books of the bank, and that, too, without the transfer of the draft given in payment for the property.

Benesch v. Waggner, 12 Colo. 534, 13 Am. St. Rep. 254, 21 Pac. 706; *Schulein v. Hainer*, 48 Kan. 249, 29 Pac. 171.

Mason, J., delivered the opinion of the court:

On March 5, 1913, W. E. Lockner, being the owner of 148 steers, executed a chattel mortgage upon them for \$5,200, which was properly filed for record. A week later he sold 99 of them to Ralph Benjamin for \$3,051.73. Benjamin paid for them by giving a sight draft on a Kansas City commission company for the amount, on which was written the statement that it was "for 99 head of two-year-old steers." This draft was made payable to the order of Lockner, but, without being indorsed by him, was handed by Benjamin to the cashier of the Welda State Bank, to which Lockner was indebted upon an overdraft,—the result of its having honored the check with which he had paid for these cattle, with others. The draft was paid on the next day by the bank receiving credit for the amount with its Kansas City correspondent, and it at once applied the proceeds in reduction of Lockner's indebtedness. Benjamin did not know of the mortgage until about the 13th of the next month, and some sixty days later he was required to pay and did pay \$2,849.52 to procure the release therefrom of the cattle he had purchased. Lockner was doubtless insolvent at the time of the sale. Upon proceedings begun in the latter part of April, 1913, he was within a few weeks adjudged a bankrupt. On February 16, 1915, Benjamin sued the bank for the amount he had paid the mortgagee, and recovered a judgment, from which it appeals.

1. No contention is made that the bank knew of the mortgage. The claim against it is based on the theory that, as it applied the proceeds of the draft to its claim against Lockner, parting with nothing of value and being placed in no worse position by reason of the transaction, its right to retain the money was no stronger than Lockner's. One who, by fraudulent means, has been induced to part with the ownership and possession of ordinary personal property, may follow it (upon rescission of the contract by which the title passed, where that is necessary) into the hands of a third person who has obtained it without notice of the fraud, but in consideration only of a pre-existing indebtedness. *Schulein v. Hainer*, 48 Kan. 249, 29 Pac. 171; note in 36 L.R.A. 161. In the case of money, however, a different rule obtains. Although L.R.A.1917A.

procured by fraud, it cannot be reclaimed after it has been used to pay an existing creditor who accepted it in good faith. *Kimmel v. Bean*, 68 Kan. 598, 64 L.R.A. 785, 104 Am. St. Rep. 415, 75 Pac. 1118, and cases there cited; 39 Cyc. 568, 569. See also *Rawlins County State Bank v. Walters*, 92 Kan. 391, 140 Pac. 864. The reason for the distinction has been thus stated: "It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no earmark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world." *Stephens v. Board of Education*, 79 N. Y. 183, 187, 35 Am. Rep. 511.

2. If the draft is regarded as the property obtained in the present case, the bank cannot be regarded as a holder in due course under the rule applicable to negotiable instruments, not because it was not a purchaser for value, but because no indorsement was made by the payee. We think, however, the transaction should not be regarded as the purchase of the draft by the bank from Lockner, but as the use of the draft by Benjamin as a means for causing the amount due for the cattle to be paid by the commission company to Lockner, coupled with Lockner's consent that the money should go to the bank and be applied on his debt. If Lockner had personally collected the draft and paid the resulting cash to the bank, there could be no doubt of its right to retain it against Benjamin. And this is substantially what took place. Lockner, in effect, authorized the bank to collect the money for him and apply it on his overdraft. The draft, upon its payment, whether that was accomplished by delivering currency to the bank or by the commission company causing the bank to be credit-

ed with the amount in some acceptable depository, ceased to have any bearing upon the matter; its function had been performed, and the situation was the same as though the actual cash had changed hands. This is an action to recover the money, not the draft. Many of the cases in which the rule as to the negotiable character of money has been applied were, in fact, based upon payments made by check or draft. In a typical instance the court said: "We think the question as to whether the state was a holder of the draft for value or not does not arise in this case. Murray, as county treasurer, was behind in his payment of the taxes due from Orange county to the state. In order to discharge his obligation he transmits the draft in question. The state, through its officer, receives it and presents it to the bank upon which it is drawn, and that bank pays it, and the state, having received the money, thereby discharges the obligation of Murray, and the taxes due from Orange county are thereby paid. The transaction is closed, and it cannot be that the drawer of the draft that has thus been paid can open up the whole matter, and claim to recover back the money which the state received in payment of the taxes due it. If the cashier, instead of sending this draft, had taken the money directly from the bank and paid the same to the state in satisfaction for the amount due for the taxes, I think no one would contend that the bank could recover it back from the state on the ground that the act of the cashier in taking the money was a fraud upon it or even a felony, and that the state had parted with no value at the time of the receipt of the money. I do not see that in this respect the case is altered by the interposition of the draft instead of the payment of the money in the first instance. The state receives in good faith (as we must assume on this point) the written direction of the claimant to a third party to pay the money to the state upon demand, and the state makes the demand accordingly, and the money is paid and the debt extinguished. The interposition of the draft makes no difference in principle after it has been paid. It is then the same as if the money had been originally paid instead of an order given for its payment. The order having been complied with, and the original debt thereby satisfied, the transaction is closed, and may not be reopened on this ground." *Goshen Nat. Bank v. State*, 141 N. Y. 379, 384, 36 N. E. 317.

And in another: "If Mills, Robeson, & Smith, on receiving the check of Ferris & Kimball, had at once collected it and turned it into money, and then had paid that money to the bank in discharge of their L.R.A.1917A.

debt to it, and the bank had accepted that payment in ignorance of the source from which the money had been derived, and had surrendered the notes and discharged their debtors' liability in entire good faith, the owner of the stolen money would have had no right of recovery against the bank. *Justh v. National Bank*, 56 N. Y. 478; *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511. This doctrine goes upon the ground that money has no earmark, that in general it cannot be identified as chattels may be, and that to permit in every case of the payment of a debt an inquiry as to the source from which the debtor derived the money, and a recovery if shown to have been dishonestly acquired, would disorganize all business operations and entail an amount of risk and uncertainty which no enterprise could bear. The rule is founded upon a sound general policy as well as upon that principle of justice which determines as between innocent parties upon whom the loss should fall under the existing circumstances. If, therefore, Smith had come with the money, and with it had paid his debt over the counter, the amount could not have been recovered by the plaintiff, although admitted to have been actual proceeds of the stolen certificate. I think the situation was not at all changed because the debtor came with Ferris & Kimball's check, which the bank collected. If Smith had brought that and the bank had accepted it as cash or conditionally upon its proving good, the result would have been the same. The debt would have been paid and the money become the absolute property of the bank." *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184, 191, 41 N. E. 404.

The cases from which these quotations are made are peculiarly applicable here because of the refusal of the New York courts to regard as an innocent purchaser for value one who accepts a negotiable instrument in payment of an existing obligation, without surrendering some security (4 Am. & Eng. Enc. Law, 288), while giving that standing to a creditor to whom money is paid under similar circumstances. This distinction is pointed out in one of the cases already quoted from in these words: "It is said that the case is to be governed by the doctrine established in this state that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt." *Stephens v. Board of Education*, 79 N. Y. 183, 187, 35 Am. Rep. 511.

3. It is suggested that the cashier acted

as the agent of the owner in regard to the sale of the cattle, and therefore that the bank was chargeable with all the facts known to Lockner. The draft was delivered by Benjamin to the cashier in accordance with the direction of the clerk of the sale, which was public. Lockner testified that he left the settlement for the cattle to the bank. The only connection the bank was shown to have had with the sale was in receiving the proceeds at the direction of Lockner. The arrangement seems to have contemplated their application to the overdraft, but no specific authority to that effect was necessary. *Gunn v. Stock Yards State Bank*, 97 Kan. 404, 155 Pac. 796. Knowledge on the part of the bank that the draft was given in payment for the cattle had no tendency to charge it with notice of

any fraud. It naturally looked to their proceeds for the payment of its claim against Lockner, since he had used its money in paying for them.

The bank seeks to invoke the rule that one who has voluntarily parted with the title to property, although induced to do so by fraudulent representations, can recover it from a third person only after a rescission of the contract. Because of the views already expressed it is unnecessary to consider what, if any, application might be made of that principle here.

The judgment is reversed, and the cause is remanded, with directions to render judgment for the defendant, the essential facts not being in dispute.

Petition for rehearing denied.

Annotation—Title of one who takes money from a thief or embezzler.

This note is supplemental to a note on the same subject appended to *First Nat. Bank v. Gibert*, 25 L.R.A.(N.S.) 631.

As to the right of a drawee of a forged check or draft to recover money paid thereon, see notes in L.R.A.1915A, 77, 25 L.R.A.(N.S.) 1308, and 10 L.R.A.(N.S.) 49.

As pointed out in the prior note on the subject, a person receiving money bona fide, for a valuable consideration and in due course of business, cannot be held liable to the true owner thereof, although the person from whom it was received had no title thereto. And this rule has been followed in the following cases, which have passed upon the point subsequently to the note referred to:

—*Oklahoma State Bank v. Bank of Central Arkansas* (1915) 120 Ark. 369, 179 S. W. 509, declaring it to be well settled that money which has been misappropriated or obtained by fraud, and afterwards paid to an innocent party, cannot be recovered, since money cannot be recovered from one who, in good faith, took it in due course of business, but holding that the rule did not apply where plaintiff gave notice to a bank receiving money on a draft that the payment thereof had been wrongfully obtained, and the bank still had the funds as the depository of the person who perpetrated the fraud;

—*Texas State Bank v. First Nat. Bank* (1914) — *Tex. Civ. App.* —, 168 S. W. 504, holding that, after a bank has paid a forged check, it cannot follow the money into the hands of a good-faith holder receiving it from the forger in due

course of business and for a valuable consideration.

As pointed out in *Oklahoma State Bank v. Bank of Central Arkansas* (Ark.) *supra*, however, this rule does not apply where the person receiving money had notice of the fraud inducing the payment while it still had the money in its possession as a depository of the person who perpetrated the fraud.

And it has been held that the rule that money obtained by felony or fraud cannot be followed into the hands of a bona fide holder in due course, for value, cannot be invoked by a bank for its protection where it received money fraudulently obtained and deposited it to the credit of the defaulter, and did not then apply it on an indebtedness it held against him, although, when sued for the money, it claimed a lien upon the deposit to cover such indebtedness, since merely crediting a defaulter's account with the amount deposited by him was in no sense a payment to him of a valuable consideration. *Batson v. Alexander City Bank* (1912) 179 Ala. 490, 60 So. 313.

So, where a trustee took money from one trust fund and paid himself, as trustee of another fund, a debt which he owed the latter fund, this manipulation of stolen money did not result in the true owner losing his title and the creditor of the thief getting a better title to the money than the thief had to it. *Newell v. Hadley* (1910) 206 Mass. 335, 29 L.R.A.(N.S.) 908, 92 N. E. 507.

A. G. S.

KANSAS SUPREME COURT.

CARRIE WHITSEL

v.

D. M. WATTS, Appt.

(— Kan. —, 159 Pac. 401.)

Fright — recovery for.

1. In general, there can be no recovery for fright or mental anguish unless it results in or is accompanied by bodily injury. For other cases, see *Fright*, in *Dig. 1-52 N. S.*

Same — resulting bodily injuries.

2. A recovery may be had for bodily injuries which are the natural and proximate result of extreme fright caused by negligence, and especially where the fright is caused by wilful wrong, or an act so grossly negligent as to show utter indifference to consequences.

For other cases, see *Fright*, in *Dig. 1-52 N. S.*

(July 8, 1916.)

APPEAL by defendant from a judgment of the District Court for Bourbon County in plaintiff's favor in an action brought to recover damages for injuries alleged to have been wilfully and maliciously inflicted upon plaintiff by defendant. Affirmed.

The facts are stated in the opinion.

Mr. A. M. Keene, for appellant:

No actionable assault was made on plaintiff.

State v. Holman, 90 Kan. 105, 132 Pac. 1175; 3 Cyc. 1066; Irlbeck v. Bierl, 101 Iowa, 240, 67 N. W. 400, 70 N. W. 206; Haupt v. Swenson, 125 Iowa, 694, 101 N. W. 520; Hubbard v. Perlie, 25 App. D. C. 477; Goddard v. Watters, 14 Ga. App. 722, 82 S. E. 304, 7 N. C. C. A. 1; Watkins v. Kaolin Mfg. Co. 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, 13 Am. Neg. Rep. 197; Shelton v. Bornt, 77 Kan. 4, 93 Pac. 341; Salina v. Trosper, 27 Kan. 544; West v.

Headnotes by JOHNSTON, Ch. J.

Note. — The right to recover for physical injury resulting from fright caused by a wrongful act is treated in the note to *Huston v. Freemansburg*, 3 L.R.A.(N.S.) 49, and supplementary notes appended to *Chittick v. Philadelphia Rapid Transit Co.* 22 L.R.A.(N.S.) 1073, and *Conley v. United Drug Co.* L.R.A.1915D, 830. And see also later cases, *Jeppsen v. Jensen*, L.R.A.1916D, 614, and *O'Meara v. Russell*, L.R.A.1916E, 743.

The liability of a carrier for frightening passenger is treated in the note to *Chesapeake & O. R. Co. v. Robinett*, 45 L.R.A.(N.S.) 433.

The right to recover for mental suffering caused by an assault where no bodily injury is inflicted is treated in the note to *Small v. Loneragan*, 25 L.R.A.(N.S.) 976. L.R.A.1917A.

Western U. Teleg. Co. 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453; *Kansas City, Ft. S. & M. R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645; *Manser v. Collins*, 69 Kan. 290, 76 Pac. 851; *Cole v. Gray*, 70 Kan. 707, 79 Pac. 654; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; *Miller v. Baltimore & O. S. W. R. Co.* 78 Ohio St. 309, 18 L.R.A.(N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; *Baltimore & O. R. Co. v. Harris*, 121 Md. 254, 88 Atl. 282; *Goddard v. Watters*, 14 Ga. App. 722, 82 S. E. 304, 7 N. C. C. A. 1; *Braun v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; *Allsop v. Allsop*, 5 Hurlst. & N. 534, 29 L. J. Exch. N. S. 316, 6 Jur. N. S. 433, 2 L. T. N. S. 290, 8 Week. Rep. 449; *Gulf, C. & S. F. R. Co. v. Trott*, 86 Tex. 412, 40 Am. St. Rep. 866, 25 S. W. 419; *Adams v. Salina*, 53 Kan. 246, 48 Pac. 918; *Ramey v. Western U. Teleg. Co.* 94 Kan. 199, 146 Pac. 421; *Sondegard v. Martin*, 83 Kan. 277, 111 Pac. 442; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 950, 7 Am. Neg. Cas. 478; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Fent v. Toledo, P. & W. R. Co.* 50 Ill. 349, 14 Am. Rep. 13; *Derry v. Flitner*, 118 Mass. 131, *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359.

Mr. Hubert Lardner for appellee.

Johnston, Ch. J., delivered the opinion of the court:

Carrie Whitsel recovered a judgment against D. M. Watts for \$225 as damages for injuries which he is alleged to have wilfully and maliciously inflicted upon her. Defendant appeals, and insists that the evidence did not warrant the verdict of the jury and the judgment of the court, and that several rulings made during the trial were erroneous.

It appears that defendant held a mortgage on some hogs belonging to the plaintiff's husband, and that, accompanied by a constable, he visited the plaintiff's home when her husband was absent and undertook

to obtain possession of the mortgaged hogs. Upon arriving at the place, the constable went into the house and told the plaintiff of the purpose of their visit, but the plaintiff refused to surrender possession of the hogs. The interview between them occurred in the yard, between the house and the gate, near which the defendant was seated in a buggy. According to the plaintiff's testimony, the defendant, upon learning of the plaintiff's refusal to give possession of the hogs, jumped out of his buggy, ran towards the plaintiff in an angry, threatening manner, swearing and shaking his fist, saying: "You are fooling with the wrong person this time." She was greatly frightened, turned and ran into the house, closing and fastening the door, and then collapsed. Her husband returned shortly after the occurrence and found her in an unconscious state, and when she became conscious she was suffering intense pain and within a few hours a miscarriage and subsequent illness resulted.

Defendant insists that he inflicted no bodily injury upon her, that no physical injury was in fact threatened; that there was no assault upon her, and that proof of a mere fright furnishes no basis for a recovery. It has long been the rule here that there can be no recovery for fright or mental anguish unless it results in or is accompanied by physical injury to the person. *Shelton v. Bornt*, 77 Kan. 1, 93 Pac. 341. The plaintiff, however, is not asking a recovery for fright alone, but for the personal injuries directly resulting from fright caused by the wilful tort of the defendant. It is argued that, as the acts of the defendant did not amount to an assault, she has no right to recover; but the defendant's liability does not depend upon whether his wrongful onset constitutes an assault. The plaintiff is seeking to enforce a civil liability for the consequences of the wrong, and the general rule is that a wrongdoer is liable in damages for injuries which are the natural and reasonable consequences of his wrongful act, whatever name may be fittingly applied to the wrong. Taking the testimony of the plaintiff, as the jury did, the defendant advanced upon the plaintiff with clenched fist, in a threatening manner, at the same time using violent, abusive, and insulting language towards the plaintiff which she says led her to fear that he would strike and injure her, and the result was the nervous prostration and miscarriage. A physician testified that miscarriages do result from fright and mental disturbances. In *Thompson on Negligence*, vol. 1, § 158, it is said: "Not only will every competent physician or surgeon that can be summoned testify that a severe fright or nervous shock has a tendency to produce a miscarriage in a pregnant woman, but it is a matter so

well known that it may be rested upon common observation; and every court ought to take judicial notice of such a fact."

There is a conflict in the authorities in regard to whether there can be a recovery for physical injuries resulting from fright where the act causing the fright was merely negligent, and not wilful; and differences of opinion as to what constitutes a physical injury, and whether certain injuries can be regarded as the proximate results of the negligence which caused the fright; but the great weight of authority is that, if the bodily injury is the direct and reasonable consequence of the fright caused by the negligence, a recovery may be had although the negligence may have been unintentional. Notes in 3 L.R.A.(N.S.) 49; 22 L.R.A.(N.S.) 1073; 33 L.R.A.(N.S.) 667; 24 L.R.A.(N.S.) 1159; 12 Ann. Cas. 741; and Ann. Cas. 1913E, 505; *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; 8 R. C. L. § 81. Although the authorities are in conflict as to injuries resulting from fright where fright is caused by a merely negligent act, there is general agreement in the cases that a recovery may be had where the injury results from fright caused by a wilful wrong, or an act so grossly negligent as to show utter indifference to consequences. *Lonergan v. Smali*, 81 Kan. 48, 25 L.R.A.(N.S.) 976, 105 Pac. 27; Notes in 3 L.R.A.(N.S.) 66; and Ann. Cas. 1913E, 506; 13 Cyc. 4144. The testimony produced by the plaintiff tended to establish that the fright of the plaintiff was caused by the intentional wrong of the defendant, and the finding of the jury is that he acted wantonly and with the intention of injuring the plaintiff. It follows that he is liable for the injuries which resulted from his wrong.

There is complaint that the plaintiff's husband was allowed to testify to statements made by her which are said to be of a self-serving character. Those objected to were exclamations of pain and acts of the plaintiff indicating that she was suffering pain before the miscarriage, also requests that he obtain medicine or some relief for her. Husband and wife are not allowed to testify for or against each other concerning communications made by one or the other during the marriage, and one or two of the statements in question might be regarded as communications, but they cannot have been prejudicial. They only went to show the labor pains endured by the plaintiff about the time of the miscarriage, and as to that there can be no controversy. Only material errors are available for a reversal.

The judgment is affirmed.

All the Justices concur.

OHIO SUPREME COURT.

JOHN H. SCHELL, Plff. in Err.,
v.D. D. DU BOIS, Admr., etc., of William
Gitchell, Deceased.

(— Ohio St. —, 113 N. E. 664.)

Negligence — violation of statute.

1. The violation of a statute passed for the protection of the public is negligence per se, and where such act of negligence by a defendant is the direct and proximate cause of an injury not directly contributed to by the injured person, the defendant is liable.

For other cases, see Negligence, I. a, in Dig. 1-52 N. S.

Same — violation of ordinance.

2. The violation of a municipal ordinance passed in the proper exercise of the police power in the interest of the public safety, and not in conflict with general laws, is negligence per se, and where such act of negligence by a defendant is the direct and proximate cause of an injury, not directly contributed to by the want of due care on the part of the injured person, the defendant is liable.

For other cases, see Negligence, I. a, in Dig. 1-52 N. S.

(February 29, 1916.)

ERROR to the Court of Appeals for Belmont County to review a judgment reversing a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Affirmed.

Statement by the Court:

The administrator of William Gitchell, deceased, brought the original action in the court of common pleas of Belmont county, against plaintiff in error, John H. Schell. The allegations of the petition substantially were that the plaintiff's intestate was killed by reason of the negligence of the defendant in the operation of an automobile, at the time and place, at an excessive rate of speed and beyond his control, at a rate of speed in violation of § 12,604, General Code, in failing to sound a warning of his

Headnotes by the COURT.

Note. — For violation of ordinance in relation to speed of automobile as ground of liability for injury, see annotation in 51 L.R.A.(N.S.) 993, and earlier notes there referred to.

The general question as to violation of police ordinance as a ground of liability is discussed at length in the note to *Sluder v. St. Louis Transit Co.* 5 L.R.A.(N.S.) 186; specifically as to ordinances in relation L.R.A.1917A.

approach, and in driving the automobile past a street car, from which the plaintiff's intestate had alighted while the same was standing at the street crossing for the purpose of unloading passengers, in violation of an ordinance of the city of Bellaire, which ordinance was duly pleaded. It is alleged that the ordinance provided that it should be unlawful for any person to drive an automobile past a street car or other conveyance for passengers in the city of Bellaire when said street car or other conveyance is standing for the purpose of receiving or discharging passengers; that the defendant was negligent and reckless in failing to see the deceased while crossing the street, in time to avert the accident. The answer of the defendant, after acknowledging the qualification of the administrator, admitted that the deceased was struck by the defendant's automobile and received injuries from which he died. The answer contained further admissions as to the description of the locality and general situation with reference to the accident, and denied each and every other allegation in the amended petition contained. In a second defense in the answer the defendant alleged that the death of the plaintiff's intestate was caused solely by his own negligence, in that he failed to keep a proper and reasonable lookout for his safety at the time of, and before, walking across said Noble street. The allegations of this defense were denied in the reply.

In the charge of the court to the jury on the trial of the case there was included the following: "It is a rule of law that violation or violations of a provision of the Code or statute of the state constitutes prima facie negligence. This means simply that proof of the violation of a provision of the Code or statute by running an automobile at a greater rate of speed than is provided by such Code or statute shall be prima facie proof only of negligence; but it is not conclusive, and, if the jury find in this particular case that the defendant ran the automobile at a greater rate of speed than is provided by law, that is not conclusive of negligence on the part of the defendant if the jury should find, under all the circumstances as shown by the evidence, in this case, that the defendant was not

to speed of railroad trains, see pages 218 et seq.; as to speed of street cars, pages 250 et seq.; as to fast or reckless driving, page 254, of that note.

A similar question with respect to statutes is discussed in notes in 9 L.R.A.(N.S.) 338, and L.R.A.1915E, 500; specifically as to speed of railroad trains, see page 373 of the earlier note, and page 538 of the later note.

negligent in the operation of his automobile."

There was also included in the charge of the court to the jury the following: "Now, while this ordinance has been introduced in evidence, and while the plaintiff claims that the same was violated by the defendant, which he denies, neither the ordinance itself nor its violation, if the same has been proven, is sufficient in and of itself to establish the claim of the plaintiff that the defendant was guilty of negligence, but such ordinance and the testimony tending to show its violation, if any, may be considered by you as circumstances tending to prove negligence. You are, however, to determine the question as to whether or not the defendant was negligent on account of his failure to exercise ordinary care, as we have said, from a consideration of all the facts and circumstances proven upon the trial of this case."

The jury rendered a verdict in favor of the defendant. Judgment was entered on the verdict, and the court of appeals, on error, reversed that judgment for "error in the charge of the court below and in refusing to charge as requested, and that substantial justice, therefore, has not been done said plaintiff in error."

This proceeding is brought to reverse the judgment of the court of appeals and affirm that of the common pleas.

The defendant in error, in support of the judgment of the court of appeals, insists that the portions of the charge above quoted were erroneous, and points out other claimed errors which we do not regard as important.

Messrs. William Dixon, Jr., David H. James, and Fred Spriggs, for plaintiff in error:

A violation of the ordinance was evidence of negligence.

Meek v. Pennsylvania Co. 38 Ohio St. 632; Variety Iron & Steel Works Co. v. Poak, 89 Ohio St. 297, 106 N. E. 24; Hoppe v. Parmalee, 20 Ohio C. C. 306, 11 Ohio C. D. 24; Bell v. Pistorius, 18 Ohio C. C. 76, 9 Ohio C. D. 869; Pennsylvania Co. v. Trainer, 18 Ohio C. C. 719, 7 Ohio C. D. 567; Erie R. Co. v. McCormick, 3 Ohio C. C. N. S. 654; Becker v. Cincinnati Street R. Co. 1 Ohio N. P. 360, 2 Ohio S. & C. P. Dec. 137; Whelan v. New York, L. E. & W. R. Co. 38 Fed. 15; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Oates v. Union R. Co. 27 R. I. 499, 63 Atl. 675, 20 Am. Neg. Rep. 213; Hanlon v. South Boston Horse R. Co. 129 Mass. 310; Hall v. Ogden City Street R. Co. 13 Utah, 243, 57 Am. St. Rep. 726, 44 Pac. 1046. L.R.A.1917A.

If plaintiff's decedent saw the automobile approaching at a speed greater than that allowed by the ordinance, he could not reject the evidence of his senses and rely on something that he knew would not be done.

Baker v. Pendergast, 32 Ohio St. 494, 30 Am. Rep. 620; Hart v. Devereux, 41 Ohio St. 565; Cincinnati Traction Co. v. Edwards, 22 Ohio C. C. N. S. 539; Wabash R. Co. v. Skiles, 64 Ohio St. 458, 60 N. E. 576, 10 Am. Neg. Rep. 175; Steubenville & W. Traction Co. v. Brandon, 87 Ohio St. 187, 100 N. E. 325.

Messrs. D. D. Du Bois and Gordon J. Kinder, for defendant in error:

The trial court erroneously charged the jury as to the violation of the statute.

Variety Iron & Steel Works Co. v. Poak, 89 Ohio St. 297, 106 N. E. 24; Cincinnati, H. & D. R. Co. v. Van Horne, 16 C. C. A. 182, 37 U. S. App. 262, 69 Fed. 139.

Violation of a municipal ordinance constitutes negligence per se.

Variety Iron & Steel Works Co. v. Poak, supra; Thomp. Neg. §§ 10, 11, 773, 951, 1195, 1236, 1295; Lindler v. Southern R. Co. 84 S. C. 536, 66 S. E. 995; Sluder v. St. Louis Transit Co. 189 Mo. 107, 5 L.R.A. (N.S.) 186, 88 S. W. 648; Farrington v. Cheponis, 82 Conn. 258, 73 Atl. 139; Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944; Watts v. Montgomery Traction Co. 175 Ala. 102, 57 So. 471; Healy v. Johnson, 127 Iowa, 221, 103 N. W. 92; Hartje v. Moxley, 235 Ill. 164, 85 N. E. 216; Missouri, K. & T. R. Co. v. Matherly, 35 Tex. Civ. App. 604, 81 S. W. 589; Galveston, H. & H. R. Co. v. Levy, 35 Tex. Civ. App. 107, 79 S. W. 879; Pittsburgh, C. C. & St. L. R. Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218, 660; Baltimore & O. S. W. R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Reed v. St. Louis, I. M. & S. R. Co. 107 Mo. App. 238, 80 S. W. 919; Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Eswin v. St. Louis, I. M. & S. R. Co. 96 Mo. 290, 9 S. W. 577; Bott v. Pratt, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237; Schlereth v. Missouri, P. R. Co. 96 Mo. 509, 10 S. W. 66; Keim v. Union R. & Transit Co. 90 Mo. 314, 2 S. W. 427; Dahlstrom v. St. Louis, I. M. & S. R. Co. 108 Mo. 525, 18 S. W. 919; Osborne v. McMasters, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543; Denver, T. & G. R. Co. v. Robbins, 2 Colo. App. 313, 30 Pac. 261, 434; Siemers v. Eisen, 54 Cal. 418; Jones v. Belt, 8 Houst. (Del.) 562, 32 Atl. 723; Williams v. Louisiana Electric Light & P. Co. 43 La. Ann. 295, 8 So. 938; Correll v. Burlington, C. B. & M. River R. Co. 38 Iowa, 120, 18 Am. Rep. 22; Kansas City, M. & B. R. Co. v. Flippo, 138 Ala. 47, 35 So. 457.

It was error for the court to say to the

jury that Gitchell's duties were the same as those of pedestrians at street crossings ordinarily.

Cincinnati Street R. Co. v. Snell, 54 Ohio St. 197, 32 L.R.A. 276, 43 N. E. 207, 12 Am. Neg. Cas. 477; Steubenville & W. Traction Co. v. Brandon, 87 Ohio St. 194, 100 N. E. 325.

Johnson, J., delivered the opinion of the court:

The only questions presented are those relating to the action of the court in its charge to the jury.

It was alleged in the petition that at the time of the accident the defendant was driving his automobile at a rate of speed in violation of § 12,604, General Code, which makes unlawful the operation of a motor vehicle at a greater speed than 8 miles an hour in the business and closely built-up portions of a municipality. As to this the court charged the jury: "It is a rule of law that violation or violations of a provision of the Code or statute of the state constitutes prima facie negligence. This means simply that proof of the violation of a provision of the Code or statute, by running an automobile at a greater rate of speed than is provided by such Code or statute, shall be prima facie proof only of negligence; but it is not conclusive, and, if the jury find in this particular case, that the defendant ran the automobile at a greater rate of speed than is provided by law, that is not conclusive of negligence on the part of the defendant if the jury should find, under all the circumstances as shown by the evidence in this case, that the defendant was not negligence in the operation of his automobile."

This was a plain instruction to the jury that, notwithstanding the fact that the evidence might show that the defendant ran the automobile in the business and closely built-up portion of Bellaire at a greater speed than is allowed by law, it would still be the province of the jury to say whether the defendant was negligent in thus disregarding the law and in violating the specific duty which was imposed upon him by the statute.

It was thus left to the jury to say whether the violation of the law was a negligent act. The statute imposed the duty on the defendant not to operate the automobile at a greater rate of speed than that specified in the statute. The defendant was bound to comply with this legal requirement. It was not for him to speculate or decide whether he would or would not obey the law. The obligation was imposed upon him for the protection of the public, and for each member of the public; and when he L.R.A.1917A.

violated that obligation, he was guilty of negligence by that act alone. But that would not create a liability unless that act was the proximate cause of the injury. As was said in *Variety Iron & Steel Works Co. v. Poak*, 89 Ohio St. 297, 310, 106 N. E. 24, 27: "The plaintiff . . . predicated his right of recovery upon the violation of the statute, which made it an absolute duty on the part of the employer to adopt certain measures to protect its employees. It was not for the jury to say whether a failure to comply was negligence. To use the language of the court of appeals: 'As no jury is allowed to say that which is not the law shall be the law, so they should not be permitted to say that which is the law is not the law.' The violation of this statute in this case was negligence as a matter of law. If this negligence was the proximate cause of the injury, the company was liable."

Section 1027, General Code, which was involved in that case, did not expressly create a cause of action in favor of an injured person, but this court held its violation to be negligence per se. As said by Judge Taft in *Cincinnati, H. & D. R. Co. v. Van Horne*, 16 C. C. A. 182, 37 U. S. App. 262, 69 Fed. 139: "There was no issue before the jury as to whether the failure to insert a block was negligence on the part of the railroad company. It was negligence as a matter of law, and the court properly charged the jury that, if the block was not there, and the absence of it caused the accident, the defendant was liable."

The statute involved in that case (85 Ohio Laws, p. 105), which required the blocking of frogs, was a penal statute, and did not, by its terms, confer a cause of action upon one who had been injured by reason of its violation. Nevertheless the right of action was sustained, and it was held that the plaintiff could recover if he could show that the absence of a block "caused the accident." It was negligence as a matter of law. This holding was expressly reaffirmed in *Lake Erie & W. R. Co. v. Craig*, 19 C. C. A. 631, 37 U. S. App. 654, 73 Fed. 642; *Narramore v. Cleveland, C. C. & St. L. R. Co.* 37 C. C. A. 499, 48 L.R.A. 68, 96 Fed. 298; and *Cooper v. Baltimore & O. R. Co.* 16 L.R.A. (N.S.) 715, 86 C. C. A. 272, 159 Fed. 82, 14 Ann. Cas. 693.

In *Pittsburgh & W. Coal Co. v. Estievernard*, 53 Ohio St. 43, 40 N. E. 725, the action was brought under the provisions of § 6871, Revised Statutes. The act required the owner, agent, or operator of a coal mine to keep a supply of timber constantly on hand, and to deliver it to the working place of the miner. It provided that no miner should be held responsible for accidents

which might occur in mines where the provisions of the section had not been complied with by the owner, agent, or operator. It also provided that it should be the duty of the miner to securely prop the roof of the place under his control. This court held, at page 49 of 53 Ohio St.: "All he [the miner] has to prove to make his case, as to that point, is that in fact the delivery was not made. . . . And a failure on the part of the owner, agent, or operator to so deliver timber to the working place of the miner is negligence, and if injury is thereby proximately caused to the miner, an action will lie therefor."

It is likewise to be noted that the act involved in that case did not confer a cause of action upon one who had been injured by reason of the failure to comply with its terms.

In *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612, it is held that, under the Safety Appliance Act of March 2, 1893, chap. 196, 27 Stat. at L. 531, Comp. Stat. 1913, §§ 8605-8612, there is imposed an absolute duty on the carrier, and the penalty cannot be escaped by the exercise of reasonable care.

In the cases to which we have referred the disregard of the obligation imposed by the statute was held by the courts to be in itself an act of negligence, and it was held that if this act of negligence was the proximate cause of the injury to the plaintiff, to which he had not contributed by any want of due care on his own part, the defendant was liable.

In the case of a violation of a statute which requires the covering of a setscrew, or other similar safeguard, the negative act of failing to provide the contrivance required is the act of negligence. Whereas, in the case of a violation of a statute regulating speed in the streets of municipalities to secure safety to the public, the positive violation of the statute is the act of negligence.

Of course, a different case might be presented in which a speed much less than the maximum fixed by statute would be found by the jury to be negligence in the particular place and circumstances, without reference to the statute.

In this case, if the operator of the automobile ran it in the portion of the city referred to at a speed in excess of the speed fixed by the statute, he was guilty of negligence; and if this act of negligence was the direct and proximate cause of the injury, not contributed to by want of due care on the part of the decedent, the defendant was liable.

The court also charged the jury as to L.R.A.1917A.

the ordinance referred to: "Now, while this ordinance has been introduced in evidence, and while the plaintiff claims that the same was violated by the defendant, which he denies, neither the ordinance itself nor its violation, if the same has been proven, is sufficient in and of itself to establish the claim of the plaintiff that the defendant was guilty of negligence, but such ordinance and the testimony tending to show its violation, if any, may be considered by you as circumstances tending to prove negligence."

One of the allegations of negligence in the petition, after stating the fact that the car had stopped to discharge passengers and that Gitchell was a passenger, is that the defendant carelessly and negligently drove his automobile past the standing car, in consequence of which the decedent was struck by the automobile. The plaintiff avers that there is an ordinance of the city of Bellaire, which provides that it shall be unlawful to drive an automobile past a standing car which is receiving or discharging passengers, and that in consequence of the violation of this ordinance and of defendant's carelessness in driving his automobile at the time, the decedent received his injuries.

It will be observed that the charge of the court as to the ordinance was different in some essentials from the portion thereof with reference to the violation of the statute. As to the statute, the rule declared was that a violation or violations of a provision of the statute constitutes prima facie evidence, but that it is not conclusive. As to the ordinance, the charge is that the violation of the ordinance is not sufficient, in and of itself, to establish that the defendant was negligent. Therefore, if this is the correct rule, if the injury to the deceased had been caused solely by and because of the very acts of the defendant in violation of this ordinance, even though the decedent was wholly free from fault on his part, the jury nevertheless is instructed that this would "not be sufficient to establish negligence by defendant."

The city of Bellaire was fully authorized by the provisions of the municipal code to pass the ordinance in question. It was a police regulation, passed in the interest of public safety, and each member of the public was entitled to its protection. Nothing is more firmly established than that the state and municipal authorities, in the exercise of the police power, may make all such provisions as may be reasonably necessary and appropriate for the protection of the public health and safety. *Toledo Disposal Co. v. State*, 89 Ohio St. 230, L.R.A. 1915B, 1207, 106 N. E. 6; *California Reduction Co. v. Sanitary Reduction Works*, 109

U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100.

Manifestly this ordinance had no other object in view than to protect the public. A police regulation, duly and legally passed by a municipal corporation, "not in conflict with general laws," is entitled to as much respect, and is as much a legal regulation within the limits of the municipality, as a police regulation passed by the legislature.

Where an incorporated city or village is invested by the legislature with power to pass ordinances, an ordinance enacted by the legislative branch of the corporation, within the powers conferred on it, has the force and effect of a law passed by the legislature, and cannot be regarded otherwise than a law of and within the corporation. 28 Cyc. 391, and cases there cited. Also *Hayes v. Michigan C. R. Co.* 111 U. S. 237, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Mason v. Shawneetown*, 77 Ill. 533; *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47, 23 N. W. 237.

While there is not entire harmony in the decision as to the legal effect of a violation of a municipal ordinance, passed in the proper exercise of the police power, for the protection of the public, we think it clear, from an examination of many cases, that the weight of authority and reason supports the proposition that a violation of an ordinance of the character referred to is negligence per se, and that where the act of violation is the proximate cause of an injury to a plaintiff who has not by his own negligence contributed to the injury, the defendant is liable. This is now the generally recognized rule.

Thompson, in vol. 1 of his work on Negligence 2d ed. at § 10, says: "This seems to introduce in this place a consideration of the antithesis of the proposition contained in the preceding paragraph, the case where the legislature of the state, or the council of a municipal corporation, having in view the promotion of the safety of the public, or of individual members of the public, commands or forbids the doing of a particular act. Here the general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as mere matter of law, otherwise called negligence per se."

And in § 11 he says: "It is to be regretted that two or three authoritative courts have fallen into the aberration of holding that the violation of a statute, or municipal ordinance, enacted for the public safety, does not establish negligence per se, but is merely what the books term, 'evidence of negligence;' that is to say, competent but

not conclusive evidence to be submitted to the jury on the question of negligence or no negligence."

In each of the following cases it was expressly held that the violation of a municipal ordinance, passed in the interest of public safety, was negligence as matter of law upon which an action could be predicated, where it was the proximate cause of injury: *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45; *Healy v. Johnson*, 127 Iowa, 221, 103 N. W. 92; *Lindler v. Southern R. Co.* 84 S. C. 536, 66 S. E. 995; *Dyson v. Southern R. Co.* 83 S. C. 354, 65 S. E. 344; *Fenn v. Clark*, 11 Cal. App. 79, 103 Pac. 944; *Watts v. Montgomery Traction Co.* 175 Ala. 102, 57 So. 471; *Wise v. Morgan*, 101 Tenn. 273, 44 L.R.A. 548, 48 S. W. 971; *Roscoe v. St. Paul & D. R. Co.* 68 Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20; *Missouri, K. & T. R. Co. v. Matherly*, 35 Tex. Civ. App. 604, 81 S. W. 589; *Dahlatrom v. St. Louis, I. M. & S. R. Co.* 108 Mo. 529, 18 S. W. 919; *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543; *Siemers v. Eisen*, 54 Cal. 418; *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. 261, 434; *Jones v. Belt*, 8 Houst. (Del.) 562, 32 Atl. 723; *Kansas City, M. & B. R. Co. v. Flippo*, 138 Ala. 487, 35 So. 457.

It is said that the trial court in this case relied on the case of *Meek v. Pennsylvania Co.* 38 Ohio St. 632, as sustaining the charge to the jury. In that well-known case the ordinance of the city was not pleaded as ground of negligence. The negligence alleged was that two detached cars were moving at a dangerous rate of speed, and turned on a side track at a switch, while the locomotive and other cars continued on the main track. The flying switch was itself evidently regarded as sufficient ground of recovery. No reference whatever was made to the ordinance in the petition. On the trial the plaintiff offered in evidence an ordinance of the city of Belaire which forbade trains moving at a higher rate of speed than 8 miles an hour. The court rejected the evidence. This court held that the ordinance was admissible, and reversed the judgments of the courts below. In the syllabus it is held: "In an action to recover for an injury alleged to have been caused by cars moving on a railroad track, proof that the company was moving its cars in violation of a city ordinance at the time the injury was inflicted, while not sufficient per se to create a liability, is yet competent to go to the jury as tending to show negligence."

The counsel for plaintiff in error in that case did not contend that a violation of the ordinance was negligence per se. The only

dispute related to its competency as evidence. The court, in the opinion, at page 637, of 38 Ohio St. says: "In the absence of knowledge of apparent danger from an approaching train, or that these detached cars were moving toward him, and were about to cross the public street near which he was, without sufficient motive power to control them, the deceased had the right, having used due caution in going upon the track, to act on the assumption that the defendant would conform to the requirements of the ordinance."

The court further says: "While the violation of a law or ordinance is not, per se, conclusive proof of negligence that will render the company liable, yet it is competent to be considered with all the other evidence in the case. The ordinance was enacted for the purpose of rendering the streets more safe and convenient for the public. It is a police regulation defining what is a legitimate use of the streets by the railroad company. It was a command to those operating trains within the city limits which it was their duty to obey."

It will be observed that these remarks indicate that the court did not make any distinction between a city ordinance and a statute of the state, so far as its legal effect is concerned within the municipality.

The remark that "while the violation of a law or ordinance is not, per se, conclusive proof of negligence," was an unnecessary parenthetical concession on the matter, not put in issue in the case.

There are some considerations which apply with equal force to the statute and the ordinance in the case. Negligence is the failure to comply with some duty imposed by law. But in order that an act of negligence may be the predicate of an action, it is necessary that the duty should have been imposed for the benefit of the person injured, and that the violation of the duty be the proximate cause of the injury.

Where there is no fixed legal duty specifically defined by statute or by an ordinance passed by a municipality within its police power, which has been violated, the acts and conduct of the parties must necessarily be measured by the circumstances of each case. The liability, if any, would arise out of the violation of a common-law duty only. The question in such case is whether the defendant acted as an ordinarily prudent and careful man, having due regard for the protection of others, would have acted in the circumstances. Such conduct is all that the plaintiff had a right to rely on.

But when the legislature or municipality has specifically defined what the conduct of all persons shall be in certain particular

circumstances, each member of the public, acting himself with due care, has the right to rely on the compliance by the rest of the public with the duty thus imposed. The soundness and salutary effect of this principle are peculiarly manifest under a state of facts such as are set forth in this case. The rule is stated in *Baker v. Pendergast*, 32 Ohio St. 494, 30 Am. Rep. 620, where it is held: "A person about to cross a street of a city in which there is an ordinance against fast driving has a right to presume, in the absence of knowledge to the contrary, that others will respect and conform to such ordinance; and it is not negligence on his part to act on the presumption that he is not exposed to a danger which can only arise through a disregard of the ordinance by other persons."

A pertinent observation was made by Judge Taft in *Narramore v. Cleveland C. & St. L. R. Co.* 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 298, which also concerned our statute as to blocking frogs, which did not expressly give a cause of action in favor of an injured person. Said he: "It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements."

In this case the ordinance made it unlawful for a person to drive an automobile past a street car, standing for the purpose of receiving or discharging passengers. It is inconceivable that, in the midst of daily experiences which arrest attention, any argument is needed to show the wisdom of such an ordinance, or that it is within the police power of the state, whose exercise has been delegated to the city. Such an ordinance must be reasonable, and must not conflict with general laws. The right of the driver of an automobile to the use of the public thoroughfares must be recognized and not unreasonably interfered with. But the rights of pedestrians and others must be equally respected. All must realize that this comparatively new and more dangerous method of travel, which has become a permanent and essential factor in the life of the country, has imposed increased mutual obligations of care on drivers and pedestrians.

The general and united action of automobile associations in urging upon members

that safety should be the first consideration is a hopeful indication that these obligations will be increasingly regarded.

It is further claimed in this case that the trial court erred in refusing the request of plaintiff to give certain charges which are included in the record. We think these charges were objectionable because they as-

sumed that Mr. Gitchell did not, when he started to cross the street, know of the approach of the automobile.

For the reasons given, the judgment will be affirmed.

Nichols, Ch. J., and Wanamaker and Matthias, JJ., concur.

OKLAHOMA SUPREME COURT.

N. S. SHERMAN, Doing Business as N. S. Sherman Machine & Iron Works, Plff. in Err.,

v.

PACIFIC COAST PIPE COMPANY.

(— Okla. —, 159 Pac. 333.)

Accord and satisfaction — liquidated demand — payment of less sum.

While, if a demand is unliquidated or disputed, payment and acceptance in discharge of the same of a less sum than that claimed will constitute an accord and satisfaction, yet, in cases where the debt is liquidated and is due (except where changed by statute), the general doctrine is applied that payment by the debtor and receipt by the creditor of a part thereof is not a satisfaction of the whole, unless it be made on some new consideration, such payment operating only as a discharge of the amount paid; and the creditor may maintain an action for the balance.

For other cases, see Accord and Satisfaction, in Dig. 1-52 N. S.

(May 9, 1916.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover an alleged balance of the purchase price of certain wood pipe sold and delivered by plaintiff to defendant. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Oliver C. Black and Welty & Orr, for plaintiff in error:

There was a complete accord and satisfaction.

1 R. C. L. p. 196; Fuller v. Kemp, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034; Canton Union Coal Co. v. Parlin & O. Co. 215 Ill. 244, 106 Am. St. Rep. 162, 74 N. E. 143; Dreyfus v. Roberts, 75 Ark. 354, 69 L.R.A. 823, 112 Am. St. Rep. 67, 87 S. W. 641, 5 Ann. Cas. 521; Cleveland County v. Seawell, 3 Okla. 281, 41 Pac. 592.

Headnote by BLEAKMORE, C.

Note. — For payment of part of a liquidated and undisputed debt as a consideration for the discharge of the whole, see annotation following this case, post, 719. L.R.A.1917A.

Messrs. Harris, Nowlin, & Singleton, for defendant in error:

The law on the subject of accord and satisfaction was not properly administered by the district court of Oklahoma county, under the issues and the evidence in this case.

Deming Invest. Co. v. McLaughlin, 30 Okla. 20, 118 Pac. 380; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695, 42 N. E. 716; 1 R. C. L. 213; Jennings v. Durlinger, 23 Ind. App. 673, 55 N. E. 979; Harby v. Henes, 45 Misc. 366, 90 N. Y. Supp. 461; Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 289, 51 N. E. 986; Amer v. Folk, 28 Misc. 508, 59 N. Y. Supp. 532; McKay v. Myers, 168 Mass. 312, 47 N. E. 98; Levenson v. Gillen Pub. Co. 30 Misc. 454, 62 N. Y. Supp. 472; Mull v. Ingalls, 30 Misc. 80, 62 N. Y. Supp. 830; Bowery Bay Bldg. & Improv. Co. v. Rossiter, M. & Co. 113 App. Div. 652, 99 N. Y. Supp. 992; Hodges v. Truax, 19 Ind. App. 651, 49 N. E. 1079; Robinson v. Leatherbee Tie & Lumber Co. 120 Ga. 901, 48 S. E. 380; Goldsmith v. Lichtenberg, 139 Mich. 163, 102 N. W. 627.

Bleakmore, C., filed the following opinion:

This action was commenced in the district court of Oklahoma county by defendant in error as plaintiff against plaintiff in error as defendant to recover an alleged balance of the purchase price of certain wood pipe sold and delivered by plaintiff to defendant. The parties are referred to as they appeared below. The defense pleaded is an accord and satisfaction. There was judgment for plaintiff, and defendant has appealed.

Plaintiff contracted with defendant to deliver to him at agreed prices certain wood pipe on board the cars at Ballard, Washington, to be used by defendant in the construction of waterworks system at Teague, Texas. The pipe was shipped at divers times, and was received and used by defendant in the installation of said waterworks system. An account of each shipment was rendered and forwarded by mail to defendant, and retained without objection on his part. Defendant contends that there was an overcharge of \$312.24 in the aggregate amount of the account, and also that, by reason of certain defects in the pipe and the failure of the plaintiff to furnish a

competent person to superintend the laying thereof, he was damaged in the sum of \$2,396.07. There was correspondence between the parties, but no complaint was made of any overcharge or defect in the pipe on the part of defendant. The entire indebtedness being past due, plaintiff, in an effort to secure its payment, presented its verified claim therefor to the city of Teague. Thereafter defendant telegraphed plaintiff as follows:

The Western Union Telegraph Company,
Teague, Tex., May 21, '09.
Pacific Coast Pipe Co., Ballard, Wash.:

Wire release claim filed with city and draft in full will come forward next week on acceptance plant otherwise time of your settlement indefinite. Act quick.

N. S. Sherman.

Plaintiff answered:

The Western Union Telegraph Company,
May 21, 1909.
To N. S. Sherman, Jr., Teague, Texas:

Will wire release upon bank guarantee our account paid in full next week. Your indifference toward our account and withholding expense bills causes our action.
Pacific Coast Pipe Co.

Four days later the plaintiff received the following telegram:

The Western Union Telegraph Company,
Teague, Texas, June 5, 1909.
Pacific Coast Pipe Co., Ballard, Wash.:

We hold money to pay your claim by check on us in your favor. Draw for account in full.

First National Bank of Teague.

Whereupon plaintiff made draft through such bank for the amount of its account, which draft was subsequently dishonored. On May 26th following defendant wrote plaintiff as follows:

N. S. Sherman Machine & Iron Works.
Oklahoma City, May 26, 1909.
Pacific Coast Pipe Co., Ballard, Wash.
Gentlemen:

The writer has just returned from Teague, Texas, and we are handing you herewith freight expense bills covering the last three cars of pipe, same being for \$273.90, \$298.65, and \$285.15, respectively. The writer regrets very much that you saw fit and proper to file a bill with the city. However, we will take this matter up with you in a further communication during the present week.

ther communication during the present week.

Yours very truly,

N. S. Sherman Machine & Iron Works,
Dict. NSS-D By N. S. Sherman, Jr.
Inclosure.

On July 3d defendant telegraphed plaintiff:

The Western Union Telegraph Company,
Oklahoma City, Okla., July 3, '09.
Pacific Coast Pipe Co., Ballard, Wash.:
Yours twenty-fourth mail full settlement
Monday. N. S. Sherman.

On July 14th he again telegraphed:

The Western Union Telegraph Company,
Oklahoma City, Okla., July 14, '09.
Pacific Coast Pipe Company, Ballard,
Wash.:
Check mailed have been out of town hence
delay. N. S. Sherman.

On July 15th defendant again wrote plaintiff as follows:

N. S. Sherman Machine & Iron Works,
Oklahoma City, Okla., July 15, 1909.
Pacific Coast Pipe Company, Ballard,
Wash.:
Gentlemen:

We have at last got straightened out on the Teague matter and are inclosing you herewith our check in the sum of \$10,278.66, in full and complete settlement for all material furnished on or for account of Teague, Texas, waterworks system as per the inclosed statement; this without prejudice, as we feel that we are really paying you more than we should in view of all the circumstances. We have credited you with the total measurement of pipe, as allowed us by the city. This measurement includes all specials, valves, and hydrant connections, which amounts to far more than the amount of pipe that was left over; we have not credited you with the mauls and tompons, as in the first place Mr. Greenwood advised they would be furnished, and in the next place neither were of any use, except the small tompons.

Now, as to our charge of \$807.56, our pay roll and expense account shows an expenditure of \$1,615.12, for cost of repairing leaks, maintenance of plant on account of leaks caused by defective pipe, and defective instructions by your representative, to a certain extent, in our opinion, as his advice was: Fill the pipe up twice, let it soak, and then put on the pressure. This we have discovered, will not do, as pipe that we let soak twenty days before put-

ting on pressure gave us the least trouble; to be sure which rightfully should belong to you, further we paid Mr. Betaque the total sum of \$395.76, and of this amount it is a serious question in the mind of the writer if the last payment of \$289.76 would have been made, had he been at Teague, as his work was entirely unsatisfactory to the engineers, and, if drawn to a fine point, it occurs to us that you should reimburse us on this account. However, for the sake of a final settlement, we are willing to pass this, as well as for Mr. Betaque, because personally he is a fine fellow, but has a lot to learn about placing wood pipe in a complete waterworks system. We were compelled to pay quite a sum for storage, which we believe would have been unnecessary, had you followed our advice as to the shipments.

We do not believe it is necessary to go into further details in this matter, and we believe that you can congratulate yourself that we are as liberal with you as we are in making this settlement. We certainly would "shake" with ourselves if we had come out with the pipe laying as well. Please favor us with duplicate receipts in full.

Yours very truly,

N. S. Sherman Machine & Iron Works.
NSSJr-D By N. S. Sherman, Jr.

Pacific Coast Pipe Company
Bought of N. S. Sherman Machine & Iron Works, Teague, Texas.

We credit:

430 ft. 10-200' at 56.....	\$1,960.80
15590 ft. 8-200' at 40½.....	6,313.95
5000 ft. 8-300' at 48.....	2,400.00
8091 ft. 6-200' at 29½.....	2,406.62
9441 ft. 4-200' at 22½.....	2,137.82
	\$15,219.19

Less we debit:

Freight bills rendered...	4,132.97
One half \$1,615.12.....	807.56
	\$10,278.66

The check inclosed was as follows:

No. 1065. Teague, Texas, Jul. 15, 1909.
The First National Bank.

Pay to Pacific Coast Pipe Co. or order \$10,278.66 ten thousand two hundred and seventy-eight and 68/100 dollars, in full and complete settlement for any and all material furnished for Teague, Texas, waterworks system.

N. S. Sherman Machine & Iron Works.
N. S. Sherman, Jr.

Plaintiff retained said check and collected L.R.A.1917A.

the amount thereof. Shortly after the receipt of same, plaintiff wrote defendant as follows:

Pacific Coast Pipe Company,
Ballard Station, Seattle, Wash.,
Aug. 3, 1909.

N. S. Sherman Machinery & Iron Co., Oklahoma City, Oklahoma,
Gentlemen:

We are in receipt of your delayed favor of July 15, inclosing check for \$10,278.66, and we hereby serve notice on you that this check does not pay us in full for our account as per notation made by you on its face, and is not received by us with that understanding. On advice of payment of the above-mentioned check, we will credit proceeds to your account, and will hold these funds separate and apart from our other funds subject to future action of the courts.

As regards your claims on deductions, we refuse to allow any of them, our reason for this being that your claim for defective pipe is not founded on fact; further, we have nothing to do with the city measurements of pipe as laid. You are charged on our books with the amount of pipe shipped you, as per your order, and we expect you to pay for it in full. As per your original order, we were to receive monthly 90 per cent of the engineer's estimate as allowed you, which has not been done, and we are entitled to interest for the delay. Payments were to be made in Chicago exchange at par, and any exchange charged us on your check will be charged to your account.

On payment of the check we will send you a bill of the amount still due us, a copy of which we will send to our attorney at Oklahoma City, and we expect payment in full when presented. If not paid, we have given him instructions to proceed at once and collect by law. Trusting you will not force us to take this action, we are,

Yours very truly,

Pacific Coast Pipe Co.,
By Treas.

In its reply plaintiff pleaded: "Plaintiff further states that it has now in its possession the said sum of \$10,278.66, being the proceeds of the said defendant's check, and that it now tenders same into this court, subject to the final action and final order of this court as to its proper distribution or application, and is now ready, and stands ready at any and all times, to make its tender good, and to pay said fund into this court, or to dispose of same pursuant to any order, judgment, or decree which said court may render in this action."

The sole question for our consideration is

whether, under the circumstances, the retention and use by plaintiff of the check reciting that it was "in full and complete settlement of any and all material furnished for Teague, Texas, waterworks," constituted an accord and satisfaction. While, if a demand is unliquidated or disputed, payment and acceptance in discharge of the same of a less sum than that claimed will constitute an accord and satisfaction, yet in cases where the debt is liquidated and is due (except where changed by statute) the general doctrine is applied that payment by the debtor and receipt by the creditor of a part thereof is not a satisfaction of the whole, unless it be made on some new consideration, such payment operating only as a discharge of the amount paid, and the creditor may maintain an action for the balance. 1 C. J. 539, 540, and cases cited.

In *Fire Ins. Asso. v. Wickham*, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84, it is said: "The rule is well established that, where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim; but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

The uncontroverted evidence in the instant case establishes that subsequent to the receipt and use of the pipe, and with full knowledge of any defects therein and of the alleged consequent damages, and after an account thereof had been rendered and received and retained for some time and the

claim therefor filed with the city of Teague, defendant, without objection, specifically promised to pay the same in full. There was at that time no bona fide dispute as to the items or the amount of the account sued on; and no claim is even now asserted of any then existing fact or circumstances tending to impeach the same subsequently brought to the knowledge of defendant. In *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. ed. 1099, 20 Sup. Ct. Rep. 924, it is said: "The word 'liquidated' is used in different senses, and as applicable here means made certain as to what and how much is due; made certain by agreement of parties or by operation of law."

The general rule is that where an account has been rendered to a debtor, and he receives it without objection and promises to pay it, it becomes an account stated. Under the facts in the instant case, the account sued on may properly be regarded as an account stated. We are of the opinion that the evidence was insufficient to establish an accord and satisfaction. By the retention and use of the check under the circumstances of this case, the plaintiff was not estopped to maintain its action for the balance declared on. *Harby v. Henis*, 45 Misc. 366, 90 N. Y. Supp. 461; *Jennings v. Durlinger*, 23 Ind. App. 673, 55 N. E. 979; *Amer v. Folk*, 28 Misc. 508, 59 N. Y. Supp. 532; *Robinson v. Leatherbee Tie & Lumber Co.* 120 Ga. 901, 48 S. E. 380; *Fuller v. Kemp*, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034.

There being no error in the proceedings on the trial prejudicial to the substantial rights of defendant, the judgment should be affirmed.

Per Curiam:
Adopted in whole.

Petition for rehearing denied July 25, 1916.

Annotation—Payment of part of a liquidated and undisputed debt as a consideration for the discharge of the whole.

Earlier cases considering the question under annotation will be found in notes to *Fuller v. Kemp*, 20 L.R.A. 785; *Melroy v. Kemmerer*, 11 L.R.A.(N.S.) 1018; and *Ex parte Zeigler*, 21 L.R.A.(N.S.) 1005.

As to acceptance of partial allowance of claim of public body as an accord and satisfaction, see note to *Paulson v. Ward County*, 42 L.R.A.(N.S.) 111.

The rule sustained by the great weight of authority, that an agreement not under seal to accept, or the actual acceptance of, part of a past due liquidated

and undisputed indebtedness in discharge of the whole, without other consideration, is not binding upon the creditor as a discharge of the amount remaining unpaid, has been followed in the following cases decided since the earlier notes: *Louisiana Lumber Co. v. J. W. Farrior Lumber Co.* (1913) 9 Ala. App. 383, 63 So. 788; *Abercrombie v. Goode* (1914) 187 Ala. 310, 65 So. 816; *American Workmen v. James* (1915) — Ala. App. —, 70 So. 976; *Phillips v. Graham County* (1915) 17 Ariz. 208, 149 Pac. 755; *State v. Gregg* (1916) — Ariz.

—, 157 Pac. 227; *Weber v. Head Camp*, Pacific Jurisdiction, W. W. (1915) — Colo. —, 154 Pac. 728; *Jordy v. Maxwell* (1911) 62 Fla. 236, 56 So. 946; *Holslag v. Morse* (1914) 188 Ill. App. 607; *Kushner v. Perlman* (1914) 189 Ill. App. 59; *Foster County State Bank v. Lammers* (1912) 117 Minn. 94, 134 N. W. 501; *Barrett v. Kern* (1909) 141 Mo. App. 5, 121 S. W. 774; *Vinson v. Lee Jordan Lumber Co.* (1912) 167 Mo. App. 201, 151 S. W. 199; *Miners' & F. Bank v. American Bonding Co.* (1916) — Mo. App. —, 186 S. W. 1139; *Castelli v. Jereissati* (1910) 80 N. J. L. 295, 78 Atl. 227; *Decker v. George W. Smith & Co.* (1916) — N. J. —, 96 Atl. 915; *Dorman v. Arkin* (1910) 120 N. Y. Supp. 757; *Kleinfelter v. Granger* (1911) 136 N. Y. Supp. 485; *Donnell v. First Mortg. & Real Estate Co.* (1915) 153 N. Y. Supp. 218; *Greenberg v. Eisenberg* (1915) 154 N. Y. Supp. 119; *Martinson & Nibur v. Van Cortlandt Operating Co.* (1915) 155 N. Y. Supp. 359; *Baccaria v. Landers* (1914) 84 Misc. 396, 146 N. Y. Supp. 158; *Havender v. Brodbeck* (1914) 88 Misc. 30, 150 N. Y. Supp. 162; *Cornell v. Taylor* (1910) 137 App. Div. 496, 122 N. Y. Supp. 157; *MacAvoy v. Tide Water Oil Co.* (1914) 165 App. Div. 954, 150 N. Y. Supp. 641; *SHERMAN v. PACIFIC COAST PIPE Co.* ante, 716; *Schumacher v. Moffitt* (1914) 71 Or. 79, 142 Pac. 353; *Tustin v. Philadelphia & R. Coal & I. Co.* (1915) 250 Pa. 425, 95 Atl. 595; *Parker v. Mayes* (1909) 85 S. C. 419, 137 Am. St. Rep. 912, 67 S. E. 559; *Simmons Hardware Co. v. Adams* (1912) — Tex. Civ. App. —, 147 S. W. 1196; *Johnson v. Hoover* (1914) — Tex. Civ. App. —, 165 S. W. 900; *Schultze v. Waco Land & Trust Co.* (1915) — Tex. Civ. App. —, 177 S. W. 157; *Smoot v. Checketts* (1912) 41 Utah, 211, 125 Pac. 412, Ann. Cas. 1915C, 1113; *Nixon v. Kiddy* (1909) 66 W. Va. 355, 66 S. E. 500.

The cases decided since the note in 21 L.R.A.(N.S.) 1005, disclose no other courts that are willing to adopt the position taken in Mississippi and New Hampshire and repudiate the rule altogether, although many of the cases show the same tendency manifested in the earlier cases to lay hold of the slightest circumstance to take a case out of the operation of the rule. The court in *Sigler v. Sigler*, post, 725, expressly declares that the courts should seize upon any possible or probable benefit to the one party, or loss or inconvenience to the other, which may be said to constitute a consideration for the new agree-

ment, and thus carry into effect the understanding of the parties.

The reluctance either to repudiate or apply the rule, if it can be avoided, is conspicuously illustrated by a case subsequently cited which holds that the acceptance of the debtor's own check is sufficient to take the case out of the rule, although a cash payment by him would not be sufficient,—a distinction that seems to place more value on a bird in the bush than one in the hand.

The South Carolina supreme court in *Davis v. Barwick* (1910) 88 S. C. 355, 70 S. W. 1007, observed that it may be that the courts ought to have held in *Pinnel's Case* (see discussion of that case in *Clayton v. Clark*, 74 Miss. 499, 37 L.R.A. 771, 60 Am. St. Rep. 521, 21 So. 565, 22 So. 189, set out in the note in 11 L.R.A.(N.S.) 1020), and in other cases which follow it, that being relieved of the possibility of suit and of the doubt of ultimate collection is a sufficient consideration to support an agreement to settle for less than the full amount, but that the rule had been settled otherwise.

So, acceptance of a less sum than actually due under an assurance policy, upon the company's representation that because of deceased's suicide the full amount could not be recovered, the insurer knowing that such suicide clause in the policy was void, will not preclude a recovery of the balance, although the beneficiary executed and delivered a release. *Weber v. Head Camp*, Pacific Jurisdiction, W. W. (1915) — Colo. —, 154 Pac. 728. The court stated that the company knew that the suicide clause was void under the statutes of the state, and so there was no room for an honest dispute as to its liability for the full amount of the policy, and therefore the payment must be considered only, as a payment on account, and, the company having paid nothing more than its conceded liability, the receipt or release as to the remainder was without consideration.

The question, however, as to what amounts to an honest dispute which will sustain a compromise, is not within the scope of this note.

An agreement to accept as full satisfaction one half of a claim against the county, as allowed by the county board, is without consideration, and does not estop a recovery of the balance. *Crawford v. Darrow* (1910) 87 Neb. 494, 127 N. W. 891.

So, also in general Fireproof Constr. Co. v. Butterfield (1911) 143 App. Div.

708, 128 N. Y. Supp. 407, it was held that an attorney and client do not occupy such contractual relations as will render permissible the application of the rule of accord and satisfaction upon the sending by the attorney to the client of part of the funds collected as in full satisfaction of the entire amount. See also *Wolfe v. Mack* (1913) 81 Misc. 185, 142 N. Y. Supp. 433.

The rule governing the payment and acceptance of a less sum where a debt or demand is liquidated or certain and due, as applied in dealings between private individuals and corporations, should be enforced in the affairs of municipal corporations in dealing with their officials. *Phillips v. Graham County* (1915) 17 Ariz. 208, 149 Pac. 755.

So, a county cannot refuse to pay one of its officers the balance due him as salary fixed by law, upon the ground that he has accepted and receipted for a less sum under the belief that he was being paid full salary. (Ariz.) Ibid.

Therefore, where by statute the salary of a county assessor automatically increases as the valuation of real estate in the county increases, such assessor, upon the valuation of real estate being increased during his incumbency of the office, automatically becomes entitled to the increase of salary, and the county obligated to pay the same, and so the acceptance by such an assessor of his salary at the old rate per annum, after by reason of increased valuation of real estate he is entitled to a larger salary, is not binding upon him in discharge of the whole amount due. (Ariz.) Ibid.

The common-law doctrine that an agreement to accept part payment in full satisfaction of a liquidated or undisputed debt does not bar recovery was modified by the Virginia Code of 1887, § 2858, which provides that "part performance of an obligation, promise, or undertaking, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose, though without any new consideration, shall extinguish such obligation, promise, or undertaking."

In construing such statute in *Thomas v. Brown* (1914) 116 Va. 233, 81 S. E. 56, it was held that a debtor did not bring himself within the influence of that statute where the acceptance by the creditors of a less sum in full satisfaction of an undisputed debt was the result not of an agreement, but practically of coercion, they being in great financial straits and being told that, unless they accepted

such sum in full payment, they could proceed to collect the money otherwise. The court stated that in the light of the evidence it could not be said that there was ever any meeting of the minds of the parties in an agreement that the less sum was expressly accepted by the creditor in full satisfaction of his demand, but that on the contrary it plainly appears that it was accepted under protest and aggravated circumstances and constraint. The court added that "much is said of the danger of what would follow the precedent of a recovery by the plaintiff in this case. During all the years of the common law as it stood prior to the enactment of the present statute, no agreement, however solemn, would serve to satisfy a debt by part payment, and the statute was never intended to enable a party to perpetrate the wrong and injustice that the defendant has sought to accomplish in this case. Hence the provision that part performance of an obligation must be 'expressly accepted by the creditor in satisfaction and rendered in pursuance of an agreement for that purpose.'"

But there may be an accord and satisfaction where a creditor receives anything of benefit to himself that he would not otherwise have had, together with a payment of a less sum.

And so, in *Donahue v. Brooks* (1908) 143 Ill. App. 188, where a judgment debtor abandoned an appeal, the right to which had been fixed by the court, and made an immediate cash payment of a less sum in full satisfaction of a judgment, it was held that the payment of such money was an advantage to the judgment creditor, he being sick and having been told that he had but a few weeks at most to live, and constituted an accord and satisfaction. See also *Roberts v. Banse* (1909) 78 N. J. L. 57, 72 Atl. 452, cited in note in 21 L.R.A. (N.S.) 1006.

It is, however, not a sufficient consideration to make an exception to the general rule, that the creditor would be saved the delay and trouble of further prosecuting the suit it had brought. *Brush Hat Mfg. Co. v. Abeles* (1911) 45 Pa. Super. Ct. 243. The court stated that "every debtor may delay the collection of an overdue and undisputed debt by taking advantage of the law's delay; but if he pays at once, as he is under legal obligation to do, he surrenders no legal right in the proper sense of the term. To delay payment is a legal wrong, and though it be a fact that it will cost the plaintiff money to obtain redress, the foregoing of the

opportunity which the law gives for prolonging the wrongful delay cannot be a legal consideration. To hold that it is would be destructive of the rule itself."

Effect of insolvency.

Supplementing note in 11 L.R.A.(N.S.) 1024.

A settlement made in view of the insolvency of a debtor was held in *Winter v. Meier* (1909) 151 Ill. App. 572, to be a consideration of sufficient value to bind the party to a settlement made, and work an accord and satisfaction between them.

And an agreement by a debtor not to go through bankruptcy, in connection with the fact that part of the money used in making the payment was furnished by a third person, was held a sufficient consideration to support an agreement by creditors to accept a less sum in full payment of an undisputed debt, in *Kuhn v. Kuhn* (1912) 171 Ill. App. 298.

But in *Davis v. Barwick* (1910) 88 S. O. 355, 70 S. E. 1007, where, pending bankruptcy proceedings, the debtors, at the request of the creditors, agreed that they would not include the debt due them in the schedule of debts filed in the bankruptcy court, but would pay them, in discharge of the debt as large a percentage as other creditors received whose claims were listed, which agreement was carried out, it was held that the agreement was of no effect because without consideration, and did not preclude a recovery of the balance due.

Nor is an agreement by several joint makers of a promissory note, to get one of their number, who is insolvent, to pay his proportionate share, a sufficient consideration for an agreement to accept a sum less than the whole in full payment. *Foster County State Bank v. Lammers* (1912) 117 Minn. 94, 134 N. W. 501. Plaintiff, the court says, was legally entitled to collect the entire note from any one or more of the makers, and therefore an agreement by the makers other than the one insolvent, to induce the latter to pay his share or to furnish him the money for that purpose, was not an advantage to the plaintiff or a disadvantage to the defendants.

And there is no accord and satisfaction of an undisputed debt where the acceptance of a less sum in full settlement is due to the debtor's misrepresentations as to his probable insolvency. *Scott v. Parkview Realty & Improv. Co.* (1912) 241 Mo. 112, 145 S. W. 48. L.R.A.1917A.

Debtor's note or check.

Supplementing notes in 20 L.R.A. 791, and 11 L.R.A.(N.S.) 1026.

Payment by the debtor's own check instead of by cash will not make an exception to the rule that payment of a less sum than the whole demand, which is undisputed or liquidated, is not an accord and satisfaction. *Foster County State Bank v. Lammers* (1912) 117 Minn. 94, 134 N. W. 501; *Stewart v. Riley* (1914) 189 Ala. 519, 66 So. 488; *National Art Co. v. Ellery* (1913) 145 N. Y. Supp. 277.

And a cashier's check is of no higher dignity than a payment in specie, and so the acceptance and cashing of a cashier's check for an amount less than is admittedly due on a debt, upon which is written "full and complete settlement," constitute only a payment on account, and do not preclude recovery of the balance. *Jordy v. Maxwell* (1911) 62 Fla. 236, 56 So. 946.

And the sending of the debtor's check for less than a liquidated or undisputed sum, in which it is recited that it is in full payment, will not, if there is no other consideration, discharge the debt, although the check is accepted and used. *Nixon v. Kiddy* (1909) 66 W. Va. 355, 66 S. E. 500; *Louisiana Lumber Co. v. J. W. Farrior Lumber Co.* (1913) 9 Ala. App. 383, 63 So. 788; *Johnson v. Hoover* (1914) — Tex. Civ. App. —, 165 S. W. 900; *Schuller v. Robison* (1910) 139 App. Div. 97, 123 N. Y. Supp. 881.

So, also, where a debtor sends his check for a sum less than the amount of an acknowledged debt, and with it sends a statement in the nature of a set-off, which equals the balance, if there is no condition as to the acceptance of the check as satisfaction, its acceptance it without consideration, and there is no accord and satisfaction so as to deprive the creditor of the right to sue for the balance. *McKinnon v. Holden* (1909) 85 Neb. 406, 123 N. W. 439; *Philadelphia, B. & W. R. Co. v. Walker* (1911) 45 Pa. Super. Ct. 524; *Alfred M. Slocum Co. v. St. Clair* (1912) 52 Pa. Super. Ct. 98; *American Warming & Ventilating Co. v. Fayette Lumber Co.* (1913) 54 Pa. Super. Ct. 211.

For acceptance of remittance of part of an unliquidated or disputed claim, accompanied with a statement that it is "in full," or words of like import, as assent to its receipt in full payment, see note to *Canadian Fish Co. v. McShane*, 14 L.R.A.(N.S.) 443, and *Barham v. Bank of Delight*, 27 L.R.A.(N.S.) 439.

So, also the fact that an insurance ad-

juster, in making a settlement of the benefit due under a policy, has no authority to deliver to the beneficiary a check for a less amount than that due, unless it shall be accepted by such beneficiary in full settlement of the company's liability, and that such beneficiary at the time he accepts such check knows that to be a fact, will not relieve the insurance company of liability for the remainder actually due on the policy, unless there is a bona fide dispute as to that liability, or if no dispute, unless there is some other consideration moving to the beneficiary in addition to the check. *American Workman v. James* (1915) — Ala. App. —, 17 So. 976.

In *Drewry-Hughes Co. v. Davis* (1909) 151 N. C. 295, 66 S. E. 139, while it was conceded that the procuring of the certification of a check is equivalent to an acceptance thereof, yet it was held that it did not preclude the enforcement of an agreement made before such certification, that the maker would waive or withdraw the condition he had annexed to the acceptance of the check, that it was in full payment of a larger debt.

But it has been held by the first division of the appellate court of Indiana, in *American Seeding Mach. Co. v. Baker* (1914) 55 Ind. App. 625, 104 N. E. 524, that the acceptance even of the debtor's own check purporting to be in full payment amounts to an accord and satisfaction, although the claim (a judgment) was liquidated, past due, and undisputed, such holding being an exception to the general rule.

In *Neubacher v. Perry* (1914) 57 Ind. App. 362, 103 N. E. 805 (decided by the second division), also it was held that the acceptance, retention, and collection of a debtor's check for an amount less than the rent conceded to be due under the lease of an engine was a sufficient consideration for the agreement to discharge the remainder. But in this case there was a bona fide claim of a set-off against the rent on account of repairs, so, as the court said, the amount due the creditor was fairly in dispute and consequently unliquidated.

It is provided by the Georgia Code that "an agreement by a creditor to receive less than the amount of a debt cannot be pleaded as an accord and satisfaction unless it be actually executed by the payment of the money, or the giving of additional security, or the substitution of another debt, or some other new consideration." In *Edwards Bottling Works v. Jarnagin & Wright* (1912) 11 Ga. App. 162, 74 S. E. 1004, the court said L.R.A.1917A.

that it is only where there is a dispute as to the amount due, and one party tenders and the other accepts a check reciting that it is in payment in full of the demand, and the check is subsequently paid, that an acceptance and retention of a check can be set up as an accord and satisfaction. In this case, however, there was not only no dispute as to the amount of the account, but there was no evidence that a check had ever had been received or paid or accepted in full settlement. See in this connection *Phinizy v. Bush* (1907) 129 Ga. 479, 59 S. E. 259, set out in the note in 21 L.R.A. (N.S.) 1006.

Payment in property.

The principle that a liability cannot be discharged by payment and acceptance of a less sum applies only to a payment in money, and so a valid accord and satisfaction takes place when specific property is delivered and accepted in satisfaction of the demand, regardless of the value of the property. *Ikard v. Armstrong* (1914) 10 Ala. App. 657, 65 So. 849.

Payment less interest.

Supplementing note in 20 L.R.A. 789.

The common-law rule that payment by a debtor and receipt by the creditor of a less sum than is due upon an undisputed liquidated demand do not amount to satisfaction of the debt, although the creditor agrees to accept it as such, is inapplicable to a balance claimed for interest on the implied contract of the debtor to pay interest on an account for work and labor, after the creditor has accepted certain notes and a check in payment of the account without including interest. *Bennett v. Federal Coal & Coke Co.* (1912) 70 W. Va. 456, 40 L.R.A. (N.S.) 588, 74 S. E. 418, Ann. Cas. 1913E, 578. See note to this case in 40 L.R.A. (N.S.) 588, on the general question of acceptance of principal sum as affecting the right to interest.

So, where a creditor to whom is owing a sum of money for work and labor accepts certain notes and a check in settlement of the account, giving his receipt therefor without including interest on the account previously to the date of the settlement, there being no express contract on the part of the debtor to pay interest, a separate action to collect such interest cannot be maintained. *Bennett v. Federal Coal & Coke Co.* (W. Va.) supra.

But where the demand of a mortgage, including interest, is liquidated, certain, and absolute, the sending of a check for

the principal alone, and the accepting and cashing of such check, do not operate as an accord and satisfaction of the balance due on the mortgage debt. *Abercrombie v. Goode* (1914) 187 Ala. 310, 65 So. 816.

Formal release in writing.

Supplementing notes in 20 L.R.A. 787, and 11 L.R.A.(N.S.) 1026.

In *State v. Gregg* (1916) — *Ariz.* —, 157 Pac. 227, the court observed that appellant attached considerable importance to the fact that a written release was executed by appellee; but said that the courts hold that a receipt reciting full satisfaction and release, when less is received than the whole debt, will not cancel the debt.

Payment by third person; borrowing.

Supplementing notes in 20 L.R.A. 794, and 11 L.R.A.(N.S.) 1024.

Payment by a stranger of a smaller sum in full satisfaction of an entire debt, and its acceptance as such by the creditor, constitute accord and satisfaction, although at the time of the payment the creditor may not be aware that such stranger is acting for the debtor. *Sigler v. Sigler* (1916) post, 725. The court pointed out that the weight of authority is that payment of part by a stranger who may have acted without the knowledge or consent of the debtor will, if accepted by the creditor and afterward ratified by the debtor, constitute a full accord and satisfaction, and, this being so, the court did not see how a creditor's rights are affected in the slightest by his failure to know and understand that a third person is acting as the agent of the debtor in making a settlement.

So a creditor's agreement with the father of a debtor to accept part payment in full satisfaction of the son's indebtedness, and the creditor's acceptance of the check for the agreed amount, and the retention of the proceeds thereof, preclude the recovery of the balance. *Hirachand Punamchand v. Temple* [1911] 2 K. B. (Eng.) 330, 80 L. J. K. B. N. S. 1155, 105 L. T. N. S. 277, 55 Sol. Jo. 519, 27 Times L. R. 430.

Also a payment by a father of a less sum in full satisfaction of an entire debt owed by his son, which was receipted in full by the creditor, was held in *Cunningham v. Irwin* (1914) 182 Mich. 629, 148 N. W. 786, to have operated as a valid accord and satisfaction, the father being a stranger to the demand and under no obligation whatever to pay it, and the money being his own.

And in *Kuhn v. Kuhn* (1912) 171 Ill. L.R.A.1917A.

App. 298, it was held that the insolvency of the debtors and the waiver of their purpose to go through bankruptcy, and the fact, known to the creditor, that part of the money with which the payment was made was furnished by a third person, were sufficient to support an agreement by creditors to accept a less sum in full payment of an undisputed debt.

In *Barber Asphalt Paving Co. v. Mullen* (1915) 220 Mass. 308, 107 N. E. 978, which held that it was immaterial that the check for part of the amount due was made by a third person, there was no agreement to accept the smaller sum in payment of the larger, but a mistake was made in rendering the statement of the account.

Payment at different place.

An agreement to pay a note at a place other than that specified in the note is not a sufficient consideration for an agreement by a creditor to accept a sum less than the whole in full payment, where the note is past due. *Foster County State Bank v. Lammers* (1912) 117 Minn. 94, 134 N. W. 501. The court stated that before maturity the creditor cannot compel payment at any other time or place than that mentioned in the note, but after maturity he is legally entitled to collect his debt wherever and whenever the debtor is found. The agreement to make the payment at a place other than that specified in the note was therefore no more than the defendants were legally bound to do, and was in fact a convenience to defendants rather than a burden, and a loss to plaintiff rather than an advantage.

Payment before maturity.

Supplementing notes in 20 L.R.A. 790, and 11 L.R.A.(N.S.) 1026.

Where an entire debt is in the form of three notes bearing different dates, the payment before due of the note bearing the earliest date, and the surrender of all the notes, and the execution and delivery of a receipt in full, constitute a good accord and satisfaction, and bar action for any further sum. *Zabludowsky v. Gottfried* (1916) 95 Misc. 623, 159 N. Y. Supp. 785. The court stated that the parties entered into a new agreement whereby the debtor bound himself to pay the first note immediately, which, under the original contract, he was not bound to do, and the payment was made accordingly; and the creditor on his part agreed to forgive the entire debt upon such immediate payment of a part thereof; and that, as this new agreement was

in all respects valid, it constituted a good accord and satisfaction.

But in *Gilia v. Robbins* (1916) — Minn. — 158 N. W. 807, while conceding that an agreement between the maker and the holder of a note not due, that the former will pay, and the latter receive, a sum less than the amount called for by the note in full satisfaction of the same, is valid, yet it was held that there was

not a valid accord and satisfaction by an agreement to take a less sum in full satisfaction of an entire indebtedness, part of which indebtedness was three notes not due, where such accord wiped out absolutely the debt shown by the notes, and the creditor obtained nothing from his debtor in the way of a benefit to in some degree recompense him for discharging such debt. J. H. B.

KANSAS SUPREME COURT.

ODE SIGLER, Appt.,

v.

JOSEPH SIGLER.

(98 Kan. 524, 158 Pac. 864.)

Accord and satisfaction — payment of less than due.

1. The rule that a payment of a lesser sum, accepted with the understanding that it shall be in full discharge of the entire debt, will not bar an action to recover the balance unless made upon a new and distinct consideration, rests rather upon technical considerations than upon reason, and the strict adherence to it has often resulted in preventing justice and the enforcement of the real intent of the parties. The modern tendency of the courts has been to enlarge the exceptions to the rule in order to avoid its harshness, and in order to carry into effect settlements, adjustments, and compromises.

For other cases, see Accord and Satisfaction, in Dig. 1-52 N. S.

Same — acceptance of less sum.

2. While the agreement that a smaller sum shall be accepted in discharge of a larger sum due must be consummated by a meeting of the minds of the parties, it is sufficient if the smaller sum has been offered and accepted with the understanding that it is in full satisfaction of the debt, provided the agreement is accompanied by a sufficient consideration.

For other cases, see Accord and Satisfaction, in Dig. 1-52 N. S.

Same — consideration.

3. Where it is shown that the minds of the parties, whether acting by themselves as principals, or through others as agents, have met and agreed upon the proposition that the receipt of the lesser sum shall extinguish all right on the part of the creditor to exact further payment, any possible or probable benefit to the one, or loss or inconvenience to the other, will be held to

constitute a consideration for the new agreement.

For other cases, see Accord and Satisfaction, in Dig. 1-52 N. S.

Same — payment by agent.

4. A debtor may authorize a third person as his agent to make a satisfaction of his debt, and if what is given by the stranger is accepted in satisfaction by the creditor, who thereupon releases the debt, and the agent's act is authorized or subsequently ratified by the debtor, there will be a complete accord and satisfaction.

For other cases, see Accord and Satisfaction, in Dig. 1-52 N. S.

Same — advancement by stranger.

5. A sufficient consideration is shown for an agreement that a payment of a lesser sum shall be in full discharge of the entire debt, where, so far as shown by the evidence or findings, the money actually received by the creditor was advanced for the debtor by a third party, who acted as his agent.

For other cases, see Accord and Satisfaction, in Dig. 1-52 N. S.

Bills and notes — discharge — acquisition by maker.

6. Section 126 of the Negotiable Instruments Law (Gen. Stat. 1909, § 5372), which enumerates the various ways in which negotiable instruments may be discharged, including "(5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right," is construed, and the phrase "in his own right" is held to include a case where the maker of a promissory note, past due, authorizes a third person, as his agent, to purchase the note from the holder thereof, who, in consideration of the payment to him by such agent of a sum less than the amount due, assigns and transfers the note and a mortgage securing the same to the agent, who releases the mortgage and transfers the note to the maker upon being reimbursed by the latter, notwithstanding the fact that the holder of the note believes the agent is purchasing the note for himself.

For other cases, see Payment, I. in Dig. 1-52 N. S.

Same — purchase by agent.

7. Whether the transaction referred to in the preceding paragraph be considered as one in which the maker furnished the money to purchase the note through his agent, or as one in which the agent first purchased

Headnotes by PORTER, J.

Note. — For payment of part of a liquidated and undisputed debt as consideration for the discharge of the whole, see annotation following *Sherman v. Pacific Coast Pipe Co.* ante, 719. L.R.A.1917A.

the note with his own funds and afterward, upon being reimbursed by the maker, transferred it to the latter, the maker becomes the holder of the note after maturity "in his own right."

For other cases, see Payment, I. in Dig. 1-52 N. S.

Same — fraud in purchase.

8. Upon the findings of fact it is held there was no showing of fraud in the transaction in which plaintiff, who held an overdue note against his brother, was induced to sell and assign the instrument to his brother's agent for a sum less than the amount due thereon.

For other cases, see Fraud and Deceit, II. in Dig. 1-52 N. S.

(July 8, 1916.)

CROSS APPEALS from a judgment of the District Court for Trego County in an action to enforce payment of a debt; plaintiff appealing from the entry of judgment in defendant's favor on the pleadings, evidence, and findings in the action on a promissory note; and defendant appealing from judgments for plaintiff on the other causes of action. **Affirmed.**

The facts are stated in the opinion.

Mr. Herman Long, for appellant:

Payment of an amount less than is admitted to be due is not a sufficient consideration for an agreement to cancel the whole indebtedness.

American Bridge Co. v. Murphy, 13 Kan. 35; *Neeley v. Thompson*, 68 Kan. 193, 75 Pac. 117; *Bright v. Coffman*, 15 Ind. 371, 77 Am. Dec. 96; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; 1 Page, Contr. § 313.

Plaintiff was induced to part with the possession of this paper by the fraudulent practices of the defendant.

Pom. Eq. 1st ed. § 878; *Kerr, Fr. & Mistake*, § 94; *Nairn v. Ewalt*, 51 Kan. 355, 32 Pac. 1110.

If plaintiff's attempt to avoid the fraud be deemed a rescission, still, as he has received nothing by virtue of the sale which he was not entitled to without the sale, he cannot be in duty bound to tender back to defendant the \$400 which he received, and which he is entitled to hold irrespective of any sale.

Lesson v. Anderson, 99 Mich. 247, 41 Am. St. Rep. 597, 58 N. W. 72; *Hargadine-McKittrick Dry-goods Co. v. Swofford Bros. Dry-goods Co.* 65 Kan. 572, 70 Pac. 582; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593.

Messrs. Lee Monroe, James A. McClure, and C. M. Monroe, for appellee:

The alleged representations by banker Wilson did not constitute fraud.

Woods v. Nicholas, 92 Kan. 258, 140 Pac. 862; 2 *Mechem, Sales*, § 871; 35 Cyc. 70, 71; *Elerick v. Reid*, 54 Kan. 579, 38 Pac. L.R.A.1917A.

814; *Subke v. Gonder*, 27 Kan. 414, 155 Pac. 793; *Hedin v. Minneapolis Medical & S. Institute*, 35 L.R.A. 417, note; *Hedin v. Minneapolis Medical & S. Institute*, 62 Minn. 146, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; *Graffenstein v. Epstein*, 23 Kan. 443, 33 Am. Rep. 111; *O'Donnell & D. Bavarian Brewing Co. v. Farrar*, 163 Ill. 471, 45 N. E. 283.

The transaction with Wilson was an executed sale, and cannot be rescinded without a joinder of Wilson and a tender back of the \$400.

35 Cyc. 144; *Hindman v. Askew Saddlery Co.* 9 Kan. App. 97, 57 Pac. 1050.

If the transaction between plaintiff and Wilson is to be treated and construed as one between Ode and Joseph Sigler, and not as an executed contract of sale, then it becomes an executed contract of payment and release, a complete accord and satisfaction of the \$1,200 note, impeachable only for fraud, and then only upon a tender back of the \$400.

Silvers v. Reynolds, 17 N. J. L. 275; *Ellsworth v. Fogg & Harvey*, 35 Vt. 355; *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292; *Helling v. United Order of Honor*, 29 Mo. App. 309; 1 Am. & Eng. Enc. Law, 430; *Butler v. Richmond & D. R. Co.* 88 Ga. 594, 15 S. E. 668.

Porter, J., delivered the opinion of the court:

The action in the district court was to recover an alleged indebtedness. There were three causes of action, but the error complained of relates to the third cause of action, which was upon a promissory note. The jury returned a verdict in plaintiff's favor and made a number of findings of fact. The court approved the findings, but sustained defendant's motion for judgment on the pleadings, evidence, and findings, and this is the ruling we are asked to review.

The answer admits the execution of the note, but alleges that plaintiff is not the owner or holder of it; that prior to the commencement of the action he had sold, assigned, and delivered to one C. M. Hutchison the note, together with a mortgage given to secure its payment, and that thereafter defendant paid the note, and that the mortgage had been canceled and delivered to him by the holder; that the plaintiff had retained the moneys received by him for the sale of the note and had never tendered or offered to return the same. The reply admitted the execution, delivery, and assignment of the note and mortgage, but alleged that C. M. Hutchison's name was not written in the assignment of the mortgage at the time it was delivered, and that the transfer and assignment were made under the following circumstances: Defendant

employed one R. C. Wilson to purchase the note and mortgage for him as cheaply as possible, and agreed to provide a fund amounting to \$1,200 or more with which to make the purchase; that thereupon Wilson, concealing from plaintiff the fact that he had been employed by and was acting for the defendant, negotiated with plaintiff for the purchase of the note and mortgage, and falsely and fraudulently represented to plaintiff that they were of very little value and would be difficult to collect; that the plaintiff believed these false representations and relied upon them; and that Wilson, for and on behalf of defendant, paid the plaintiff \$400, and the plaintiff, under these circumstances, executed the assignment and delivered the note and mortgage to Wilson. The reply further alleged that the whole transaction amounted in law to nothing more than the payment of \$400 on the note, for which plaintiff in his petition had given defendant credit. It further alleged that Wilson wrote in the name of Hutchison as assignee, in order that Hutchison might make a formal release of the mortgage. The jury found that plaintiff accepted the \$400 on Wilson's representations to the effect that the note and mortgage were of very little value and would be very difficult of collection; that Wilson knew at that time that defendant had made arrangements for the payment or purchase of the note; and that plaintiff believed and relied upon the statements.

As already observed, the trial court approved these findings of fact, but held that the note had been paid and discharged by the transaction. The plaintiff relies upon the rule that an agreement to accept part in satisfaction of the whole of a liquidated demand is invalid, because without consideration. *American Bridge Co. v. Murphy*, 13 Kan. 35; *St. Louis, Ft. S. & W. R. Co. v. Davis*, 35 Kan. 464, 11 Pac. 421. The reason for the rule is that there is no consideration for the release of the remainder of the debt, as the debtor gives no more than he is bound to give, and the creditor accepts no more than he is entitled to receive. The rule is said to have had its origin in a dictum in the English court of Common pleas (*Pinnell's Case*, 5 Coke, 117, 77 Eng. Reprint, 237, 1 Eng. Rul. Cas. 368). Although it is universally recognized by courts and text-writers, it has been criticized as technical, artificial, and having no foundation in reasoning. *Brooks v. White*, 2 Met. 283, 285, 37 Am. Dec. 95; *Bolt v. Dawkins*, 16 S. C. 198, 214. In a number of states it has been entirely abrogated or modified by statute. Courts generally refuse to apply the rule where the technical reasons for doing so do not exist (*Brooks v. White*, L.R.A.1917A.

supra; *Harper v. Graham*, 20 Ohio, 105, 115), and have recognized numerous exceptions to it; for instance, the payment of a part before due, or at a place other than that where the obligor was legally bound to pay, or a payment in property, regardless of its value, or by the debtor in composition with his creditors generally, by which they agree to accept less than is due them, is held to create a consideration which is sufficient. The rule quite generally followed is that any additional consideration, however small, will support the new agreement, provided only it be such that in law it is sufficient to support an ordinary contract, and consist of something which the debtor was not legally bound to do or give. *Bryant v. Proctor*, 14 B. Mon. 451. Thus it has been held that the payment of a debt, or any part of the debt, before it is due, is something which the debtor is not under legal obligation to do, and therefore furnishes a legal consideration for a contract to release or cancel a debt; and any new consideration moving from the debtor toward the creditor will take the agreement out of the operation of the rule. 1 C. J. 544, 545. It is well settled that the courts will refuse to inquire into the adequacy of the consideration if there be any that will support an ordinary contract. *Hastings v. Lovejoy*, 140 Mass. 261, 54 Am. Rep. 462, 2 N. E. 776. It is said that the additional consideration may consist of anything which might be a burden to the one party or a benefit to the other. 1 C. J. 541. One established exception to the rule is that payment by a third person of a sum less than the amount due, with the understanding that it shall be in full payment, is held to be an accord and satisfaction.

A very thorough discussion of the subject of accord and satisfaction will be found in an elaborate note in 100 Am. St. Rep. 390-456. The author of the note, referring to the technical distinction drawn by the earlier cases, says: "The strictness of the rule undoubtedly worked many hardships in preventing a creditor who needed the money, from making an accord and satisfaction with his debtor, or in preventing a debtor who might be temporarily embarrassed from settling with his creditor for less than the fixed amount of his debt. Hence the courts, though bound by precedents, from time to time enlarged the exceptions to the rule, so that now the exceptions might almost be said to form the rule itself." Page 430 of 100 Am. St. Rep.

There was great lack of harmony in the earlier decisions on the question whether part payment made by a stranger to the transaction to which it relates could be pleaded as accord and satisfaction. The

English and many of the early American cases held that a satisfaction given by a stranger is not good, because he is in no respect a privy to the original contract. The leading English cases to that effect are *Grymes v. Blofield*, Cro. Eliz. pt. 2, p. 541, 78 Eng. Reprint, 788, and *Edgcombe v. Rodd*, 1 Smith, 515, 5 East, 294, 102 Eng. Reprint, 1082, 7 Revised Rep. 700. The doctrine of *Grymes v. Blofield* was followed in the United States by *Clow v. Borst*, 6 Johns. 37, and by a number of other courts.

In *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334, the doctrine that a satisfaction is no defense if it accrue from a stranger is discussed, and the older cases are criticized. In the opinion it was said: "But mere precedent alone is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason, and tend to the purposes of justice. . . . Precedents are to be regarded as the great storehouse of experience, not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which, although at times they be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps in the road to truth. . . . The rule laid down is purely technical; and the reason assigned, that the stranger is not privy to the condition of the obligation, loses all its reality when we consider that the satisfaction must have been accepted by the plaintiff, and assented to or ratified by the defendant. It would seem, therefore, that a rule which in its tendency is calculated to foster bad faith and defeat the purposes of justice ought not to be adhered to simply on account of its antiquity." Pages 78, 80, of 6 Ohio St.

The Ohio case was approved in *Harvey v. Tama County*, 53 Iowa, 228, 233, 5 N. W. 130, and cited in *Wellington v. Kelly*, 84 N. Y. 543, 547, as having materially criticized and limited *Grymes v. Blofield*, supra. In *Snyder v. Pharo* (C. C.) 25 Fed. 398, it was held that "satisfaction of a debt by the hands of a stranger is good when made by the authority of or subsequently ratified by the defendant; and the fact of pleading it will be sufficient evidence of ratification." Headnote, ¶ 2.

In *Jackson v. Pennsylvania R. Co.* 66 N. J. L. 319, 55 L.R.A. 87, 49 Atl. 730, it was held that an accord between the plaintiff and a third person, and satisfaction moving from such third person to the plaintiff, who accepts and retains it, are available as a defense if the defendant has either authorized or ratified the settlement. After a full consideration of the early authorities, Eng-
L.R.A.1917A.

lish and American, on the question of accord and satisfaction entered into by a third person, it was said in the opinion: "The tendency of the American decisions is strongly in favor of supporting a satisfaction moving from a third person, when such person either had authority to make it, or the act was followed by ratification, and the article received in satisfaction was retained."

. . . The reason of the rule is simple. On the one hand, no party can be deprived of a right by mere payment by a volunteer. On the other hand, since a party is entitled to only one satisfaction, his acknowledgment that he has received it, and his retention of it, operate to extinguish his right." Pages 325, 326 of 66 N. J. L.

In *Crumlish v. Central Improv. Co.* 38 W. Va. 390, 23 L.R.A. 120, 45 Am. St. Rep. 872, 18 S. E. 456, there is a review of the English cases and the early New York cases, as well as the later American cases, and attention is called to the fact that in *Wellington v. Kelly*, 84 N. Y. 543, the old cases were doubted. In the opinion it was said: "It seems utterly unjust and repugnant to reason that a creditor accepting payment from a stranger of the third person's debt should be allowed to maintain an action against the debtor, pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the contract. The creditor has himself, for this purpose, allowed him to make himself a quasi party, and consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? In that case can the stranger recover back? What matters it to the creditor who pays? As the supreme courts of Wisconsin and Ohio in cases above cited said, this doctrine is against common sense and justice." Page 396 of 38 W. Va.

In *Harrison v. Hicks*, 1 Port. (Ala.) 423, 27 Am. Dec. 638, it was said: "The payment of a debt, although it be made by one who is not a party to the contract, and although the assent of the debtor to such payment does not appear, is still the extinguishment of the demand." Syl. ¶ 2.

No cases have been cited in the brief which involved facts at all similar to the case at bar. Our own research has resulted in finding but two cases which are at all analogous. In *Shaw v. Clark*, 6 Vt. 507, 27 Am. Dec. 578, where a judgment debtor furnished the money to a third person to purchase the judgment from the creditor, who accepted a less sum than the face of the judgment, it was said in the opinion: "As the sum paid was really the money of the debtor, and paid over by his agent, it

is the same as if paid by himself." Page 508 of 6 Vt.

The court held it to be quite obvious that the act of a debtor in furnishing funds to a third person to buy up his debts at a discount is so far fraudulent as to render the sale voidable at the election of the creditor. This case was decided in 1856.

A case to the contrary is *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606, where the facts were in some respects similar to those in the present case, and it was held that an agreement by a creditor to accept from a third person, in behalf of the debtor, a smaller sum in satisfaction of the whole, is valid and binding and will discharge the debt. In the opinion it was said that the consideration is that the creditor gets, or is assured of getting, what perhaps the debtor might never pay, and that "it cannot alter the nature of the case that the debtor repaid the advance." Page 355 of 44 Ark. In 1 R. C. L. 182, it is said: "The modern and better rule is that an accord and satisfaction, made with one who is a stranger to the transaction to which it relates, is good, and will bar an action on the claim involved, if the person against whom the claim was made has either authorized or ratified the settlement."

The author concedes that there are authorities which hold to the contrary, supported by some of the earlier American cases and the English authorities, but adds that "it requires powers of discrimination looking far beyond the justice of the case to see the reason of this rule. The reason assigned by some of the early adjudications is that the person from whom the accord and satisfaction comes is not privy to the contract giving rise to the debt. This reason might give just cause to the creditor to refuse to receive the satisfaction from a stranger, or third person, not known in the transaction of the parties, even as agent of the debtor; but, where the creditor has actually received and accepted the contribution in satisfaction of the debt, to allow him to maintain an action on the same debt afterward would seem to shock the ordinary sense of justice of every man." Page 182.

In 1 Cyc. 317, it is said: "But in order that the act of the stranger operate as a satisfaction of the debt or demand, it must have been authorized by the debtor or subsequently ratified by him."

Formerly an exception to the rule was always made in a case where a release under seal was given with part payment, on the theory that a release under seal implies a consideration. But this exception to the rule finds no room for application in those jurisdictions where, as in this state, the distinction between sealed and

unsealed instruments has been abolished. Gen. Stat. 1909, § 1643; 1 C. J. 543.

From the foregoing authorities it seems firmly established that a debtor may authorize and employ a third person as his agent to make a satisfaction of his debt; that where he does so, and the money is advanced by the third party and accepted by the creditor in satisfaction of the debt, it is a good accord and satisfaction. This is so even where the third party makes the payment without the debtor's knowledge, if the latter afterward ratifies the action. Did the concealment by Wilson of the fact that he was acting for the defendant destroy the effect of the payment, or, in other words, must there be knowledge on the part of the creditor that the payment is made on behalf of the debtor before it will constitute an accord and satisfaction? It was held that an accord and satisfaction is "the result of an agreement between the parties, and, like all other agreements, must be consummated by a meeting of the minds of the parties, accompanied by a sufficient consideration. If the creditor is to be held to abate his claim against the debtor, it must be shown that he understood that he was doing so when he received the claimed consideration therefor." *Harrison v. Henderson*, 67 Kan. 194, 200, 62 L.R.A. 760, 100 Am. St. Rep. 386, 72 Pac. 875.

And in *Matheney v. El Dorado*, 82 Kan. 720, 28 L.R.A. (N.S.) 980, 109 Pac. 166, it was ruled that "to constitute an accord and satisfaction, the agreement that a smaller sum shall be accepted in discharge of a larger one originally claimed must have been entered into by the parties understandingly and with unity of purpose." Syl. ¶ 1.

But the extent of the doctrine there declared is merely that the smaller sum must not only have been offered, but it must have been accepted with the understanding that it was in full satisfaction of the larger amount claimed. The plaintiff certainly understood that he was accepting the \$400 in full satisfaction of all his interest in the note and mortgage. It is difficult to see how his rights were affected in the slightest by his failure to know and understand that Wilson was acting as the agent of the debtor, because, as we have seen, the weight of authority is that a payment of a part by a stranger, who may have acted without the knowledge or consent of the debtor, will, if accepted by the creditor and afterwards ratified by the debtor, constitute a full accord and satisfaction.

Section 126 of the Negotiable Instruments Law (Gen. Stat. 1909, § 5372) enumerates the various ways in which negotiable instruments may be discharged, among which is "(5) when the principal debtor

becomes the holder of the instrument at or after maturity in his own right." The phrase "in his own right" has been construed to exclude a case where a maker acquires the instrument in a purely representative capacity. *People's State Bank v. Dryden*, 91 Kan. 216, 137 Pac. 928. There it was held that the note is not discharged when the maker acquires it as agent for another. Nor is it discharged when the maker becomes the holder, for example, as executor or administrator. See *Crawford's Anno. Neg. Inst. Law*, p. 195, and cases cited. Did not the debtor in this case become the holder of the instrument after maturity, in his own right? Whether we consider the transaction as one in which he furnished the money in the first instance to purchase the note through his agent, Wilson, or as one in which Wilson first purchased it with his own funds and subsequently, upon being reimbursed by defendant, transferred it to him, it would seem to be clear that the maker became the owner in his own right, unless there be some principle of law which forbids a debtor to purchase his own debt. The holder of the note was willing to part with all his interest in it upon payment of \$400, and accepted in full consideration for his interest that sum from one whom he believed to be the purchaser, and surrendered the note and security. How are his rights as a holder affected in any manner by the subsequent transfer of the note to the maker? Promissory notes, both before and after maturity, are negotiable and transferable, and the exigencies of business and trade demand the extension rather than the restriction of these qualities.

We fail to find any showing of fraud in the transaction by which plaintiff was induced to transfer the note to Wilson, unless it must be said as a matter of law that the transaction was fraudulent because it amounted to a purchase by the defendant of his own debt, and because the plaintiff supposed he was dealing with Wilson. Leaving out of consideration for the present that feature of the matter, let us inquire what finding there is which shows fraud. Finding No. 10 is as follows: "Did the plaintiff accept \$400 from R. C. Wilson for an assignment of the \$1,200 note and mortgage in question, relying upon his own general knowledge of the defendant's responsibility and probable ability to pay, and induced by a belief, based upon such knowledge, that it was for his best interest to accept Wilson's proposition to pay said sum for such assignment? Answer: Accepted on R. C. Wilson's representations."

Other findings are to the effect that Wilson said to plaintiff, in substance, that the L.R.A.1917A.

note and mortgage "were of very little value, and would be very difficult of collection;" that Wilson knew defendant had made arrangements for the payment or purchase of the note, and concealed that fact from the plaintiff. The jury, being asked to state in what way he concealed the fact from the plaintiff that defendant had made these arrangements, answered that it was done by leaving the name of the assignee out of the assignment. The answer is meaningless. It would have been an equally appropriate answer if they had been asked to state in what way Wilson concealed from plaintiff the existence of any other fact which he had failed to mention. If they had been asked to state in what way he concealed from plaintiff the condition of defendant's health, the answer would have been no less absurd. The jury might better have answered, "We do not know." The execution of a blank assignment of instruments is a common practice. The assignment was left in blank, and the jury found that Hutchison's name was written in afterwards in order that he might execute a proper release of the mortgage. The assignment was executed by the plaintiff, not by Wilson. The plaintiff was willing to execute it in blank, and there was no fraud in the act of Wilson in writing in the name of anyone he pleased. The plaintiff supposed he was transferring his right in the mortgage to Wilson: and, if the latter's name had been written in the assignment, plaintiff would have remained equally ignorant of the fact, if it was a fact, that his brother had made arrangements for the purchase or payment of the note. Moreover, there is no showing or finding that the defendant had provided a fund for the full payment of the note. The most that is shown is that he had arranged with a banker to buy the note for him. How much he paid the banker over and above the \$400 advanced to the plaintiff, or how he paid it, does not appear. If plaintiff had known that his brother was to reimburse Wilson, or had already advanced the money to Wilson, he might still have been willing to accept that sum in satisfaction of the entire debt.

It certainly does no violence to the presumed intention of the parties to hold him to the result of his own act in accepting the \$400 with the understanding, at least, that he was parting with all his interest in the note, and that, so far as he was concerned, the sum he received was to be in full payment of his claim. So far as shown by the evidence or findings, the money actually received by the plaintiff was advanced by the third party. Plaintiff, therefore, received something he might not otherwise

have received; and applying the rule that any benefit or advantage accruing to the creditor, however slight, is a sufficient consideration to support the agreement, we think it must be held that a consideration was shown in this case. The rule that a payment of a lesser sum, accepted with the understanding that it shall be in full discharge of the entire debt, will not bar an action to recover the balance unless made upon a new and distinct consideration, rests rather upon technical considerations than upon common sense, and the strict adherence to it has often resulted in preventing justice and the enforcement of the real intent of the parties. As we have seen, the modern tendency of the courts is to enlarge the exceptions to the rule in order to avoid its harshness, and to enforce settlements, adjustments, and compromises. It is always necessary that the minds of the debtor and creditor meet upon the proposition that the receipt of the lesser sum shall extinguish all rights on the part of the creditor to exact further payment. *Harrison v. Henderson*, 67 Kan. 194, 62 L.R.A. 760, 100 Am. St. Rep. 386, 72 Pac. 875; *Matheney v. El Dorado*, 82 Kan. 720, 28 L.R.A. (N.S.) 980, 109 Pac. 166. When it is shown that the minds of the parties, whether acting by and for themselves as principals, or through others as agents, have met and agreed upon this point, the courts should reach out and seize upon any possible or probable benefit to the one, or loss or inconvenience to the other, which may be said to constitute a consideration for the new agreement, and thus carry into effect the understanding of the parties.

Wilson's representations were merely the expression of his opinion. Besides, it seems far-fetched to say that plaintiff had a right to or did rely on Wilson's statement as to the financial responsibility of his brother, because the record shows that he must have known more about that matter than Wilson. The defendant is his brother. In this same action plaintiff sues upon other causes of action involving an account showing numerous business transactions between the two covering a period of thirteen years, and in which the plaintiff was the creditor and his brother the debtor. They lived in the same neighborhood. Part of the account sued for is for labor performed by plaintiff for the defendant. Plaintiff must have known about his brother's financial affairs. He knew the note had been given to take up a previous note for \$1,000 and interest which his brother had been unable to pay. So far as the record shows, the \$400 was advanced by a third party. It was entirely satisfactory to plaintiff until he learned subsequently that Wilson had been acting in

behalf of his brother, when he attempted to repudiate the transaction, but retained the payment.

Property of all kinds, real and personal, is purchased every day by agents for undisclosed principals. Why may not an individual purchase and become the owner of the evidence of his indebtedness? It is a common practice for the state, for cities and other municipalities, as well as for private corporations, to purchase their own bonded indebtedness. We have been cited to no principle of law, and are not aware of any, which would prevent an individual from going into the market and purchasing, at a discount or otherwise, securities upon which he is indebted and which he has put in circulation. If he may do this himself, he may accomplish the same thing by an agent who acts without disclosing the agency.

We think the trial court wisely concluded that the findings of fact might be permitted to stand as approved without affecting the rights of the parties, and that upon the facts plaintiff cannot maintain the action to recover on the note.

There is a cross appeal in reference to the two causes of action upon which plaintiff recovered a small judgment. We find nothing substantial in the claims of error as to these matters, and the judgment will be affirmed.

VERMONT SUPREME COURT.

ANDREW F. HILL, Appt.,

v.

R. A. RITCHIE et al.

(— Vt. —, 98 Atl. 497.)

Subrogation — discharge of lien — keeping alive.

1. One satisfying a lien note at the request of the property owner, upon the understanding that he is to have new security upon the property released, acting in ignorance of a second mortgage lien on the property, although it is on record, is entitled to subrogation to the rights of the first lien holder.

For other cases, see Subrogation, III. and V. in Dig. 1-52 N. S.

Note.—The right of one advancing money to pay off a lien or encumbrance, upon security which proves defective, to be subrogated to such lien or encumbrance, is discussed in the notes to *Capen v. Garrison*, 5 L.R.A. (N.S.) 838; *Southern Cotton Oil Co. v. Napoleon Hill Cotton Co.* 46 L.R.A. (N.S.) 1049; and *Berry v. Stigall*, 50 L.R.A. (N.S.) 489; and see also later case, *Boley v. Daniel*, post 734.

Parties — subrogation — holder of discharged lien.

2. One having a lien on property which is discharged by a stranger is not a necessary party to an action by the latter to secure subrogation to his rights as against a second lien on the property.

For other cases, see Parties, II. a, 8, in Dig. 1-52 N. S.

(August 14, 1916.)

A PPEAL by plaintiff from a decree of the Chancery Court for Orleans County dismissing a bill filed to secure subrogation, as against a second lien on property, to a lien which had been discharged by plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Dutton & Mulcahy, for appellant:

The fraudulent collusion between the said Hanson and defendant Ritchie being found, it follows that the court of equity will take jurisdiction and grant adequate relief according to the prayer of the plaintiff's bill.

2 Pom. Eq. Jur. § 910.

In granting to the plaintiff the relief prayed for, the defendant Ritchie is not injured, because he is then left in precisely the same situation in which he was before the said Hanson lien was canceled; that is to say, holding a mortgage upon said horses, subject to said Hanson lien.

2 Pom. Eq. Jur. § 910, p. 1627.

If a stranger, at the request of the person primarily liable for a debt, pays the debt, he is subrogated to the rights of him who is paid, even though such stranger does not act under compulsion nor for his own protection.

2 Pom. Eq. Rem. § 921; Warford v. Hankins, 150 Ind. 489, 50 N. E. 468; Demeter v. Wilcox, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613; Martin v. Martin, 164 Ill. 640, 56 Am. St. Rep. 219, 45 N. E. 1007; MacGreal v. Taylor, 167 U. S. 688, 42 L. ed. 326, 17 Sup. Ct. Rep. 961.

The rule first above stated seems to be qualified in some jurisdictions, including Vermont, in that, in order to be entitled to subrogation, the payment must either be made under compulsion or the necessity of self-protection, or at the invitation and request of the debtor, with the understanding that the person making the payment shall be subrogated to the rights of the creditor.

Davis v. Davis, 81 Vt. 259, 130 Am. St. Rep. 1035, 69 Atl. 876; Home Sav. Bank v. Bierstadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Thompson v. Connecticut Mut. L. Ins. Co. 139 Ind. 325, 38 N. E. 796; American Bonding Co. v. National Mechanics' Bank, L.R.A.1917A.

99 Am. St. Rep. 519, note; Straman v. Rehtine, 58 Ohio St. 443, 51 N. E. 44; Crippen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453.

The above rule applies even though the creditor was ignorant of the facts, and transferred the note and mortgage to the debtor.

Commercial & Farmers' Bank v. Scotland Neck Bank, 158 N. C. 238, 73 S. E. 157.

If there are two mortgages on the same property, the second having been taken with knowledge of the first, one who, at the debtor's request, pays off the first mortgage, upon an agreement that the security will be kept alive for his benefit, and that he shall have a first lien for the money furnished, will be subrogated, in equity, as against the second mortgagee, to the rights of the first mortgagee, even where the first mortgage was released, and the person advancing the money took a new mortgage, believing that it would be a first lien, and even though the second mortgage was recorded when the last mortgage was taken.

Home Sav. Bank v. Bierstadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; Thompson v. Connecticut Mut. L. Ins. Co. 139 Ind. 325, 38 N. E. 796; American Bonding Co. v. National Mechanics' Bank, 99 Am. St. Rep. 519, note; Straman v. Rehtine, 58 Ohio St. 443, 51 N. E. 44; Crippen v. Chappel, 35 Kan. 495, 57 Am. Rep. 187, 11 Pac. 453; 37 Cyc. 473.

Subrogation is not founded upon contract, but is the creation of equity, and is enforced solely for accomplishing the ends of substantial justice.

Emmert v. Thompson, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31.

This mortgage should be treated as superior to that of defendant Ritchie, so as to give the plaintiff the security agreed upon, leaving Ritchie in the same relative position as to security which he had occupied before.

Demeter v. Wilcox, 115 Mo. 634, 37 Am. St. Rep. 422, 22 S. W. 613; Home Sav. Bank v. Bierstadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; Emmert v. Thompson, 49 Minn. 386, 36 Am. St. Rep. 566, 52 N. W. 31; Thompson v. Connecticut Mut. L. Ins. Co. 139 Ind. 325, 38 N. E. 796; American Bonding Co. v. National Mechanics' Bank, 99 Am. St. Rep. 519, note; 37 Cyc. 473.

The fact that defendant Ritchie's mortgage was on record in the town clerk's office at Greensboro does not affect the plaintiff's equitable right to subrogation, for when the transactions in question occurred the plaintiff had no knowledge of that mortgage. Constructive notice alone is not of

sufficient potency to overcome the plaintiff's equity.

Bruse v. Nelson, 35 Iowa, 157; *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

Mr. W. W. Reiriden, for appellee Ritchie:

The bill having been dismissed as to the defendant Hanson, no decree can now be made reviving said lien note and subrogating the plaintiff to the rights of Hanson thereunder, because Hanson is no longer a party to this action. If the plaintiff is to be subrogated to the rights of Hanson under said lien note, Hanson is a necessary party.

37 Cyc. 388, 389; *Schilb v. Moon*, 50 W. Va. 47, 40 S. E. 329; *Bond v. Montgomery*, 56 Ark. 563, 35 Am. St. Rep. 119, 20 S. W. 525; *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374.

The payment of the Hanson note by the plaintiff does not entitle him to be subrogated to the rights of Hanson under his lien.

Davis v. Davis, 81 Vt. 259, 130 Am. St. Rep. 1035; *Downer v. Wilson*, 33 Vt. 1; *Collins v. Adams*, 53 Vt. 433; 37 Cyc. 363; *National Bank v. Cushing*, 53 Vt. 321; *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303; *Ocobock v. Baker*, 52 Neb. 447, 66 Am. St. Rep. 519, 72 N. W. 582; *Aultman v. Bishop*, 53 Neb. 545, 74 N. W. 55; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365.

There was no fraud or collusion on the part of the defendant Ritchie.

Boutwell v. Marr, 71 Vt. 1, 43 L.R.A. 803, 76 Am. St. Rep. 746, 42 Atl. 607; *Sheple v. Page*, 12 Vt. 519; 8 Cyc. 621; *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898, 6 Am. Crim. Rep. 570.

Mr. Horace F. Graham for appellee Hanson.

Munson, Ch. J., delivered the opinion of the court:

The plaintiff hands up in connection with the findings of the chancellor the transcript of the testimony, and the defendants claim that the transcript is not properly before us. This question we do not find it necessary to decide. We state the case as shown by the findings.

October 20, 1914, defendant Flynn bought of one Hanson a pair of horses for \$500, giving Hanson a lien note for \$400, and a horse valued at \$100, on which defendant Ritchie had a mortgage. December 30th Flynn gave Ritchie a chattel mortgage on the Hanson horses and other property, to secure an indebtedness to Ritchie amounting to about \$1,200. Hanson was then pressing Flynn for payment and threatening to take the horses. After Ritchie had taken

this mortgage, Hanson told him that he would assign the lien note to him for cash, discounting it \$50. February 15, 1915, Flynn and the plaintiff saw Hanson, and plaintiff proposed to take an assignment of the lien note if Hanson would discount it \$50. Hanson thereupon asked Ritchie by telephone what he should do, and Ritchie replied that he did not care what he did, if he discharged the note. Hanson then told plaintiff and Flynn that Ritchie had guaranteed the payment of the note, and that if he discounted it \$50 he should not assign it, but should discharge it. Plaintiff then gave Hanson a check for the amount of the note, less the discount, and Hanson wrote on the note what he claimed and the plaintiff considered was a cancellation of the note. Plaintiff and Flynn then went to the town clerk's office, where a chattel mortgage from Flynn to the plaintiff was made and executed, which covered the Hanson horses and other property. On the following day the Hanson lien was discharged of record.

The bill charges Flynn, Ritchie, and Hanson with fraud and collusion, and this was claimed from the above facts and other details not recited; but the chancellor has found that there was no fraud. It is found however, in terms, that when the plaintiff took the chattel mortgage from Flynn and caused the Hanson lien to be discharged, he had no knowledge of the chattel mortgage given by Flynn to Ritchie, and supposed that the Hanson horses were free from encumbrance except the lien note. But the chancellor finds that the mortgage to Ritchie was duly recorded in the chattel mortgage records, and that if the plaintiff had examined the records he could have readily found that such a mortgage had been given."

The facts reported are equivalent to a finding that the plaintiff paid the lien note at the request of Flynn, and upon an understanding with Flynn that he was to have a new security on the property released. So the plaintiff was not an intermeddler or a mere volunteer, and his payment of the first lien did not necessarily give priority to the second. If the payment was made under a material and excusable mistake of fact, and no rights of innocent parties have intervened, the first security will be kept alive as against the holder of the subordinate lien. It is distinctly found that the plaintiff had no knowledge of Flynn's mortgage to Ritchie when he paid the lien note, and supposed that the property was free from other encumbrance; but it is not found in terms that his action was induced by this mistaken belief. It has been said that in cases of this character equity will infer that the transaction was induced by the mistake, in the absence of a finding to that

effect, if this conclusion is consistent with the facts reported. It is not necessary to inquire as to the soundness of this proposition; for the finding that the plaintiff supposed when he paid the lien note that the Hanson horses were free from other encumbrance fairly implies that he had this in mind as an inducement to the action taken.

The chancellor has found, and has apparently turned the case upon, the facts that the Ritchie mortgage was properly recorded, and that the plaintiff could readily have learned from the records that such a mortgage had been given. The doctrine of constructive notice is not applicable; and we think the findings regarding the record do not constitute a defense. An examination of the records would have disclosed the encumbrance, but the question is whether an examination was required by the rule of diligence applicable to the case. This is not a case where the relief of the plaintiff will cause an actual loss to the defendant. Ritchie has not increased his investment since the payment of the lien note, and a reinstatement of the security will simply leave him in his original position. He will lose nothing but the gain which would otherwise have accrued to him from the plaintiff's mistake. Nothing short of very culpable negligence will bar relief in these circumstances. Parties who have paid prior liens at the request of the debtor in ignorance of the existence of subsequent encumbrances have been held entitled to the remedy of subrogation, notwithstanding a failure to examine the records. *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31; *Bruse v. Nelson*, 35 Iowa, 157. And see, generally, *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204, 38 S. E. 374; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; *Heisler v. C. Aultman & Co.* 56 Minn. 454, 45 Am. St. Rep. 486, 57 N. W. 1053; *Seeley v. Bacon*, — N. J. Eq. —, 34 Atl. 139; 2 Pom. Eq. Jur. § 856.

We have cases in which it has been said that courts of equity will never afford relief where a party has acted in ignorance of facts which could have been ascertained by the exercise of due diligence and inquiry. The facts of these cases clearly distinguish them from the present one. In *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406, the orator accepted a lien in full satisfaction of an indebtedness evidenced by papers which were in his possession, but not then at hand, and did this while fully conscious that he was ignorant of the balance due. In *Hyde v. Hyde*, 50 Vt. 301, the court's comments were made in connection with the statement that the orator's ignorance was due to his failure to read the copy of the petition of foreclosure which was served on him. In *Francis v. Park*, 55 Vt. 80, the orator had failed to make a payment required by a judgment in ejectment, and sought relief on the ground that he supposed the instalment was payable May 1st instead of April 1st. In *Bishop v. Allen*, 55 Vt. 423, the mortgagors did not know that a certain clause was in the mortgage because they failed to read it or have it read to them. The bill in *Durkee v. Durkee*, 59 Vt. 70, 8 Atl. 490, was brought to establish and enforce the performance of a contract under which the defendant was to make the orator his heir. In *Ripton v. McQuivey*, 61 Vt. 76, 17 Atl. 44, the principal statement of the opinion is that the parties evidently were mistaken as to the legal effect of a deed to husband and wife in respect to the doctrine of survivorship.

There is nothing in the facts of the case that shows Hanson to be a necessary party. His lien note has been paid and canceled, and the priority of the new security, given the plaintiff in lieu of a transfer of the lien note, can be established without setting up Hanson's former interest as a medium. Priority will be given this security only to the amount actually paid by the plaintiff. Decree reversed, and cause remanded, with mandate that a decree be entered establishing the chattel mortgage given by Flynn to the plaintiff as a first lien on said horses, superior to the mortgage of defendant Ritchie, and forever enjoining said Ritchie from asserting or enforcing his said mortgage against said property, and from disposing of the same in any manner, without first satisfying plaintiff's said mortgage.

FLORIDA SUPREME COURT.

M. C. BOLEY, Exr., etc., of Louis Boley,
Deceased, et al., Appts.,
v.

LEE DANIEL.

(— Fla. —, 72 So. 644.)

Definition — subrogation.

1. Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right.

For other cases, see *Subrogation*, in *Dig.* 1-52 N. S.

Headnotes by WHITFIELD, J.

Note. — As to right to subrogation of one advancing money to pay off lien or encumbrance upon security which proves defective, see footnote to *Hill v. Ritchie*, ante, 731.

Subrogation — when exists.

2. Subrogation arises by operation of law where one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. This is called "legal subrogation."

For other cases, see Subrogation, III. in Dig. 1-52 N. S.

Same — contract right.

3. Conventional subrogation depends upon a lawful contract, and occurs where one having no interest in or relation to the matter pays the debt of another, and by agreement is entitled to the securities and rights of the creditor so paid.

For other cases, see Subrogation, III. in Dig. 1-52 N. S.

Mortgage — discharge of first lien — effect.

4. When a first mortgage lien existing against real estate is paid off and the lien discharged, the lien of a second mortgage thereon becomes at once, by operation of law, a first lien on the property; and this first lien, and the right to enforce it as such, are vested rights.

For other cases, see Mortgage, II. in Dig. 1-52 N. S.

Subrogation — denial.

5. Courts of equity will not apply the doctrine of subrogation where to do so would be to deprive a party of a legal right.

For other cases, see Subrogation, I. in Dig. 1-52 N. S.

Same — payment of first mortgage.

6. Where a party who is under no duty, legal or otherwise, to pay a first mortgage debt, and has no interest in the property, loans money that is used to pay off such first mortgage, and takes a mortgage on the same and other property, with an understanding with the mortgagor "that he was to have a first lien on the property covered by said mortgage," and "in the belief that there were no other liens on the property caused to be satisfied on record the first mortgage," with no agreement that the security of the first mortgage shall be kept alive for his benefit, there is no clear showing of a right to a conventional subrogation.

For other cases, see Subrogation, V. in Dig. 1-52 N. S.

(July 27, 1916.)

A PPEAL by defendants from a decree of the Circuit Court for Escambia County overruling a demurrer to a bill filed to subrogate plaintiff to the lien of a first mortgage which had been canceled by him. Reversed.

The facts are stated in the opinion.

Messrs. E. C. Maxwell and George W. P. Whip, for appellants:

One is not subrogated to the rights of another when it clearly appears that such was not the intention of the parties concerned, and no rights of subrogation can be enforced to the prejudice of an innocent third person.

37 Cyc. 475; Lackawanna Trust & S. D. Co. v. Gomeringer, 236 Pa. 179, 84 Atl. 757; Garwood v. Eldridge, 2 N. J. Eq. 145, 34 Am. Dec. 195; Ft. Dodge Bldg. & L. Asso. v. Scott, 86 Iowa, 431, 53 N. W. 283; Rice v. Winters, 45 Neb. 517, 63 N. W. 830.

Messrs. Watson & Pasco, for appellee: Where the owner of the property agrees that a third party shall pay off a mortgage then existing on the property, and have a first mortgage as security for the loan in paying off such mortgage, and, acting on said agreement, the third party pays off the first mortgage and has the same canceled of record, and takes a new mortgage in ignorance of the fact that there was a second mortgage on the property, a court of equity will keep such canceled mortgage alive for the protection of such mortgagee.

Reilly v. Quigley, 99 Am. Dec. 519, note; Porter v. Curry, 99 Am. Dec. 520, note; Home Sav. Bank v. Bierstadt, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161; Thompson v. Connecticut Mut. L. Ins. Co. 139 Ind. 325, 38 N. E. 796; Farm Land Mortg. & Debenture Co. v. Elsbree, 55 Kan. 562, 40 Pac. 906; Park v. Kribs, 24 Tex. Civ. App. 650, 60 S. W. 905; Powers v. McKnight, — Tex. Civ. App. —, 73 S. W. 549; Bankers' Loan & Invest. Co. v. Hornish, 94 Va. 608, 27 S. E. 459; Cumberland Bldg. & L. Asso. v. Sparks, 49 C. C. A. 510, 111 Fed. 647; Homeopathic Mut. L. Ins. Co. v. Marshall, 32 N. J. Eq. 103; Darrough v. Herbert Kraft Co. Bank, 125 Cal. 272, 57 Pac. 983.

Whitfield, J., delivered the opinion of the court: This suit was brought against Louis Boley and others. After Boley's death his executor was made a party defendant in his stead. The purpose of the suit is to have a mortgage held by Daniel decreed to be a first lien on property upon which Boley has a mortgage prior in time to Daniel's mortgage, and for incidental relief. From a decree on the pleadings granting the relief, the defendants appealed.

It appears that one Waters mortgaged property described as lot 4, block 131, to Leslie E. Brooks, to secure the payment of a note for \$500. Brooks assigned the note and mortgage to a third party. Brooks acquired the property covered by the mortgage, and, the note being past due, Brooks borrowed \$500 from Lee Daniel for the purpose of paying up the mortgage indebtedness, and executed to Lee Daniel a note for \$500, with a mortgage on lot 4 and the

south 5 feet of lot 5, block 131. Lee Daniel made the loan and took the mortgage from Brooks "in the belief that there were no other liens on the property, and caused to be satisfied on record the first mortgage" given by Waters to Brooks. Leslie E. Brooks conveyed the property to Bessie B. Brooks, wife of Harry L. Brooks. After the execution of the mortgage from Waters to Leslie E. Brooks, "and while the same was subsisting and outstanding, the defendant Louis Boley, with full knowledge of the existence of the" note and mortgage from Waters to Brooks, acquired a mortgage lien on the property, which was duly recorded, but Lee Daniel "had no actual notice or knowledge thereof" when he took his mortgage "and caused to be satisfied on record the first mortgage" from Waters to Brooks. At the time Lee Daniel "made the loan aforesaid, it was understood and agreed between him and Brooks that he was to have a first lien on the property covered by said mortgage." The question to be determined is whether Daniel is entitled to be subrogated to the rights of the first mortgagee, whose mortgage was canceled upon payment with money furnished by Daniel for that purpose.

Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right. Subrogation arises by operation of law where one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. This is called "legal subrogation." Conventional subrogation depends upon a lawful contract, and occurs where one having no interest in or relation to the matter pays the debt of another, and by agreement is entitled to the securities and rights of the creditor so paid. See *Sheldon*, Subrogation, §§ 2, 140; *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830; *Watson v. Wilcox*, 39 Wis. 643, 20 Am. Rep. 63; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 48 N. E. 161.

As Lee Daniel was under no obligation whatever to pay the note that was secured by the first mortgage on the property given by Walters to Brooks, and had no interest in or relation to the property, there can be no legal subrogation of Daniel to the rights of the holder of the first note and mortgage. If there can be a subrogation, it must be a conventional subrogation, and based on an agreement of the parties that the first mortgage lien shall continue for the benefit of Daniel. An agreement between Daniel "and the mortgagors that he was to have a first lien on the property covered by said

mortgage" is not necessarily an agreement that the first mortgage lien shall remain in force for the benefit of Daniel. It is true the money loaned by Daniel was obtained and used "for the purpose of paying up the mortgage" which was superior to Boley's mortgage; but, as Daniel "had no actual notice or knowledge" of the second or Boley, mortgage, he could not have contracted for a continuance of the first mortgage lien as having reference to Boley's mortgage. The agreement between Daniel "and the mortgagors that he was to have a first lien on the property covered by said mortgage" was consistent with Daniel's "belief that there were no other liens on property," and consistent with Daniel's action under such belief when he "caused to be satisfied on record the first mortgage." If Daniel had known of the Boley mortgage, the cancellation of the record of the first mortgage would most probably have contained some reference to a reservation as against the Boley mortgage. Besides this, the agreement as to "a first lien on the property covered by said mortgage" relates to all the property in the mortgage, some of which, though a small part, was not in the first mortgage. Daniel had constructive notice by the record of Boley's mortgage, which is binding on Daniel.

The fact that a subsequent mortgagee's lien will occupy the same relation to the property if one who has advanced money secured by a mortgage on the real estate, to pay off the prior mortgage, is subrogated to the rights of the holder of such first mortgage, affords no reason why equity should permit the party so advancing the money to be subrogated to the rights of the holder of the first mortgage.

When a first mortgage lien existing against real estate is paid off, the lien of a second mortgage thereon becomes at once, by operation of law, a first lien on the property; and this first lien, and the right to enforce it as such, are vested rights.

Courts of equity will not apply the doctrine of subrogation where to do so would be to deprive a party of a legal right. *Rice v. Winters*, 45 Neb. 517, 63 N. W. 830; *Ft. Dodge Bldg. & L. Asso. v. Scott*, 86 Iowa, 431, 53 N. W. 283; *Kitchell v. Mudgett*, 37 Mich. 81; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Holt v. Baker*, 58 N. H. 276.

Being under no duty, legal or otherwise, to pay the first mortgage debt, Daniel is not entitled to a legal subrogation to the prior right that had existed in favor of the first mortgage holder. And not having shown an agreement that the lien of the first mortgage should be kept alive for his

benefit, but it appearing merely that the agreement was for "a first lien on the property covered by" the last mortgage, which included other property besides that covered by the first mortgage, and that Daniel, "in the belief that there were no other liens on the property, caused to be satisfied on record the first mortgage," there is no clear showing of a right to a conventional subrogation.

In *Home Sav. Bank v. Bierstadt*, *supra*, the court said: "It is the agreement that the security shall be kept alive for the benefit of the person making the payment which gives the right of subrogation, because it takes away the character of a mere volunteer."

Here there was no agreement that the se-

curity of the first mortgage should be kept alive.

In *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566, 52 N. W. 31, the court held under the peculiar facts that justice required the first security to be kept alive.

The conclusion here reached is not inconsistent with the decisions in *Powers v. McKnight*, — Tex. Civ. App. —, 73 S. W. 549; *Farm Land Mortg. & Debenture Co. v. Elsbree*, 55 Kan. 502, 40 Pac. 906; *Bankers' Loan & Invest. Co. v. Hornish*, 94 Va. 608, 27 S. E. 459; *Thompson v. Connecticut Mut. L. Ins. Co.* 139 Ind. 325, 38 N. E. 796.

The decree is reversed.

Taylor, Ch. J., and Shackelford, Cockrell, and Ellis, JJ., concur.

WASHINGTON SUPREME COURT. (Department No. 2.)

CREDITORS' CLAIM & ADJUSTMENT COMPANY, Appt., v.

NORTHWEST LOAN & TRUST COM- PANY, Resp't.

(81 Wash. 247, 142 Pac 670.)

Bank — guaranty of customer's account — ultra vires — estoppel.

A bank cannot plead ultra vires to a guaranty of its customer's account for merchandise which is shipped in reliance on the guaranty, where it has taken good security to protect itself and assured the vendor of its power to make the guaranty when he questioned it.

For other cases, see Corporations, IV. d, 2, in Dig. 1-52 N. S.

(August 13, 1914.)

A PPEAL by plaintiff from a judgment of the Superior Court for Spokane County in defendant's favor in an action brought to recover an amount due for merchandise purchased from plaintiff's assignor, payment of which was guaranteed by the defendant. Reversed.

The facts are stated in the opinion.

Mr. Henry R. Newton, with Messrs. Belden & Losey, for appellant:

Although the contract is without the powers of a corporation, it is estopped to invoke the plea of ultra vires when the contract is executed and the corporation has received benefits thereunder.

Note. — The question how far a private corporation is estopped from raising the defense of ultra vires in an action brought against it is discussed in the annotation following *GILBERT V. CITIZENS' NAT. BANK*, post, 749.

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Denver F. Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; *Tootle v. First Nat. Bank*, 6 Wash. 181, 35 Pac. 345; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141; *Dewey v. Toledo, A. A. & N. M. R. Co.* 91 Mich. 351, 51 N. W. 1063.

In the case of executed contracts, corporations are estopped to plead ultra vires when the other party to the contract cannot be placed in statu quo, or has altered his position to his disadvantage, relying upon the contract.

Chapman v. Iron Clad Rheostat Co. 62 N. J. L. 497, 41 Atl. 690; *State Bd. of Agri. v. Citizens Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Osmer v. Lemay-Wegmann Brokerage Co.* 155 Mo. App. 211, 134 S. W. 65; *McQuaig v. Gulf Naval Stores Co.* 56 Fla. 505, 131 Am. St. Rep. 160, 47 So. 2; *Hutchins v. Planters Nat. Bank*, 128 N. C. 72, 38 S. E. 252; *Farmers' & M. Nat. Bank v. Illinois Nat. Bank*, 146 Ill. App. 136; *Seiber v. Commercial Nat. Bank*, 77 Fed. 957; *First Nat. Bank v. Greenville Oil & Cotton Co.* 24 Tex. Civ. App. 645, 60 S. W. 828.

Mercantile corporations are estopped from pleading ultra vires when third parties who have entered into contracts relying upon contracts of guaranty executed by the corporation cannot be placed in statu quo.

Timm v. Grand Rapids Brewing Co. 160 Mich. 371, 27 L.R.A.(N.S.) 186, 125 N. W. 357; *Wittmer Lumber Co. v. Rice*, 23 Ind. App. 586, 55 N. E. 868; *Wheeler, O. & Co. v. Everett Land Co.* 14 Wash. 630, 45 Pac. 316.

Messrs. Cordiner & Cordiner and A. E. Gallagher, for respondent:

The contract of guaranty is strictly an ultra vires contract, and is not binding on defendant because it was beyond its power to make it, and of its secretary to bind de-

defendant in making it, of which facts plaintiff was conclusively charged with knowledge, and defendant is not estopped to set up the defense of ultra vires.

Washington Mill Co. v. Sprague Lumber Co. 19 Wash. 165, 52 Pac. 1067; *Spencer v. Alki Point Transp. Co.* 53 Wash. 77, 132 Am. St. Rep. 1058, 101 Pac. 509; *Mooney v. Mooney Co.* 71 Wash. 258, 128 Pac. 225; *Kom v. Cody Detective Agency*, 76 Wash. 540, 50 L.R.A. (N.S.) 1073, 136 Pac. 1165; *Hamor v. Taylor-Rice Engineering Co.* 84 Fed. 392; *Central Transp. Co. v. Pullman's Palace Car Co.* 189 U. S. 24, 48, 59, 35 L. ed. 55, 64, 68, 11 Sup. Ct. Rep. 478; *Stacy v. Glen Ellyn Hotel & St. Co.* 223 Ill. 546, 8 L.R.A. (N.S.) 966, 79 N. E. 133; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Pearce v. Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; *Buckeye Marble & F. Co. v. Harvey*, 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427; *Dresser v. Traders' Nat. Bank*, 165 Mass. 120, 42 N. E. 567; *Day v. Spiral Springs Buggy Co.* 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628; *California Nat. Bank v. Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *Deaton Grocery Co. v. International Harvester Co.* 47 Tex. Civ. App. 267, 105 S. W. 556; *First Nat. Bank v. American Nat. Bank*, 173 Mo. 153, 72 S. W. 1059; *McCormick v. Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *Bowen v. Needles Nat. Bank*, 36 C. C. A. 553, 94 Fed. 925.

Morris, J., delivered the opinion of the court:

In May, 1909, A. C. Rice, having obtained the contract for installing the electrical fixtures in the Federal building at Spokane, wrote to the Crown Electrical Manufacturing Company at St. Charles, Illinois, requesting prices on certain fixtures. The Crown Electrical Manufacturing Company, replying to this letter, quoted prices to Mr. Rice, and on June 16th Rice wrote a letter to the Crown Electrical Manufacturing Company accepting its offer, and a second letter inquiring as to the credit conditions, saying that he would make arrangements to have the account guaranteed by a local bank. This course being satisfactory to the Crown Electrical Manufacturing Company, Rice obtained a guaranty from the respondent, and wired the Crown Electrical Manufacturing Company to that effect, the respondent upon the same day wiring the L.R.A.1917A.

Crown Electrical Manufacturing Company as follows:

Spokane, Wash., 7-3-09.

Crown Elec. Mfg. Co.

We guarantee A. C. Rice bill \$2,000 for Spokane Postoffice Elec. equipments.

Northwestern Loan & Trust Co.

Upon receipt of this telegram, the Crown Electrical Manufacturing Company wrote a letter to the respondent, part of which is as follows: "We have your telegram stating you will guarantee A. C. Rice bill for \$2,000 for the Spokane Postoffice equipment. We would like you to confirm this, and also state that you are in a position where you can guarantee this so that it will be binding, as our understanding is that an ordinary bank guaranty is not good under the law, and, of course, we wish this to be what it represents, a guaranty in fact. We have had trouble in Washington with the Oregon Trust & Savings Bank under the same kind of a guaranty, in which the receiver has refused to pay when they went into bankruptcy, and which we are now suing, and consequently do not wish to get tied up in another deal of the same kind."

In response to this letter, the respondent wrote to the Crown Electrical Manufacturing Company partly as follows: "Replying to your letter of July 6th, we beg leave to say that we do now confirm our telegram, and inasmuch as we have taken their note secured to cover any payments we might make up to \$2,000, we surely are in a position to guarantee the matter. Our ordinary telegraphic guaranty in the usual order of business is accepted by our New York correspondents and other banks, and we think your statement that an ordinary bank guaranty is not good under the law is perhaps too full a statement on your part. The wire or telegram that we sent you is a guaranty in fact."

About the same time Rice wrote a letter to the Crown Electrical Manufacturing Company, part of which is as follows: "In regards to bank guaranty will say that bank guarantying payment to you is controlled by the Gallands, who are wealthy brewers and property owners of this city. If you take time to look up Dun's reports you can readily satisfy yourself on this score. The bank here are themselves protected by a note of \$2,000, signed by N. E. Rice and F. E. Empey and myself. Mr. Empey, my brother-in-law, and N. E. Rice, my father, are worth in the neighborhood of \$100,000. So the bank is amply protected."

On July 2d F. E. Empey, N. E. Rice, and A. C. Rice executed and delivered to the respondent a note in the ordinary form for the

sum of \$2,000. This is the note referred to in the letters of Rice and respondent, and the record shows that, as stated in the letters, it was given for the purpose of protecting the respondent against any loss that might come to it by reason of this guaranty. The account not having been paid, it passed into the hands of the appellant through due assignment, and this action was brought to recover the amount due, after the institution of suit against Rice and the obtaining of a judgment against him for \$1,724.10, and the return of execution unsatisfied. The court below dismissed this action, holding that the act of respondent in entering into the contract of guaranty was ultra vires. The defense of ultra vires is one with which the courts have had much trouble in attempting to compel some corporations to live up to their contracts, and much has been said that is hard to reconcile. Many cases, among which may be classed those from this state, have refused to recognize this defense where the contract has been fully executed, and where in its performance one party has received and retained a benefit or the other has suffered a detriment and cannot be placed in statu quo. *Tootle v. First Nat. Bank*, 6 Wash. 181, 33 Pac. 345; *Allen v. Olympia Light & P. Co.* 13 Wash. 307, 43 Pac. 55; *Wheeler, O. & Co. v. Everett Land Co.* 14 Wash. 630, 45 Pac. 316; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 60 Pac. 141.

In the last case *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950, and *Parish v. Wheeler*, 22 N. Y. 494, were cited, to the effect that executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. The statutes of this state under which the respondent was organized, and from which it derives its powers, give us no aid in determining the power of this corporation to enter into contracts of this character. They contain neither a grant of such power nor a prohibition against its exercise. At the time of the transaction here involved Rice was a customer of respondent bank, and had been since the preceding October. Such fact was held in *Farmers' & M. Nat. Bank v. Illinois Nat. Bank*, 146 Ill. App. 136, to sustain a liability against the bank upon the ground that, in promising to honor the draft which was there sought to be enforced against it, the bank did so to secure business for one of its customers, in whose business it in turn had an interest, and from which it hoped to derive gain, and that in extending and encouraging its customers' business, the bank, from a business standpoint, was promoting its own interest, and for that reason could not plead ultra vires as a defense. This holding is in line with L.R.A.1917A.

those cases like *Tootle v. First Nat. Bank*, supra, which take the position that the receiving and retention of a benefit or the suffering of a detriment is sufficient to take away the defense of ultra vires. Morse on Banks & Banking, § 740 (4), states as the rule that, where the excess of power is not a violation of the statute, but of the common law, a bank will be liable on its ultra vires contract, "provided that either of the following combinations of facts exist: First, that the bank has received benefit from the transaction which it cannot or does not restore, . . . or, second, that the opposing party against whom the plea of ultra vires is hurled can show both that he had no notice, actual or constructive, that the contract was ultra vires, . . . and that he is a holder for value, or has parted with value or changed his condition disadvantageously by reason of the transaction."

In *Hagerstown Bk. v. Loudon Sav. Fund Soc.* 3 Grant, Cas. 135, the supreme court of Pennsylvania held that, though the act of the bank was unauthorized and beyond its power, as between the bank and those who contracted with it the unauthorized act would become a part of the usual and appropriate business of the bank, and it could not avoid liability. The following cases hold that, while generally a bank has no power to make a guaranty, it may do so for the protection of its own rights, or as an incident to the transaction of its own business: *Ayer v. Hughes*, 87 S. C. 382, 60 S. E. 657; *Talman v. Rochester City Bank*, 18 Barb. 123; *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. ed. 907; *Commercial Nat. Bank v. Pirie*, 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; *Thomas v. City Nat. Bank*, 40 Neb. 501, 24 L.R.A. 263, 58 N. W. 943; *Michie, Banks & Bkg.* 681.

The last authority, at page 682, also lays down the rule that a bank may be estopped to deny its liability on a guaranty notwithstanding the contract was ultra vires, when the other party relied and acted thereon to his injury.

In *Hutchins v. Planters' Nat. Bank*, 128 N. C. 72, 38 S. E. 252, it was held, in ruling upon a demurrer to the complaint, that liability could be enforced against the bank upon its guaranty of a draft, basing such holding upon the following citations:

"The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong." *Ohio & M. R. Co. v. McCarthy*, 98 U. S. 258, 24 L. ed. 693.

"Although there may be a defect of power in the corporation to make a contract, yet if a contract made by it is not in violation

of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise, and in execution of the contract, to accept money and perform his part thereof, the corporation is liable on the contract." *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702.

"Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains for it to do but to pay the consideration promised, it will not be allowed to set up the plea of ultra vires." *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160, 2 Mor. Min. Rep. 421.

"Even if a contract is ultra vires, yet if it is not illegal, the defendant is estopped from setting up that defense, as it would be a fraud on the plaintiff to allow this to be done; he having entered into the transaction relying upon said contract." *Bushnell v. Chautauqua County Nat. Bank*, 10 Hun, 378. See also *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504.

Applying these principles to the facts of that case, the court added: "It does not lie in the defendant's mouth to say that it had no authority to do what it did, after the plaintiff has shipped his hides, relying upon the defendant's promise that the draft should be paid."

The lower court was seemingly of the opinion that the application of these principles would defeat the defense of ultra vires in case an ordinary commercial or industrial corporation should seek its protection, but that public policy demands a different rule when applied to a banking corporation. So far as public policy demands honesty and fair dealing on the part of corporations, we know of no reason why such a policy should include one class of corporations and exclude the other. Upon this line respondent strongly pleads for pro-

tection to respondent's stockholders. It may well be doubted whether any injury can come to any innocent party by denying to respondent its plea. It has fortified itself against possible loss by demanding security for its indemnity in the \$2,000 note. It may safely be assumed that, before accepting this note, the bank well knew that it was a good note, collectable on condition broken, so that in fulfilling its contract the bank would work no hardship upon its stockholders or deprive them of assets in which they had the right to share. The respondent not only freely entered into this relation with the Crown Electrical Manufacturing Company, but after the electrical company had indicated its misgivings as to the binding force of the guaranty, and called attention to its understanding of the law and its resort to legal proceedings to enforce like contracts, respondent, seeking to allay this suspicion and to establish full reliance upon its good faith, wrote the letter of July 16th, referring to the fact that it has secured itself with the \$2,000 note, and that its guaranties are accepted by other banks and are to be received as "a guaranty in fact." Having lulled the electrical company into a position of financial security by referring to its protection against loss and affirming that its guaranty was without blemish of either law or fact, common honesty demands an enforcement of the contract. We have no hesitancy in holding that, upon the facts of this case, the defense of ultra vires is not available to the respondent. To hold otherwise in the light of this record would be to encourage fraud and bad faith, and to put the law in the position of awarding a premium to dishonesty.

The judgment is reversed.

Crow, Ch. J., and Fullerton, Parker, and Mount, JJ., concur.

OKLAHOMA SUPREME COURT.

N. T. GILBERT, Trustee, Plff. in Err.,
v.
CITIZENS' NATIONAL BANK OF CHICK-
ASHA.

(— Okla. —, 160 Pac. 635.)

Evidence — to explain writing.

1. Where the words employed to express

Headnotes by BURFORD, C.

Note. — The question how far a private corporation is estopped from raising the defense of ultra vires in an action brought against it is discussed in the annotation following this case, post, 749.
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a particular condition in a contract in writing are ambiguous and cannot be satisfactorily explained by reference to other portions thereof, it is not error to admit parol evidence to show the meaning intended by the parties as to the use of the words employed.

For other cases, see *Evidence*, VI. c, in *Dig.* 1-52 N. S.

Corporation — ultra vires contract — enforcement.

2. A plea of ultra vires is available to a national bank in a suit upon, or for the enforcement of, a contract beyond the powers of such bank, under the National Banking Act (Act Cong. June 3, 1864), but, if the bank has received the money or property of the plaintiff under an ultra vires contract not *malum in se*, and refuses to return the

same, he may maintain an action for the recovery of so much of such money or property by which the bank has actually benefited; but in an action of tort, even though an ultra vires contract was an incident leading up to the tort, the plea of ultra vires is not available to such bank.

For other cases, see Corporations, IV, d, 2, in Dig. 1-52 N. S.

Evidence — custom — pleading.

3. A local custom or usage applying to a special or particular class of business may not be proven to explain the ambiguous terms of a contract, unless the existence of such custom or usage is pleaded.

For other cases, see Evidence, VI, b; XIII, a, in Dig. 1-52 N. S.

Same — objection — sufficiency.

4. An objection to the introduction of such testimony that the same is "incompetent, irrelevant, and immaterial" is sufficient, in the absence of an inquiry by court or counsel as to the specific grounds of the objection.

For other cases, see Trial, I, f, in Dig. 1-52 N. S.

(October 17, 1916.)

ERROR to the District Court for Grady County to review a judgment in favor of defendant in an action brought to recover the proceeds of certain bales of cotton alleged to have been converted by it to its own account. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Stevens & Myers and Burwell, Crockett, & Johnson for plaintiff in error.

Messrs. R. D. Welborne, Stuart, Cruse, & Cruse, and S. W. Hayes for defendant in error.

Burford, C., filed the following opinion:

It appears from the record in this case that during the cotton buying season of 1910-11, L. M. Potts, who resided at Chickasha, Oklahoma, was engaged in the buying and selling of cotton upon a large scale, throughout the country tributary to Chickasha; that in order to finance his operations he made arrangements with various banks, among them the Lawton State Bank of Lawton, Oklahoma. The effect of the arrangement with the Lawton bank was that Potts was to buy cotton at various inland towns surrounding Lawton, and that the purchasers of said cotton would ship the same to Potts, at Chickasha, Altus, and Hobart, but principally to Chickasha, for concentration, compression, and reshipment, there being cotton compresses located at the points named, but none at Lawton. Bills of lading for the cotton were attached to a draft drawn by the shipper against Potts and transmitted to the Lawton State Bank, and were there accepted by Potts or his agent,

and paid by the Lawton bank, which bank then took the bills of lading, detached them from the paid drafts, and transmitted them to the Citizens' National Bank of Chickasha. It is agreed that the whole contract between the Lawton bank and the Chickasha bank was contained in the correspondence. After the first three letters transmitting the bills of lading, the form used by the Lawton bank was the same, except for the names and amounts therein contained, and was as follows:

Citizens National Bank, Chickasha, Okla.
Gentlemen:

We beg to inclose you herein shipper's order bill of lading, No. D-9, covering 25 bales of cotton shipped from Snyder, Oklahoma, and signed by J. A. Kreuger, as shipper, and consigned to the order of M. L. Potts, Chickasha, Oklahoma.

Please hold same in trust for us, notifying Mr. Potts and receipting to us.

Very truly yours,
Cashier.

The Chickasha bank acknowledged receipt of these bills of lading upon a form which stated: "We hold in trust for your account with L. M. Potts, bills of lading or compress ticket for ——— bales of cotton."

It was undisputed at the trial that the cotton bought by Potts at the various inland towns was of widely varying kinds and grades, and that in the cotton business when cotton was resold to Eastern buyers or to exporters, it was not only usual, but absolutely necessary, in order to make a sale, to reclassify the cotton, inasmuch as the purchasers would buy so many bales of cotton of approximately the same grade and class. In order that this might be done the Chickasha bank turned over to Potts the various bills of lading sent it by the Lawton bank. Potts paid the freight upon the bills of lading, had the cotton transferred to the compress, there compressed and reclassified, receiving from the compress company what were known as cotton tickets, one representing each bale of cotton sold and delivered, and identified by a number, and that after he had reclassified and sold the cotton he made up a new bill of lading which was attached to the draft against the purchaser for the amount of the cotton so sold, and that these drafts were regarded as cash. Necessarily in the prosecution of such a business the cotton paid for by the Lawton bank was not, and could not, be sold in lots which contained only cotton paid for by that bank, but the natural and necessary result of the business was that each draft upon the exporter was for cotton which was paid for not only by the Lawton bank, but

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by the Chickasha bank, which was also advancing Potts money, and by various other banks throughout Texas and Oklahoma, which banks were advancing him funds in the same manner as the Lawton bank.

Payments were made from time to time to the creditors of Potts by means of these different drafts, and at the close of the season there was unpaid to the Lawton bank the proceeds of 536 bales of cotton, and Potts was indebted to said bank in excess of \$24,000. It was agreed that the value of the 536 bales of cotton not accounted for was much in excess of the amount owed by Potts.

Under this state of affairs N. T. Gilbert, as trustee of the Lawton bank, which had meanwhile gone into voluntary liquidation in order to reorganize as a national bank, brought this action against the Chickasha bank, alleging the delivery of the bills of lading under the contract as aforesaid, and that the Chickasha bank had converted the proceeds of the 536 bales of cotton to their own account, and had applied the proceeds of the same to the payment and discharge of the obligations of Potts to the Chickasha bank, with knowledge of the source from which the same was derived. The Chickasha bank alleged various defenses, of which the principal ones urged at the trial were that if its conduct in turning the bills of lading over to Potts were in violation of the contract, the Lawton bank knew of the way the drafts were being handled, and had received the proceeds of drafts, which included the proceeds not only of cotton paid for by it, but cotton paid for by the various other banks, and had thus acquiesced in the actions of the Chickasha bank; further, that the contract made with the Lawton bank was ultra vires and void, and also denying generally the allegations of the plaintiff's petition.

Upon the issues thus formed a trial was had to a jury who returned a verdict for the defendant. From the judgment on such verdict, a motion for new trial having been overruled, the plaintiff prosecutes error to this court.

The question to be first determined is whether or not the trial court erred in admitting testimony tending to explain the contract made between the two banks. After a careful examination of the whole record we are satisfied that in so doing the trial court did not commit any error. It is true, as contended by the plaintiff, that in some cases the words "hold in trust" might have a definite, legal meaning, and that parol evidence to attempt to vary or explain such meaning would not be competent, but in construing any contract the necessary facts and surrounding circumstances which must have been and were known by the parties

must be taken into consideration. Here it must have been known to any man of ordinary business intelligence that the cotton represented by the bills of lading sent to the Chickasha bank was on the cars; that actual possession of it could not be obtained without the surrender of the bills of lading, which it is to be here noted were what is known as "shipper's order" bills of lading, and that the freight must be paid; that if these things were not done the cotton was subject to heavy demurrage charges, and ultimately, if not taken up, would be sold by the railroad company for the payment of its freight. It must have been known to the Chickasha bank that the Lawton bank had some special interest in these bills of lading, very probably as creditors of Potts. Under these circumstances, we think, it cannot be said that the Chickasha bank was bound to look only at the ordinary meaning of the words "hold in trust," and to simply take and keep the bills of lading until such time as the Lawton bank should demand their return. Especially is this true in view of the words contained in the letter, to the effect that the Chickasha bank was to notify Potts. If the Chickasha bank was simply to act as trustee for the Lawton bank, why notify Potts? In what way would he be concerned in such transactions? Clearly it was implied from the face of the letters themselves that Potts had something to do with the transaction. Clearly from the nature of the business, which must have been and was known to both banks, the interest of Potts in the bills of lading, which called for notification to him, must have something to do with his making or assisting in making some disposition of the cotton represented by the bills of lading. What was that interest of Potts? What was the duty of the Chickasha bank under such a letter? The letter itself does not state. It is admitted that these letters and the receipt above set out constitute the whole contract. Under such circumstances we have no hesitancy in saying that the contract was ambiguous upon its face, and, if it was, it is apparent that between the parties parol evidence was competent, not to vary, but to explain, the contract and show what the meaning of such parties was when they entered into it. *Janes v. Citizens' Bank*, 9 Okla. 546, 80 Pac. 290; *Cohee v. Turner*, 37 Okla. 778, 132 Pac. 1082; *First Nat. Bank v. Womack*, — Okla. —, 156 Pac. 208; *Barricklow v. Boice*, — Okla. —, 150 Pac. 1094. As to this meaning there was wide variance between the plaintiff Gilbert, who was president of the Lawton bank, and the cashier of the Lawton bank, on the one hand, and the officers of the Chickasha bank, and the assistant cashier of the Lawton bank, who

wrote the letters in question, on the other hand.

Taking the testimony of the plaintiff in the case, the witness Gilbert, explaining the meaning of the contract, testified as follows:

Q. Did you ever at any time give the Chickasha bank specific instructions and directions not to turn these bills of lading over to Mr. Potts until they got the cotton tickets? That they should not turn over these bills of lading to Potts until he surrendered the cotton tickets?

A. I would say not, that no specific instructions were given to them. I would qualify it by saying that along with these bills of lading these letters were sent to them which have been introduced, asking that they be held in trust for us.

Q. Did any of those letters state how long the bills of lading should be held in trust?

A. I think not.

Q. Did you intend the Chickasha bank should hold the bills of lading for any specified time, and then send the bills of lading back to you?

A. I would hardly say that it was the intention that the bills of lading should be sent back.

Q. Did you intend that they should hold the bills of lading forever?

A. No, sir.

Q. You intended that those bills of lading should be turned over to Mr. Potts?

A. No, sir.

Q. Whom did you expect them to be delivered to?

A. We expected them to be surrendered to the railroad company in return for compress tickets, covering the same cotton.

Q. That is what you intended?

A. Yes, sir.

Q. Did you intend that this cotton should be reshipped from Chickasha?

A. Yes, sir.

Q. By whom?

A. By Mr. Potts.

Q. How much were you paying the Chickasha bank for holding those bills of lading in trust?

A. We did not pay them anything.

Q. Did you agree to pay them anything?

A. No, sir; we did not.

Q. Did you expect to pay them anything?

A. No, sir; we did not.

Q. Did he (meaning Potts) have a right to ship it?

A. Certainly.

Q. You expected them (meaning the Chickasha bank) to go to the depot and surrender the bills of lading?

A. Yes, sir.

Q. And get the compress ticket?

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A. Let me testify and I will answer the questions. I don't want you to testify for me.

Q. Go ahead.

A. We expected the bank or the runner to go to the agent of the railroad company and exchange the bills of lading for compress tickets and hold the tickets until Mr. Potts was ready to ship the cotton out. Potts knows from his records just what particular bales of cotton are covered by these particular tickets. When he sells the cotton he can make out an invoice and sell a certain number of bales of cotton, weigh so much, and list them and fix up the bill of lading, and then attach to it the draft which he has drawn with a new bill of lading and have the bank make the transfer again, which would be an opposite transfer from the other one, exchanging the compress tickets for the new outgoing bill of lading.

Q. What transfer would that be?

A. He would have the bank transfer the compress tickets for the new bill of lading.

Q. You expected the bank at Chickasha would first take the bills of lading to the railroad company and get the compress tickets?

A. Yes, sir.

Q. And Potts would make out an outgoing bill of lading?

A. Yes, sir.

Q. And Potts would bring that bill of lading, signed by the bank, and surrender for the tickets?

A. I don't think Potts would get the bills of lading signed until the compress tickets were delivered. The bank would send their runner again to the agent, and the agent would sign the bill of lading and receive the compress tickets.

Q. Did you tell the bank that you would pay them for their runner to go make these exchanges?

A. No, sir.

Q. And you did not expect to pay them for it?

A. No, sir.

Q. If you had sent them (meaning the bank) a bill of lading with draft attached, or if you had sent the bills of lading and written them the amount of the draft, it would have notified them that he owed you on that cotton?

A. Yes, sir.

Q. And you did not do that in a single instance?

A. No, sir.

It seems also from the record that some of the cotton was shipped to other points than Chickasha for concentration and compression.

Upon this testimony we are confronted

with the contention on behalf of the defendant that any errors made in the trial court were immaterial for the reason that the contract of the Chickasha bank was ultra vires and void, and that therefore the plaintiff could not recover upon the undisputed evidence in the case, and that any error committed by the trial court was immaterial.

It is urged by counsel for defendant in error that in our decision of this question we ought to be governed by the decisions of the Supreme Court of the United States. We have no hesitancy in following this suggestion, not only by reason of the high learning and authority of that court, and that upon questions involving the power of national banks, our decisions may in certain cases be reviewable in that court, but also by reason of that decent comity between the courts of the states and those of the nation which the Supreme Court of the United States itself affords to decisions of the state courts upon questions of local law, and which in turn we should afford to that court upon questions peculiarly within its province. This we have consistently done, beginning with *Johnston Fife Hat Co. v. National Bank*, 4 Okla. 17, 44 Pac. 192, through *Shawnee Nat. Bank v. Purcell Wholesale Grocery Co.* 34 Okla. 34, 41 L.R.A.(N.S.) 494, 124 Pac. 603, and *Crowder State Bank v. Aetna Powder Co.* 41 Okla. 395, post, 1021, 138 Pac. 392, down to the recent case of *First Nat. Bank v. Womack*, — Okla. —, 156 Pac. 208. But upon principles announced in the decisions of the Supreme Court of the United States itself, it seems that we may concede, without deciding, that the contract in this case, as defined by the plaintiff, is beyond the scope of the powers conferred upon national banks, without the result contended for by defendant following such a concession. The Supreme Court of the United States, without deviating from the principle as stated in *Le la Vergne v. German Sav. Inst.* 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. Rep. 20, that where the suit is upon an executed contract the corporation may set up ultra vires to defeat a recovery, has still held, as stated in that case, that, if the action be upon a quantum meruit for the money or benefit actually received by the bank, and the transaction was not malum in se, the action may be maintained, and has followed the doctrine of *De la Vergne v. German Sav. Inst.* supra, through many decisions, the most recent of which are *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; *Citizens' Cent. Nat. Bank v. Appleton*, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364; and *Rankin v. Emigh*, 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672, where recoveries were had as for L.R.A.1917A.

money had and received, the court saying, as in *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24-00, 35 L. ed. 55-68, 11 Sup. Ct. Rep. 478, 488, that "to maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

These principles have had the concurrence of this court in *Shawnee Nat. Bank v. Purcell Wholesale Grocery Co.* 34 Okla. 34, 41 L.R.A.(N.S.) 494, 124 Pac. 603; *Crowder State Bank v. Aetna Powder Co.* 41 Okla. 395, post, 1021, 138 Pac. 392; and *First Nat. Bank v. Womack*, — Okla. —, 156 Pac. 208. The Supreme Court of the United States has also held to the broad principle applicable to this case, that where the action is for a tort the defense of ultra vires does not apply. This doctrine was stated in *Merchant's Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 645, 19 L. ed. 1008, 1018, where the court said: "Corporations are liable for every wrong of which they are guilty, and in such cases, the doctrine of ultra vires has no application."

The doctrine was applied to a case of conversion the same as the case at bar in *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750, 1 Am. Neg. Cas. 588. There a bank, as a gratuitous bailee, had received certain bonds, the interest on which the officers would collect and place to the credit of the depositor. The bonds were entirely lost by gross negligence, no benefit accruing to the bank or any other person, except the thief who obtained them. There was no charge of collusion. The bank pleaded ultra vires. The court said: "Conceding for the moment that the contract was illegal and void for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow. There was no moral turpitude on either side,—certainly none on the part of the depositor. She was entitled at any time to reclaim the securities. The bank was bound in good faith and in law to return them, or to keep them, without gross negligence, until they were called for. If, when applied for, they were refused, it cannot be doubted that they, or their value, according to the form of action adopted, might have been recovered. *White v. Franklin Bank*, 22 Pick. 181. If the bank had destroyed them or had thrown them into the street, whereby they were lost to the plaintiff, the liability of the bank would have been the same. To have kept them with gross negligence, whereby the same consequence to the plaintiff was incurred, involved necessarily the same result to the depository. The only way of escape from liability open to the latter would have been to return the property to the owner, or to get rid of its possession otherwise in some lawful way. Gross negligence on the part of a gratuitous bailee, though not a fraud,

as in legal effect the same thing. *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502. It is a tort, and an action on the case is the appropriate remedy for such a wrong. In many cases where there is a valid contract it may be regarded only as an inducement and as raising a duty, for the breach of which an action may be brought *ex contractu* or *ex delicto*, at the option of the injured party. 1 Chitty, Pl. 151. Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application."

It seems from these decisions that a clear distinction must be made according to the form of action brought by plaintiff, and that where the action is and can be maintained *ex delicto*, the question of a benefit received by the bank has nothing to do with the determination of the liability, nor is *ultra vires* a defense. As is said by Mr. Morse in his work on Banks and Banking, § 727: "A distinction must be made at the outset between *ultra vires* transactions which constitute a tort and those involving matters of contract. No plea of *ultra vires* can ever avail to ward off liability for a tort. A tort is always *ultra vires*. It would be a lamentable state of law in which a court would allow a defendant to say, 'I exceeded my power, and as the law will not recognize any transaction that involves its own violation, you cannot recover.' The law will recognize its own violation to punish it and compel justice, and prevent a wrongdoer from taking advantage of his own wrong."

In *First Nat. Bank v. Anderson*, 172 U. S. 573, 43 L. ed. 558, 19 Sup. Ct. Rep. 284, the Supreme Court of the United States again denied the right to plead *ultra vires*, as against an action for conversion. The second paragraph of the syllabus to that case reads: "A national bank which, being authorized by the owner of notes in its possession to sell them to a third party, purchases them itself and converts them to its own use, is liable to their owner for their value, as for a conversion, even though it was not within its power to sell them as the owner's agent."

We do not understand that any of the more recent decisions of the Supreme Court of the United States in any way weaken the force of these decisions. In this jurisdiction the doctrine of *First Nat. Bank v. Graham*, *supra*, was followed by the supreme court of the territory in *Johnston Fife Hat Co. v. National Bank*, 4 Okla. 17, 26, 35, 44 Pac. 192. The conduct of the bank in that case "amounted to a conversion," and after a lengthy review of the authorities it was held that the bank was liable, regardless of the plea of *ultra vires*.

Applying these principles to the case at L.R.A.1917A.

bar, it seems that if the Chickasha bank, under the construction of the contract given it by the plaintiff, turned over the bills of lading to Potts, by gross or ordinary negligence, depending upon whether or not it was a gratuitous bailee, and failed to either return them to the Lawton bank upon demand, or to account for their proceeds, it would be liable to the Lawton bank in an action for conversion, regardless of the receipt of any benefit by the Chickasha bank, since in an action of tort the limitation of recovery to the benefit received does not apply, and conversion lies as well where the wrongful act is for the benefit of a third party as where it is for the benefit of the tort-feasor. Addison, Torts, § 82; Cooley, Torts, 858-861; Street, Foundations of Legal Liability, pp. 235 et seq., and cases cited.

It is to be noted that in this case there is involved the element of a positive act in delivering the bills to Potts, distinguishing it from those cases holding that conversion does not lie for a loss by a bailee through pure negligence, such as negligently allowing live stock to die, etc.

We are far from determining that plaintiff's construction of the contract was true, or that the Lawton bank did not acquiesce in the construction or the conduct in relation to the contract by the Chickasha bank, but we are of the opinion that the trial judge was correct in sending the case to the jury rather than in disposing of it upon the plea of *ultra vires*.

Passing to the assignments of error urged by the plaintiff, the most serious appears to be the admission over the objection and exception of the plaintiff of certain testimony tending to show a custom in and around Chickasha, existing between the banks and cotton buyers, to allow the cotton buyer to take bills of lading, held as collateral security, for the purpose of enabling such buyer to reship and reclassify the cotton, have it compressed, and transact the other business necessary to its sale. This custom was not pleaded by the defendant. His five defenses were: First, the general issue; second, the authority of the cashier; third, *ultra vires*; fourth, that Potts represented himself to be the agent of the Lawton bank to receive these bills of lading, and, believing him to be such, the Chickasha bank turned them over to him, and that the Lawton bank knowingly accepted the proceeds of the acts of Potts, and thereby ratified his agency, and was estopped to deny it; and, fifth, that if there was any liability, that it did not exceed the amount owing by Potts to the Lawton bank. None of these defenses put the plaintiff upon notice that the defendant would attempt to explain the terms of the contract itself by testimony

as to a local custom, applicable only to the cotton business.

In *Smith v. Stewart*, 29 Okla. 26, 116 Pac. 182, plaintiff alleged that he bought certain cotton of defendant, and that defendant guaranteed the weights at the compress. Upon the trial he attempted to prove not an express guaranty, but that there was a custom that the seller should guarantee the weight. The evidence in this regard was rejected by the trial court because not pleaded, and upon appeal this court said: "There are probably several reasons why this evidence was not properly admissible under the state of the case at the time it was offered. A sufficient reason is that it is generally the rule that, before a local custom or usage applying to a special or particular class of business may be made the basis of recovery, it must be pleaded by the party relying on it. *Harnett v. Holdrege*, 5 Neb. (Unof.) 114, 97 N. W. 443; *First Nat. Bank v. Farmers' & M. Bank*, 56 Neb. 149, 76 N. W. 430; *Mobile Fruit & Trading Co. v. Judy*, 91 Ill. App. 82; *Norwood v. Alamo F. Ins. Co.* 13 Tex. Civ. App. 475, 35 S. W. 717; *Oriental Lumber Co. v. Blades Lumber Co.* 103 Va. 730, 50 S. E. 270; 22 Enc. Pl. & Pr. 406. Some courts have recognized exceptions to the general rule, but it is not necessary to notice them here."

That case and the one at bar are very similar. This possible distinction may be noted that in *Smith v. Stewart*, the evidence offered was for the purpose of establishing a term of the contract, whereas in the case at bar it is said that the evidence but tends to explain and make clear a term already a part of the agreement. It is important therefore to ascertain whether or not there are any exceptions to the rule stated in *Smith v. Stewart*, within which the case at bar falls. As to the general doctrine there stated it might be as logically said that the rule is as applicable where the evidence is offered as the basis of a defense as of a recovery.

The possible exception to which reference is made in *Smith v. Stewart*, supra, is doubtless that suggested by the language of 22 Enc. Pl. & Pr. 406-408, cited in the opinion. It is there said: "It has been held in numerous cases that a general and well-established usage or custom, or one actually known to the parties to a contract, constitutes the common understanding of the parties, and should be resorted to as aiding in the interpretation of the contract in an action thereon, and that evidence of such usage or custom, though local, may be admitted without being specially pleaded; at least where it does not contradict or vary the contract unreasonably and does not violate established law."

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A number of cases are cited in support of this statement of the text. Considering them and others bearing upon the subject, we find in *Fish v. Crawford Mfg. Co.* 120 Mich. 500, 79 N. W. 793, the question was whether the seller of lumber was liable for certain inspection charges upon an alleged implied contract to pay such charges. It was there held that evidence that a custom existed that the seller should pay such charges was admissible without being pleaded, since it was "only a matter of evidence, adduced for the purpose of showing what the implied contract between the defendant and plaintiff was."

In *Breen v. Moran*, 51 Minn. 525, 53 N. W. 755, evidence of a local custom as to how measurement of certain stone sold should be made by the "square yard" was admitted without being pleaded. There was a definite contract for the sale of the stone, payment to be made at so much per square yard, and the controversy was as to whether such measurement was to be made in the completed work for which the stone was sold, or by taking the aggregate measurement of the faces of the stone blocks. Here, apparently, the evidence was admitted to explain an ambiguity in the written contract, but the court does not put it upon any exception to the general rule, but says: "We are of the opinion that a custom in its proper sense, even though local, need not ordinarily be pleaded."

The doctrine is squarely contrary to the decision of this court in *Smith v. Stewart*, supra, and to the great weight of authority.

Miller v. Insurance Co. of N. A. 1 Abb. N. C. 470, somewhat supports the rule suggested in 22 Enc. Pl. & Pr. supra. That case involved a suit for commissions. There was an agreement as to the amount, but not as to the time of payment. Evidence was admitted as to a custom covering the time when payment of such commission was due. The court held the evidence admissible under a general denial, saying: "We think, also, that evidence of the custom was admissible under the general denial contained in the answer. When proved, it became one of the constituents of the contract, and the statement thereof in the complaint, therefore, varied from the one actually made. The provision of the Code (§ 149) which requires new matter to be specially pleaded applies only to matters of defense arising after the contract was made."

This case, however, gives the question here involved little consideration, and neither cites nor considers any of the authorities on the proposition. *Lowe v. Lehman*, 15 Ohio St. 179, involved a custom as to measuring brick. It was held the evidence as to custom might be admitted without being

pleaded. The court there, without considering the general subject, simply holds the rule inapplicable in that case, saying: "It would be impractical to apply the rule that special customs must be specially pleaded, to cases like the present. No authority for such application of the rule is shown by counsel. Pleadings would be almost endless if parties were bound to set out in them all the shades and variations in the meaning of terms employed in contracts. The rule seems to be to require each party to come to the trial prepared to meet questions of that kind without special notice."

But the same court in *Palmer v. Humiston*, 87 Ohio St. 401, 45 L.R.A. (N.S.) 640, 101 N. E. 283, in a case involving a custom of physicians and surgeons, said: "If he is relying upon a professional custom or usage obtaining among good surgeons at the time and in the place where the operation is performed, which would avoid the liability charged, he must specially plead that particular usage or custom."

In that case the surgeon had admitted a contract to perform an operation, and alleged that the use of certain sponges was necessary, but upon the trial sought to avoid liability for leaving one of the sponges in the patient's body by proving a custom to the effect that the nurse in attendance had charge of the sponges, and was responsible for their being properly accounted for, after the operation. This testimony would in effect explain and modify the terms of the contract, in the performance of which it was alleged the use of the sponges was necessary. But, as above stated, the Ohio court in the later decision holds that such a custom must be specially pleaded.

In *Hansbrough v. Neal*, 94 Va. 722, 27 S. E. 593, considered a case where there was no contract between the parties, except what the law implied, and where the action was brought to recover what the services performed were reasonably worth. In such a case the court said: "There does not seem to be any good reason why he should set up in his pleadings a local usage or custom by which the value of the services are fixed, since he is entitled to recover what is usual and customary for like services."

The decision can hardly be said to be an authority for the exception claimed, especially in view of *Oriental Lumber Co. v. Blades Lumber Co.* 103 Va. 730, 50 S. E. 270, where the court apparently limited the doctrine of the *Hansbrough* case to the facts of that case, saying: "There is some conflict among the authorities as to the necessity of pleading a custom or usage of trade. See 12 Cyc. 1097, and notes, 22 Enc. Pl. & Pr. 403, and cases cited. But whenever the question has been raised in this court, except in the case L.R.A.1917A.

of *Hansbrough v. Neal*, supra, which was thought to be an exception to the general rule, it has been considered necessary for the party relying on such custom or usage to set it up in his pleadings. *Jackson v. Henderson*, 3 Leigh. 190; *Liggatt v. Withers*, 5 Gratt. 24, 50 Am. Dec. 95."

Coyle v. Gozzler, 2 Cranch, C. C. 625, Fed. Cas. No. 3,312, also cited, is not available to us.

On the other hand, the adjudicated cases in great number supporting the doctrine of *Smith v. Stewart*, 29 Okla. 26, 116 Pac. 182, hold that, as a general rule, proof of a local custom, or one applicable to a particular trade or business, must be pleaded in order to be proved. See as examples: *First Nat. Bank v. Farmers' & M. Bank*, 56 Neb. 149, 76 N. W. 430; *Norwood v. Alamo F. Ins. Co.* 13 Tex. Civ. App. 475, 35 S. W. 717; *Society for Establishing Useful Manufactures v. Haight*, 1 N. J. Eq. 393; *Templeman v. Biddle*, 1 Harn. (Del.) 522; *Lindley v. First Nat. Bank*, 76 Iowa, 629, 2 L.R.A. 709, 14 Am. St. Rep. 254, 41 N. W. 381; *Turner v. Fish*, 28 Miss. 306; *Hayden v. Grillo*, 42 Mo. App. 1; *Dommerich v. Garfunkel*, 32 Misc. 740, 65 N. Y. Supp. 564; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534, 6 Mor. Min. Rep. 303.

Upon the particular branch of the case under consideration, *Elmore, Q. & Co. v. Parrish Bros.* 170 Ala. 499-505, 54 So. 204, is closely in point. There the parties had contracted for the sale of 500 bales of cotton at so much per pound. It was sought to introduce a usage to determine the weight of a bale of cotton. The court said: "Nor do we know, in the absence of averment, how much cotton the parties intended when they used the word 'bales.' It may be that this was determined for the parties by a custom with reference to which they ought to be held to have contracted, or it may have been determined by a supplemental agreement defining the term, or by a course of dealing between the parties from which a definition by agreement was to be implied. In connection with the written contracts, it would be competent to prove any or all these things, in a case properly presented by the pleading, without transcending the rule which denies the right to alter contracts in writing by parol evidence. Appellants cite cases which hold with respect to commercial contracts—the rule, however, is not limited to contracts of a strictly mercantile character—that evidence of a usage of trade, which the parties knew, or may be reasonably presumed to have known, is admissible for the purpose of explaining the meaning of contracts; and they argue *id certum est, etc.* But the question here is a question of pleading, not of evidence. There is no

avermment of a usage or custom of the cotton trade by which a bale of cotton is taken to mean 500—as appellants suggested—or other number of pounds, and in respect to which the parties may be held to have contracted. Nor is there averment in those counts which undertake to set out the contracts according to their legal effect that they contracted for the sale of bales of cotton of any certain weight,—an averment which might have been sustained by proof of a supplemental agreement, express or implied, or of a custom or usage fixing for the parties the weight of a bale.”

The court reached the conclusion that “a custom or usage in the cotton business as to the weight of a bale of cotton must be pleaded in order to be relied on to show that a bale of cotton has a certain weight in such transaction.”

In *Mobile Fruit & Trading Co. v. Judy*, 91 Ill. App. 82-90, the plaintiff had sold some fruit to defendant. The fruit spoiled in transit. Testimony was admitted to establish a custom at the point of receipt to the effect that the loss should be borne by the shipper. The court said:

“The rule is well recognized that where a commercial contract is in any respect ambiguous, and the necessities of the particular line of commerce render a particular custom or usage so indispensably necessary as to commend itself to enforce itself upon all those engaged in that line of commerce, there may be great propriety in allowing such custom or usage to be proved when it has become universal, well understood, and acquiesced in by all, in order to explain the intention of the parties upon the points as to which the contract itself is not explicit, although without such custom or usage, the law might give it a different construction. This is allowed upon the same principle which allows other extraneous facts to be proven, in view of which parties have entered into contract, and by the aid of which their intentions are ascertained, where otherwise they might be doubtful. Such custom or usage will not, however, be admitted to vary or control the express terms of a contract, but will be permitted to determine that which by the contract is left undetermined, for the purpose of interpreting a contract when both parties thereto are supposed to have been acquainted with it, and to have contracted with reference to it. *Dixon v. Dunham*, 14 Ill. 324; *Gilbert v. McGinnis*, 114 Ill. 28, 28 N. E. 382, and *Cleveland, C. C. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811.

“But such a particular custom or usage in order to be invoked and proved by a party to such a contract must be specially plead. L.R.A.1917A.

ed, evidence thereof not being admissible under the general issue. *Leggat v. Sands' Ale Brewing Co.* 60 Ill. 158, and 1 *Saunders*, Pl. & Ev. 884-886.

“And while we are of opinion that a custom or usage such as counsel for appellees attempted to show in this case, if one existed when the contract sued upon was made, could be shown, if properly pleaded, yet the general issue being the only plea that appellees interposed to the declaration, the court improperly admitted the testimony concerning such custom under the pleadings.”

In view of these cases we think it can hardly be said that there is such a weight of authority in the courts of the nation establishing an exception to the rule in *Smith v. Stewart*, supra, to the effect that evidence of a local custom, applicable to a particular business, may be introduced to explain a contract relating to such business, without first being pleaded, as to impel us to adopt such exception as to the law of this jurisdiction. Rather, in view of the conflict in the cases, we feel free to determine the question of practice upon what we deem to be the underlying principles, and to the end that ultimate justice not only in this, but in the cases to come, shall be accomplished. The primary object of pleading is to notify the adversary of that which he has to meet. Necessarily the evidence is ordinarily not a proper part of a pleading, but the allegation of a material fact is. Where a custom is general, long established, and well known, it is held that it need not be pleaded, since all are presumed to know of it. It is one of the common facts of life which enter into every case and which the parties are assumed to be ready to meet. But the same cannot be said of a special local custom applicable to a particular business. As to such a custom, we think that the interests of general justice demand it should be properly pleaded and the opposing party notified of what he has to meet. Although we think this evidence admissible, if pleaded, to explain the contract, under the authority of *Chicago, R. I. & P. R. Co. v. Dodson & Williams*, 25 Okla. 822, 107 Pac. 921, its admission without being pleaded was prejudicial error. It tended to show what the contract was, and, taking it into consideration, the jury might well have said that the Chickasha bank had been guilty of no breach of the contract, whereas, without this testimony, the result might have been entirely different. Merely because the question of waiver was submitted to the jury, we cannot say that the verdict was upon it alone, since the court also submitted to the jury the question of what the contract was.

It is argued by defendant that no ob-

jection was properly made. The repeated objections were upon the ground that the evidence was "incompetent, irrelevant, and immaterial." After the close of the testimony plaintiff moved to strike out this testimony in relation to custom because not pleaded. This motion was overruled, and an exception saved. We think the question is properly before us for review. Rev. Laws 1910, § 5070, being the same as the law in force at the trial, provides: "An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness. Where any party desires to object to any question put to a witness, either before a court or tribunal or upon the taking of depositions upon notice, the ordinary objections of incompetency, irrelevancy or immateriality, shall be deemed to cover all matters ordinarily embraced within such objections, and it shall not be necessary to specify further the grounds of such objections or to state the specific reasons whereby the question is so objectionable; but the court or opposing counsel may inquire of the objector wherein the question is so objectionable, and the objector shall thereupon state specifically his reasons or grounds for such objections."

The evidence as to the custom was irrelevant under the issues as formed, and, in the absence of an inquiry by the court or counsel as to the specific grounds, the objection was sufficient. Certainly after the particular ground of objection was called to the court's attention by the motion to strike, all the requirements of the statute were fulfilled.

The cases of *Enid & A. R. Co. v. Wiley*,

14 Okla. 310, 78 Pac. 06, and *Sparks v. Territory*, 16 Okla. 127, 83 Pac. 712, on appeal 76 C. C. A. 504, 146 Fed. 372, support the contention of defendant, but these cases were decided upon cases arising when the statute contained only the first sentence of the section above quoted. The succeeding part of the section was later added by the legislature, perhaps because of the decision in *Enid & A. R. Co. v. Wiley*, supra. These cases are clearly inapplicable to the present statute. Nor do we find anything in the later decisions of this court in conflict with the views herein expressed. In *Continental Casualty Co. v. Wynne*, 36 Okla. 325, 332, 129 Pac. 16, the objection held insufficient was merely "we object." In *Diamond v. Perry*, — Okla. —, 148 Pac. 89, though reference is made to *Enid & A. R. Co. v. Wiley*, supra, the general objection was held insufficient because the evidence admitted was competent, relevant, and material upon one issue in the case, though perhaps not as to all the issues.

In *St. Louis & S. F. R. Co. v. Murray*, — Okla. —, 150 Pac. 884, a motion to strike the "testimony of the witness along that line" was held insufficient to advise the court to what testimony reference was made. None of these cases decided the question before us now.

Upon the whole we are of the view that the testimony above referred to was improperly admitted under the state of the pleadings, and that the objections thereto were sufficient.

For the reasons given the cause should be reversed for further proceedings not inconsistent with this opinion.

Per Curiam.

Adopted in whole.

Annotation—How far a private corporation is estopped from raising the defense of ultra vires in an action brought against it.

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with relation to contracts involving merely an abuse of corporate powers:

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I. Introductory.**1. Scope of monograph.**

There is virtually no difference of opinion as to the general rule that, as long as an ultra vires contract remains executory on both sides, it is not susceptible.

ble of enforcement.¹ "Contracts with corporations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, . . . should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and therefore a breach of private trust."²

The authorities are also in agreement as to the proposition that, in any case to which the general rule applies, the principle of estoppel cannot be invoked for the purpose either of enabling a party to the contract to maintain an action upon it,³ or of debarring a stockholder from

¹ Apparently the only case in which the contrary has been maintained is *Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123. See next section, note 5.

An ultra vires contract comes within the scope of the doctrine that, "while an unlawful contract, the parties to which are in *pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose." *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* (1982) 145 U. S. 407, 36 L. ed. 754, 12 Sup. Ct. Rep. 953 (lease).

² *Comstock, Ch. J.*, in *Parish v. Wheeler* (1860) 22 N. Y. 494.

³ *Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge* (1836) 8 Gill & J. (Md.) 248, 29 Am. Dec. 543 (rejecting the contention that the corporation had, by entering into the contract, estopped itself from pleading ultra vires); *Nassau Bank v. Jones* (1884) 95 N. Y. 115, 47 Am. Rep. 14; *Swindell v. Bainbridge State Bank*, 3 Ga. App. 364, 60 S. E. 13.

In *McCutcheon v. Merz Capsule Co.* (1896) 31 L.R.A. 415, 19 C. C. A. 108, 37 U. S. App. 586, 71 Fed. 787 (consolidation agreement), the court said: "To hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay, and before the contract is executed or other persons have irrevocably acted in reliance upon its supposed legality." This case was followed in *Gunnison Gas & Water Co. v. Whitaker* (1898) 91 Fed. 191 (issue of bonds to stockholders).

In *Montgomery v. Whitbeck* (1903) 12 N. D. 385, 96 N. W. 327, where an action was brought on behalf of a corporation to enforce an invalid assessment in a jurisdiction in which the principle of an estoppel

procuring its annulment.⁴ On the other hand, there is a conflict of views with regard to the question whether that principle is available for such a purpose in a case where the claimant has performed the whole contract, or the divisible part thereof with respect to which recovery is sought. An examination of the decisions which relate to this question shows that the following diverse theories have been propounded:

(1) That the mere fact of performance by the plaintiff never operates so as to estop the defendant from setting up the defense of ultra vires.

(2) That this fact is of itself sufficient to estop the defendant from setting up that defense in whatever respect the contract may have transcended the powers of the corporation.

(3) That this fact creates such an estoppel in cases where the contract involves simply an abuse or an improper exercise of the powers conferred, but not in cases where it relates to a subject matter entirely outside the scope of the business which the corporation was authorized by its charter to carry on.

In the following monograph it is proposed to show the extent to which these theories have been adopted by the different courts, in so far as they have been exemplified in cases where the corporation was the defendant. The cases relating to the remedial right of the

corporation itself are reviewed in the subsequent monograph which is appended to Calumet & C. Canal & Dock Co. v. Conkling, L.R.A.1917B, —. But as the general principles with reference to which it is determined whether the doctrine of estoppel shall be accepted or rejected are in the main identical whether the corporation is the defendant or the moving party, it has been deemed advisable to use in the present monograph all the judicial statements which have a bearing upon the general nature and operation of any principles which are equally applicable in actions by and actions against corporations. Decisions involving the liability of municipal corporations will not be discussed, except for the purpose of explaining more clearly than would otherwise be possible the development of the law in certain jurisdictions.

In view of the important place which is occupied by corporations in the commercial, financial, and industrial affairs of modern communities, it may safely be affirmed that no other single topic of jurisprudence is of greater practical interest than a determination of the relative correctness of the three theories enunciated above. The momentous question involved is in effect whether the doctrine of ultra vires shall or shall not be virtually nullified, so far as regards actions upon contracts which have been performed on the side of the parties seek-

as predicated from the receipt of the benefits of an ultra vires contract had been adopted, the ratio decidendi was that, as the defendant had not received or retained any property of the corporation for which he was either morally or legally obligated to pay, he had nothing to restore, and consequently that the right of the parties was controlled by the general rule that a contract which is contrary to law or public policy is simply void, and that neither party to it is estopped from showing the fact. "Every member of this corporation," said the court, "was a party to these contracts, individually as the assured, and collectively as the corporation. As parties to the contract with the corporation, they were severally in pari delicto. No estoppel operates either in favor of or against any of them, because there is nothing upon which it can be built. . . . There cannot be any estoppel to show a violation of a statute, even to the prejudice of an innocent party. How much less can a corporation claim to bind a member to the payment of a void assessment on the theory of estoppel? To build up an estoppel against one situated as appellant is in this case, and in favor of the corporation, would be to make the courts an instrument of oppression."

L.R.A.1917A.

For other cases in which the doctrine stated in the text was recognized, see *Wilks v. Georgia P. R. Co.* (1885) 79 Ala. 180; *Long v. Georgia P. R. Co.* (1890) 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706; *Day v. Spiral Springs Buggy Co.* (1885) 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628.

⁴In *Memphis & C. R. Co. v. Grayson* (1889) 88 Ala. 572, 16 Am. St. Rep. 69, 7 So. 122, where a decree declaring a lease of a railroad to be void was rendered, the court, after adverting to the rule that "the company itself is not estopped to proceed against a third person or other corporation for the avoidance of an executory ultra vires contract," proceeds thus: "This well-settled proposition demonstrates that the estoppel does not obtain in favor of third parties, natural or artificial, and that they cannot rely upon it, either against the corporation eo nomine or against a stockholder suing for and in behalf of the corporation; for clearly it would be wholly immaterial to them whether the assault on the ultra vires contract proceeded from corporate volition, so to speak, or from the volition of a stockholder exercising his right to act for the corporation."

ing to enforce them.⁵ The conclusion reached by the present writer after a careful study of the authorities from various points of view is that the reasons which have been assigned for narrowing the scope of that doctrine by the application of the principle of estoppel are unsatisfactory.

2. Principle of estoppel viewed generally with reference to the doctrine of ultra vires.

The term "ultra vires" in its proper sense "denotes some act or transaction on the part of a corporation which, although not unlawful or contrary to public policy if done or executed by an individual, is yet beyond the legitimate powers of the corporation as they are defined by the statutes under which it

is formed, or which are applicable to it, or by its charter or incorporation papers."¹ As an introduction to the present monograph this general explanation of the meaning of ultra vires will suffice. But it should be observed that the statement, being quite general, fails to take account of a distinction to which, in a discussion of the applicability of the principle of estoppel to actions brought upon ultra vires contracts, a very material importance attaches; that is to say, it does not specifically refer to the fact that a contract may be ultra vires by reason either of an express or of an implied prohibition.² Some courts, as will be shown hereafter, hold that an estoppel can be predicated only where the prohibition is one of the latter description. See § 44, *infra*.

⁵ That the disintegrating operation of the extensive adoption of the second and third of the theories specified is fully appreciated by the courts and text-writers is shown by such statements as those referred to below.

"The doctrine of ultra vires is disappearing. The old theory that a corporate act beyond the express and implicit corporate powers was illegal, and not enforceable, no matter whether actual injury had been done or not, has given way to the practical view that the parties to a contract which has been wholly or partially executed will not be allowed to say it was ultra vires of the corporation." Cook, Corp. 4th ed., quoted in *Hutchins v. Planters' Nat. Bank* (1901) 128 N. C. 72, 38 S. E. 252.

That the decisions relating to the doctrine of ultra vires "exhibit a development in the direction of restricting the scope of its operation" was remarked in *Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123.

"As to private corporations created for business purposes, the doctrine of ultra vires has been so limited by applying to them the doctrine of estoppel as to almost destroy it." *Taylor Feed Pen Co. v. Taylor Nat. Bank* (1915) — Tex. Civ. App. —, 181 S. W. 534.

See also *Bell v. Kirkland* (1907) 102 Minn. 213, 13 L.R.A.(N.S.) 793, 120 Am. St. Rep. 621, 113 N. W. 271, where Jaggard, J., refers to the statement of Mr. Pepper in 9 Harvard L. Rev. 255, that "in modern times there has been a steady movement in the direction of enforcing unauthorized and prohibited contracts as between the parties;" to the tendency toward what Mr. Cooke (28 Am. L. Rev. 227) calls "the extinction of the doctrine;" and to the following remark in the note to *Re Assignment Mut. Guarantee F. Ins. Co.* 70 Am. St. Rep. 180: "The original rule that an ultra vires contract was illegal and void, could give rise to no rights, nor be validated by any performance or application of the law of estoppel, has practically been erased from the law." L.R.A.1917A.

¹ 2 Machen, Corp. § 1012. This definition is adopted in 5 Laws of England (Halsbury) p. 285; and *Pennsylvania R. Co. v. Minis* (1913) 120 Md. 461, 87 Atl. 1062.

"Perhaps the most general statement which can be made of the doctrine of ultra vires is to say that the contract of a corporation which is unauthorized by or in violation of its charter or other governing statute, or entirely outside the scope of the purposes of its creation, is void, in the sense of being no contract at all, because of a total want of power to enter into it." Judge Thompson in 10 Cyc. 1146, quoted in *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (1905) 102 Md. 307, 2 L.R.A.(N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351.

In *Trevor v. Whitworth* (1887) L. R. 12 App. Cas. (Eng.) 409, 57 L. J. Ch. N. S. 28, 57 L. T. N. S. 457, 36 Week. Rep. 145, it was remarked by Lord Macnaghten that the principles laid down in *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304, with regard to the limits of the powers of incorporated companies, had been held by the House of Lords to "apply with equal force to companies governed by the Companies Acts and to companies incorporated by special act of Parliament." That a similar rule holds, *mutatis mutandis*, with respect of companies organized in the United States, was taken for granted in a large part of the cases cited in this monograph.

² In support of this statement it will be sufficient for our present purposes to quote the following remarks of Lord Cranworth in *Shrewsbury & B. R. Co. v. Northwestern R. Co.* (1857) 6 H. L. Cas. 113, 10 Eng. Reprint, 1237: "When the legislature constitutes a corporation, it gives to that body *prima facie* an absolute right of contracting. But this *prima facie* right does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is ex-

It will be advisable to emphasize at this early stage of the discussion the fact that each of the considerations to which the generally accepted doctrine is referable, that an ultra vires contract is nonenforceable while it remains executory on both sides, has a definite bearing upon certain aspects of the question whether it should be treated as enforceable on the ground that it has been performed on the side of the party whose claim is based upon it. A brief reference to this phase of the subject will therefore be proper.

"The reasons why a corporation is not liable upon a contract ultra vires, that is to say, beyond the powers conferred upon it by the legislature, and varying from the objects of its creation as declared in the law of its organization, are: 1st. The interest of the public, that the corporation shall not transcend the powers granted; 2d. The interest of the stockholders, that the capital shall not be subjected to the risk of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for the stock; 3d. The obligation of everyone entering into a contract with a corporation, to take notice of the legal limits of its powers."³

The first of these considerations is, in one point of view, material as drawing attention to the fact that one particular part of the public whose interests are subserved by the doctrine of ultra vires consists of the persons who are or may become creditors of corporations.⁴ This aspect of the doctrine has been almost entirely ignored by the courts which have adopted the principle of estoppel. See § 65, *infra*. The importance of this consideration in another point of view

consists in the circumstance that there is an obvious relationship between it and a doctrine which has been applied in numerous cases, viz., that the question whether a contract which it is sought to enforce was ultra vires is one which concerns the state only, and consequently cannot be raised in an action in which a private party sues, or is sued by, a corporation. See § 5, *infra*, and § 8 of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —. As ordinarily applied, this doctrine has been invoked with respect only to contracts which have been executed by the complaining party. For practical purposes, therefore, it may, so far as regards those jurisdictions in which the principle of estoppel prevails, be regarded as a ground of recovery which operates concurrently with that principle, and in cases which involve circumstances of the same description as those under which the principle is controlling. There is not much likelihood that many courts will accept the view recently advanced in one jurisdiction that the theory as to the exclusive right of the state to interfere involves the corollary, "that, in the absence of special circumstances affecting the matter, neither party to even an executory contract should be allowed to defeat its enforcement by the plea of ultra vires."⁵ Such a view ignores to a strange degree the theory upon which the invalidity of an ultra vires contract is actually predicated, that is to say, the prohibition, express or implied, of the lawmaking body.

The importance of the second consideration consists in the fact that it necessarily involves, or at all events points very distinctly to, the conclusion that a doctrine which permits an ultra vires

pressly or impliedly prohibited from making: such a contract is said to be ultra vires." He also referred to the language used by Parke, B., in *South Yorkshire R. & R. D. Co. v. Great Northern R. Co.* (1853) 9 Exch. (Eng.) 75: "Where a corporation is created by an act of Parliament for particular purposes with special powers, . . . their deed, though under their corporate seal, . . . does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments that the deed was ultra vires; that is, that the legislature meant that such a deed should not be made."

³ *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (1888) 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770, citing *Pearce v. Madison & I. R. Co.* (1858) 21 How. (U. S.) 441, 16 L. ed. 184. For other statements of a similar tenor, see *Central L.R.A.1917A*.

Transp. Co. v. Pullman's Palace Car Co. (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *McCormick v. Market Nat. Bank* (1896) 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; *De la Vergne Refrigerating Mach. Co. v. German Sav. Inst.* (1899) 175 U. S. 40, 59, 44 L. ed. 66, 71, 20 Sup. Ct. Rep. 20.

⁴ See the judgment of Lord Cairns in *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 704, 2 Eng. Rul. Cas. 304.

⁵ *Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123, the court was obliged to admit that it had found no case in which its view has been recognized with respect to executory agreements,—an absence of authority which might well have suggested greater caution in laying down the law.

contract to be indirectly validated by the operation of an estoppel must be unsound, simply because it may, and frequently does, operate unjustly by rendering shareholders liable in respect to obligations to which, under the circumstances, they cannot be presumed to have assented even by implication. See § 35, *infra*.

The third consideration has been adverted to in many of the cases in which, as in those already cited with regard to the second, the principle of estoppel, as predicated simply upon a receipt of the benefit of the contract, has been rejected.⁶ But its significance has been fully recognized in jurisdictions in which that principle is accepted,⁷—a situation which seems to be somewhat anomalous in view of the fact that is clearly suggestive of the fundamental objection to which the application of that principle is open in respect of ultra vires transactions; viz., that, so far as regards all other branches of the law of contracts, an essential element of the concept of an estoppel is that the person who claims the benefit of the estoppel should have been misled by the words or conduct of the other party. See § 58, *infra*.

There is a fourth consideration, which has been less frequently alluded to than those enumerated above; viz., the interests of persons who may become creditors of the corporation.⁸ It is clear that every member of the public is entitled to deal with a corporation upon the assumption that it has not previously exceeded its powers, and that it will not afterwards do so.

In England, where the theory of an estoppel as predicated from a receipt of the benefits of an ultra vires contract is rejected, the nonliability of the corporation has sometimes been treated as a deduction from the principle, "In pari delicto potior est conditio possidentis."⁹ But obviously the invocation of this

principle merely suggests a secondary reason for denying the right of action, the prohibition of the legislature being, in the final analysis, the ground upon which such denial is based.

For the purposes of the ensuing discussion it is also advisable to draw attention to the well-settled doctrine that "a contract beyond the corporate powers of either part is as invalid as if beyond the corporate powers of both."¹⁰

3. Principle of estoppel considered with relation to partially performed contracts.

Where a portion of an ultra vires contract has been performed by one of the parties, and that portion is separable from the residue, the question whether a claimant is entitled to sue upon the executed portion is presumably determinable upon the same footing as where the claimant is relying upon a full performance as the basis of an estoppel in his favor. But the writer has not found any decision which directly involved this point.

With regard to the effect of partial performance as an element operating upon the remedial rights of the parties in respect of the unexecuted residue of a divisible contract, the authorities are not harmonious. From the universally accepted doctrine that an ultra vires contract cannot be enforced while it remains executory, it would seem to be a necessary deduction that, if one of the parties withdraws from the contract after it has been performed on both sides during a portion of the period which it covers, such withdrawal cannot constitute a cause of action, for the simple reason that the unperformed residue of the contract is executory in its nature. Decisions in accord with the view indicated by this consideration have been rendered not only by courts which refused to recognize the principle of an estoppel, as predicated from the performance of the contract by the claimant,¹

⁶ See § 34, *infra*.

⁷ See, for example, *Leslie v. Lorillard* (1888) 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363.

⁸ See the remarks quoted in § 36, *infra*, from the judgment of Lord Cairns in *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304.

⁹ *Lord Campbell in Norwich v. Norfolk R. Co.* (1855) 4 El. & Bl. 397, 119 Eng. Reprint, 143, 3 C. L. R. 519, 24 L. J. Q. B. N. S. 105, 1 Jur. N. S. 344; *Blackburn, J.*, in *Taylor v. Chichester & M. R. Co.* (1867) L. R. 2 Exch. (Eng.) 356.

¹⁰ *Pennsylvania R. Co. v. St. Louis, A. & L.R.A.1917A.*

T. H. R. Co. (1885) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Louisville & N. R. Co. v. Kentucky* (1895) 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Anglo-American Land, Mortg. & Agency Co. v. Lombard*, (1904) 68 C. C. A. 89, 132 Fed. 721.

¹ In *Thomas v. West Jersey R. Co.* (1879) 101 U. S. 71, 25 L. ed. 950, where the action was brought for rent accruing under a lease in respect of a period subsequently to the repudiation of the contract by the defendant, it was held that the claim could not be enforced upon the principle laid down in certain cases cited; viz., that the contract was "so far an executed one that the plaintiff in error was estopped to deny

its validity and to refuse to continue its performance." The court said: "What is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action,—damages for a material part of the contract never performed; damages for the value of a contract which was void.

... Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty—a duty both to stockholders of the company and to the public—give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority, and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." This statement was quoted with approval in *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 55, 35 L. ed. 55, 67, 11 Sup. Ct. Rep. 478, and the decision was followed in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1885) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094, where an action brought for the specific enforcement of a lease of a railway line was held not to be maintainable,—the court declining to affirm the argument that, although the contract might be void, so that no action could originally have been sustained upon it, there had been for ten years such performance of it, in the use, possession, and control of plaintiff's road and its franchisees, by the defendants, that they could not now be permitted to repudiate or abandon it; that it now presented one of a class of cases which hold that "where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the courts will not disturb the possession of such property or compel restitution of money received under such a contract." It was remarked: "Undoubtedly there are such decisions of courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the par-

ties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands. We know of no well-considered case where a corporation which is party to a continuing contract which it had no power to make, [which] seeks to retract, and refuses to proceed further, can be compelled to do so."

In *Oregon R. & Nav. Co. v. Oregonian R. Co.* (1884) 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409, the doctrine laid down in the above cases was again applied with respect to a partially performed lease. The judgment of the lower court, which was reversed, is reported in 10 Sawy. 464, 22 Fed. 245. For a subsequent trial of the case, see 27 Fed. 277. The judgment was reversed in 136 U. S. 646, 34 L. ed. 552, 10 Sup. Ct. Rep. 1072, on the same grounds as those stated in 130 U. S. 1.

The same doctrine was applied in *Hamilton v. Savannah, F. & W. R. Co.* (1892) 49 Fed. 412; *Gunnison Gas & Water Co. v. Whitaker* (1898) 91 Fed. 191. The *Thomas Case* was also cited with approval in *Kansas City v. O'Connor* (1900) 82 Mo. App. 665, rehearing denied in (1900) 3 Mo. App. Rep. 258.

In *Eufaula v. McNab* (1880) 67 Ala. 588, 42 Am. Rep. 118, it was laid down that the payment by the city of two instalments of interest upon bonds issued to pay for land, the purchase of which was ultra vires, did not estop it from setting up this invalidity as a defense to an action for the balance of the price.

In *Mallory v. Hanaur Oil Works* (1888) 86 Tenn. 598, 8 S. W. 396, which was an action of unlawful detainer in respect of certain property of the plaintiff corporation which it had transferred in pursuance of an ultra vires contract, the court reasoned thus: "As to the unexpired time during which the defendants in error might be deprived of the use of their property, and subjected to the hazards of another year's operations, it was not an executed contract. The possession obtained under this contract was illegal, and it was the duty of the officers of the Hanaur company to renounce the arrangement and recover possession. There are cases where, an invalid contract being fully executed, the courts will not entertain a suit to recover money or property transferred under such agreement, or, if they do interfere, will do so only upon equitable terms. But the defense here made would result, if successful, in enforcing the performance of the unexecuted part of a void contract. It is not a case of contract fully executed. The part remaining to be executed is a material part, and is beyond the power of defendant in error to make or sanction. Having entered into it, it was its duty to rescind or abandon it. . . . That the defendant in error has submitted to a void contract, by which it has been deprived of the use of its property for two years, furnishes no sound

but also by courts which accept that principle.²

All the decisions of a contrary tenor were rendered by intermediate courts of review, and, having regard to the authorities already mentioned, they may safely be pronounced erroneous.³

In one of the states in which the principle of estoppel prevails, it was held that a corporation which had received and paid for one of certain articles which it had agreed to purchase could not raise the plea of ultra vires in an ac-

tion brought for the balance of the price stipulated under the contract. The ratio decidendi was that the contract was entire and that the defendant had received part of the benefits accruing from it.⁴ But, having regard to the authorities already reviewed, this decision seems to be one of very questionable soundness. The present writer ventures to express the opinion that the incidents of the contracts in question were, so far as the applicability of the doctrine of ultra vires was concerned, essentially the same

reason why it shall submit for three years. To hold that it did would be to apply the doctrine of part performance in a way to perfect and legalize illegal contracts which were partly performed."

² In *McNulta v. Corn Belt Bank* (1895) 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, affirming (1895) 63 Ill. App. 593, relief was denied on the ground that the object of the action was to recover a sum claimed as being due in respect to the unexecuted part of the contract. This case, it should be observed, belongs to the period which preceded the change of views concerning the doctrine in Illinois. See § 80, *infra*.

In *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (1905) 102 Md. 307, 2 L.R.A.(N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351, where a railroad company had guaranteed the payment of interest and dividends on the stock of a hotel company, an action brought to recover in respect to one year's deficit was held not to be maintainable. The court rejected the contention that, as the contract had been partly executed by both parties, the railroad company was estopped to set up the defense of ultra vires.

In *Bowman Dairy Co. v. Mooney* (1890) 41 Mo. App. 665, ultra vires was held to be a good plea in an action brought by a corporation to enforce a restrictive covenant in a partially performed contract of employment. The court said: "When the action is based on a contract which is shown to be beyond the powers of the corporation, and which remains executory, we have found no case which goes to the extent of holding that the individual cannot allege the illegality of the contract in opposition to its enforcement."

In *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.* (1875) 4 Hun (N. Y.) 268, 6 Thomp. & C. 488, it was distinctly laid down that the estoppel doctrine does not preclude a corporation from repudiating the unexecuted part of the contract.

See also *Sabine Tram Co. v. Bancroft* (1897) 16 Tex. Civ. App. 170, 40 S. W. 837 (action not maintainable to recover probable profits that would have accrued to plaintiff if an illegal partnership had been continued).

³ In *Keeley Brewing Co. v. Emrick* (1896) 64 Ill. App. 247, where the defendant corporation had abandoned, before the expira-

tion of its term, premises leased in excess of its powers, an action for the rent accruing in respect of the remainder of the term was held to be maintainable, on the ground that the defendant was "estopped from setting up its lack of power to make such a contract, when, after having made it, it entered into possession under it, and partook of the benefit conferred by it."

In *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 185, an action was held to be maintainable for damages resulting from the breach of a contract to give permanent employment.

In *Lemp Hunting & Fishing Club v. Cottle* (1913) 172 Mo. App. 574, 156 S. W. 709, the defense of ultra vires was held not to be available in a suit by a corporation for the specific performance of a stipulation to renew a lease, as the lease had been fully performed and the lessor had received and retained the rent. A similar decision was rendered in *Lemp Hunting & Fishing Club v. Hackmann* (1913) 172 Mo. App. 540, 156 S. W. 791, where the court observed that the contract was not wholly executory, because the consideration for the stipulated renewal was the payment of the rent during the original term, and had therefore been fully received. But probably this theory as to the nature of the contract would not be approved by all courts. It is submitted that the contract was essentially a divisible one, and that the sole remedy available for the refusal of the lessor to renew the lease was an action to recover that particular portion of the rent, if any there was, which represented the consideration paid for the option of obtaining a renewal.

In *Osmer v. Le May-Wegmann Brokerage Co.* (1911) 155 Mo. App. 211, 134 S. W. 65, the court approved the suggestion in *Green's Brice, Ultra Vires*, 2d ed. p. 784, that the governing principle when the transaction has been only partly performed is "that if there has been 'substantial' part performance, such a course of conduct by the corporation, and such action by the other side, as to show that both parties intended the due carrying out of the transaction, then it is too late for the corporation to object to the invalidity of the matter."

⁴ *Vermont Farm Machinery Co. v. De Sota Co-op. Creamery Co.* (1909) 145 Iowa, 491, 122 N. W. 930.

as those of a lease by which property is leased for a term of years, and provision made for periodical payments of rent.

4. Effect of complete execution of ultra vires contract on both sides.

The courts have not infrequently had occasion to distinguish between cases of the description discussed in the present monograph and those involving contracts which have been executed on both sides. The doctrine applicable in cases of the latter description is that "the executed dealings of corporations must be allowed to stand for and against both

parties when the plainest rules of good faith require it."¹ Hence "where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract."² This doctrine is apparently a deduction from the principle, "In pari delicto, potior est conditio possidentis," which has in point of fact been relied upon as the ratio decidendi in many cases involving circumstances of essentially the same character as those in which the doctrine has been invoked.³

¹ Thomas v. West Jersey R. Co. (1879) 101 U. S. 71, 25 L. ed. 950, citing Parish v. Wheeler (1860) 22 N. Y. 494.

² Principle approved by the court in Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. (1885) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094, but declared not to be applicable to a case in which the contract had been only partially performed. See § 3, supra.

For cases in which this principle was held to be controlling, see Taylor v. South & North Ala. R. Co. (1882) 4 Woods, 575, 13 Fed. 152 (stockholder of a corporation will not be allowed, after a reasonable time, to impeach a contract for the issuance of stock which has been fully executed); Cincinnati, H. & D. R. Co. v. McKeen (1894) 12 C. C. A. 14, 24 U. S. App. 218, 64 Fed. 36 (transfer of stock); Vanderveer v. Asbury Park & B. Street R. Co. (1897) 82 Fed. 355 (conveyance of land); Savings & T. Co. v. Bear Valley Irrig. Co. (1902) 112 Fed. 693 (sale); Bear Valley Land & Water Co. v. Savings & T. Co. (1902) 117 Fed. 941 (same transaction involved as in case last cited); Alabama Consol. Coal & I. Co. v. Baltimore Trust Co. (1912) 197 Fed. 347 (conversion of preferred stock into bonds); Santa Cruz v. Wykes (1913) 120 C. C. A. 485, 202 Fed. 357, affirming (1911) 184 Fed. 752 (sale); Chase & B. Co. v. National Trust & Credit Co. (1914) 215 Fed. 633 (sale); Bigbee & W. River Packet Co. v. Moore (1898) 121 Ala. 379, 25 So. 602 (subscription for stock); Albert v. Baltimore Sav. Bank (1849) 1 Md. Ch. 407 (loan repaid); Shoemaker v. Mechanics' Nat. Bank (1869) 31 Md. 396, 100 Am. Dec. 73 (stockholder in bank which had made a loan in excess of its powers was held not to be entitled to an injunction restraining the bank from prosecuting suits to recover value of collateral securities taken when the loan was made); Kansas City v. O'Connor (1900) 82 Mo. App. 655; Camden & A. R. Co. v. May's Landing & E. H. City R. Co. (1886) 48 N. J. L. 530, 7 Atl. 523 (lease); Emmet v. Reed (1853) 8 N. Y. 312 (promissory note had been canceled and returned after it had been paid in the manner agreed); Seneca County Bank v. Lamb (1858) 26 Barb. (N. Y.) 595 (discount of commercial paper at an excessive rate); Cunningham v. Massena Springs & Ft. C. R. Co. (1892) 63 Hun, 439, 44 N. Y. S. R. 723, 18 N. Y. Supp. 600, affirmed in (1893) 138 N. Y. 614, 33 N. E. 1082 (construction contract); Tourtelot v. Whited (1900) 9 N. D. 467, 84 N. W. 8 (corporate stock had been accepted in payment of debt); Spokane v. Amsterdamsch Trustees Kantoor (1900) 22 Wash. 172, 60 Pac. 141 (mortgage had been foreclosed).

In Berry v. Kentucky Union Land Co. (1894) 10 C. C. A. 393, 22 U. S. App. 267, 62 Fed. 335, it was held that contracts by which land was exchanged for the stock of another company should not, at the instance of creditors, be set aside "in the absence of the third persons, who have advanced money on the faith of their validity, and who have not been tendered the money advanced by them on the stock or invested by them in the lands sought to be recovered." The court refused to discuss the question whether the action could have been maintained if it had been begun before third persons had acquired any rights in the land or stock.

³ National Bank v. Stewart (1882) 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778 (loan by national bank on security of its own shares); Cincinnati, H. & D. R. Co. v. McKeen (1894) 12 C. C. A. 14, 24 U. S. App. 218, 64 Fed. 36 (complete purchase of shares in another company); Metcalf v. American School Furniture Co. (1903) 122 Fed. 115 (sale of property had passed title); Long v. Georgia F. R. Co. (1890) 91 Ala. 519, 24 Am. St. Rep. 931, 8 So. 706 (completed conveyance of land); Chapin v. Merchants' Nat. Bank (1888; Sup. Ct.) 14 N. Y. S. R. 272 (same facts as in National Bank v. Stewart (U. S.) supra); Reed's Appeal (1888) 122 Pa. 565, 16 Atl. 100 (contractor had received in part payment for his work stock for which payment had not been made in money).

In St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. (1892) 145 U. S. 393, 408, 36 L. ed. 748, 754, 12 Sup. Ct. Rep. 953, the law was thus laid down: "When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property or by the payment of money, and has not been repudiated by the defendant, it is now

Considered with special reference to the remedial rights of the corporation itself, this doctrine assumes the form indicated by the following statement: "A corporation acting without authority is not in the position, with the privileges of an infant, to avoid an improvident contract, but in the position and subject to the liabilities and disabilities for a wrongdoer, if it exceeds its authority. It cannot complete a bargain with a third party, which such third party has a right to make, and then rescind the contract, wholly executed, if such contract proves to be an improvident one,

and recover back the consideration."⁵

The operation of the doctrine is, it may be presumed, qualified to some extent by the general rule of law which has been thus formulated: "An illegal contract will not be executed; but when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied."⁶ But this aspect of the matter has apparently never been discussed.

equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract." A suit to set aside a conveyance of a railroad and franchises was declared not to be maintainable after the defendant had held the property, and paid the stipulated consideration, for seventeen years. It was remarked that no such suit had been entertained by the English courts, and that the only similar cases cited by counsel, or which had come to the notice of the court, had been decided by inferior American tribunals, and presented no sufficient reasons for maintaining the suit. The cases thus unfavorably criticized were *Auburn Academy v. Strong* (1824) *Hopk. Ch.* (N. Y.) 278; *Atlantic & P. Teleg. Co. v. Union P. R. Co.* (1880) 1 *McCrary*, 541, 1 *Fed.* 745; *Western U. Teleg. Co. v. St. Joseph & W. R. Co.* (1880) 1 *McCrary*, 565, 3 *Fed.* 430; *Union Bridge Co. v. Troy & L. R. Co.* (1872) 7 *Lans.* (N. Y.) 240; *New Castle Northern R. Co. v. Simpson* (1884) 21 *Fed.* 533. Another ground assigned for the decision was that both the corporation and the stockholders were barred by laches. The case was followed in *Hill v. Atlantic & N. C. R. Co.* (1906) 143 *N. C.* 539, 9 *L.R.A.* (N.S.) 606, 55 *S. E.* 854, which involved similar facts.

For a similar case in which the Supreme Court laid down the doctrine that "if parties are in *pari delicto*, the law will help neither, but leaves them as it finds them," see *Daniels v. Tearney* (1880) 102 *U. S.* 415, 26 *L. ed.* 187 (action on a bond void as being executed in pursuance of unconstitutional legislation).

For cases which applied this doctrine, but did not involve *ultra vires* transactions, see *Munt v. Stokes* (1792) 4 *T. R.* 561, 100 *Eng. Reprint*, 1176, 2 *Revised Rep.* 459; *Howson v. Hancock* (1800) 8 *T. R.* 577, 101 *Eng. Reprint*, 1555; *Morris v. Hall* (1868) 41 *Ala.* 510, 91 *Am. Dec.* 614; *Bishop v. American Preservers' Co.* (1895) 157 *Ill.* 284, 48 *Am. St. Rep.* 317, 41 *N. E.* 765.

In *Talmage v. Pell* (1852) 7 *N. Y.* 328, the arrangement in question was essentially *L.R.A.* 1917A.

"a purchase of stock by a bank upon their notes or certificates payable at a future day, the stock to be sold by the state of Ohio on account and on the risk of the company, the proceeds to be applied to the payment of other certificates of the same character held by the vendor as creditor of the bank." The contention that this was a case of an executed contract, and that, although illegal, the assignment of the securities could not be recalled or impeached by the defendant, the receiver of the bank, was thus dealt with: "The certificates of deposit it is true, as the agreement recites, were received in payment for the stock sold by Ohio, and the mortgage as collateral security for their payment. But this is not an executed agreement within the meaning of the authorities cited by the complainants. If the promise to pay contained in the certificates was a satisfaction of the debt incurred by the purchase, the complainants have no place in court; they have received all for which they stipulated. But they in fact are seeking a performance of the promise by means of the mortgage assigned to secure that performance. That promise arising from an illegal consideration is void, and the assignment, which by the terms of the agreement was specifically made to secure the payment of the certificates, is void also. It might as well be contended that a note secured by the assignment of a mortgage for a gaming debt, or for money loaned at a usurious rate of interest, was an agreement executed. The complainants claim title to the security through the illegal contract, and not by virtue of a distinct and independent agreement in satisfaction of it. In such cases the maxim "*Melior est conditio defendentis*," would apply if the receiver represented the association exclusively. But he is in fact a trustee, not only for the stockholders, but creditors also. *Gridley v. Dole* (1850) 3 *N. Y.* 488."

⁵ *Attleborough Nat. Bank v. Rogers* (1878) 125 *Mass.* 339 (sale of promissory notes).

⁶ *Lestapies v. Ingraham* (1846) 5 *Pa.* 71.

4a. Rule applicable in cases where the ultra vires transaction was disconnected from the contract in suit.

Both on principle and authority, it is clear that the ultra vires quality of an agreement to which the claimant is a party will not preclude him from recov-

ering upon another contract which is valid, and which, although it has some relation to the same transaction as the ultra vires agreement, is, in a juristic point of view, distinct and separable from it.¹ This doctrine was carried to an extreme limit in a case which apparently involved the assumption that an ac-

¹In *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (1888) 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770, it was held that, although no action could be maintained upon an ultra vires lease of a railroad by one railroad company to another, the tolls due from the defendant in respect of the use of a bridge under a concurrent valid contract were recoverable.

In *Llano Improv. & Furnace Co. v. Pacific Improv. Co.* (1895) 13 C. C. A. 625, 30 U. S. App. 253, 66 Fed. 526, the defendant company, being unable to pay the whole consideration of the contract alleged to be ultra vires after it had been fully performed by the plaintiff, accepted the offer of the latter to take a promissory note of the defendant for the unpaid residue, and return certain notes executed and stock transferred by the shareholders. Held, that an action on the defendant's note might be maintained for the reason that, even assuming the contract to be invalid, there was, at the time when the plaintiff's offer was accepted, sufficient ground for litigation if the defendant had then chosen to rely upon the invalidity, and consequently a good consideration for the note.

In *Re Ervin* (1902) 114 Fed. 596, the court proceeded upon the ground that the fact of a corporation's having exceeded its powers in becoming a partner of another corporation did not prevent it from prosecuting a valid claim against the other partner, which had been contracted before the illegal partnership was formed, and had reference to money never intentionally used for the benefit of the partnership business. Under such circumstances "the claim does not grow out of the partnership relation, but out of an independent and antecedent transaction."

In *Jenson v. Toltec Ranch Co.* (1909) 98 C. C. A. 60, 174 Fed. 86, where the validity of a loan was in question, the general principle with reference to which the right to recover was affirmed was that "a contract or obligation which is executed by the promisee, and is sustained by a legal and valuable consideration which the promisor had the power to give, may not be defeated because the promisor also agreed to give another consideration which it was beyond its corporate power to bestow. The promisee may waive the unauthorized consideration and rely upon that which was within the power of the corporation."

In *Illinois Trust & Sav. Bank v. Pacific R. Co.* (1897) 117 Cal. 332, 49 Pac. 197, the bonds sued upon were held not to be invalidated by reason of the fact that the company issuing them had exceeded its powers in mortgaging, for the purpose of secur-

ing them, the property of another company of whose assets it was the transferee.

In *Arnot v. Erie R. Co.* (1876) 67 N. Y. 315, affirming (1875) 5 Hun, 608, the defendant company had guaranteed the bonds of another company, and, having afterward become possessed of some of them, transferred these, with the coupons and guaranties, for a valuable consideration. Held, that, even assuming the guaranties to have been ultra vires when originally given, they should, so far as the rights of the transferee and his privies were concerned, be regarded as having been given again at the time of the transfer, and consequently as enforceable for the reasons thus stated: The transferee's claim "was a valid one, and that the defendant had become legally liable to pay it. It could pay it in cash, or could give its own obligation to pay it. Instead of giving its own obligation, it would give the obligation of another which it owned, and guarantee its payment. . . . If the guaranty was before void, because supported by no valid consideration, or made for no authorized purpose, it then became operative." New York is one of the states in which the doctrine of an estoppel as predicated from a receipt of the benefits of an ultra vires contract has been adopted. See § 95, *infra*. But this doctrine was not invoked, in spite of the fact that the circumstances under review were apparently suitable for its application.

In *Brewer & H. Brewing Co. v. Boddie* (1899) 181 Ill. 622, 55 N. E. 40, it was held that a lessee corporation will "not be permitted to say that, because it had used the premises for a business which it had no power by its charter to carry on, its contract to pay rent is void and cannot be enforced against it."

In *Dexter v. First Guaranty State Bank* (1915) — Tex. Civ. App. —, 180 S. W. 1172, certain banks entered into an arrangement with West, by the terms of which the parties were to become the owners of cotton purchased on the open market with a view to its being sold either for their joint or several account. They insured the cotton in which they were to deal, and, by an agreement reduced to writing and signed by "West & Co., Assured," stipulated to pay premiums on specified dates. A demurrer to a complaint alleging these facts, in an action on the insurance policies, was held to have been improperly sustained. The ratio decidendi was that, while the contract between the banks and West was ultra vires in respect to the former, the plaintiff's allegations did not show that the

tion may be maintained upon the accessory contract, even though the corporation would have exceeded its powers if it had done what it agreed to do.²

In a case where it is shown that the corporation made the contract in question with the purpose of using its proceeds in an unauthorized manner, it is clear that, if the contract itself was *intra vires*, there is no ground upon which

it can be held that the mere fact of the corporation's having entertained and carried out such a purpose precludes the other party from enforcing the contract,³ and that his knowledge of that purpose is immaterial, except in so far as it may tend to prove his guilty participation in the ulterior acts of the defendant.⁴ It should be pointed out, however, that even the fact of a guilty

insurance companies were parties in any sense to that agreement. "Under the allegations, as we understand them," said the court, "the insurance companies were not concerned in either the success or failure of the business venture. They were entitled to their premiums whether the cotton transactions resulted in profits or losses. Their undertaking was collateral to the purpose and intention manifested by the contract to buy cotton. In the very nature of things, they would not be entitled to premiums, nor could they become liable for losses, until cotton had been acquired by West & Company. Their connection with the *ultra vires* transactions and operations described in the petition was purely a contingent one. Granting the invalidity of the contract or business arrangement between West and the defendant banks, because it was *ultra vires*, it in no degree taints the separate contract alleged to have been made between the banks and insurance companies."

See also *Curtis v. Leavitt* (1857) 15 N. Y. 9, and *Sacketts Harbor Bank v. Codd* (1858) 18 N. Y. 240, *infra*.

Reference may also be made to *Bank of Australasia v. Breillat* (1847) 6 Moore, P. C. C. 162, 13 Eng. Reprint, 642, 12 Jur. 189, where a rule similar to that stated in the text was applied with respect to a contract which was merely *ultra vires* of the directors. See § 7, *infra*.

² In *Soule v. Union Bank* (1865) 45 Barb. (N. Y.) 111, a mortgagee bank charged the mortgagor with the premium for an insurance on his life for three years, and included the amount in the mortgage as a part of the principal. Held, that the bank was bound to keep the policies alive; and that if, in consequence of its neglect to pay the premiums, the policies became extinguished, it was itself liable as an insurer. The court said: "If it should be said the bank could not be insurer for want of power, the answer is that it is immaterial whether the bank is charged as insurer or as guilty of negligence in not making the insurance. The amount the plaintiffs are entitled to be credited on the mortgage would be the same."

³ In *Underwood v. Newport Lyceum* (1844) 5 B. Mon. (Ky.) 129, 41 Am. Dec. 260, where the plaintiffs sued to recover the amount of their bill for work done in engraving bank bills for the defendant institution, and for the value of the plate made for the engraving, the court said: "Though it should be presumed that their object was to use those bills illegally, and in the illegal L.R.A.1917A.

exercise of banking powers, we are not prepared to concede that their assumption to the plaintiffs . . . would not be valid and enforceable against the corporation."

In *Taylor v. North Star Gold Min. Co.* (1889) 79 Cal. 285, 21 Pac. 753 (suit to set aside assessment of mining stock), it was laid down that the company could not refuse to pay the money borrowed for the purpose of paying certain expenses which were incidental to an *ultra vires* act.

For cases in which the doctrine that recovery of a loan was not barred by the mere fact that the money claimed had been borrowed for an unauthorized purpose was recognized, see *Traer v. Lucas Prospecting Co.* (1904) 124 Iowa, 107, 99 N. W. 290; *Planters' Cotton Oil Co. v. Guaranty State Bank* (1916) — Tex. Civ. App. —, 188 S. W. 38.

⁴ In *Jenson v. Toltec Ranch Co.* (1909) 98 C. C. A. 60, 174 Fed. 86, the ratio decidendi was thus stated: "It is no defense to a suit to enforce a contract that has been performed by the promisee to repay money loaned to or paid for another, and to foreclose a mortgage to secure that repayment, that the lender or the payor knew that the borrower intended to use, or was using, the money for an illegal purpose, or a purpose beyond its corporate powers, where the lender or payor did not combine or conspire with the borrower to induce such a use, and did not share in the benefits thereof."

In *Illinois Trust & Sav. Bank v. Pacific R. Co.* (1897) 117 Cal. 332, 49 Pac. 197, where certain bonds of the defendant railway company were alleged to be void in the hands of the holders because the undertaking for the promotion of which they issued was beyond the charter powers of the two companies concerned, the court said: "That was a vice which infected only the contract of the two corporations; the issue and disposition of bonds to third persons constituted a series of transactions each resting on a new consideration and connected only indirectly with the contract between the corporations. Admitting, as urged by appellant, that the holders had notice of the purposes of the Pacific Railway Company, yet they did nothing to promote those purposes beyond parting with their property on the faith of its obligations; they do not found their right of recovery on the illegal contract between the companies; and in our opinion they are not affected by it."

In *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563, it

participation would apparently not preclude a claimant from recovering by virtue of the principle of estoppel, if the action is brought in a jurisdiction in which that principle prevails. The courts which reject that principle would, of course, not grant any relief except such as he might be entitled to independently of the contract. See note to *Crowder State Bank v. Aetna Powder Co.* post, 1026.

5. Effect of the doctrine that only the state can raise the question of ultra vires.

The doctrine under which the right to maintain an action upon an ultra vires

was held that a corporation having power to borrow money cannot evade payment on the ground that it expended the money in prosecuting a business which, though in itself not immoral or illegal, it had no authority to carry on, even though the lender knew the money was to be expended in such business. Effect of decision as stated in *Brewer & H. Brewing Co. v. Boddie* (1899) 181 Ill. 622, 55 N. E. 49. But the decision turned partly upon the principle of an estoppel as predicated from the receipt of benefits. See § 80, *infra*.

In *Wright v. Hughes* (1889) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907, the law was thus laid down: "Even if it were conceded that the money was borrowed to be used in a transaction altogether beyond the power of the corporation, and that the lender knew the purpose for which it was to be used, since there is no statutory prohibition involved, and the lender was in no way in complicity with the borrower in carrying out the transaction in which the money was used, there exists no impediment against the enforcement of the contract. . . . The most that can be said in the present case is that there was a defect of power to engage in the transaction in which the money borrowed was used. The power to borrow money was plenary, and subject to no restrictions. In such a case, although the lender may know that it is the purpose of the borrower to use the money in an irregular way, yet if the contract between the lender and borrower is not in violation of law, or declared void by statute, the money may be recovered, unless the lender was in some way implicated in furthering the borrower's design, or accessory to the prohibited or illegal act."

The doctrine of the above cases was also approved in *Thompson v. Lambert* (1876) 44 Iowa, 239; *Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & T. Co.* (1916) 169 Ky. 840, 185 S. W. 156; *Taylor Feed Pen Co. v. Taylor Nat. Bank* (1915) — Tex. Civ. App. —, 181 S. W. 534.

In *Maryland Trust Co. v. National Mechanics' Bank* (1906) 102 Md. 608, 63 Atl. 70, it was laid down that "anyone lending

contract which the complainant has performed on his side is referred to the conception that only the state can raise the question of invalidity, has been more frequently invoked in cases where the corporation was the moving party (see § 8 of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —) than in cases involving actions against corporations. But the authorities cited in the footnote show that it has been recognized quite extensively in cases of the latter description.¹

In many instances this doctrine has been explicitly relied upon concurrently with the principle of estoppel, and, so far as actions against corporations are

a corporation money to purchase its own stock (knowing that was to be the use of it) cannot recover from the company to the prejudice of creditors." Unless the rationale of this ruling is assumed to have been participation in the unlawful transaction, it is difficult to reconcile with the cases above cited. The same doctrine was formulated in *Bear Creek Lumber Co. v. Second Nat. Bank* (1913) 120 Md. 566, 87 Atl. 1084.

The general rule has been laid down that "where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used." *Armstrong v. American Exch. Nat. Bank* (1889) 133 U. S. 433, 469, 33 L. ed. 747, 760, 10 Sup. Ct. Rep. 450.

¹*Kingman County v. Cornell University* (1893) 6 C. C. A. 206, 12 U. S. App. 551, 57 Fed. 149 (action on bonds issued by county was held to be maintainable); *Sioux City Terminal R. Co. v. Trust Co. of N. A.* (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 133 (excessive borrowing); *Central Trust Co. v. Columbus, H. Valley & T. R. Co.* (1898) 87 Fed. 815 (excessive borrowing); *Beach v. Wakefield* (1899) 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197 (excessive borrowing); *Cass County v. Mercantile Town Mut. Ins. Co.* (1904) 188 Mo. 1, 86 S. W. 237 (policy of insurance); *Glass v. Ferd Heim Brewing Co.* (1891) 47 Mo. App. 639 (lease); *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 365 (purchase of shares in another corporation); *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 185 (contract to employ plaintiff); *Osmer v. LeMay-Wegmann Brokerage Co.* (1911) 155 Mo. App. 211, 134 S. W. 65 (purchase of patent rights); *Hough v. St. Louis Car Co.* (1914) 182 Mo. App. 718, 165 S. W. 1161 (purchase of shares in another corporation); *Bullen v. Milwaukee Trading Co.* (1901) 109 Wis. 41, 85 N. W. 115 (suit on note); *Ledebuhr v. Wisconsin Trust Co.* (1902) 112 Wis. 657, 88 N. W. 607 (action on benefit certificate). Possibly *New York Bank Note Co. v. Kidder Press Mfg. Co.* (1906) 192 Mass. 301, 78 N. E. 463, should also be

concerned, there seems to be no clear instance of its application by any court which at the time of the application disapproved of that principle.²

Manifestly, however, the effect of adopting the doctrine is to render the principle entirely superfluous as *ratio decidendi*.

The same remark may be made with regard to the practical consequences of entertaining the theory that the doctrine of ultra vires is one which "only concerns the corporation in its relation with the state and with its shareholders, and is never entertained where it will injure innocent third persons."³ Yet the principle of estoppel was the actual *ratio decidendi* in the case in which this statement was made.

added to this list. See § 87, *infra*, *ad finem*.

One of the points relied upon by Comstock, Ch. J., in *Bissell v. Michigan Southern & N. I. R. Co.* (1860) 29 N. Y. 258, was that "if state sovereignties were wronged by the course of dealing pursued, no interference or complaint had come from that quarter."

In *New York Cement Co. v. Consolidated Rosendale Cement Co.* (1904) 178 N. Y. 167, 70 N. E. 451, reversing (1903) 84 App. Div. 635, 81 N. Y. Supp. 1137, where an injunction was granted to restrain the defendant from excluding the plaintiff's boats from a portion of a canal which it controlled as the successor by purchase of the original canal company, one of the points raised by the defendant was that its exercise of the franchise granted by the state to the canal company would be ultra vires. But the court said: "This is a question between the defendant and the state of New York, with which the former has no concern, as it is estopped from raising it by voluntarily assuming the position which it now occupies. So long as the state of New York raises no objection in the premises, the defendant will not be heard to complain.

In *Welsh v. Ferd Heim Brewing Co.* (1892) 47 Mo. App. 608 (case), the court said: "I understand the true rule on this matter to be that it must be shown to be the intention of the charter, as gathered from its terms, not only to restrict the business of the corporation to certain things, but, in addition, to declare that when it exceeds these restrictions the act shall be void, before any other party than the state can question such act as ultra vires, unless the contract should be against public policy or good morals."

As to the qualified doctrine announced in Illinois, Missouri, and Mississippi with respect to actions by corporations, see review of decisions in those states in the monograph specified in the text. This doctrine would presumably be applied in those L.R.A.1917A.

II. Principle of estoppel considered with relation to contracts ultra vires in a secondary sense.

6. Generally.

In many of the cases in which the effect of a receipt of benefits by the defendant has been discussed with relation to contracts which were ultra vires in the strict sense explained in § 2, *supra*, attention has been drawn to the difference between contracts of that type and those of certain other descriptions, to which, although they are within the scope of the corporate powers, the term "ultra vires" has not infrequently been applied. This alternative use of the term is sanctioned by the courts and other authorities.¹ But it has undoubt-

states with respect to actions against corporations also; but it does not prevail, or at all events has not been explicitly formulated in other jurisdictions.

In *Bell & C. Co. v. Kentucky Glass Works Co.* (1899) 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, the court, while conceding this doctrine to be applicable as between the parties to the contract, held that it could not be invoked so as to prejudice the rights of a third person,—in this case a creditor whose claim was subsequent to that of one who had taken a mortgage to secure a loan to the corporation which exceeded the amount which it was authorized to borrow. The decisions in 82 Fed. and 87 Fed. cited *supra*, were considered to be incorrect, in so far as they were precedents for the contrary view.

² As the Federal decisions cited in note 1, *supra*, all belong to a period during which the views of the Supreme Court with regard to estoppel were strangely disregarded by some of the inferior tribunals (see § 69, *infra*), it is somewhat uncertain whether they can be deemed exceptions to the general statement in the text.

³ *Wright v. Hughes* (1889) 119 Ind. 330, 12 Am. St. Rep. 412, 21 N. E. 907.

¹ "Where an act is not ultra vires for want of power in the corporation, but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated powers, it may be valid as to third persons. In the more proper and legitimate use of the term, it applies only to acts which are beyond the purpose of the corporation, which could not be sanctioned by the stockholders." *National Home Bldg. & L. Assn. v. Home Sav. Bank* (1899) 181 Ill. 43, 64 L.R.A. 390, 72 Am. St. Rep. 245, 54 N. E. 619.

In *Buckeye Marble & F. Co. v. Harvey* (1892) 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427, the court observed: "There are cases where the defense

of ultra vires has not been entertained when the defect was in the mode of executing the contract or in the power of the agent."

"Acts of directors which should not be undertaken by them without the sanction of the members of the company are, however, frequently described as acts ultra vires of the directors." 5 *Laws of England* (Halsbury) sub voce, "Companies," § 466. For cases sustaining this statement, see *Norwich v. Norfolk R. Co.* (1855) 4 El. & Bl. 397, 119 Eng. Reprint, 143, 30 Eng. L. & Eq. Rep. 120, 3 C. L. R. 519, 24 L. J. Q. B. N. S. 105, 1 Jur. N. S. 344; *Anglo-Australian Life Assur. Co. v. British Provident L. & F. Ins. Soc.* (1862) 3 Giff. 521, 66 Eng. Reprint, 515, 6 Jur. N. S. 209, 1 L. T. N. S. 126; *Lowndes v. Garnett & M. Gold Min. Co.* (1864) 3 New Reports (Eng.) 601, 33 L. J. Ch. N. S. 418, 10 L. T. N. S. 229, 12 Week. Rep. 573; *Spackman v. Evans* (1868) L. R. 3 H. L. (Eng.) 171, 19 L. T. N. S. 151; *Evans v. Smallcombe* (1868) L. R. 3 H. L. (Eng.) 240, 19 L. T. N. S. 207; *Re London & N. Ins. Corp.* (1869) L. R. 4 Ch. (Eng.) 682, 21 L. T. N. S. 182, 17 Week. Rep. 751; *Phosphate of Lime Co. v. Green* (1871) L. R. 7 C. P. (Eng.) 43, 25 L. T. N. S. 636; *Bensiek v. Thomas* (1895) 13 C. C. A. 457, 27 U. S. App. 765, 66 Fed. 104; *Cozart v. Georgia R. & Bkg. Co.* (1875) 54 Ga. 379; *National Home Bldg. & L. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; *Stacy v. Glenn Ellyn Hotel & Springs Co.* (1906) 223 Ill. 546, 8 L.R.A. (N.S.) 966, 79 N. E. 133; *Batesburg Cotton Oil Co. v. Southern R. Co.* (1916) 103 S. C. 494, 88 S. E. 360, 11 N. C. C. A. 263; *Indianola v. Gulf, W. T. & P. R. Co.* (1882) 56 Tex. 594; *St. Clair v. Rutledge* (1902) 115 Wis. 583, 95 Am. St. Rep. 964, 92 N. W. 234.

In *Shrewsbury v. North Staffordshire R. Co.* (1865) 35 L. J. Ch. N. S. (Eng.) 172, *Kindersley, V. C.*, said: "When you speak of ultra vires of the company, you mean one or other of two things: either that you cannot bind all the shareholders to submit to it, or that it is ultra vires in this respect, that the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbor. But in the present case the latter question does not arise. The question is whether it is ultra vires as being beyond the power of the directors to bind all the shareholders." This passage was quoted with approval by *Blackburn, J.*, in *Taylor v. Chicester & M. R. Co.* (1867) L. R. 2 Exch. (Eng.) 377.

In *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 2 Eng. Rul. Cas. 304, Lord Cairns made the following remarks with regard to the distinction between the two instruments which the English Joint Stock Companies Act requires to be registered: "With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is ultra vires not only of the di-

rectors of the company, but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act extra vires the directors, but intra vires the company."

The failure to proceed "in the way or through the officers designated by the law" was adverted to as a defense standing in a narrower ground than the defense of ultra vires, in *Metropolitan Stock Exch. v. Lydonsville Nat. Bank* (1904) 76 Vt. 303, 57 Atl. 101.

In *Alabama Consol. Coal & I. Co. v. Baltimore Trust Co.* (1912) 197 Fed. 347, the court adverted to the "scarcely accurate" use of the expression "ultra vires" as applied to acts which the corporation has the power of doing provided it does them in a certain prescribed way.

In *Savannah Ice Co. v. Canal-Louisiana Bank & T. Co.* (1913) 12 Ga. App. 818, 825, 79 S. E. 45, the court, adverting to the fact that two classes of ultra vires acts are mentioned in the reports, "one which is in excess of charter power, and the other where an officer of a corporation undertakes to do an act within the charter power which he has no authority to perform," proceeded thus: "In reality it is a misnomer to speak of the latter character of acts as ultra vires, because such acts are within the power of the corporation, and are simply in excess of the authority of the officer or agent attempting to perform them. Strictly speaking, an ultra vires act of a corporation is one which it has no power under its charter to perform."

In *Minnesota Thresher Mfg. Co. v. Langdon* (1890) 44 Minn. 37, 46 N. W. 310, the following remarks were made: "The term 'ultra vires' is used in two different senses: First, as to the state, meaning an act which transcends the powers conferred by law on the corporation,—something which is not within the scope of the powers of a corporation to perform under any circumstances or for any purpose, as, for example, where a corporation authorized only to build a railroad engages in banking. This is the primary, and really only proper, sense of the term. But it is also used in a secondary sense, as something beyond the power of the majority to bind dissenting stockholders, or something in violation of the legal rights of creditors, and sometimes in the sense merely of something beyond the authority of corporate agents or executive officers. The primary meaning of the term applies only when the public is concerned; the secondary meanings, when the question is between the corporation and its shareholders or creditors, or other parties dealing with it, or between it and its agent or executive officers." The court, taking the position that the payment of unearned dividends by a certain company was ultra vires in the secondary sense, held that the dividends could not be recovered by a corpo-

edly been a source of some confusion.² Thus, the general language employed in one of the earlier cases with respect to a contract which was merely defective in point of form misled an eminent judge into treating the decision as a precedent favoring the theory that corporations may be estopped from alleging the invalidity of contracts which are ultra vires in the sense of being entirely beyond their powers.³ On the other hand, the courts, when discussing the right of recovery upon contracts of the latter description, have sometimes relied upon cases which involved merely the au-

thority of agents^{3a} or an informality.⁴ On the other hand, decisions relating to such contracts have not infrequently been cited in cases in which mere irregularities were involved.⁵

7. Estoppel with respect to contracts beyond the powers of the corporate agents making them.

The contracts of a corporation which are invalid merely in respect of their being in excess of the powers of the directors or other agents by whom they were made may obviously be ratified by the corporation itself.¹ Hence there is, in

ration which purchased the property and assets of the payor. But the classification, and the deduction drawn from it, would possibly not be approved in all jurisdictions.

²In *Alabama Consol. Coal & I. Co. v. Baltimore Trust Co.* (1912) 197 Fed. 347, the court observed that "it would be better" if the phrase "ultra vires" were applied only to "transactions altogether foreign to the purposes for which the corporation was chartered."

In *Minnesota Thresher Mfg. Co. v. Langdon* (1890) 44 Minn. 42, 46 N. W. 310, it was remarked that "the twofold use of the term is unfortunate in obscuring a subject in itself sufficiently perplexing."

³One of the authorities cited by Comstock, Ch. J., in *Bissell v. Michigan Southern & N. I. R. Cos.* (1860) 22 N. Y. 258, was *Bulkley v. Derby Fishing Co.* (1817) 2 Conn. 252, 7 Am. Dec. 271, where, in an action brought upon a policy of insurance not countersigned by the secretary of the company, the court argued thus: "I consider it to be undoubted law, that a corporation may incur liability different from the prescriptions of its charter. Like individuals, it is responsible in the manner in which it permits its agents to hold it out to the world. The corporation should disavow the practice, or the usages of their agents in the transaction of business shall be presumed to have their sanction. . . . A corporation certainly cannot, by its own act, enlarge its own capacities, powers, or rights; but it would be strange to say that it cannot thus voluntarily incur liabilities. If a corporation, by a corporate act, appoints an agent, under any name or title whatever, for the purpose of making, in its own behalf, any contract which it has a right to make, can the corporation itself impeach such a contract, made in its name, by that agent, by alleging its own want of power to make such an appointment, or to contract by such an agent? The present objection must, to avail the defendants, go to this extent. But such a doctrine is in violation of all principle. A corporate body, by transgressing the limits of its charter, may doubtless incur a forfeiture of its privileges and powers; but whoever imagined that it could thus acquire an immunity, to the prejudice of third per-

sons?" As was pointed out in *Hood v. New York & N. H. R. Co.* (1852) 22 Conn. 505, 9 Am. Dec. 149, where the question involved was one of power, not of form, the doctrine applied in this case really was this: that "if a corporation has the power to do a thing, and is in the habit of doing it, in a particular way, it may bind itself to third persons, though it do not pursue the exact mode prescribed in the charter."

^{3a}For example, in *H. Scherer & Co. v. Everest* (1909) 94 C. C. A. 346, 168 Fed. 822, the court referred to *Bird v. Daggett* (1867) 97 Mass. 494.

In *Clarke v. Sarnia Street R. Co.* (1877) 42 U. C. Q. B. 39, the court cited *Bank of Australasia v. Brillat* (1847) 6 Moore, P. C. C. 152, 13 Eng. Reprint, 642, 12 Jur. 189. See next section, note 6.

In *Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & T. Co.* (1916) 169 Ky. 840, 185 S. W. 156, a case involving a contract which was ultra vires as being beyond the power of the corporation itself, one of the precedents relied upon was *Kenyon Realty Co. v. National Deposit Bank* (1910) 140 Ky. 133, 31 L.R.A.(N.S.) 169, 130 S. W. 965, in which the defense interposed was simply a want of authority on the part of the corporate agent by whom the contract was made.

⁴See, for example, *Bradley v. Bullard* (1870) 55 Ill. 417, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563; *Northland Produce Co. v. Stephens* (1911) 116 Minn. 23, 133 N. W. 93.

⁵In *Missouri P. R. Co. v. Sidell* (1895) 14 C. C. A. 477, 35 U. S. App. 152, 67 Fed. 464, where the authorities referred to were *Hitchcock v. Galveston* (1877) 96 U. S. 351, 24 L. ed. 662; *Ohio & M. R. Co. v. McCarthy* (1877) 96 U. S. 267, 24 L. ed. 695, and *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 70, 20 Am. Rep. 504.

In *Seymour v. Spring Forest Cemetery Asso.* (1895) 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365, where *Whitney Arms Co. v. Barlow* (N. Y.) supra, was cited.

¹For a case recognizing the doctrine that a ratification may be inferred from the receipt and retention of the benefits of the invalid transaction, see *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.* (1882) 90 N. Y. 607; *Manhattan Hard-*

a logical point of view, no reason why they should not also be treated as being susceptible of indirect confirmation through an estoppel, whether based upon

subsequent conduct or upon some other element. Such an estoppel has been predicated in numerous cases.²

But it is obvious that a person dealing

ware Co. v. Phalen (1880) 128 Pa. 116, 18 Atl. 428; Presbyterian Board v. Gilbee (1907) 212 Pa. 310, 61 Atl. 925; Pannebaker v. Tuscarora Valley R. Co. (1907) 219 Pa. 60, 67 Atl. 923.

For a case in which the ratio decidendi was that the contract in question had never been confirmed by the corporation, see *Re London & N. Ins. Corp.* (1869) L. R. 4 Ch. (Eng.) 682, where Giffard, L. J., remarked: "The whole agreement was beyond the powers of, at least, one of the parties to it, and consequently it was wholly void. In fact, the parties seemed to have had a notion that this agreement would not be valid, for one of the provisions was that it should be confirmed by a meeting of the amalgamated company, and it was clear that without confirmation the agreement was illegal." See also *Irvine v. Union Bank* (1876) L. R. 2 App. Cas. (Eng.) 366, 46 L. J. P. C. N. S. 87, 37 L. T. N. S. 176, 25 Week. Rep. 682.

In *Phosphate of Lime Co. v. Green* (1871) L. R. 7 C. P. (Eng.) 43, where the evidence was held to show ratification, Willes, J., made the following remarks: "I do not go along with the argument of Mr. Benjamin that, assuming that the directors had no authority to make the compromise, yet, inasmuch as the company received some benefit from the transaction, the company are not in a condition to say that the transaction was absolutely void, but only that it was what he calls relatively void, so that, if the company wished to avoid it, they could only do so by rescinding it and returning what they had received under it. That may be very good sense if the matter be looked at in a moral point of view; but it is not law. If the act done be unauthorized, the law makes it absolutely void at the election of the person on whose behalf it is done, so that he may repudiate it or take the benefit of it as he chooses; but it is not a relative nullity, in the sense that the person not choosing to ratify it is to perform some condition precedent or do some act before he declares it to be void. It comes round, therefore, to this alternative: either the defendants must establish that the directors had authority at the time, or that the company did, by their subsequent conduct, assent to and ratify the act of the directors so as to bind themselves as if there had been a previous authority."

In *Spackman v. Evans* (1868) L. R. 3 H. L. (Eng.) 244, Lord Romilly made the following remarks: "It seems to be admitted that, if all the members of the company had thought fit to assent to the transaction, it would have been good. This, to use the expression of Lord Mansfield in the great case of *Zouch ex dem. Abbot v. Parsons* (1807) 3 Burr. 1794, 97 Eng. Reprint, 1103, L.R.A.1917A.

1 W. Bl. 575, 96 Eng. Reprint, 332, proves it to be voidable only, for a void transaction is incapable of confirmation. . . . I take it to be a cardinal rule that whenever the validity of an irregular transaction depends on the confirmation of any one or more persons, that transaction is voidable only, and not void. Of course, if this company had bought mines, or entered into a contract to set up a steam packet business, this could have been simply void, and could not have bound the company or anyone, because they could do nothing that was beyond the objects of the company; but, on the other hand, the directors might do anything, however irregular, in promoting the objects of the company, provided it was done bona fide; and this could not be avoided unless steps were speedily taken for that purpose."

² "The term [ultra vires] has been applied to acts of directors or officers which are outside and beyond the scope of their authority, and therefore are invasions of the rights of stockholders, but which are within the powers of the corporation. In such a case the act may become binding by ratification, consent, and acquiescence, or by the corporation receiving the benefit of the contract." *National Home Bldg. Assn. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619. An earlier case cited was *Ottawa Northern Pl. Road Co. v. Murray* (1853) 15 Ill. 336.

In *Anglo-Australian & U. Family L. Ins. Co. v. British Provident L. & F. Ins. Soc.* (1862) 3 Giff. 521, 66 Eng. Reprint, 515, decree modified in (1862) 4 DeG. F. & J. 341, 45 Eng. Reprint, 1215, Stuart, V. C., referring to a contract under which one company had purchased the business, etc., of another company, said: "It is clear that the defendants' company have had the benefit of it, and, having had the benefit, I think they are bound by the obligations in the deed."

In *Re Bahia & S. F. R. Co.* (1868) L. R. 3 Q. B. (Eng.) 585, 9 Best & S. 844, 37 L. J. Q. B. N. S. 176, 18 L. T. N. S. 467, 16 Week. Rep. 762, the purchasers of shares in a company paid the value in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferrers had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery. Held, that the facts were such as to bring the case within the principle that "if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact," and that the claimants

with corporate agents is bound to take notice of the fact that their powers can-

not be more extensive than those possessed by the corporation itself.³

were entitled to recover from the company the value of the shares at the time they were deprived of them. This decision was followed in *Hart v. Frontino Gold Min. Co.* (1870) L. R. 5 Exch. (Eng.) 111, 39 L. J. Exch. N. S. 111, 22 L. T. N. S. 30.

In *Bishop v. Balkis Consol. Co.* (1890; C. A.) L. R. 25 Q. B. Div. (Eng.) 512, affirming (1890) L. R. 25 Q. B. Div. 77, one Powter, the registered owner of shares in the defendant company, transferred them all to two persons, and afterward purported to sell a portion of them to one Lupton, who in his turn transferred them to the plaintiff Cuthbert. Both of these later transfers were "certificated" by the secretary of the company. The plaintiff Bishop was Cuthbert's principal in this transaction, and, on the faith of the certification when the transfer from Lupton to Cuthbert was made, Bishop paid Lupton the price of the shares. On the ground that the shares really belonged to the first transferees of Powter, the company refused to recognize the title of the plaintiffs. The contention that the doctrine of estoppel could be made available to assist the plaintiffs was rejected. Lindley, L. J., speaking for the court, said: "The doctrine of estoppel cannot put the company in a worse position than if a certificate of Lupton's transferrer, Powter, had been produced. If it had, still the transfer from Powter to Lupton would have been invalid, and Lupton, without any default on the part of the company, would not have been able to transfer the shares to Cuthbert. The fact, then, which the company is estopped from denying, would not, if true, have entitled the plaintiff to the 135 shares. The loss of the shares, as distinguished from the loss of the money paid for them, is attributable not to any misrepresentation by the company, but to something quite different; viz., the invalidity of the transfer from Powter to Lupton. If, indeed, the certification amounted to a warranty of Lupton's right to transfer, or if it were equivalent to a certificate by the company that Lupton was the registered owner of the shares which he purported to transfer to Cuthbert, the case would be very different, and would be indistinguishable from *Re Bahia & S. F. R. Co.* [see supra] . . . The real truth is that the plaintiffs lost their money by reason of a misrepresentation for which no action lies; and they lost the shares transferred to them by Lupton because he had no title to them, and the company is not estopped from denying this."

In *Moss v. Rossie Lead Min. Co.* (1843) 5 Hill (N. Y.) 137, the question, "Shall those by whom the company are furnished with articles of doubtful utility be made responsible for the excess?" was thus answered: "I think not. This company was authorized by statute to exercise a general agency, to which a large discretion was necessarily incident. The exigencies of their L.R.A.1917A.

business and conditions of their affairs were known to themselves only. Acts done by such a company which bear an equivocal appearance because they may be within or without the corporate power of the capital employed must be tested by such rules as we apply to the acts of a general agent. The man who deals with such an agent is not bound to know that the transaction is within the scope of his authority. If it may be so, the principal cannot repudiate unless he can show that the person with whom his agent dealt was privy to the fact of the excess."

"Where a corporation has charter authority to do an act, it will always be estopped to question the authority of one whom it held out as having the power to act for it, or whose act has been ratified by the corporation after its performance." *Savannah Ice Co. v. Canal-Louisiana Bank & T. Co.* (1913) 12 Ga. App. 818, 79 S. E. 45, citing *Hazelhurst v. Savannah, G. & N. A. R. Co.* (1871) 43 Ga. 14, 55; *City F. Ins. Co. v. Carriugi* (1871) 41 Ga. 673.

See also *Bensiek v. Thomas* (1895) 13 C. A. 457, 27 U. S. App. 765, 66 Fed. 104; *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* (1904) 127 Iowa, 350, 69 L.R.A. 968, 109 Am. St. Rep. 387, 101 N. W. 742; *Smith v. Richardson* (1898) 77 Mo. App. 422; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.* (1882) 90 N. Y. 607 (approving the rule laid down in *Kent v. Quicksilver Min. Co.* (1879) 78 N. Y. 159, 4 Mor. Min. Rep. 47, that "the express assent of stockholders is not necessary to work an equitable estoppel in them"); *Byron v. First Nat. Bank* (1915) 75 Or. 296, 146 Pac. 516; *Batesburg Cotton Oil Co. v. Southern R. Co.* (1916) 103 S. C. 494, 88 S. E. 360, 11 N. C. C. A. 263; *Crowder State Bank v. Aetna Powder Co.* (Okla.) post, 1021.

In *Potter v. New York Infant Asylum* (1887) 44 Hun (N. Y.) 367, affirmed in (1890) 118 N. Y. 684, 23 N. E. 1147, the law was thus laid down: "When, upon the request of an agent of a corporation, money has been loaned, goods supplied, or services performed, and the corporation has received the benefit, to hold it absolved from liability because the agent went beyond the letter of his power would be, in the language of the cases, to encourage fraud. . . . And if the liability is restricted to a quantum meruit, no injustice can be done to the corporation." The limitation implied in the closing sentence of this extract indicates a standpoint different from that shown by most of the cases. According to the usually accepted theory, the effect of an estoppel as predicated from the acceptance of benefits is to render the corporation liable upon the contract itself.

³ "It can never be presumed that an agent of a corporation had authority to transact

Whenever the scope of an agent's authority is considered with reference to this criterion, it is obvious that, in the final analysis, the actual question presented is whether the contract sued upon was within the powers of the corporation. In this point of view, an action

based on an agent's contract which exceeds those powers cannot be maintained on the ground of an estoppel, (1) if the doctrine adopted as controlling for the purpose of the case is that the principle of estoppel is not applicable in respect of such contracts,⁴ or (2) if that doc-

business which the corporation itself was not, by its charter, authorized to engage in." *Alexander v. Cauldwell* (1881) 83 N. Y. 480, 5 Mor. Min. Rep. 650. For similar phraseology, see *Planters' Cotton Oil Co. v. Guaranty State Bank* (1916) — Tex. Civ. App. —, 188 S. W. 38.

"No act done by an officer of an incorporated company in furtherance of a business venture which is outside of the company's corporate powers can be said to be an act which is within the scope of the apparent or customary powers of such officer." *Farmers' & M. Nat. Bank v. Smith* (1896) 23 C. C. A. 80, 40 U. S. App. 382, 77 Fed. 120.

In *Chambers v. Manchester & M. R. Co.* (1864) 5 Best & S. 588, 122 Eng. Reprint, 951, *Crompton, J.*, remarked: "I think the directors of these companies [railway companies] are in the position of special agents, having authority to affix the seal of the company to deeds when not ultra vires, but have no power to affix the seal where the legislature have declared, directly or by implication, that such deeds are not to be made. And the company are not bound by the seal affixed by the directors to a deed, not merely where there is illegality in it, but where the directors have not authority to affix it. The power of a partner to bind the partnership is in the nature of that of an agent to bind his principal; and with some limitations, such is the power of the directors of a company to bind the company."

⁴In *Hoffman v. John Hancock Mut. L. Ins. Co.* (1875) 92 U. S. 161, 23 L. ed. 539, the grounds upon which it was held that no action could be maintained upon an insurance policy against a company whose agent had taken a horse in part payment of the premium were thus stated: "If the agent had authority to take the horse in question, he could have taken other horses from Hoffman, and have taken them in all cases. This would have carried with it the right to establish a stable, employ hands, and do everything else necessary to take care of the horses until they could be sold. The company might thus have found itself carrying on a business alien to its charter, and in which it had never thought of embarking. The exercise of such a power by the agent was liable to two objections,—it was ultra vires, and it was a fraud as respects the company. Hoffman must have known that neither Goodwin nor Thayer had any authority to enter into such an arrangement, and he was a party to the fraud. No valid contract as to the company could arise from such a transaction."

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In *Re Sea, Fire & Life Assur. Co.* (1854) 5 DeG. M. & G. 465, 43 Eng. Reprint, 951, the claim of one insurance company against another in respect to a sum of money alleged to be payable under a contract by which the former transferred its business to the latter was held to be enforceable on the ground that the facts in evidence rendered it unnecessary to determine whether the directors of the vendor exceeded their powers in agreeing to the transaction, because it was certainly approved, adopted, and accepted by the directors of the vendor. This judgment was reversed in *Ernest v. Nicholls* (1857) 6 H. L. Cas. 401, 10 Eng. Reprint, 1351, 3 Jur. N. S. 919, on the ground that the contract was wholly void as regards the vendor corporation itself. Lord Cranworth referred to some earlier cases which decided that creditors can render a company liable only on contracts made with the directors according to the deed under which it is organized.

See also *Medlin Mill. Co. v. Moffatt Commission Co.* (1915) 218 Fed. 686, where, in an action brought by a corporation whose treasurer had conspired with the defendant to divert its funds, it was held that the acts of the treasurer, being of such a nature that they were ultra vires of the plaintiff itself, were not binding on it.

In *Kraniger v. People's Bldg. Soc.* (1895) 60 Minn. 94, 61 N. W. 904, where a member of the defendant society had accepted from it a loan which on its face exceeded the authorized amount, the contention of counsel that the case should be regarded as falling within the category which consists of those in which the contract is merely beyond the powers of an agent was based upon the notion that, as the secretary was the agent of the society for the purpose of receiving money borrowed in its name, the receipt of the money by the secretary was the receipt of it by the society itself. But the court said: "This, it seems to us, is to beg the question, and to reason in a circle. The secretary was the agent of the society only to receive money authorized to be borrowed by the articles of association. Beyond this he had no authority, actual or apparent, to act for or bind the corporation. The proposition that the receipt by him of money which he was not authorized to receive, and of which it never received the benefit, is not a receipt of the society, so as to render it liable either upon the contract or for money had and received, is illustrated and supported by the case of *Western Nat. Bank v. Armstrong* (1893) 152 U. S. 346-352, 38 L. ed. 470-473, 14 Sup. Ct. Rep. 572-574."

trine is assumed to be applicable, but there is no evidence upon which an estoppel can be predicated.⁵

In one case where an action was held to be maintainable on a promissory note given to the plaintiff for a loan made in pursuance of a contract which contained some stipulations which were ultra vires of the directors, the ratio decidendi was the general rule of the law of contracts, "that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts, some of which are legal and some illegal, at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot."⁶ In this case, the court was not called upon to consider the question whether an estoppel had been created by the borrowing company's enjoyment of the benefits accruing from the plaintiff's performance of the particular stipulations which were treated as being ultra vires of the directors. On general principles, it is clear that such a question must have been answered in the affirmative.

8. Estoppel with respect to contracts defective in point of form.

So far as regards the operation of the principle of estoppel, the nature of the distinction between contracts which are wholly beyond the scope of the corporate powers and contracts which are invalid merely by reason of some informality is exhibited under one of its aspects in such statements as the following:

"Where a party deals with a corporation in good faith—the transaction is not ultra vires—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them."¹

"When a corporation is acting within the general scope of the powers conferred

In *American Nat. Bank v. E. W. Adams & Co.* (1914) 44 Okla. 129, L.R.A.1915B, 542, 143 Pac. 508, the cashier of the defendant bank agreed with two persons that a stock of shoes might be stored in the bank building, and guaranteed to them that the shoes would be delivered to the proper party upon compliance with certain conditions. Held, that allowing a stock of shoes in which the bank had no interest to be thus stored was a transaction ultra vires of the bank, and consequently that the bank was not bound by the cashier's contract of guaranty.

See also *Planters' Cotton Oil Co. v. Guaranty State Bank* (1916) — Tex. Civ. App. —, 188 S. W. 38 (money advanced to manager for the purpose of speculating in cotton).

⁵ Such was the situation in *Alexander v. Cauldwell* (1881) 83 N. Y. 480, 5 Mor. Min. Rep. 650, where the action was brought by a retail coal dealer against the trustees of a coal mining company to recover the balance due for coal delivered in pursuance of an ultra vires contract.

⁶ *Bank of Australasia v. Breillat* (1847) 6 Moore, P. C. C. 152, 13 Eng. Reprint, 642, where the defendant was the chairman of the borrowing company. The court said: "Here, in our opinion, the directors had power to borrow the money for the company, and, of course, power to bind the company for the engagement. They did so bind them, and they engaged that the company should do, in addition, certain other acts, and which we assume that, without their consent, the company could not be compelled to do. The engagements are entirely distinct. Can the shareholders say, L.R.A.1917A,

Because we cannot be compelled to perform those engagements to which the directors had no authority to bind us, therefore, we will not perform those engagements to which they had authority to bind us? The company cannot have all the benefit for which they agreed to advance the £150,000, therefore they shall not even have their money? We think not. The only consequence would be that those stipulations which are ultra vires of the directors could not be enforced; and if the object of the present action were to enforce them, or to recover damages for a breach of them, it would be necessary to examine them more particularly than the view which we take of the case requires."

¹ *Merchants' Nat. Bank v. State Nat. Bank* (1870) 10 Wall. (U. S.) 604, 19 L. ed. 1008, quoted in *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* (1898) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, where the court remarked: "The distinction between the doing by a corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

In *Zabriskie v. Cleveland, C. & C. R. Co.* (1859) 23 How. (U. S.) 381, 16 L. ed. 488, it was stated that the principle which permits an action to be maintained on a contract that is not "clothed in authentic form" "does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization."

upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws."²

"There is a clear distinction . . . between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations in a particular instance, when such abuse or failure is not known to the other contracting party."³

In *Boisgerard v. New York Bkg. Co.* (1844) 2 Sandf. Ch. (N. Y.) 23 (contract of bank not signed by cashier as required by statute), Sandford, V. C., referring to certain cases cited by defendant's counsel, said that they "were those of agreements founded upon or intended to effect some design or operation prohibited by law. They came within the well-defined principle that contracts founded upon an unlawful act cannot be enforced by action. They have no application to a contract lawful in its objects, but defectively executed; or which, made for some legitimate purpose, was inoperative and null for informality."⁴

² *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, quoted in *Anglo-American Land, Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 89, 132 Fed. 721, and *Stacy v. Glenn Ellyn Hotel & Springs Co.* (1906) 223 Ill. 546, 8 L.R.A.(N.S.) 966, 79 N. E. 133.

³ *Davis v. Old Colony R. Co.* (1881) 131 Mass. 258, 41 Am. Rep. 221.

⁴ See § 34, *infra*.

⁵ "The question of corporate liability in such case is one of agency as affected by the apparent scope of the authority committed to the agent who acts for the corporation, and strangers are not held to notice of by-laws placing special restrictions on the apparent authority of corporate agents." *Buck Creek Lumber Co. v. Nelson* (1914) 188 Ala. 243, 66 So. 476.

⁶ For examples of the kind of phraseology, see *Royal British Bank v. Turquand* (1856) 6 El. & Bl. 327, 119 Eng. Reprint, 886, 25 L. J. Q. B. N. S. 317, 2 Jur. N. S. 663; *Moran v. Miami County* (1862) 2 Black (U. S.) 722, 17 L. ed. 342; *Bulkley v. Derby Fishing Co.* (1817) 2 Conn. 252, 7 Am. Dec. 271; *Hackensack Water Co. v. De L.R.A.* 1917A.

In the point of view thus indicated, the footing upon which the two classes of cases are differentiated is that a person who enters into a contract with a corporation is bound to know whether it transcends the corporate powers,⁴ but is not bound to know whether it is formally defective;⁵ or, in another point of view, he is entitled to presume that the necessary formalities have been complied with.⁶ In cases involving the latter situation, therefore, the circumstances are treated as being *prima facie* appropriate for the predication of that species of estoppel which is inferred for the protection of one who has been misled by reason of his justifiable reliance upon the assertions or conduct of another party.⁷

Manifestly the advantage of such an estoppel cannot be claimed where the complainant entered into the contract with actual or imputed notice of its invalidity.⁸ Under such circumstances the only description of estoppel of which he

Kay (1883) 36 N. J. Eq. 548; *Miller v. American Mut. Acci. Ins. Co.* (1893) 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39.

⁷ In *Miller v. American Mut. Acci. Ins. Co.* (1893) 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39, the court said: "Certainly the contract in question was within the apparent scope of the power of this company, and a stranger in good faith dealing with it had a right to assume that the necessary steps had been taken to accept the power its officers were assuming to have, and the company must be held estopped to show that a majority of its shareholders had not accepted" the amendment of its charter by which the power in question had been conditionally granted.

See also *Alabama Consol. Coal & I. Co. v. Baltimore Trust Co.* (1912) 197 Fed. 347; *Boyce v. Montauk Gas Coal Co.* (1892) 37 W. Va. 73, 16 S. E. 501.

As to the rule that noncompliance by directors with regulations as to "indoor" or "internal management" of a company does not invalidate their actions as regard a third person without notice of the irregularity, see, generally, *Machen, Corp.* §§ 1473 et seq.

It may be mentioned that the right of enforcing contracts which are merely informal has also been asserted on the ground that the court itself is entitled to presume that the necessary formality was not wanting. *Re British Provident L. & F. Ins. Soc.* (1863) 9 Jur. N. S. 631, 1 De G. J. & S. 488, 46 Eng. Reprint, 194, 32 L. J. Ch. N. S. 326, 8 L. T. N. S. 98, 11 Week. Rep. 385.

⁸ In *Commercial Bank v. Great Western R. Co.* (1865) 3 Moore, P. C. C. N. S. 295, 16 Eng. Reprint, 112, affirming (1864) 2 U. C. Err. & App. 285, the right of the plaintiff to recover a loan was thus discussed: "The bank had the fullest information

can avail himself is that which is discussed in the following paragraph.

Another conception to which the right of action upon a formally defective contract has been referred is that of an acceptance and retention of benefits.⁹ So far as the remedial rights of the plaintiff are concerned, it is of course, immaterial whether this claimant is regarded

as raising an estoppel or justifying the inference of a ratification.

In many of the cases in which recovery has been allowed, the defect alleged was that the contract had not been assented to by the ordained proportion of the stockholders voting at a meeting convened in a certain specified manner.¹⁰ But some of the statutory provisions

that the account which was opened on behalf of the Great Western Company was for the purpose of their making advances for the Detroit and Milwaukee Railway. They must have known that the company could not apply its funds in aid of another company without the authority of the legislature. They must therefore, upon the opening of the account, have been directed at once to the source of this extraordinary power, and must have learnt the conditions under which it was to be exercised. The words of the act are negative and prohibitory: 'No such expenditure shall be incurred unless by a vote to that end of two thirds of the shareholders.' The case differs in this respect from the Royal British Bank v. Turquand (1856) 6 El. & Bl. 327, 119 Eng. Reprint, 886, 25 L. J. Q. B. N. S. 317, 2 Jur. N. S. 663, for there the clause of the deed of settlement was an empowering clause, enabling the directors to borrow on bond such sums as should, from time to time, by a general resolution of the company, be authorized to be borrowed; and this very distinction was taken by Chief Justice Jervis in that case, for, after observing that parties dealing with the bank were not bound to do more than to read the statute and the deed of settlement, he adds, 'And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions.'

In *Re Magdalena Steam Nav. Co.* (1860) Johns. V. C. (Eng.) 690, 70 Eng. Reprint, 597, involving the enforceability of bonds which had been issued to members of the company, the assignors of the claimants, in pursuance of resolutions passed by shareholders representing less than the prescribed proportion of total amount of shares, Page Wood, V. C., laid it down that the present holders of the bond could "only establish their claim through the equities of those by whom the advances were applied in satisfaction of the debts and liabilities of the company." In this point of view recovery was precluded for the reason that "persons who are not only members of the company, but who are present at a meeting where an irregular issue of debentures is resolved upon, cannot afterwards take their stand upon securities irregularly issued to them in pursuance of such resolution, and claim the rights which a stranger might assert who had accepted such debentures bona fide, without any information as to the illegality of their issue."

Compare also *Chicago R. & Equipment Co. v. National Hollow Brake Beam Co.* (1913) L.R.A.1917A.

173 Ill. App. 573, and *Cicotte v. Anciaux* (1884) 53 Mich. 227, 18 N. W. 793, in both of which it was held that members of the corporations in question could not impeach the validity of the transactions in question.

⁹ For cases in which the liability of the corporation was affirmed, see *Homersham v. Wolverhampton Waterworks Co.* (1851) 6 Exch. 142, 6 Eng. Ry. & C. Cas. 790, 20 L. J. Exch. N. S. 193; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 135; *Cozart v. Georgia R. & Bkg. Co.* (1875) 54 Ga. 379; *Lurton v. Jacksonville Loan & Bldg. Assn.* (1900) 187 Ill. 141, 58 N. E. 218; *Wood v. Supreme Ruling, F. M. C.* (1904) 212 Ill. 532, 72 N. E. 783; *Steele v. Fraternal Tribunes* (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; *Stacy v. Glenn Ellyn Hotel & S. Co.* (1906) 223 Ill. 546, 8 L.R.A.(N.S.) 966, 70 N. E. 133; *Atchison, T. & S. F. R. Co. v. Fletcher* (1886) 35 Kan. 236, 10 Pac. 506; *Bell v. Kirkland* (1907) 102 Minn. 213, 13 L.R.A.(N.S.) 796, 120 Am. St. Rep. 621, 113 N. W. 271; *Clearwater County State Bank v. Bagley-Ogema Teleph. Co.* (1911) 116 Minn. 4, 36 L.R.A.(N.S.) 1132, 133 N. W. 91, Ann. Cas. 1913A. 622; *Eastman v. Parkinson* (1907) 133 Wis. 375, 13 L.R.A.(N.S.) 921, 113 N. W. 649.

"That kind of plunder which holds onto the property, but pleads the doctrine of ultra vires against the obligation to pay for it, has no recognition or support in the laws of this state." *Seymour v. Spring Forest Cemetery Assn.* (1895) 144 N. Y. 333, 26 L.R.A. 859, 39 N. E. 365, where there had been certain technical irregularities in the issue of the bonds.

¹⁰ *Wood v. Corry Waterworks Co.* (1890) 12 L.R.A. 168, 44 Fed. 146; *Campbell v. Argenta Gold & S. Min. Co.* (1892) 51 Fed. 1; *Missouri P. R. Co. v. Sidell* (1895) 14 C. C. A. 477, 35 U. S. App. 152, 67 Fed. 464; *Westerlund v. Black Bear Min. Co.* (1913) 121 C. C. A. 640, 203 Fed. 599; *Eakin v. St. Louis, K. C. & N. R. Co.* (1876) 3 Cent. L. J. 655, Fed. Cas. No. 4236; *Hamilton Trust Co. v. Clemes* (1900) 163 N. Y. 423, 57 N. E. 614, affirming (1897) 17 App. Div. 153, 45 N. Y. Supp. 141; *Atlantic Trust Co. v. Crystal Water Co.* (1902) 72 App. Div. 539, 76 N. Y. Supp. 647; *Manhattan Hardware Co. v. Phalen* (1880) 128 Pa. 110, 18 Atl. 428; *Boyce v. Montauk Gas Coal Co.* (1892) 37 W. Va. 73, 16 S. E. 501; *Eastman v. Parkinson* (1907) 133 Wis. 375, 13 L.R.A.(N.S.) 921, 113 N. W. 649.

In *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* (1892) 145 U. S. 393,

have been regarded as operating so as to render contracts not made in compliance with them ultra vires in the strict sense of that expression. Where such a construction is placed upon them, it is clear, on the one hand, that, in those

jurisdictions in which the principle of estoppel is deemed to be inapplicable in respect to contracts which are wholly unauthorized, no recovery can be had by virtue of the operation of that principle;¹¹ and, on the other hand, that an

403, 36 L. ed. 738, 752, 12 Sup. Ct. Rep. 953, 956, the court said: "Although this statute, in terms, declares that any such lease made without the written consent of the Illinois stockholders 'shall be null and void,' it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed by them only. It did not limit the scope of the powers conferred upon the corporation by law, an excess of which could not be ratified or be made good by estoppel; but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time or otherwise, to deny."

In *Commonwealth Trust Co. v. Salem Light, Heat & P. Co.* (1914) 77 N. H. 146, 89 Atl. 452, one of the defenses interposed in a suit to foreclose a mortgage was that the votes authorizing the contract were passed at a stockholders' meeting held outside the state of the corporation's domicile. But the court approved the following statement: "On equitable principles, the corporation itself may be estopped from denying the validity of its acts done outside the state of its incorporation. There is no apparent reason why the doctrine of estoppel may not be held to apply to such corporate acts, if invalid, as well as to any other, where the corporation received the benefit of its ultra vires contracts." *Thomp. Corp.* § 504; *Galveston, H. & H. R. Co. v. Cowdrey* (1870) 11 Wall. (U. S.) 459, 20 L. ed. 199.

In *Georgia Granite R. Co. v. Miller* (1916) 144 Ga. 665, 87 S. E. 897, it is laid down in the syllabus prepared by the court that, if the deed of trust executed to secure railway bonds contained "a recital that notice was duly given, that a majority of all the capital stock was represented in person or by proxy, and that the stockholders by unanimous vote authorized the issuance of such bonds so secured, and if the bonds found their way into the hands of innocent purchasers, such bonds and mortgage or deed of trust were not so void that they could not be ratified, or that the company might not be estopped from contesting their validity, even if, in fact, notice of the stockholders' meeting was not published for the time stated in the statute, and one or possibly two persons who were stockholders, holding each one share of stock, did not receive notice of the meeting."

In *Dillon v. Myers* (1915) 58 Colo. 492, 146 Pac. 268, Ann. Cas. 1916C, 1032, where the suit was brought to cancel a trust deed, the statute provided that the directors of the company should have power

to execute a mortgage with the consent of a majority of the stockholders at a regular meeting, and that a mortgage executed without such consent should be "absolutely void." Held, that the word "void" meant merely "voidable," and that the company, and a fortiori outside parties, could not raise the question of ultra vires. In view of the categorical language of the enactment, the correctness of the decision seems to be quite disputable. It may be conceded that the word "void" in statutes has often been construed as "voidable;" but it would seem that some significance should be ascribed in this instance to the intensive adverb "absolutely."

For another case in which it was held that an acceptance by a corporation of the benefits of an informal contract estops it from maintaining an action to set it aside, see *McKee v. Title Ins. & T. Co.* (1911) 159 Cal. 206, 113 Pac. 140.

¹¹ In *Ernest v. Nicholls* (1857) 6 H. L. Cas. 401, 10 Eng. Reprint, 1351, where it was held that the approval of a majority of shareholders was a condition precedent to the validity of the transaction under review, Lord Wensleydale said: There can be no remedy, either at law or in equity, against a company upon any contract entered into in which a director of the company was a party, and in which he was interested, unless the terms of that clause [§ 29 in 7 & 8 Vict. chap. 110, the earlier Companies Act] have been complied with, and that not upon any ground or matter of form, but one entirely of substance.

In *Southern B. & L. Asso. v. Casa Grande Stable Co.* (1900) 128 Ala. 630, 29 So. 654 (for first appeal, see (1898) 119 Ala. 181, 24 So. 886), relief would apparently have been denied if the court had not considered the case to be one for the application of the principle, "He who seeks equity must do equity." The statutory provision which was here involved (Code 1886, § 1664 (7)) is one which simply affirms the power of corporations to execute mortgages, etc., and specifies the formalities which must be observed for the purpose of validating them. There is no declaration to the effect that the transactions shall be "void" if those formalities are not observed.

In *American Tube Works v. Boston Mach. Co.* (1885) 139 Mass. 5, 29 N. E. 63, it was held that a vote of a corporation to issue "special stock" at a meeting called to consider whether the corporation will issue "preferred stock" is invalid; that the issue of the "special stock" authorized at such a meeting was "illegal;" and that a holder of it could not, by estoppel, be made a member in respect to his shares. This

action may be maintained in any state in which that principle may be invoked with relation to such contracts.¹²

The principle of an estoppel against denying the invalidity of an informal contract is, of course, no less applicable in actions brought by or on behalf of corporations than it is in actions in which they or their members are defendants.¹³

III. Principle of estoppel discussed with relation to contracts involving merely an abuse of corporate powers.

9. Classification of cases in this point of view.

A distinction has frequently been predicated by the authorities between contracts which are ultra vires in the strict sense of the term, as being entirely outside the scope of the corporate power,

and contracts which merely involve abuse of those powers, or the exercise of those powers for an unauthorized purpose. In a large proportion of the instances in which this distinction has been relied upon, its existence has been affirmed in formal statements of the doctrine that only contracts belonging to the latter of these categories come within the scope of the principle of estoppel, in so far as such estoppel is based simply upon the circumstances of a receipt of benefits by the defendant. The significance and validity of the distinction in this regard are considered elsewhere. See § 43, *infra*. But the other classes of cases in which it has been adverted to also demand some attention, both because the circumstances with relation to which it has been treated as a controlling factor are of the same character as those which are deemed to be within the scope of the principle of estoppel,¹ and because the fact of its

case was followed in *Reed v. Boston Mach. Co.* (1886) 141 Mass. 454, 5 N. E. 852.

Compare also *Marsh v. Fulton County* (1870) 10 Wall. (U. S.) 876, 19 L. ed. 1040, where it was held that county bonds issued without the statutable assent of a majority of the voters were invalid even in the hands of innocent purchasers.

¹² *Texas Western R. Co. v. Gentry* (1888) 69 Tex. 625, 8 S. W. 98.

In *Lanthe v. Farmers' Mut. F. Ins. Co.* (1882) 55 Wis. 543, 13 N. W. 490, where a provision which expressly forbade a company to insure a certain class of buildings without a majority vote of the members was held to operate as a restriction of corporate power, and not to be a mere regulation, it was laid down that the doctrine of consent and waiver was not applicable. Wisconsin is one of the states in which the principle of estoppel is recognized with regard to contracts which are wholly beyond the corporate powers; but the question of liability was not discussed in this point of view.

¹³ *Latimer v. Bard* (1896) 76 Fed. 536 (action brought by receiver of insolvent national bank to enforce payment of assessments); *Lurton v. Jacksonville Loan & Bldg. Asso.* (1901) 187 Ill. 141, 58 N. E. 218, affirming (1900) 87 Ill. App. 395 (defendant in an action brought to recover a loan was held to be estopped to interpose the defense that there had been no competitive bidding after the application for the loan was made).

In *Veeder v. Mudgett* (1884) 95 N. Y. 295, which was an action by directors against stockholders of a corporation to enforce the liability imposed upon them because of an alleged failure to pay in the full amount of the capital stock, it appeared that the meeting at which the increased stock was voted was not formally called, nor was a certificate of the increase

of capital made and filed as prescribed by the state statute. The stock was, however, all issued to stockholders who had voted for the increase. These holders subsequently received dividends thereon, voted at stockholders' meetings, and in all respects were treated and acted as stockholders. The court held that the attempted increase was illegal, but that the defendant stockholders, as against the creditors of the company, by accepting their proportions of the increased stock, by voting for its increase, by taking dividends upon it, and by holding it out to those dealing with the company as an actual component of its capital, were estopped from denying the validity of the increase. The court, after adverting to the inapplicability of the principle of estoppel to cases in which there is an entire lack of power to make the contract in question, proceeded thus: "Where, as in the present case, the abstract power did exist, and there was a way in which the increase could lawfully be made, and the creditors could, without fault, believe that the increase had been lawfully effected and the necessary steps had been taken, there the doctrine of estoppel may apply, and the increased stock be deemed valid as against the creditors who have acted upon the faith of such increase. The referee has found that each and every one of the present defendants has done some act which brings them within the range of the estoppel alleged, or holds shares of the stock which in the hands of the assignors stood charged and burdened with a liability for the company's debts. We must therefore treat the increase as lawful, and precisely as if the needed preliminary steps had in truth been taken." The statement of doctrine was approved in *Handley v. Stutz* (1891) 139 U. S. 417, 35 L. ed. 227, 11 Sup. Ct. Rep. 530.

¹ This is no doubt the explanation of

operating independently of that principle renders it admissible as a determinative element even in jurisdictions in which that principle is not accepted.

10. Claimant's ignorance of the quality of the contract, right of action as predicated upon; generally.

The ratio decidendi in some of the cases to which the remark at the end of the preceding section applies is an estoppel based not upon the receipt of benefits by the defendant, but upon the consideration that, under the circumstances, the claimant was not chargeable with knowledge, either actual or constructive, that the corporation had, in making the contract in question, abused one of its powers. The general doctrine applicable to such a situation is shown by the following statements:

"Where the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of ultra vires is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers,

then the corporation would . . . be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."¹

"When the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of ultra vires does not apply."²

"In suits between the corporation and strangers dealing with it, the question is whether the act is one the corporation is not authorized to perform under any circumstances, or one that it may perform for some purposes or under certain conditions. In the first case, it is ultra vires, and there can be no recovery, because the party dealing with the corporation is bound to know, from the law of its existence, that it has no power to perform it. In the second case, the issue will turn upon whether the party dealing with it is aware of the intention to perform the act for some unauthorized purpose, or whether the attendant circumstances justify its performance."³

"Everyone dealing with a corporation is charged with notice of its corporate powers. If, therefore, a reference to the charter shows a seeming act of the corporation to be beyond its powers, it is void, and cannot be made the basis of any claim of liability against the corporation. But there are acts that may

the fact that in cases of the type discussed in this subtitle the courts sometimes waiver between the conception that the doctrine of ultra vires was not applicable at all, in the conception that the fact of the defendant's having received the benefits of the contract in question created an estoppel against pleading its invalidity as a bar to the action brought upon it. See, for example, the opinions delivered in *Wood v. Corry Waterworks Co.* (1890) 12 L.R.A. 168, 44 Fed. 146, and *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1897) 27 C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Gaston v. J. I. Campbell Co.* (1911) 104 Tex. 570, 140 S. W. 770, modified in (1911) 104 Tex. 585, 141 S. W. 515, reversing (1910) — Tex. Civ. App. —, 130 S. W. 222.

¹ *Selden, J., in Bissell v. Michigan S. & N. I. R.-Cos.* (1860) 22 N. Y. 290, quoted in *Monument Nat. Bank v. Globe Works* (1869) 101 Mass. 58, 3 Am. Rep. 322; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney* (1874) 54 N. H. 325; and *Boyce v. Montauk Gas Coal Co.* (1892) 37 W. Va. 73, 16 S. E. 501.

² *Monument Nat. Bank v. Globe Works* (1869) 101 Mass. 57, 3 Am. Rep. 322, quoted in *Ossipee Hosiery & Woolen Mfg. Co. v. Canney* (1874) 54 N. H. 325. L.R.A.1917A.

³ So laid down, arguendo, in *Leslie v. Lorillard* (1888) 110 N. Y. 532, 1 L.R.A. 456, 18 N. E. 363. Compare also the phraseology of the syllabus prepared by the court for *Georgia Granite R. Co. v. Miller* (1916) 144 Ga. 665, 87 S. E. 897.

In *Leavitt v. Blatchford* (1848) 5 Barb. (N. Y.) 9, the ground upon which the receiver of a company asked for the avoidance of its notes for money borrowed, and of a trust deed given to secure the loan, was that the money had been used by the company for the purchase of its own shares, and that its intention in this regard was known to the lender. The decision denying relief, that is to say, holding in effect that the corporation was liable on the notes, was based upon the doctrine that "where there is a security given for the payment of a debt, although the security may be illegal and void, yet if, in the same instrument, there is a contract to pay the debt, the contract may be enforced." No explicit reference was made to the allegation as to knowledge on the lender's part, but it is clear that, if such knowledge in point of fact existed, the decision cannot be reconciled with the statement quoted in the text.

or may not be within the charter powers, their lawful character being dependent on the existence of a fact which cannot be known from the act itself. If the extrinsic fact upon which depends the lawful character of the act is one peculiarly within the knowledge of the general agent of the corporation by whom the act is done, the act itself is an implied representation that the necessary fact exists, the truth of which the corporation is estopped to deny against any person who in dealing with the corporation has parted with value on the faith of it."⁴

⁴ *Farmers' Nat. Bank v. Sutton Mfg. Co.* (1892) 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191.

¹ In the leading case of *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 289, Selden, J., made the following remarks in qualification of his main thesis that a corporation is never estopped from pleading *ultra vires*: "There are no doubt cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a bona fide indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers." This exposition of doctrine was quoted with approval in *Monument Nat. Bank v. Globe Works* (1869) 101 Mass. 57, 3 Am. Rep. 322, where the court rejected the contention "that to issue an accommodation note is not within the powers conferred upon the corporation, and that, as any persons taking it had notice that it was the note of the corporation, they had notice that was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain." The court also cited as being in conformity with its view *Farmers' & M. Bank v. Empire Stone Dressing Co.* (1859) 5 Bosw. (N. Y.) 275. But this was not a precedent *precisely* in point.

In *Webb v. Herne Bay* (1870) L. R. 5 Q. B. (Eng.) 642, where debentures were L.R.A.1917A.

11. *Effect of claimant's ignorance considered with respect to negotiable instruments.*

In conformity with the doctrine laid down above, it has been held that, where a corporation is for some purposes empowered to execute, accept, indorse, or guarantee a negotiable instrument of a certain description, and executes, accepts, indorses, or guarantees such an instrument for an unauthorized purpose, it may be held liable in a suit brought upon the instrument by a bona fide holder thereof.¹

issued under the circumstances mentioned in § 12, note 3, *infra* (where the views of the other judges are stated), Lush, J., rested his judgment upon the ground that the regulating statute provided that any person entitled to any security might transfer it in the terms specified, and that, when that transfer had been made and registered in the book of the commissioners, it should entitle the transferee to the benefit of the security transferred. In his opinion the effect of these sections was "to make these mortgages negotiable securities and to attach to them the incidents of negotiable securities; one of which is that an innocent holder for value, as it is admitted the plaintiffs are, acquires a title of his own unaffected by any infirmity to which the title of his assignor might have been subject."

In *Wood v. Corry Waterworks Co.* (1890) 12 L.R.A. 168, 44 Fed. 146, it was held not to be competent for a corporation "which has received and enjoys the fruits of its mortgage bonds to assail their validity in the hands of a bona fide holder," on the ground that the mortgage was in violation of a statute.

In *Lauter v. Jarvis-Conklin Mortg. & T. Co.* (1897) 29 C. C. A. 473, 54 U. S. App. 49, 85 Fed. 894, the defense to a suit for the enforcement of a deed of trust executed to secure a note which had been transferred to a bona fide holder was, that the note was made to a Missouri corporation for money loaned in Tennessee, at a time when it had not complied with an enactment which made it unlawful for any foreign corporation to do business in the state without having first registered its charter with certain specified officials. The contention that the note thus taken and the deed of trust were void in the hands of an innocent holder was rejected on grounds thus stated: "The general and well-settled rule in favor of negotiable paper is that an innocent purchaser for value, before maturity, is unaffected by the fact that the consideration was illegal, and the note void and unenforceable by one having notice of the facts. If the illegality of the consideration results from a statute merely prohibiting a business or imposing a penalty, but does not declare a note or bill upon

12. —with respect to other descriptions of contracts.

Other classes of transactions in respect of which the existence or ab-

sence of knowledge has been applied as a test of enforceability are the following:

Conveyances of real property.¹

such a prohibited transaction absolutely null and void, a bona fide holder of such paper will be protected."

In *Ellsworth v. St. Louis, A. & T. H. R. Co.* (1885) 98 N. Y. 553, a judgment of the supreme court based on the ground that, as plaintiff was a bona fide holder of certain railroad bonds, the fact that they were originally negotiated at less than their par value did not preclude him from recovering upon them, was approved. The position taken by the court of appeals was that "a railroad corporation . . . has a general power to make contracts and to borrow money, and persons dealing in securities issued by it may, in the absence of notice to the contrary, assume that restrictions upon this power have not been violated." The principle of the decisions in *Mercer County v. Hackett* (1863) 1 Wall. (U. S.) 93, 17 L. ed. 549, and *Woods v. Lawrence County* (1861) 1 Black (U. S.) 386, 17 L. ed. 122, where town bonds were involved, was held to be applicable also to securities issued by railroad companies.

The statement in the text is also sustained by the following cases: *Roosevelt v. Nashville, C. & St. L. R. Co.* (1904) 128 Fed. 465 (guaranty of bonds); *Florence R. & Improv. Co. v. Chase Nat. Bank* (1894) 106 Ala. 364, 17 So. 720 (note indorsed for accommodation); *Credit Co. v. Howe Mach. Co.* (1886) 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472 (acceptance of accommodation draft); *Bird v. Daggett* (1867) 97 Mass. 494 (note executed for accommodation); *Woodcock v. First Nat. Bank* (1897) 113 Mich. 236, 71 N. W. 477 (note executed in pursuance of ultra vires transaction); *Auerbach v. Le Sueur Mill Co.* (1881) 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799 (indebtedness of the defendant at the time of giving the note in suit already exceeded the limits prescribed by its articles of association); *National Bank v. Young* (1886) 41 N. J. Eq. 531, 7 Atl. 488 (note executed for accommodation, followed in *Blake v. Domestic Mfg. Co.* (1897) 64 N. J. Eq. 480, 38 Atl. 241; *Stoney v. American L. Ins. Co.* (1845) 11 Paige (N. Y.) 635, reversing (1844) 4 Edw. Ch. 332 (instrument issued for a purpose and at a place not authorized by the charter of the company, and in violation of the laws of the state where it was actually issued); *Bank of Genesee v. Patchin Bank* (1855) 13 N. Y. 309 (indorsement for accommodation); *Farmers' & M. Bank v. Butchers' & D. Bank* (1857) 16 N. Y. 125, 69 Am. Dec. 678 (check improperly certified); *Mechanics' Bkg. Asso. v. New York & S. White Lead Co.* (1866) 35 N. Y. 506 (indorsement for accommodation); *Wright v. Pipe Line Co.* (1882) 101 Pa. 204, 47 Am. Rep. 701 (execution of note); *Gaston v. J. I. Campbell Co.* (1911) 104 Tex. 576, 140 S. W. 770, 141 S. W. 515, L.R.A.1917A.

reversing (1910) — *Tex. Civ. App.* —, 130 S. W. 222 (indorsement for accommodation); *Blunt v. Walker* (1860) 11 Wis. 349, 78 Am. Dec. 709 (acceptance of note); *Cornell v. Hichens* (1860) 11 Wis. 369 (acceptance of note); *Howard v. Boorman* (1863) 17 Wis. 459 (acceptance of note); *Houghton v. First Nat. Bank* (1870) 26 Wis. 663, 7 Am. Rep. 107 (accommodation indorsement).

In *Farmers' Nat. Bank v. Sutton Mfg. Co.* (1892) 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191 (acceptance for accommodation), it was unsuccessfully contended that the doctrine ordinarily applied was affected by a general statutory provision which made it unlawful to divert the operations or to appropriate the funds of a corporation to purposes not set forth in the articles of association. The court held that the statute was merely declaratory of the common law.

With these cases may be contrasted *Root v. Godard* (1842) 3 McLean, 102, Fed. Cas. No. 12,037, where it was held that a note executed in contravention of a statute providing that no corporation subject to it should issue any bill or note, unless the same were payable on demand, would have been void even in the hands of a bona fide holder. But the evidence showed that the plaintiff was not a holder without notice. This case was cited in *Root v. Wallace* (1836) 4 McLean, 8, Fed. Cas. No. 12,039, where it was held that, as the note in question was void, its contents could not be received in evidence to support an action upon it by the indorsee.

In *Safford v. Wyckoff* (1842) 4 Hill (N. Y.) 442, reversing (1841) 1 Hill, 11, *Waltham, Chancellor*, laid down the following rule: "Where a corporation is authorized to give a negotiable security for any purpose, and there is nothing to show what the particular security was given for, if there is nothing upon the instrument itself to create a suspicion that it was issued for an illegal object, the court will presume that it was given for a legitimate purpose rather than for a purpose which was unauthorized and illegal." In respect of the presumption of which it takes account, the theory here formulated is obviously different from that indicated by the language of *Selden, J.*, which is quoted supra; but it involves the same consequences so far as the right of action is concerned.

In *Brinson R. Co. v. Exchange Bank* (1915) 16 Ga. App. 425, 85 S. E. 634, it was held that a bank, having acquired the note in question "without recourse," took it subject to all equities, including the defense of ultra vires.

¹ In *Miners' Ditch Co. v. Zellerbach* (1869) 37 Cal. 543, 99 Am. Dec. 300, an action to recover possession of certain realty con-

Purchases of the stock of other corporations.²

Issue of debentures to an improper person and for an improper purpose.³ It should be observed that, in the case cited below, two of the members of the court relied upon the general principle of an estoppel, and not upon the peculiar incidents attached by the law to negotiable instruments. The other, Lush, J., based his judgment upon the ground that

the debentures in question belonged to the category of such instruments.⁴

Incurring debts in excess of the authorized amount. Several cases in which the recovery of money borrowed by the corporation has been allowed have proceeded upon the ground that the fact of the contract's being in excess of its powers depended upon certain extrinsic circumstances which were not known to the claimant.⁵ A consideration of these

veyed in pursuance of a consolidation agreement, the plaintiff relied upon the theory that the conveyance had been made for an unlawful purpose. But the court said: "The Miners' Ditch Company had power to sell the property, and to make such a deed as was made for a proper purpose. Upon the face of the charter and the deed, the power existed. A comparison of the deed with the charter disclosed no want of authority. If any existed, it arose from extrinsic facts which rested in the knowledge of the corporation and its agents alone, and which strangers had no means of discovering. Under the authorities cited, and upon principle, strangers dealing with the corporation in ignorance of any extrinsic facts affecting the question of authority were entitled to rely upon the apparent power."

² In *Kennedy v. California Sav. Bank* (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, the liability of the defendant bank as stockholder in another corporation was affirmed on grounds thus stated: "Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law." This decision was reversed in *California Nat. Bank v. Kennedy* (1896) 167 U. S. 362, 42 L. ed. 108, 17 Sup. Ct. Rep. 831, for the special reasons explained in § 70, *infra*; but the correctness of the above statement as one embodying a general rule was not impugned.

For another case involving this kind of transaction, see note 9, *infra*.

³ In *Webb v. Ilerne Bay* (1870) L. R. 5 Q. B. (Eng.) 642, the defendants, who were commissioners incorporated by statute for the purpose of improving the town of H., issued assignable debentures in payment of the price of a commodity supplied by one of the commissioners in violation of a clause of the statute which imposed a penalty upon any commissioner who should accept any contract for carrying out the objects of the statute. The commissioner to whom the debentures were issued assigned them for value to the plaintiffs, who L.R.A.1917A.

had no notice of the circumstances under which they were issued. Held, that they were entitled to maintain an action of mandamus to compel the commissioners to apply their funds in payment of the interest. Cockburn, Ch. J., said: "I proceed entirely upon the ground that the defendants were estopped from disputing the validity of the debentures in question. . . . Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commissioner, and therefore prohibited from entering into such a contract with the commissioners, or as to the fact of their being debentures given for goods supplied instead of for money advanced. . . . The debentures on their face import a legal consideration, namely, the advance of money. The defendants issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred, to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal?" Blackburn, J., said: "The law laid down in *Freeman v. Cooke* (1848) 2 Exch. 654, 18 L. J. Exch. N. S. 114, 12 Jur. 777, 11 Eng. Rul. Cas. 82, and in *Re Bahia & S. F. R. Co.* (1868) L. R. 3 Q. B. (Eng.) 584, 9 Best & S. 844, 37 L. J. Q. B. N. S. 176, 18 L. T. N. S. 467, 16 Week. Rep. 862, is very clear that, when a person has made a statement similar to the present, he is precluded, as against another person who has bona fide acted upon it, from denying the truth of the statement, and consequently I hold that the commissioners, who have stated on the face of the mortgages that Halket had advanced and lent the money on the credit and for the purposes of the commissioners, are precluded, as against his bona fide transferees, from denying the truth of that statement."

⁴ See § 11, note 1, *supra*.

⁵ In *Ossipee Hosiery & Woolen Mfg. Co. v. Canney* (1874) 54 N. H. 295, where an action was brought to enforce an assessment on a stockholder to pay a debt, the court said: "Nor can they [i. e., the lenders] be said to be put upon inquiry, be-

cases is suggestive of the thought that, if the claimant's ignorance is treated as the controlling element where contracts of this description are concerned, the doctrine of ultra vires will be rendered almost wholly ineffective in a class of cases in which the reasons for enforcing it in the interests of shareholders are particularly strong.⁶ But a person who, when making a loan, was chargeable with notice that it exceeded the authorized amount, cannot, in an action on the contract, hold the corporation liable except in respect of that part of the loan

which was intra vires. In other words the loan "is valid up to the limit, and void as to the excess."⁷

Issuance of insurance policy by a foreign company which has not complied with the statutory conditions precedent to doing business in the state in which it was issued.⁸

In one case we find it laid down broadly as follows: "There are, however, acts done in excess of conferred powers, illegal as to shareholders, but for which the corporation is liable to innocent parties; as, for example, where a corpora-

tion is a public servant, whose unauthorized acts do not bind the public. In the case of a national bank, no such public record is provided, and no method is pointed out by means of which the status of the bank's indebtedness can be ascertained." See also the case cited in the following note. The theory prevailing in England is different. See case cited in § 18, note, *infra*.⁶ It is difficult to concede that this objection has been convincingly met by such an argument as the following: "Unless . . . the corporation is estopped from setting up the limit where the consideration has been received, it would properly be without credit, the very thing for which private corporations largely are organized. This result is to be avoided if it can be consistently with the protection which the limitation is designed to afford to stockholders, and we think it can be. The stockholders must be regarded as at least partially protected by the receipt of consideration, and if not fully so in every case, they may doubtless have an action (or the corporation may, which represents their interest) against the officers or agents who, without authority, have imposed upon them a liability which has resulted in their loss." *Humphrey v. Patrons' Mercantile Asso.* (1879) 50 Iowa, 607. The protection afforded by a remedy which may be, and often is, of a merely nominal value, can scarcely be regarded as efficient or adequate.

In *Citizens' Bank v. Bank of Waddy* (1907) 126 Ky. 169, 11 L.R.A.(N.S.) 598, 128 Am. St. Rep. 282, 103 S. W. 249, the court applied the rule that "a creditor whose own debt against the corporation does not exceed the limit, and who has no reason to know that the limit has been exceeded, is not affected by the fact that there are other debts of which he has no notice which, when added to his own, make an aggregate indebtedness greater than the corporation can legally incur." The authorities cited were *Bell & C. Co. v. Kentucky Glass Works Co.* (1899) 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180, and 3 Cyc. 472.

In *Weber v. Spokane Nat. Bank* (1894) 12 C. C. A. 93, 29 U. S. App. 97, 64 Fed. 208, where the defendants in error relied upon certain decisions of the Federal Supreme Court, in which it was held that municipal bonds issued beyond the limit prescribed by the legislature are void, it was observed: "Those decisions rest upon principles entirely distinct from those involved in the case at bar. The amount of the authorized issue of municipal bonds is always ascertainable by a reference to public records equally accessible to all, and the officers of the municipal corporation

are public servants, whose unauthorized acts do not bind the public. In the case of a national bank, no such public record is provided, and no method is pointed out by means of which the status of the bank's indebtedness can be ascertained."

See also the case cited in the following note.

The theory prevailing in England is different. See case cited in § 18, note, *infra*.

⁶ It is difficult to concede that this objection has been convincingly met by such an argument as the following: "Unless . . . the corporation is estopped from setting up the limit where the consideration has been received, it would properly be without credit, the very thing for which private corporations largely are organized. This result is to be avoided if it can be consistently with the protection which the limitation is designed to afford to stockholders, and we think it can be. The stockholders must be regarded as at least partially protected by the receipt of consideration, and if not fully so in every case, they may doubtless have an action (or the corporation may, which represents their interest) against the officers or agents who, without authority, have imposed upon them a liability which has resulted in their loss." *Humphrey v. Patrons' Mercantile Asso.* (1879) 50 Iowa, 607. The protection afforded by a remedy which may be, and often is, of a merely nominal value, can scarcely be regarded as efficient or adequate.

⁷ *Kraniger v. People's Bldg. Soc.* (1895) 60 Minn. 94, 61 N. W. 904. See also the English cases cited in § 20, with regard to unauthorized contracts of borrowing.

⁸ In *Watertown F. Ins. Co. v. Rust* (1892) 141 Ill. 85, affirming (1890) 40 Ill. App. 119, 30 N. E. 772, the court said: "The insurance company knows whether it has complied with the law, but the public do not, and they have the right, in the absence of bad faith and of actual knowledge to the contrary, to presume that a foreign insurance company assuming to act in this state is acting lawfully, and the company, when sued upon a policy issued under such circumstances, is estopped to allege that it had no lawful authority to issue the policy."

tion is authorized to perform an act for a specific purpose, and performs the act for another and unauthorized purpose. In such case the plea of ultra vires is available to neither party."⁹ In this passage no reference is made to the circumstance of the claimant's knowledge or ignorance, as one affecting the right of action. If the statement is to be understood as an assertion that in respect of all transactions of the description specified, the corporation is liable, irrespectively of whether the other contracting party had or had not knowledge of the unauthorized purpose, it is clearly inconsistent with the language used in the cases already cited in this section.

IV. Principle of estoppel considered with reference to the juristic quality of an ultra vires contract.

13. Diversity of views regarding the juristic quality of ultra vires contracts.

It is clear that, if only logical criteria

are considered, and no account is taken of such subsidiary elements as expediency, public policy, or abstract justice, the question whether the doctrine of an estoppel against pleading ultra vires in an action brought upon the contract of a corporation shall be adopted or rejected must, in the final analysis, depend upon the nature of the theory which is entertained with respect to the juristic quality of such a contract. There is no doubt that the want of harmony in the decisions is in a large measure attributable to the difference of opinion which prevails regarding this primary and fundamental point. It is not disputed that, if ultra vires transactions are to be regarded as being illegal, in the ordinary sense of the word, they must be regarded as absolutely "void," and consequently not susceptible of enforcement.¹ There can be no civil right where there is no legal remedy, and there can be no

⁹ *Citizens' State Bank v. Hawkins* (1896) 18 C. C. A. 78, 34 U. S. App. 423, 71 Fed. 371. There Hawkins, the receiver of a National Bank, sought to enforce an assessment levied on stockholders against the Citizens' & C. Bank, which had purchased some of the stock of the national bank before it became insolvent. Discussing the plea of ultra vires interposed by the Citizens' & C. Bank, the court said: In the case in hand no power is granted to purchase stock in another bank, and therefore a prohibition to do so may be implied. *First Nat. Bank v. National Exch. Bank* (1875) 92 U. S. 122, 23 L. ed. 679. It is not doubted, however, that under the banking law of Indiana the plaintiff in error had power to accept stock in another bank as security for a loan, or to acquire such stock by levy thereon and sale thereof under execution, to satisfy a debt due to it. *Morse, Banks & Bkg.* § 59; *Germania Nat. Bank v. Case* (1878) 99 U. S. 628, 25 L. ed. 448. It had the power, therefore, under certain circumstances, and for certain purposes, to acquire stock in a national bank. It obtained the stock in question by purchase from a third party, and procured its transfer to itself upon the books of the national bank. The acquisition of such stock was within the general scope of its powers. The case is therefore one of an abuse of a general power, a wrongful exercise of conferred power, for purposes and under circumstances contrary to law, and not the case of the exercise of a power not in any event given. It is therefore related to the second class above noted, to which the doctrine of ultra vires does not apply. In all such cases a corporation cannot 'set up its own violation of law to L.R.A.1917A.

escape the responsibility resulting from its illegal action.' *Id.* 628-633. The misuse of power in such cases is matter for consideration by the authorities of the state." A similar decision with regard to the same facts as rendered in *Cooper Ins. Co. v. Hawkins* (1896) 18 C. C. A. 81, 34 U. S. App. 428, 71 Fed. 372.

For other cases in which a rule similar to the one in the text has been formulated without any qualifying words, see *National Home Bldg. & L. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; *Wood v. Supreme Ruling, F. M. C.* (1904) 212 Ill. 532, 72 N. E. 783; *Stacy v. Glen Ellyn Hotel & Springs Co.* (1906) 223 Ill. 546, 8 L.R.A. (N.S.) 966, 79 N. E. 133.

¹ In *Orr v. Lacey* (1846) 2 Dougl. (Mich.) 230, where a bank had discounted a promissory note or prohibited rate of interest, the court thus expounded the law with reference to a new trial: "If the original contract was void in consequence of a want of power on the part of the bank to make that contract, and if the bill in the present case, in the language of the Supreme Court of the United States in the case of *Armstrong v. Toler* (1826) 11 Wheat. (U. S.) 258, 6 L. ed. 468, grew out of the illegal act, a court of justice will not enforce it. If it shall appear that the contract upon which this suit is brought grew out of the illegal contract first entered into between the parties, or, in other words, was not a new contract founded upon a new consideration, it would appear too clear for argument that this new contract comes before us with all the infirmities which attached to the old one. The reason is obvious; the original agreement being void for want

legal remedy for that which is illegal." ² It is also well established that, except in those instances in which the terms of the statute in question are such as to evince an intention on the part of the legislature that a contract which violates an expressly prohibitory enactment shall not be invalid as between the parties, ³ the quality of such a contract is determined by "the general rule of law, . . . that a contract made in violation of a statute is void; and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover." ⁴

Furthermore it is clear from the authorities that the effect of an implied prohibition in regard to the invalidation of a contract is ordinarily deemed to be precisely the same as that of an express prohibition. "Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or

statute law, no court will lend its assistance to give it effect." ⁵ "The long-established maxim of the law, 'Ex turpi causa non oritur actio,' is equally applicable where the act or contract is prohibited by statute, either expressly or by implication, as when it is contra bonos mores." ⁶ That this general rule is applicable to the contract of a corporation is agreed by all the authorities. ⁷

The decisions also indicate that, both in the jurisdictions in which the principle of an estoppel, as predicated upon the subsequent conduct of the parties with reference to such a contract, has been rejected, and also in the jurisdictions in which the principle has been adopted, there is virtually no disagreement respecting the doctrine that, if a corporate contract violates an expressly prohibitory clause of the statute or other instrument which defines the powers of the corporation, it is void in such a sense that it cannot

of capacity on the part of the bank to contract, and the new agreement being a renewal of the old one, it is tainted with the illegality which attached to the latter; and, as the courts of Indiana, if a suit had been there instituted on the bill declared upon, would have pronounced it void as having been inseparably connected with the contract out of which it grew, so the courts of this state will examine into the capacity of the bank to make a contract, and if it discovers a want of capacity to make the one on which a recovery is sought, they will not carry it into effect."

² *Bank of United States v. Owens* (1829) 2 Pet. (U. S.) 527, 7 L. ed. 508, quoted in *Tiffany v. Boatman's Sav. Inst.* (1873) 18 Wall. (U. S.) 375, 384, 21 L. ed. 868, 869, where the settled doctrine of the court was declared to be that "a contract to do an act forbidden by law is void and cannot be enforced in a court of justice." Both of these cases related to loan contracts involving the reservation of a higher rate of interest by banks than their charters authorized.

"The ordinary rule of law that no person can sue a court of law or equity upon an illegal contract" was referred to by Brett, L. J., in *Re Cottman* (1881) L. R. 10 Ch. Div. (Eng.) 70, 51 L. J. Ch. N. S. 3, 45 L. T. N. S. 392, 30 Week. Rep. 342.

³ The accepted rule in this point of view was thus stated in *Harris v. Runnels* (1851) 12 How. (U. S.) 79, 13 L. ed. 901: "Whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, . . . it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void in the sense that they were not to be enforced in a court of justice;" "the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it should

be void," so as not to be enforced in a court of justice. In some cases in which the prohibited contracts of corporations were under review, the application of this qualifying principle has been held to warrant a declaration that they were not void. *Farmers' Bank v. Burchard* (1860) 33 Vt. 346; *Davis Sewing Mach. Co. v. Beat* (1883) 30 Hun (N. Y.) 638. But these decisions are clearly opposed to the general current of authority, which is distinctly in favor of the view that a contract which a corporation is expressly prohibited from making is always void.

⁴ *Miller v. Ammon* (1891) 145 U. S. 421, 426, 36 L. ed. 759, 762, 12 Sup. Ct. Rep. 884.

"Everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, and absolutely void to all intents and purposes whatsoever." *Re Cork & Y. R. Co.* (1869) L. R. 4 Ch. (Eng.) 748.

⁵ *Cope v. Rowlands* (1836) 2 Mees. & W. 157, 150 Eng. Reprint, 710, 2 Gale, 231, 6 L. J. Exch. N. S. 63.

⁶ *Seneca County Bank v. Lamb* (1858) 26 Barb. (N. Y.) 595.

⁷ In *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188, the court, referring to § 5136 of the National Bank Act of 1864, remarked that it "does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed." In this case, however, the court, proceeding upon the rule of construction laid down in note 3, supra, held that the prohibitory provisions of the act did not operate so as to invalidate transactions which contravened them. See § 17 of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —.

be enforced.⁸ It is with reference to this rule that the expressly prohibited contracts of corporations have been treated as void in numerous cases, which, for purposes of classification, may be regarded as belonging to two categories; viz., (1) Those in which recovery was denied without any explicit reference to the question whether, in respect of the consequences of performance on the part of the plaintiff, such contracts were distinguishable from merely unauthorized contracts;⁹ and (2) Those in which it was laid down that only contracts of the latter description come within the scope of the principle of estoppel.¹⁰

On the other hand, there is a conflict of views with regard to the question whether the character of "illegality"

should be ascribed to corporate transactions which are the subject of that species of implied prohibition which is predicated from the circumstance that the instrument defining its powers does not contain any words which can be construed as authorizing them.¹¹

14. Relation of this disagreement to that which exists as to the doctrine of estoppel.

For the purposes of the discussion in the present monograph, the controverted point mentioned at the end of the preceding section is of the highest importance. That there can be no direct ratification of an "illegal" contract by a corporation any more than by an individual is indisputable.¹ Of this rule

⁸ "There is no principle of law better settled than that a corporation cannot enter into a contract which is expressly prohibited by its charter or by statute. A contract so made is absolutely void. No performance on either side can give it any validity. . . . We do not need to consider when the defense of ultra vires may or may not be interposed. The objection here is not that the contract is ultra vires, but that it is illegal. While a corporation is held in some states to be estopped from setting up the defense of ultra vires by having received the benefits of the contract, the courts so holding do not apply that principle to cases in which the contract is absolutely void." *Re Grand Union Co.* (1914) 135 C. C. A. 237, 219 Fed. 353.

⁹ *Root v. Godard* (1842) 3 McLean, 102, Fed. Cas. No. 12,037; *Weed v. Snow* (1843) 3 McLean, 265, Fed. Cas. No. 17,347; *Hayden v. Davis* (1843) 3 McLean, 276, Fed. Cas. No. 6,259; *Davis v. Bank of River Raisin* (1848) 4 McLean, 387, Fed. Cas. No. 3,626; *Stewart v. National Union Bank* (1869) 2 Abb. (U. S.) 424, Fed. Cas. No. 13,435; *Branch Bank v. Crocheron* (1843) 5 Ala. 250; *Workingmen's Bkg. Co. v. Rautenberg* (1882) 103 Ill. 460, 42 Am. Rep. 26; *Utica Ins. Co. v. Scott* (1821) 19 Johns. (N. Y.) 1, reversed in (1826) 8 Cow. 709; *New York Firemen Ins. Co. v. Sturges* (1824) 2 Cow. (N. Y.) 664; *Utica Ins. Co. v. Kip* (1827) 8 Cow. (N. Y.) 20; *Beach v. Fulton Bank* (1829) 3 Wend. (N. Y.) 573, affirming (1829) 1 Paige, 429; *Fulton Bank v. Benedict* (1829) 1 Hall (N. Y.) 480; *Utica Ins. Co. v. Bloodgood* (1830) 4 Wend. (N. Y.) 652; *Pennington v. Townsend* (1831) 7 Wend. (N. Y.) 276; *New Hope Delaware Bridge Co. v. Poughkeepsie Silk Co.* (1841) 25 Wend. (N. Y.) 648; *Green v. Seymour* (1846) 3 Sandf. Ch. (N. Y.) 285; *Bank of Chillicothe v. Swayne* (1838) 8 Ohio, 257, 32 Am. Dec. 707; *Farmers' Loan & T. Co. v. Perry* (1846) 3 Sandf. Ch. (N. Y.) 339 (rule recognized); *Barton v. Port Jackson & U. F. Pl. Road Co.* (1854) 17 Barb. (N. Y.) 397; *Bank of L.R.A.* 1917A.

Salina v. Alvord (1865) 31 N. Y. 473; *Manufacturers' & M. Sav. & L. Co. v. Conover* (1862) 5 Phila. (Pa.) 18; *Dockery v. Miller* (1849) 9 Humph. (Tenn.) 731; *Green v. Ashe* (1914) 130 Tenn. 615, 172 S. W. 293.

For a case in which an action to enforce the individual liability of a stockholder was held not to be maintainable for the reason that the corporation was an illegal institution, see *Brown v. Killian* (1859) 11 Ind. 449.

It may be mentioned that in § 12 of the English Companies Act there is an express prohibition against the making of any contract for any object beyond those mentioned in the memorandum of association. *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 678, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304.

¹⁰ See cases cited in § 44, note 6, *infra*.

¹¹ It is not out of place to observe that the appropriate doctrine in this connection is that "the specification of certain powers operates as a restraint to such object only, and is an implied prohibition of the exercise of other and distinct powers." *New York Firemen Ins. Co. v. Ely* (1824) 2 Cow. (N. Y.) 678.

"It seems reasonable to hold that when Parliament does define the objects of a company and the appropriation of its funds, it by implication prohibits other objects and a different appropriation." *Montague Smith, J., in Taylor v. Chichester & M. R. Co.* (1867) L. R. 2 Exch. (Eng.) 369.

See generally *Lindley, Companies* (1902) pp. 215, 216.

¹ For cases in which this rule was affirmed or recognized with reference to corporate contracts, see *Kent v. Quicksilver Min. Co.* (1879) 78 N. Y. 159, 4 Mor. Min. Rep. 47; *Mutual Guaranty F. Ins. Co. v. Barker* (1899) 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868; *Witter v. Grand Rapids Flouring Mill Co.* (1891) 78 Wis. 543, 47 N. W. 729.

it would seem to be an unavoidable corollary that such a contract cannot be indirectly validated by the operation of an estoppel.² The logical connection between the rule and the corollary is reflected in the state of the authorities. On the one hand, the courts which treat the doctrine of estoppel as

being inapplicable in respect of a ultra vires contract, because such a contract is illegal, have uniformly taken the position that it cannot be validated either by the assent of the corporation itself, acting in its corporate capacity,³ or by the expressed will of all the individual shareholders.⁴ On the other hand, we

² Some courts, however, have not shrunk from the extreme doctrine that even expressly prohibited transactions—a species which cannot by any possible refinement be withdrawn from the “illegal” class—may, by virtue of an estoppel, become in effect enforceable. See § 44, *infra*.

³ “The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently, a thing which is ultra vires and unauthorized is not an act of the company in such a sense as that the consent of the company to that act can be pleaded.” Lord Selborne in *Great Eastern R. Co. v. Turner* (1872) L. R. 8 Ch. (Eng.) 140.

“A company of this kind, carried on under the statutes, with the limited powers which these statutes confer, can no more by adoption or homologation make a proceeding of this kind legal than they can lawfully enter into the original transaction itself. It is a nullity originally, and the company cannot homologate or adopt a nullity, for that is equally ultra vires.” Lord Shand in *General Property Invest. Co. v. Matheson* (1888) 16 Sc. Sess. Cas. 4th series, 282.

“An ultra vires contract cannot be ratified by either party, because it could not have been authorized by either.” *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 59, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478.

“A contract which a corporation has no power to make, it has no power to ratify and no power to estop itself from denying.” *Park Hotel Co. v. Fourth Nat. Bank* (1898) 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742.

“The same want of power to give authority to an agent to contract, and thereby bind the corporation in matters beyond the scope of their corporate objects, must be equally conclusive against any attempt to ratify such contract. What they cannot do directly they cannot do indirectly. They cannot bind themselves by the ratification of a contract which they had no authority to make.” *Downing v. Mt. Washington Road Co.* (1860) 40 N. H. 235.

See also *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* (1898) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. 817; *Oregonian R. Co. v. Oregon R. & Nav. Co.* (1864) 10 Sawy. 464, 22 Fed. 245; *Watkins Salt Co. v. Mulkey* (1915) 141 C. C. A. 11, 225 Fed. 739; *Central R. & Bkg. Co. v. Smith* (1884) 76 Ala. 572, 52 Am. Rep. 353; *Alabama G. S. R. Co. v. Loveman Compress Co.* (1916) L.R.A.1917A.

— Ala. —, 72 So. 311; *Steiner v. Steiner Land & Lumber Co.* (1897) 120 Ala. 128, 26 So. 494; *National Home Bldg. & L. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619; *Myers v. Equitable Bldg. & L. Soc.* (1900) 92 Ill. App. 27; *Memphis v. Memphis Gayoso Gas Co.* (1872) 9 Heisk. (Tenn.) 543; *Hermitage Hotel Co. v. Dyer* (1911) 125 Tenn. 302, 142 S. W. 1117; *Metropolitan Stock Exch. v. Lyndonville Nat. Bank* (1904) 76 Vt. 303, 57 Atl. 101.

In *Westerlund v. Black Bear Min. Co.* (1903) 121 C. C. A. 627, 203 Fed. 599, the court said: “Another principle of law so firmly established as to be no longer debatable is that an act or contract of a corporation which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it.” The phrase, “ratification by estoppel or otherwise,” is apparently inaccurate. “Ratification” imports a voluntary assent while “estoppel” is a principle which operates independently of such assent. A similar criticism applies to the statement that, “in reference to acts which are strictly ultra vires, the Supreme Court of the United States holds broadly that neither consent of nor ratification by all the stockholders can estop a corporation from pleading its want of power.” *Savannah Ice Co. v. Canal-Louisiana Bank & T. Co.* (1913) 12 Ga. App. 825, 79 S. E. 45. But the confusion of thought in both these instances serves only to bring out more clearly the logical connection of ideas which is mentioned in the text.

In any point of view it is clear that a ratification of ultra vires acts by the directors of a company cannot render them valid. *McCullough v. Moss* (1846; Ct. of Err.) 5 Denio (N. Y.) 567.

⁴ “If a company has no power to do a particular thing, undoubtedly that power cannot be added to the company either by the agreement of the shareholders; nor can it be inferred to have been done legally merely from acquiescence or from subsequent delay in questioning the transaction.” Lord Westbury in *Re British Provident L. & F. Ins. Soc.* (1883) 9 Jur. N. S. (Eng.) 631.

“If it was a contract void at its beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, ‘that is a contract which

find numerous cases in which courts which accept the doctrine of estoppel have held that an ultra vires contract

may be legalized in one or other of these ways.⁵

Assuming, therefore, that the question

we desire to make, which we authorize the directors to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the act of Parliament, they were prohibited from doing." Lord Cairns in *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 672, 2 Eng. Rul. Cas. 304. See also the remarks of Lord Chelmsford at p. 675.

"All the shareholders and all the stockholders are entirely different from the corporation, and although the want of a formal resolution which might be required for the exercise of the powers so as to bind the minority would be done away with, in my opinion the assent of all the shareholders cannot make valid, as against the corporation, that which under the act of incorporation the corporation has not the power to do." Cotton, L. J., in *Wenlock v. River Dee Co.* (1887) L. R. 36 Ch. Div. (Eng.) 674. To the same effect, see the remarks of Bowen, L. J., at p. 686.

"No approval of those who may happen to be directors at the time when the company is formed, or of those who may happen at that time to be all the shareholders in the company, can possibly give it validity, because it is something which the company itself cannot do, and which it cannot be authorized to do either by its then directors or by its then shareholders." Mann v. *Edinburgh Northern Tramways Co.* [1893] A. C. (Eng.) 69.

"It is said the jury have found that the stockholders, in fact, gave their consent, and it may not now be denied. We have already shown this can make no difference; but we say further that this notion of their consent is altogether untenable and unjust. We know, certainly, the stockholders did not, all of them, give their consent. Some were minors, married women, executors and administrators, trustees, officers of the law in possession, and some were, at the time, out of the country. So the body of stockholders was changing from day to day. Now, to hold that the entire body of stockholders gave their consent to the contract in question, and that therefore it is good, is absurd and puerile. But suppose they did; this was not a corporate act, and has therefore no corporate character. We repeat that the directors and stockholders have no corporate powers or relations, and can give no corporate consent but what is within the appropriate business of the charter." *Hood v. New York & N. H. R. Co.* (1852) 22 Conn. 505, 9 Am. Neg. Cas. 149.

"If the assent of all the stockholders were shown to the formation of the partnership,—which is not the fact,—it could not enlarge the powers of the corporation, or L.R.A.1917A.

make that legal which was inconsistent with the law limiting their powers and prescribing their duties." *Whittenton Mills v. Upton* (1858) 10 Gray (Mass.) 600, 71 Am. Dec. 681.

"In our view of the matter, stockholders in a corporation cannot by consent set aside and render void a limitation placed by law upon the corporate action. If they could, it would serve no good purpose to limit the powers of a corporation. The shareholders could receive all the benefits of incorporation, and not be subject to any of the restrictions imposed upon them by law." *Savannah Ice Co. v. Canal-Louisiana Bank* (1913) 12 Ga. App. 829, 72 S. E. 45. It is doubtful, however, whether this statement is consistent with the decisions of the supreme court of Georgia. See § 78, *infra*.

See also *Taylor v. Chichester & M. R. Co.* (1867) L. R. 2 Exch. (Eng.) 356; *Chapleo v. Brunswick Permanent Bldg. Soc.* (1881) L. R. 6 Q. B. Div. 696, 50 L. J. C. P. N. S. 372, 44 L. T. N. S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366; *McCutcheon v. Merz Capsule Co.* (1896) 31 L.R.A. 787, 19 C. C. A. 108, 37 U. S. App. 586, 71 Fed. 787.

In *Re Phoenix Life Assur. Co.* (1862) 2 Johns. & H. 441, 70 Eng. Reprint, 1131, 31 L. J. Ch. N. S. 749, 9 Jur. N. S. 15, 7 L. T. N. S. 191, 10 Week. Rep. 816, Page Wood, V. C., seems to have argued on the assumption that, if the facts had been such as to show full acquiescence on the part of all the shareholders of a life insurance company in the unauthorized extension of its business to marine insurance, the holders of marine insurance policies would have been entitled to prove in respect to them in winding-up proceedings. This theory seems irreconcilable with the other English cases cited above. The same criticism applies to the remarks made with regard to the effect of acquiescence in *Imperial Bank v. Bank of Hindustan* (1868) L. R. 6 Eq. (Eng.) 100, 16 Week. Rep. 1107 (Giffard, L. J.), and *Shrewsbury v. North Staffordshire R. Co.* (1866) L. R. 1 Eq. (Eng.) 593, 35 L. J. Ch. N. S. 172, 12 Jur. N. S. 631, 13 L. T. N. S. 648, 14 Week. Rep. 220 (Kindersley, V. C.).

⁵ In *Allegheny City v. McCurran* (1850) 14 Pa. 82, the court said: "One rule of law . . . is often met and counterchecked by another of equal force, so that, although the corporators are, in general, protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public or lead them to trust and confide in the unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them." This passage was quoted by Comstock, Ch. J., in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 279.

whether an estoppel against pleading ultra vires can be created in a case where the contract under review was merely unauthorized depends upon whether such a contract is "illegal," we shall proceed to consider the variant theories which have been propounded upon the subject.

15. Doctrine under which ultra vires and illegal contracts are regarded as belonging to the same category.

One view is that the unauthorized transactions of corporations, as well as those which are expressly prohibited, are "illegal" in such a sense that they cannot be enforced either directly or indirectly. It

was with reference to this doctrine that Selden, J., remarked in a leading case that "the real ground upon which the defense of ultra vires rests, and the only one upon which it has ever, to any extent, been judicially based, is that the contracts of corporations which are unauthorized by their charters are to be regarded as illegal, and therefore void."¹

This is the theory which underlies all the cases in which the applicability of the doctrine of estoppel with relation to claims based upon ultra vires contracts has been denied, either expressly or by implication.² The statements reviewed in the footnote reflect the opinion not only

In *Martin v. Niagara Falls Paper Mfg. Co.* (1890) 122 N. Y. 165, 25 N. E. 303, it was held that where an accommodation indorsement by a corporation was ratified by the stockholders, and no other rights intervened, the corporation would be bound. The court said: "The general rules of law relating to contracts and property rights apply to corporations as well as to individuals, and the principles of law of agency apply to both alike. The stockholders are the equitable owners of the corporate property, and if the officers or trustees do any unauthorized act or incur indebtedness which would not create a corporate liability, the stockholders may subsequently ratify the acts and validate the original unauthorized transaction."

See also *Western Development & Invest. Co. v. Caplinger* (1908) 86 Ark. 287, 110 S. W. 1039; *Wells v. Northern Trust Co.* (1902) 195 Ill. 288, 63 N. E. 136; *Sherman Center Town Co. v. Morris* (1890) 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569 ("acquiescence" of corporation referred to as giving contract "validity"); *Butterworth v. Kritzer Mill Co.* (1897) 115 Mich. 1, 72 N. W. 990; *Kraniger v. People's Bldg. Soc.* (1895) 60 Minn. 94, 61 N. W. 904; *Western & S. F. Ins. Co. v. Murphey* (1916) — Okla. —, 156 Pac. 885; *Miller v. Washington Southern R. Co.* (1895) 11 Wash. 414, 39 Pac. 673.

In the following cases the doctrine that an ultra vires contract cannot be ratified was affirmed in jurisdictions in which the principle of estoppel is recognized: *Swindell v. Bainbridge State Bank* (1907) 3 Ga. App. 364, 60 S. E. 13; *Thompson v. West* (1900) 59 Neb. 677, 49 L.R.A. 337, 82 N. W. 13; *Hatch v. Western U. Teleg. Co.* (1881; Super. Ct.) 9 Abb. N. C. (N. Y.) 430. In the last of these cases the court cited *Ashbury R. Carriage & Iron Co. v. Riche* (Eng.) note 9, supra, being apparently unaware that the theory of ultra vires upon which that case proceeded was essentially different from that adopted by the New York court of appeals. See case cited supra.

In *Ogdensburg & L. C. R. Co. v. Vermont & C. R. Co.* (1876) 6 Thomp. & C. (N. Y.) 488, where the action was brought to pro-

cure a declaration that a lease was ultra vires, the court held that the plaintiff had not ratified the contract by accepting rent while the appeal from an order sustaining the demurrer to its complaint was pending. But there the circumstances were of such a special character that the precise significance of the case in the present connection is somewhat uncertain.

As to the effect of the assent of the stockholders in producing an estoppel against pleading ultra vires, see, generally, §§ 50, 51, infra.

¹ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 285. The further statement of the learned judge that "the contracts of corporations which are not authorized by their charters are illegal, because they are made in contravention of public policy," and that their illegality does not consist in the fact that they are mala prohibita, would not now be accepted as correct by all courts. From the language habitually used in later cases the only inference that can be drawn is that one of the grounds at all events on which ultra vires contracts are deemed to be nonenforceable is that they are expressly or impliedly prohibited by the statutes under which the corporations are organized. See, however, the remarks of Lord Cairns, quoted in § 16, infra.

² In *Hill v. Manchester & S. Waterworks* (1831) 2 Barn. & Ad. 545, 109 Eng. Reprint, 1245, Lord Tenterden said that no question of ultra vires was raised by the pleadings, because, "as framed, they raised no sufficient ground for argument as to illegality."

In *East Anglian R. Co. v. Eastern Counties R. Co.* (1851) 11 C. B. 775, 138 Eng. Reprint, 680, 21 L. J. C. P. N. S. 23, 16 Jur. N. S. 249, 22 Eng. Rul. Cas. 21, 7 Eng. L. & Eq. Rep. 509, Jervis, Ch. J., in the judgment delivered for the whole court, spoke of the undertaking in question as being "illegal" because contrary to the act of Parliament which defined the powers of the defendant company. He also remarked that the undertaking was "not within the scope of the authority of the company as a corporation, and therefore void." In *Macgregor v. Dover & D. R. Co.* (1852) 18 Q. B. 618, 118 Eng. Reprint, 233,

of courts which have never adopted that doctrine, but also of courts which adopted

it subsequently to the time when the rulings in question were made. In a strictly

16 Eng. L. & Eq. Rep. 180, 7 Eng. Ry. & C. Cas. 227, 22 L. J. Q. B. N. S. 69, 17 Jur. 21, the terminology of this case was used in the judgment delivered for the exchequer chamber by Alderson, B.

In *Norwich v. Norfolk R. Co.* (1855) 4 El. & Bl. 397, 119 Eng. Reprint, 149, the only question upon which a difference of opinion developed was as to whether the contract under review was ultra vires. That it would be illegal, if determined to be ultra vires, was not disputed. Lord Campbell designated it by the expressions, "ultra vires," "illegal," and "void." Erle, Ch. J., stated that the question for consideration was "whether this contract was illegal as not authorized by the act incorporating the defendants' company, and therefore prohibited by that act." He also laid it down that "a contract for a purpose unconnected with the purpose of incorporation is, or may result in, an application of the funds to a purpose unconnected with the purpose of incorporation, and is therefore held to be prohibited and void."

In *Eastern Counties R. Co. v. Hawkes* (1855) 5 H. L. Cas. 331, 10 Eng. Reprint, 928, 35 Eng. L. & Eq. Rep. 8, 24 L. J. Ch. N. S. 601, 3 Week. Rep. 609, the point discussed by the House of Lords was merely whether the contract upon which the action was brought was ultra vires. Lord Brougham was of the opinion that there was "nothing illegal" in it, the expression "illegal" being clearly used as a synonym of "ultra vires." This was the position of the other members of the House also.

In *Atty. Gen. v. Great Eastern R. Co.* (1880) L. R. 5 App. Cas. 473, 22 Eng. Rul. Cas. 114, Lord Watson said (p. 486): "I cannot doubt that the principle by which this House, in the case of the Ashbury Carriage & Iron Co. v. Riche (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304, tested the power of a joint stock company registered (with limited liability) under the Companies Act of 1862, applies with equal force to the case of a railway company incorporated by act of Parliament. That principle in its application to the present case appears to me to be this; that when a railway company has been created for public purposes, the legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication." To the same effect are the remarks of Lord Blackburn (p. 481).

In *Wenlock v. River Dee Co.* (1887) L. R. 36 Ch. Div. (Eng.) 674, Bowen, L. J., after referring to the doctrine that "at common law a corporation created by the King's charter has prima facie, and has been known to have ever since *Sutton's Hospital Case* (1612) 10 Coke (Eng.) 13, the power to do with its property all such acts as an ordinary person can do, and to bind itself

to such contracts as an ordinary person can bind himself to," thus contrasted the position of a corporation created by or in pursuance of a statute: "The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had."

In *Re London & N. Ins. Corp.* (1869) L. R. 4 Ch. (Eng.) 682, 21 L. T. N. S. 182, 17 Week. Rep. 751, even a transaction which was invalid merely because it had not been confirmed by the corporation was referred to by Giffard, L. J., as "illegal."

So far as England itself is concerned, the above cases and those cited infra are conclusive; but some remarks made by Lord (then Mr. Justice) Blackburn in *Taylor v. Chichester & M. R. Co.* (1867) L. R. 2 Exch. (Eng.) 379, where he dissented from the view that ultra vires contracts belong to the illegal class, are of interest to American courts which draw a distinction between ultra vires and illegal transactions. The following statement of Mellor, J., shows the position taken by the majority of the court: "I think that the statutes by which the defendants were incorporated did constitute them a company created for particular purposes, with special powers, and that the application of the funds to be raised under them is limited to prescribed and definite objects; and that, by reasonable inference from the provisions of the statutes, the bargain now under consideration is prohibited, and that its performance by the defendants would amount not merely to a breach of trust, the remedy for which would be in equity, but that, the contract itself being ultra vires and illegal, because prohibited, the defense is properly raised in a court of law."

In *Citizens' State Bank v. Hawkins* (1896) 18 C. C. A. 78, 34 U. S. App. 423, 71 Fed. 369, the court said: "An act is ultra vires a corporation when it is beyond and outside of the scope of the powers conferred by its founders,—when the corporation is without authority to perform it under any circumstances or for any purpose. Such acts are wholly void, and no contract for their performance can be enforced by or against the corporation, the plea of ultra vires being available to either party to the contract."

"The whole doctrine of ultra vires is based on the principle that the court will not aid in the enforcement of an illegal act." *Barron v. McKinnon* (1912) 116 C. C. A. 483, 196 Fed. 933.

In *National Pemberton Bank v. Porter* (1878) 125 Mass. 333, 28 Am. Rep. 235, the court remarked: "There is nothing of mystery or of sanctity in the use of the

logical point of view it seems clear that the phraseology of these statements can

with propriety be used only in jurisdictions in which the doctrine is rejected.

words of a dead language, 'ultra vires;' and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really ultra vires as the unauthorized act of a corporation. We do not see in what respect there is any difference, in legal effect, between the obtaining of a note by an individual and by a corporation, if it be obtained wrongfully."

In *Morris & E. R. Co. v. Sussex R. Co.* (1869) 20 N. J. Eq. 562, it was laid down that § 3 of the Act of 1846, concerning corporations (Nixon's Dig. 168), which provides that, in addition to the powers enumerated in § 1, "and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the power so enumerated and given," must be taken as a prohibition of any acts not within the scope of the powers permitted, and that contracts in contravention of it are illegal.

In *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.* (1893) 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525, an ultra vires contract was described as being "unlawful and void."

In *Safford v. Wyckoff* (1841) 1 Hill (N. Y.) 11, Cowen, J., in delivering the opinion of the court said: "True, there is no nullifying clause in the statute against negotiable notes or bills in whatever way or form issued, nor any positive prohibition or negative against them. But both are most obviously implied not only in the general frame and scope of the statute, . . . but more emphatically in its policy."

In *Tracy v. Talmage* (1856) 14 N. Y. 162, 67 Am. Dec. 132, the court said: "It has long been settled that contracts founded upon an illegal consideration, or which contemplate the performance of that which is either malum in se or prohibited by some positive statute, are void. But the application of this rule to contracts made by corporations, the sole objection to which consists in their being ultra vires, is comparatively modern. . . . That a contract by a corporation which it has no legal capacity to make is void and cannot be enforced, it would seem difficult to deny." This and the preceding case it should be remarked, were decided before the doctrine of estoppel was established in New York.

In *Smith v. Alabama L. Ins. & T. Co.* (1843) 4 Ala. 558, it was laid down that, when a corporation "transcends the limits within which it is confined by its charter, its acts are wholly void. Such is the case in this instance. The company had no power to lend its obligations to pay money in future, the contract therefore made by it with the plaintiff in error, whether it be considered a loan of the bonds of the com-

pany or an exchange of credits, is void, and the security taken for the performance of this illegal contract, being necessarily void also, cannot be the foundation of any proceeding in a court of justice." This case was cited in *Straus v. Eagle Ins. Co.* (1855) 5 Ohio St. 59.

In *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.* (1850) 11 Humph. (Tenn.) 1, 53 Am. Dec. 742, the objection of illegality was held to be equally fatal whether the prohibition is express or implied.

In *Miller v. American Mut. Acci. Ins. Co.* (1893) 92 Tenn. 167, 20 L.R.A. 769, 21 S. W. 39, the court expressed its disapproval of the theory embodied in the cases "which make a distinction between acts merely in excess of authority and those which, in addition, are affirmatively forbidden or immoral, or in contravention of some principle of public policy." See next section.

For other cases in which ultra vires contracts were expressly declared to belong to the "illegal" category, see *Salomons v. Laing* (1850) 12 Beav. 339, 50 Eng. Reprint, 1091, 6 Eng. Ry. & C. Cas. 289, 19 L. J. Ch. N. S. 225, 14 Jur. 471; *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* (1852) 16 Beav. 441, 51 Eng. Reprint. 848; *Re Companies Acts* (1888) L. R. 21 Q. B. Div. (Eng.) 301; *Pearce v. Madison & I. R. Co.* (1858) 21 How. (U. S.) 441, 16 L. ed. 184; *Pullman's Palace Car Co. v. Central Transp. Co.* (1897) 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Oregonian R. Co. v. Oregon R. & Nav. Co.* (1884) 10 Sawy. 464, 22 Fed. 245; *Cumberland Teleph. & Teleg. Co. v. Evansville* (1903) 127 Fed. 187; *Central R. & Bkg. Co. v. Smith* (1884) 76 Ala. 572, 52 Am. Rep. 353; *Leavitt v. Blatchford* (1848) 5 Barb. (N. Y.) 9; *Talmage v. Pell* (1852) 7 N. Y. 328; *Simpson v. Greenfield Bldg. & Sav. Assn.* (1882) 38 Ohio St. 349 (contract violating express prohibition was designated as "ultra vires"). See also *Free Home Bldg. L. & Homestead Assn. v. Edwards* (1906) 223 Ill. 126, 79 N. E. 64.

In the following cases ultra vires contracts were designated as "void,"—a nomenclature which clearly imports that they were assumed to be "illegal:" *Simpson v. Westminster Palace Hotel Co.* (1860) 8 H. L. Cas. 717, 11 Eng. Reprint, 608, 6 Jur. N. S. 935, 2 L. T. N. S. 707; *Sinclair v. Brougham* [1914] A. C. (Eng.) 411, 83 L. J. Ch. N. S. 465, 111 L. T. N. S. 1, 30 Times L. R. 315, 58 Sol. Jo. 302; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 317, 30 L. ed. 83, 94, 6 Sup. Ct. Rep. 1094; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (1888) 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* (1898) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Wheeler v. Home Sav. & State Bank* (1900) 188 Ill. 37, 80 Am. St. Rep. 161, 58 N. E. 598; *Imperial Bldg. Co. v. Chicago Open Bd. of Trade* (1908) 238 Ill. 100, 87 N. E. 167;

Nevertheless it is not infrequently found in cases in which the doctrine was applied.³

In some cases the illegality of unauthorized transactions has been distinctly

referred to the conception that they are contrary to public policy.⁴ "The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that

Brunswick Gaslight Co. v. United Gas, Fuel & Light Co. (1893) 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525; Crutcher v. Nashville Bridge Co. (1847) 8 Humph. (Tenn.) 403.

In the following cases the defect of power which was predicated on a merely implied prohibition was treated as involving, so far as the liability of claimant to maintain the action, the same consequences as if the prohibition had been express: New York Firemen Ins. Co. v. Ely (1825) 5 Conn. 560, 13 Am. Dec. 100; Hood v. New York & N. H. R. Co. (1853) 22 Conn. 502; Naugatuck R. Co. v. Waterbury Button Co. (1856) 24 Conn. 468; Andrews v. Union Mut. F. Ins. Co. (1854) 37 Me. 256; Pennsylvania D. & M. Steam Nav. Co. v. Dandridge (1836) 8 Gill. & J. (Md.) 248, 20 Am. Dec. 543; Abbott v. Baltimore & R. Steam Packet Co. (1850) 1 Md. Ch. 542; Whittenton Mills v. Upton (1858) 10 Gray (Mass.) 582, 71 Am. Dec. 681; Bacon v. Mississippi Ins. Co. (1856) 31 Miss. 116; Life & F. Ins. Co. v. Mechanic F. Ins. Co. (1831) 7 Wend. (N. Y.) 31; Hodges v. Buffalo (1846) 2 Denio (N. Y.) 110; Madison, W. & M. Pl. Road Co. v. Watertown & P. Pl. Road Co. (1859) 7 Wis. 59.

In *Silver Lake Bank v. North* (1820) 4 Johns. Ch. (N. Y.) 370, Chancellor Kent treated an ultra vires mortgage as being void, but took the ground that the question of invalidity was one which only the states could raise.

In *Beach v. Fulton Bank* (1820) 3 Wend. (N. Y.) 582, the right of recovery was in part discussed with relation to the expressly prohibitive provisions of the Restraining Act; but the ultimate ratio decidendi was the principle that, "incorporated companies having no powers but such as are granted or necessarily incident, a company having no such power, express or implied, has no capacity to lend money, of course cannot sue for it." For another case in which the extent of the powers of the same company (Hudson Insurance Company) was involved, and the same principle applied, see *Fulton Bank v. Benedict* (1829) 1 Hill (N. Y.) 529.

In *Clarke v. Sarnia Street R. Co.* (1877) 42 U. C. Q. B. 46, it was declared that the cases show "that when acts are spoken of as ultra vires, it is not intended that they are prohibited, but merely such as are not within the powers, directly or indirectly, conferred on the corporation." But this statement is plainly inconsistent with the English cases which had already been decided when it was made.

³ In *Pittsburgh & C. R. Co. v. Allegheny County* (1869) 63 Pa. 126, the court said: "Contracts, engagements, and acts of a corporation not necessarily embraced within the scope of the undertaking authorized by L.R.A.1917A.

the act of incorporation cannot be legally done or performed by the corporation."

In *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* (1876) 83 Pa. 160, 2 Mor. Min. Rep. 421, where the contract in question was held to be ultra vires as being the subject of an implied prohibition, the court laid it down that "the defendants were not in a position to defend on the ground of the illegality of the contract."

In *Parish v. Wheeler* (1860) 22 N. Y. 494, and *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.* (1910) 149 Iowa, 141, 126 N. W. 190, "illegal" was used as a synonym of "ultra vires."

In *Bankers' Union v. Crawford* (1903) 67 Kan. 449, 100 Am. St. Rep. 465, 73 Pac. 79, an ultra vires contract was designated as "void."

In *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (1905) 102 Md. 334, 2 L.R.A. (N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351, a contract "in violation of" the statute in question was viewed as being ultra vires.

In *Tourtlet v. Whited* (1900) 9 N. D. 467, 84 N. W. 8, and *Luthe v. Farmers' Mut. F. Ins. Co.* (1882) 55 Wis. 543, 13 N. W. 490, ultra vires contracts were referred to as belonging to the "prohibited" class.

In *Boyd v. American Carbon Black Co.* (1897) 182 Pa. 206, 37 Atl. 937, a contract of partnership was described as "not malum in se, but only malum prohibitum,—illegal, but not iniquitous."

See also *Louisville Tobacco Warehouse Co. v. Stewart* (1902) 24 Ky. L. Rep. 934, 70 S. W. 285, "ultra vires" contract described as "void;" *Hunt v. Hauser Malting Co.* (1903) 90 Minn. 282, 96 N. W. 85 (syllabus of court designated an "ultra vires" contract as "unlawful"); *Chapman v. Lynch* (1898) 156 N. Y. 551, 51 N. E. 275 (prohibited contract treated as ultra vires); *Hannon v. Siegel Cooper Co.* (1901) 167 N. Y. 244, 60 N. E. 597, 52 L.R.A. 429 (engaging in a certain business was declared to be "illegal and ultra vires"); *Fowler v. Scully* (1872) 72 Pa. 456, 13 Am. Rep. 699 ("ultra vires" contract described as "illegal").

⁴ In *Miller v. American Mut. Acci. Ins. Co.* (1893) 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 30, the court said: "It seems to us that the true foundation of the doctrine of ultra vires lies in the proposition that every act of a corporation in excess of its power is an act in contravention of public policy, and for that reason to be held null and void. The ground upon which corporate privileges are conferred is that the public interests may be thereby subserved. . . . Charters must be supposed to be, therefore, granted upon the supposition that some public interest is thereby advanced. 'The legislature is therefore presumed,' says

corporations should not transcend the limits of their charters."⁵ This consideration is, of course, specially applicable where the contract in question was made in contravention of a statute of general tenor regarding the powers of corporations,⁶ or where the particular ground upon which the invalidity of that contract is predicated consists in the fact that it purported to transfer to other parties, without the permission of the legislature, a franchise, such as that of a railroad company, "intended to be used in large measure for the public good."⁷ It is observable that this method of explaining the absolutely void quality of unauthorized transactions marks another point in respect to which the theory here under discussion differs from that which is reviewed in §§ 17, 18, *infra*. By the courts which have adopted the latter theory, the applicability of the principle of estoppel to such transactions is frequently predicated on the very ground that they are not void as being contrary to public policy.

16. Doctrine under which ultra vires and illegal contracts are differentiated in respect of category, but not of incidents.

According to another doctrine "ille-

gal" and "ultra vires" contracts belong to different categories, but are similar in this respect, that the latter, as well as the former, are entirely void. This theory is reflected in the following remarks made by Lord Cairns in a leading case: "I have used the expressions 'extra vires' and 'ultra vires.' I prefer either expression very much to one which occasionally has been used in the judgments in the present case, and has also been used in other cases, the expression 'illegality.' In a case such as that which your Lordships have now to deal with, it is not a question whether the contract sued upon involves that which is *malum prohibitum* or *malum in se*, or is a contract contrary to public policy and illegal in itself. I assume the contract in itself to be perfectly legal, to have nothing in it obnoxious to the doctrine involved in the expressions which I have used. The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."¹ The transaction here under review was, it should be observed, one which contravened an expressly prohibitory clause of the statute under which the company in question had been formed. But for the purposes of a gen-

Judge Selden in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 285, 'to have granted just so much power, and so many peculiar privileges, as these interests are supposed to require.' It must be therefore that any act in excess of these granted powers is an act contrary to public policy, and upon that ground illegal and void. Any other view, by which such acts are to be supported because executed, would operate as an enormous practical extension of the power of corporations.'

See also *Cumberland Teleph. & Teleg. Co. v. Evansville* (1903) 127 Fed. 187; *Whitten-Mills v. Upton* (1858) 10 Gray (Mass.) 582, 71 Am. Dec. 681.

⁵ *First Nat. Bank v. Converse* (1906) 200 U. S. 425, 439, 50 L. ed. 537, 542, 26 Sup. Ct. Rep. 306.

⁶ As was the case in *Morris & E. R. Co. v. Sussex R. Co.* (1869) 20 N. J. Eq. 542.

⁷ *Thomas v. West Jersey R. Co.* (1879) 101 U. S. 71, 25 L. ed. 950, citing *York & M. Line R. Co. v. Winans* (1854) 17 How. (U. S.) 30, 15 L. ed. 27.

¹ *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 672, 2 Eng. Rul. Cas. 304. It is interesting to find that this theory had been unsuccessfully advanced in an earlier case by the distinguished lawyer who subsequently became Mr. Justice Willes. In *Norwich v. Norfolk R. Co.* (1855) 4 El. & Bl. 406, 119 Eng. Reprint, 1143, he contended as counsel that there was a "material distinction between contracts L.R.A.1917A.

illegal because they are forbidden by some law, and contracts which are not illegal, but mere nullities because the party entering into them has not capacity to contract."

A similar point of view seems to be indicated by the following statement made, *arguendo*, by Lord Wensleydale in *Scottish Northeastern R. Co. v. Stewart* (1859) 5 Jur. N. S. (Eng.) 607: "There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statute by which it is created or regulated expressly or by necessary implication prohibit such contract between the parties."

See also the following statement: "In dealing with this branch of the law it is necessary to bear steadily in mind the difference between illegality and ultra vires. A transaction which is illegal is forbidden by law. A transaction which is ultra vires is precluded by the incompetence of the actor. The act may be a perfectly legal act, but is one which that person cannot do. Upon an illegal transaction no right enforceable in a court of justice can be maintained. But there is nothing to preclude a party coming into court, affirming the existence of an ultra vires transaction, and pointing to the incompetence of the party to bind himself thereto." Buckley, L. J., in *Re Birkbeck Permanent Benefit Bldg. Soc.* [1912; C. A.] 2 Ch. (Eng.) 232.

eral discussion, this circumstance is immaterial, when we advert to the numerous English cases in which it has been held or assumed that, so far as the applicability of the doctrine of ultra vires is concerned, an implied prohibition is the juristic equivalent of an express one.

It is manifest that under this theory also the operation of an estoppel is wholly excluded. "A contract of a corporation which is ultra vires in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it."²

As the courts which have adopted this theory also take the ground that transactions belonging to both of the differentiated categories are equally void,³ the distinction seems to be of no practical importance so long as it is considered with reference to the right of action upon the contract itself. There is, how-

ever, room for an argument that it may be a material factor in cases where a claimant is seeking relief independently of the contract. Thus, we find the following statement in an English case where an excessive loan was involved: "If the ultra vires loan is to be treated as an illegal prohibited transaction, as distinguished from a contract into which the company have no capacity to enter, there is no action at law or in equity by which the lender can recover back moneys which he has paid over in pursuance of the illegal contract. If, on the other hand, the ultra vires loan is to be treated merely as something ultra vires, and not as an illegal transaction, there is no reason why the lender should not recover the money thus paid from the company, as money received to the use of the lender, by reason of the failure of consideration arising out of the incapacity of the company to borrow, provided always that the dealing by the company with the money has not been such as to show that, notwithstanding the form of action adopted, the money has really been so dealt with by the company as that, in the interval between the lending of the money and the bringing of the action, the company has increased its borrowing obligations beyond its borrowing powers."⁴ But, so far as regards one class of actions, viz., those for money

² *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 59, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478. This passage was quoted in *Anglo-American Land, Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 80, 132 Fed. 721; *Steele v. Fraternal Tribunes* (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; and in *Stacy v. Glen Ellyn Hotel & Springs Co.* (1906) 223 Ill. 546, 8 L.R.A.(N.S.) 966, 79 N. E. 133.

For an early case in which "illegality" and "want of capacity" were distinguished, see *Vermont & C. R. Co. v. Vermont C. R. Co.* (1861) 34 Vt. 48.

³ This is shown by the cases cited in the preceding notes, and by the language used in *Re Wrexham, M. & C. Q. R. Co.* [1899; C. A.] 1 Ch. (Eng.) 456, 68 L. J. Ch. N. S. 270, 47 Week. Rep. 464, 80 L. T. N. S. 130, 15 Times L. R. 122, 6 Manson, 218 (contract invalidated by the want of corporate capacity was described as "ultra vires, and therefore null and void"); *Re Birkbeck Permanent Benefit Bldg. Soc.* [1912; C. A.] 2 Ch. (Eng.) 207, 81 L. J. Ch. N. S. 769, 106 L. T. N. S. 968, 28 Times L. R. 451 (ultra vires contract, "though not illegal, is void, and in truth has no existence").

⁴ *Re Wrexham, M. & C. Q. R. Co.* (Eng.) supra. See also *Brougham v. Dwyer* (1913) 29 Times L. R. (Eng.) 234, where Laish, J., thus stated the grounds upon which an action for money had and received was L.R.A.1917A.

maintainable for the recovery of a deposit which had been received by a building society which conducted a banking business: "The defense raised to the action, to which the judge gave effect, was that this contract, being ultra vires, had the same consequences in point of law as if it had been illegal. If it had been illegal, of course the action would not lie, because the court would not allow a person who was seeking to recover a sum of money to set up as part of his cause of action what was an illegal contract. The judge took the view that to all intents this contract was an illegal one, and that the plaintiff was suing upon an illegal contract. If it had been so, that would have been a complete answer to the action. When, however, one remembered what ultra vires was, that was not the position. The transaction was not a contract only because the building society were unable to enter into it. There was nothing wrong or illegal about it, but, the plaintiffs being incompetent to enter into it, it did not exist in point of law. The contract not being illegal, the action was maintainable and the defendant had no defense to it."

A similar point of view is possibly indicated by the language used in *Slater Woollen Co. v. Lamb* (1887) 143 Mass. 420, 9 N. E. 823, where the right of a corporation to recover the value of goods sold was

had and received, doctrine thus propounded has been rejected in England by the House of Lords.⁵ This decision would probably be deemed controlling also in cases where other kinds of actions not based on the contract are involved.

The distinction between incapacity and illegality has not been much discussed by the American courts with relation to the right of pursuing remedies which are independent of the contract. But in one case where action for money had and received was held to be maintainable, the ratio decidendi was that the contract in question was "only ultra vires, and not malum in se or malum prohibitum."⁶

In spite of the high authority by which this particular species of differentiation is supported, its propriety, even in a narrow, technical point of view, would seem to be open to controversy. The classification which it presupposes is manifestly defective in that it does not make any satisfactory provision for those transactions which are beyond the powers of a corporation by reason of the fact that they are the subject of an express prohibition. The withdrawal of such transactions from the "illegal" category, simply because the party affected by the prohibition is a corporation, seems to be somewhat arbitrary, and is certainly contrary to all analogy. Having regard to the fact that the theory of Lord Cairns was, as has been mentioned above, propounded with relation to an express prohibition, it seems clear that the difficulty which is indicated in this point of view cannot be evaded by the aid of an assumption that the term, "ultra vires," connotes only transactions which are impliedly prohibited. Moreover, if we advert to the consideration that the "incapacity" or "incompetency" of a corporation to enter into certain transactions results simply from the circumstance of their having been prohibited, and that the juristic quality of its "illegal" transactions is also predicated from the circumstance, there would seem to be no satisfactory reason for passing over the primary element of the prohibition, and resorting to a classifica-

tion based upon a secondary and merely verbal distinction. How hard it is to segregate "ultra vires" and "illegal" transactions consistently and effectually in any jurisdiction in which they are considered to be equally void is shown by such a statement as the following, which, it should be observed, occurs in the same opinion of the Federal Supreme Court as that from which the excerpt last quoted is taken: A contract ultra vires is "unlawful and void, not because it is in itself immoral, but because the corporation, by law of its creation, is incapable of making it."⁷ Here we have the "incapacity" of the corporation explicitly referred to as affixing the character of "unlawfulness" to the contract, —a doctrinal position which apparently cannot be reconciled with the phraseology of the other passage, except possibly upon the somewhat forced supposition that the words, "ought not," which the court there uses in affirming the antithesis between "ultra vires" and "illegal," are intended to cover merely that category of prohibited contracts which in the latter passage is designated by the expression, "immoral."

In one case the following language was used: "A distinction is to be noted between the invalidity of a contract resulting from the want of capacity to make it, and that resulting from its being in violation of law, or contrary to public policy. If such contract is not in violation of some public law or contrary to public policy, it would seem that only the immediate parties to it, as the corporations themselves or the stockholders, who are parties by representation, would hold such a legal position in relation to it as to entitle them to raise the question of validity on account of the want of capacity; while, on the other hand, if such contract was in violation of some public law, or against public policy in such sense as to make it void and of no efficacy to any intent, any person standing in a relation of interest to the subject matter of the contract, and to be affected by its operation, might undoubtedly set up and insist on such fatal vice, in it for the purpose of clearing himself from the consequences of its being carried into

put upon the ground that the contracts of sale, if ultra vires, were "not contracts which were prohibited or contracts which were void as against public policy or good morals."

⁵ *Sinclair v. Brougham* [1914] A. C. (Eng.) 398, 83 L. J. Ch. N. S. 465, 111 L. T. N. S. 1, 30 Times L. R. 315, 58 Sol. Jo. 302. For further information as to this L.R.A.1917A.

case, see §§ 4, 6, of the note to *Crowder State Bank v. Aetna Powder Co.* post, 1026.

⁶ *Brennan v. Gallagher* (1902) 199 Ill. 207, 65 N. E. 227, reversing (1901) 99 Ill. App. 81.

⁷ *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 130 U. S. 24, 60, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478.

effect.”⁸ It was accordingly held that a party holding the bonds of a railway company which had, without any authority, taken a lease of another company’s road, could not raise the question of the validity of the lease. This exposition of principles and the conclusion seem to be hardly consistent, in a logical point of view, with the unqualified statements which have been made in the present and preceding sections with regard to the absolutely void quality of the unauthorized contracts of a corporation. It is noteworthy that the case in which these remarks were made was decided during a somewhat early period in the evolution of the doctrine of ultra vires.

17. Doctrine under which ultra vires contracts are differentiated in respect both to category and incidents.

A third doctrine is that “ultra vires” contracts not only belong to a different category from those which are “illegal,” but are not void in such a sense that they cannot be vitalized by the subsequent conduct of the parties.

The earliest case in which this doctrine was categorically propounded seems to be one which was decided by the supreme court of New York in 1853.¹ Two years afterward the doctrine was recognized by the court of appeals.² But the most frequently cited exposition of the subject is to be found in the following passage in the well-known opinion delivered by Chief Justice Comstock in a leading case of somewhat later date: “But is it true that all contracts of corporations for purposes not embraced in their charters are illegal, in the appropriate sense of that term? This proposition I must deny. Undoubtedly such engagements may have the vices which sometimes infect the contracts of individuals. They may involve a malum in se or a malum prohibitum, and may be void for any cause which would avoid

the contract of a natural person. But where no such vices exist, and the only defect is one of power, the contract cannot be void because it is illegal or immoral. . . . The books are full of cases upon the powers of corporations and the effect of dealing in a manner and for objects not intended in their charters; but, with the slight exception named,³ there is an entire absence not only of adjudged cases, but of even judicial opinion or dicta, for the proposition that mere want of authority renders a contract illegal. Such a proposition seems to me absurd. The words ‘ultra vires’ and ‘illegality’ represent totally different and distinct ideas. It is true that a contract may have both those defects, but it may also have one without the other. For example, a bank has no authority to engage, and usually does not engage, in benevolent enterprises. A subscription made by authority of the board of directors and under the corporate seal, for the building of a church or college or an almshouse, would be clearly ultra vires, but it would not be illegal. If every corporator should expressly assent to such an application of the funds, it would still be ultra vires, but no wrong would be committed and no public interest violated. So a manufacturing corporation may purchase ground for a schoolhouse or a place of worship for the intellectual, religious, and moral improvement of its operatives. It may buy tracts and books of instruction for distribution amongst them. Such dealings are outside of the charter; but, so far from being illegal or wrong, they are in themselves benevolent and praiseworthy. So a church corporation may deal in exchange. This, although ultra vires, is not illegal because dealing in exchange is, in itself, a lawful business, and there is no state policy in restraint of that business.”⁴

The theory thus propounded that the

⁸ *Vermont & C. R. Co. v. Vermont C. R. Co.* (1861) 34 Vt. 2.

¹ *Steam Nav. Co. v. Weed*, 17 Barb. (N. Y.) 378, where the right of the plaintiff corporation to recover was affirmed on the ground that “when it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted to question its validity in an action founded upon it.”

² *Bank of Genesee v. Patchin Bank* (1855) 13 N. Y. 309, where the court, in discussing an indorsement for accommodation, referred to certain cases in which the principle of L.R.A.1917A.

estoppel had been “carried to the length of protecting a transaction prohibited by a positive law founded on considerations of public policy,” and, after having pointed out that “the objection here is not that the transaction itself was unlawful, but only that it was unauthorized in this particular case,” drew the deduction that the principle of estoppel might properly be allowed to control the case.

³ This refers to the English cases commented upon in § 18, notes 1, 2, *infra*.

⁴ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 269, see also p. 274.

In another case decided during the same year, the same judge used the following language: “In all this I can see nothing

illegal contracts of corporations are distinguishable in respect to category and incidents from those which are ultra vires has been adopted by a large number of the American courts. It affords in fact the only available ground upon which, if we exclude from consideration elements of the kind mentioned at the commencement of § 14, supra, the theory of an estoppel against pleading ultra vires can logically be defended. Having regard to its crucial importance, a few of the statements which reflect the same views as those of the Chief Justice Comstock may properly be quoted.

"When acts of corporations are spoken of as ultra vires, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created."⁵

"The contract . . . was not illegal in the sense that it was forbidden by the statute, or that it was against public policy. It is ultra vires, if at all, simply because it does not relate to something within the purview of the object for which the corporation was organized."⁶

"A corporation may do acts which affect the public to its harm, inasmuch as they are per se illegal or are malum prohibitum [sic]. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders dealing in good faith with the corporation will be protected in a reliance upon those acts."⁷

"In not infrequent instances corpora-

tions enter into unauthorized contracts which are neither mala in se nor mala prohibita, or when the only prohibition or restriction is implied from the grant of specified powers. It is this class of cases which opens the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances, or enforce its obligation whether as to past or future transaction? . . . If a lease by a corporation made in excess of its powers and without legislative sanction is illegal in the ordinary and proper sense of the term, it may be properly conceded that no action could be maintained upon it. The lessee, when sued for the rent, could set up the illegality of the contract, and the defense would prevail, however inequitable the defense might be. But the term 'illegal,' which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases, means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word 'illegal,' as applied to contracts of corporations ultra vires only, has been frequently alluded to."⁸

"Ultra vires and illegality represent totally different ideas. . . . Ultra vires contracts are, strictly speaking, only those which are defective solely because they are beyond the power of the corporation, when they involve some adventure or undertaking not within the scope of the

unlawful except the want of legal power or right to buy the property. . . . That clause [in the contract under review], considered by itself, involved nothing illegal or even ultra vires." Comstock, Ch. J., in *Parrish v. Wheeler* (1860) 22 N. Y. 509.

⁵ *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 68, 20 Am. Rep. 504. This passage was quoted with approval in *First Nat. Bank v. Guardian Trust Co.* (1905) 187 Mo. 525, 70 L.R.A. 79, 86 S. W. 109.

⁶ *Koehler v. Reinheimer* (1898) 26 App. Div. 1, 49 N. Y. Supp. 755.

⁷ *Kent v. Quicksilver Min. Co.* (1879) 78 N. Y. 186, 4 Mor. Min. Rep. 47. L.R.A.1917A.

⁸ *Bath Gaslight Co. v. Claffy* (1896) 151 N. Y. 34, 36 L.R.A. 604, 45 N. E. 390. In this case the court cited in support of its view that "ultra vires" has not the same connotation as "illegal," the remarks of Lord Cairns quoted in § 16, supra, but omitted, curiously enough, to advert to the fact that they had reference merely to the subsidiary question of correct nomenclature, and that the case in which they were made embodies a doctrine totally different from that which has been adopted in New York.

charter, which is the rule of its corporate action."⁹

"A distinction is made between the act of a corporation which is merely without authority and one which is illegal. In the one case, it is a question of authority; in the other, of legality. A corporate act becomes illegal when committed in viola-

tion of an express statute on a specific subject, or when it is *malum in se* or *malum prohibitum*, or when it is against public policy."¹⁰

Other cases in which the distinction predicated in the above passage was explicitly recognized are collected in the footnote.¹¹

⁹ Maryland Trust Co. v. National Mechanics' Bank (1906) 102 Md. 614, 63 Atl. 70. Almost the same words as those in the first sentence of this passage are found in Peoria Star Co. v. Cutright (1904) 115 Ill. App. 495.

¹⁰ Bond v. Terrell Cotton & Woolen Mfg. Co. (1891) 82 Tex. 313, 18 S. W. 691.

¹¹ The following Federal decisions, in which the distinction was adopted, are not consistent with the present theory of the Supreme Court as explained in §§ 68 et seq., infra: Gorrell v. Home L. Ins. Co. (1894) 11 C. C. A. 245, 24 U. S. App. 188, 63 Fed. 371 (erroneously stating that the distinction is "*universally*" recognized); Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124 ("no moral turpitude" involved); St. Avit v. Kettle River Co. (1914) 133 C. C. A. 76, 216 Fed. 872 (contract in question not "expressly prohibited"); Re Grand Union Co. (1914) 135 C. C. A. 237, 219 Fed. 353, quoting 3 Cook, Corp. 7th ed. p. 2161, note; Oliver v. Gilmore (1892) 52 Fed. 562.

In Chapman v. Douglas County (1882) 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62, we find the following statement: "The illegality in the contract related not to its substance, but only to a specific mode of performance. . . . The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized. It was not illegal in the sense of being prohibited as an offense; the power in that form was simply withheld." The theory indicated by this language, taken in connection with the decision itself, is that unauthorized, as well as expressly prohibited, contracts, come within the scope of the term "illegal," but that the former can be enforced where justice requires it. But the attribution of such a connotation to the term is unusual in respect to the class of cases under discussion.

For illustrative cases decided by state courts, see Illinois Trust & Sav. Bank v. Pacific R. Co. (1897) 117 Cal. 332, 49 Pac. 197 (nothing "criminal or immoral" involved); Denver F. Ins. Co. v. McClelland (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771 (where act "is prohibited by statute," its performance is held to be void); Neils-ville Bank v. Tuthill (1886) 4 Dak. 295, 30 N. W. 154 (ultra vires transactions distinct from those "which are illegal either because expressly prohibited or because contrary to the general policy of the law"); Penn v. Bornman (1882) 102 Ill. 523; Kadish v. Garden City Equitable Loan & Bldg. L.R.A.1917A.

Asso. (1894) 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; First Nat. Bank v. Brooks (1887) 22 Ill. App. 238 (contract "not illegal as against public policy, or immoral, or expressly prohibited"); State Bd. of Agri. v. Citizens' Street R. Co. (1874) 47 Ind. 407, 17 Am. Rep. 702 (contract "not prohibited" or in violation of any statute); Wright v. Hughes (1889) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; Wittmer Lumber Co. v. Rice (1900) 23 Ind. App. 586, 55 N. E. 868; Flint & W. Mfg. Co. v. Kerr-Murray Mfg. Co. (1899) 24 Ind. App. 350, 56 N. E. 858; Mutual Guaranty F. Ins. Co. v. Barker (1899) 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868; Beach v. Wakefield (1899) 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197 (creation of excessive indebtedness "involved no moral turpitude"); Fidelity Ins. Co. v. German Sav. Bank (1905) 127 Iowa, 591, 103 N. W. 958 (ultra vires contracts distinguished from those "prohibited" or contrary to public policy); Iowa Drug Co. v. Souers (1908) 139 Iowa, 72, 19 L.R.A.(N.S.) 115, 117 N. W. 300 (similar distinction drawn); Weste v. Maryland R. Co. v. Blue Ridge Hotel Co. (1905) 102 Md. 326, 2 L.R.A.(N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351, quoting France in Corporation Law, § 72; Maryland Trust Co. v. National Mechanics' Bank (1906) 102 Md. 614, 63 Atl. 70; Coit v. Grand Rapids (1898) 115 Mich. 493, 73 N. W. 811; Blackwood v. Lansing Chamber of Commerce (1914) 178 Mich. 321, 144 N. W. 823; Hunt v. Hauser Malting Co. (1903) 90 Minn. 282, 96 N. W. 85 (transaction not "inherently wrong, though *malum prohibitum*"); Prairie Lodge v. Smith (1880) 58 Miss. 301; Winscott v. Guarantee Invest. Co. (1895) 63 Mo. App. 367; Goodland v. Bank of Darlington (1898) 74 Mo. App. 365 ("ultra vires" distinguished from "*malum in se*" and "*malum prohibitum*"); York v. Farmers' Bank (1904) 105 Mo. App. 127, 79 S. W. 968 (similar distinction drawn); Wilson v. Torchon Lace & Mercantile Co. (1912) 167 Mo. App. 305, 149 S. W. 1156; Whitehead v. American Lamp & Brass Co. (1905) 70 N. J. Eq. 583, 62 Atl. 554; Woodruff v. Erie R. Co. (1883) 93 N. Y. 609 (contract neither *malum in se* nor *malum prohibitum*, nor void as contrary to public policy); Crocker v. Whitney (1877) 71 N. Y. 161; New York State Loan & T. Co. v. Helmer (1879) 77 N. Y. 64, affirming (1877) 12 Hun. 35; Kent v. Quicksilver Min. Co. (1879) 78 N. Y. 150, 4 Mor. Min. Rep. 47; Atlantic State Bank v. Savery (1880) 82 N. Y. 291; New York v. Sonneborn (1889) 113 N. Y. 423, 21 N. E. 121; Vought v. Eastern Bldg. & L.

In some cases the nature of the distinction is expressed by the statement that ultra vires contracts are not "void," but merely "voidable."¹²

18. Same doctrine further discussed.

An examination of the cases in which the doctrine that there is an essential distinction between an ultra vires and an illegal contract, in respect both to category and incidents, has been recognized, shows that the views of virtually all the courts by which this theory has been adopted are founded, either directly or indirectly, upon the opinion of Chief Justice Comstock from which an extract is given in the preceding section. Nor, so far as the present writer has been able

to ascertain, have any material reasons besides those adverted to by him, been subsequently suggested for differentiating to this extent between the two descriptions of contracts. It will be advisable, therefore, to see how far his remarks were justified by the earlier decisions.

While he concedes that, although some "slight foundation" for the doctrine that "ultra vires" contracts are "illegal" was afforded by two English cases,¹ that doctrine had been discredited by two other cases of later date.²

It is submitted that this assertion was erroneous in more than one respect. In the cases which he assumes to have been discredited, "ultra vires" contracts are *explicitly* referred to as "illegal," and the

Asso. (1902) 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496 (contract "involved no moral turpitude, and did not offend any express statute"); *Otis v. Harrison* (1862) 36 Barb. (N. Y.) 210; *Bushnell v. Chautauqua County Nat. Bank* (1877) 10 Hun. (N. Y.) 378, modified in (1878) 74 N. Y. 290; *Hutchins v. Planters' Nat. Bank* (1901) 128 N. C. 72, 38 S. E. 252 (ultra vires "distinguished from expressly prohibited and illegal"); *Union Trust Co. v. Mercantile Library Hall Co.* (1899) 189 Pa. 263, 42 Atl. 129; *San Antonio Hardware Co. v. Sanger* (1912) — Tex. Civ. App. —, 151 S. W. 1104; *Luthe v. Farmers' Mut. F. Ins. Co.* (1882) 55 Wis. 543, 13 N. W. 490.

In *Haynes v. Covington* (1850) 13 Smedes & M. (Miss.) 408, the court remarked that there was "no pretense that the consideration of the note [for which suit was brought] is illegal, or that the contract is void, as being opposed to the public policy," and that, if it was in point of fact beyond the power of the plaintiff corporation to make the loan in question, the act of making it would have been merely "an irregular, at most an illegal, exercise of a privilege acknowledged to exist; an act of which the state would have a right to complain, but which would not furnish a ground on which the borrower could evade a repayment of the money." Here it will be observed that the distinction was affirmed not for the purpose of letting in the doctrine of estoppel, but as a basis for the conclusion that the excess of powers was a matter which could be taken advantage of by the state alone.

In *Maryland Hospital v. Foreman* (1868) 29 Md. 524, the distinction between ultra vires and illegal transactions was relied upon as a reason for rejecting the contention that the principle in *pari delicto* could be applied for the purpose of precluding the claimant from recovering back money which he had paid to the hospital.

In *Williams v. Bank of Commerce* (1894) 71 Mass. 867, 42 Am. St. Rep. 503, 16 So. 238, the court, referring to the consequences of a foreign company's not having complied L.R.A.1917A.

with the statutory prerequisites to doing business in the state where the contract in question had been made, observed that there is "a wide and marked distinction between transactions of the character here involved and those involving moral turpitude, the mere making of which is detrimental to the public welfare or private morals."

"A provision in a general corporation law that no corporation created thereunder shall employ its assets for any other purpose than to accomplish the legitimate objects of its creation is merely declaratory of the common-law rule by which corporations are confined in their powers to the purposes for which they are created, and does not amount to such an express statutory prohibition of ultra vires loans and other transactions as to render them illegal instead of ultra vires merely." 1 Clark & M. Priv. Corp. § 225b, quoted with approval in *Harris v. Independence Gas Co.* (1907) 76 Kan. 762, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123.

¹² *Benton County Sav. Bank v. Boddicker* (1898) 105 Iowa, 548, 45 L.R.A. 321, 67 Am. St. Rep. 310, 75 N. W. 632; *Wright v. Hughes* (1889) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Beach v. Wakefield* (1899) 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197; *Smith v. Richardson* (1898) 77 Mo. App. 422.

¹ *East Anglian R. Co. v. Eastern Counties R. Co.* (1851) 11 C. B. 775, 138 Eng. Reprint, 680, 7 Eng. L. & Eq. Rep. 509, 7 Eng. Ry. & C. Cas. 150, 21 L. J. C. P. N. S. 23, 16 Jur. 249, 22 Eng. Rul. Cas. 21; *Macgregor v. Dover & D. R. Co.* (1862; Exch. Ch.) 18 Q. B. 618, 118 Eng. Reprint, 233, 16 Eng. L. & Eq. Rep. 180, 22 L. J. Q. B. N. S. 69 (as to these two cases, see § 15, note 2, supra).

² *Norwich v. Norfolk R. Co.* (1855) 4 El. & Bl. 397, 119 Eng. Reprint, 143, 3 C. L. R. 519, 24 L. J. Q. B. N. S. 105, 1 Jur. N. S. 344; *Eastern Counties R. Co. v. Hawkes* (1855) 5 H. L. Cas. 331, 35 Eng. L. & Eq. Rep. 8, 24 L. J. Ch. N. S. 601, 3 Week. Rep. 609 (as to these two cases, see further § 15, note 1, supra).

whole of the reasoning in both the judgments is based upon the hypothesis that they were of this nature. Under these circumstances, he was manifestly not warranted in minimizing the significance of these cases by the use of the depreciatory expression, "slight foundation." Furthermore, the judgment in the more recent of those cases was rendered by the exchequer chamber, a court of error, and was therefore absolutely binding upon all other tribunals except the House of Lords. If the attention of the learned chief justice had been directed to this fact, he would certainly not have stated that the first mentioned of the two cases which are declared to have changed the English doctrine had impaired the authority of the earlier ones; for it was decided by the court of Queen's bench sitting in banc. But, as a matter of fact, all the cases, including the latest, which was decided by the House of Lords, are perfectly harmonious. The language and reasoning of every one of the judges who participated in the two later cases indicate that they took it for granted that "ultra vires" contracts are illegal and void, and that the only question really discussed was whether the contracts actually under review were or were not authorized.

The learned judge, after having thus explained the English precedents on a footing which exhibited them as being favorable to his own views, deemed himself to be warranted in asserting that "there is an entire absence not only of adjudged cases, but of even judicial dicta, for the proposition that mere want of authority renders a contract illegal." But it is submitted that, even if the English cases are left out of consideration, this statement is erroneous. The reports show that, before the time when it was made, a "want of authority" of that description which is inferred from the fact that a certain power was not explicitly granted to the corporation in question had, in a much larger number of American cases than he was able to produce in favor of his own theory, been recognized as an element which rendered a contract absolutely void.³ It is true that, in several of

the instances in which this position was taken, the term "illegal" was not actually used to characterize the transaction in question. But for the purposes of the present discussion, this circumstance is immaterial. From the language of the opinions it is clear that, in all the cases where contracts which were simply unauthorized were declared to be nonenforceable, "illegality" was the ground upon which they were treated as void. The learned judge would, of course, not have conceded that the decisions which turned upon the effect of expressly prohibitive enactments were precedents unfavorable to his theory.⁴ Nevertheless it may reasonably be contended that they are by implication antagonistic to that theory in this respect at least, that the courts by which they were rendered evidently regarded the expressions "illegal" and "ultra vires" as being identical in their connotation.

The only conclusion which it seems possible to draw from the foregoing review of the earlier decisions is that, at the date when the learned chief justice made the statement under discussion, there was a very distinct preponderance of authority against his theory. It is impossible to deny that the situation is now reversed; that is to say, if preponderance of authority is assumed to be a matter determinable solely by a comparison of the number of the precedents which are consistent or inconsistent with his views. But this method of computation is hardly satisfactory when we are appraising the value of the opinions entertained by judges who, as expositors of the law, are very far from being of the same standing. Having regard to the high reputation of the courts which have refused to accept his theory, a commentator seems to be fully warranted in expressing the opinion that their decisions embody the correct doctrine.

A strong, if not conclusive, objection to that theory is that, in the final analysis, it rests upon the conception that, where the enforceability of a prohibited contract is in question, the extent of the remedial rights varies according as the prohibition is express or merely implied. Such a dis-

³ Many of the cases cited in § 15, note 2, *supra*, as sustaining the theory that ultra vires and illegal contracts belong to the same category, were anterior to 1860. As some of these were adverted to in the opinion of Selden, J., it is not a little remarkable that the chief justice should have ignored them. But even the former was, it is apparent, not acquainted with all the precedents which were available in support of his own views. L.R.A.1917A.

⁴ See, for example, *Philadelphia Loan Co. v. Towner* (1839) 13 Conn. 249 (company authorized to lend money at a rate "not exceeding 6 per cent"); *Leavitt v. Palmer* (1849) 3 N. Y. 10, 51 Am. Dec. 333.

Many of the decisions as to statutes of this type related to the New York Restraining Act. See § 44 of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A. 1917B, —.

tion, it is apprehended, has never been recognized except in cases which are concerned with corporate transactions. In all other classes of cases transactions which are impliedly prohibited are assumed to belong, so far as regards the attribute of nonenforceability, to the same category as those which are expressly prohibited.⁵ Both kinds of transactions are plainly in violation of law, and consequently "illegal" in the broad sense of that word. Having regard to this consideration, there would seem to be no satisfactory ground upon which they can be segregated, except, perhaps, in the special point of view discussed in § 16, *supra*. It is true that, in statutes which do not relate to the powers of corporations, illegal acts are customarily specified by means of prohibitive words. But obviously the adoption of this kind of phraseology is due merely to the nature of the subject matter. The reason why prohibitory language is almost invariably employed in such statutes clearly is that they are intended to operate upon individual members of the community who are assumed to enjoy a liberty of action which is complete except in so far as it may be circumscribed by the law, written or unwritten. On the other hand, the scope of that liberty of action which a corporation possesses depends entirely upon the terms of the enactment, general or special, under which it has been organized. There are, accordingly, two ways in which the extent of its powers may appropriately be defined; that is to say, there may be an enumeration either of the things which it may do or of the things which it may not do. One type of provision declares the will of the legislature by means of an implied prohibition, the other by means of an express prohibition. In view of these obvious considerations, it is difficult to admit that there is any logical basis for the theory that diverse rights and liabilities are created according as the former type of provision or the latter is employed. The scope of both types is

identical in so far as they serve to specify the boundaries of the corporate powers. Why should any distinction be predicated between them for the purposes of the doctrine? The apparent unreasonableness of such a distinction is accentuated by the fact that it is doubtless in many instances a mere matter of accident whether one type or the other is selected; as, for example, where it is a question of placing restrictions upon the powers of corporations to borrow money or insure property or issue certain securities.

As a factor bearing upon the character of the incidents which should be ascribed to ultra vires contracts, the antithesis, so often emphasized, between such transactions and those which are immoral or contrary to public policy, seems to be wholly irrelevant.⁶ Under the general law of contracts, transactions that are impliedly prohibited by statutes constitute, like these which are the subject of this differentiation, one of several distinct descriptions upon which no suit can be maintained. It is clear, therefore, that the antithesis predicated has no tendency whatever to show that the courts are warranted in withdrawing such transactions from the "illegal" category. There is a complete *petitio principii* involved in the argument that, because they do not belong to certain specified classes of "illegal" contracts, they are not themselves "illegal." Furthermore, apart from this consideration, it is to be remarked that, so far as regards the contrast with transactions which are inconsistent with public policy is concerned, several courts have taken the position that one ground upon which unauthorized transactions may properly be treated as absolutely void is that they actually do violate public policy. See § 15, *supra*. It is plain, therefore, that, even with respect to the fundamental concept upon which the contrast is based, there is such a difference of opinion as to render it almost value-

⁵ How far some courts have traveled from this elementary conception is apparent from such a passage as the following: "The term 'ultra vires' has been used without accurate discrimination. Certain contracts on the part of corporations may be prohibited by positive law, either statutory or common. Where such contracts are made by corporations, they are, of course, unlawful. They are *malum prohibitum* and void, for the same reason that the prohibited contract of an individual would be void. Yet courts have termed them 'ultra vires,' L.R.A.1917A.

and have then proceeded to say that ultra vires contracts were void, and might be disregarded at pleasure. More properly speaking, ultra vires contracts of a corporation are such as do not in any manner serve the accomplishment of the purposes for which the corporation is chartered. They are contracts not positively forbidden, but impliedly forbidden, because not expressly or impliedly authorized." *Tourtelot v. Whited* (1900) 9 N. D. 478, 84 N. W. 8.

⁶ Several cases in which this antithesis was adverted to are cited in § 17, *supra*.

less as an independent support of the theory under discussion.

V. Doctrine that a corporation cannot be estopped from pleading ultra vires; English and Scotch decisions.

19. Historical summary of cases bearing upon the doctrine.

In an early case in which an action of ejectment was brought by a person to whom a mortgage had been executed in excess of their powers by the trustees under a public turnpike act, it was held that they were not estopped by their deed from insisting that the mortgage was unauthorized.¹ The effect of this decision was recently declared to be that "the doctrine of estoppel was held inapplicable . . . on the ground that the plaintiffs were a public body with limited powers conferred by statute, and could not exceed those powers."² In the case in which this statement was made, the court went still further and held that the plaintiffs, the vestry of a parish, were neither estopped nor precluded by laches or acquiescence from bringing an action for an injunction to restrain the defendants from using a certain sewer. These two authorities, although they have no explicit bearing upon the question whether an estoppel may be created by the acceptance of the benefits of an ultra vires contract, are so broad in scope that they may be construed as nega-

tiving by implication any such result, so far as public and quasi-public corporations are concerned. It should also be pointed out that to some extent they support the view of those American courts which hold it to be inapplicable in respect to corporations of these descriptions. See §§ 47 and 48, *infra*.

The reports which cover the period between the date of the earlier of the above-mentioned decisions and the time when the powers of incorporated joint-stock companies began to engage the attention of the courts contain no definite information regarding the subject considered in this monograph. But, having regard to the facts involved, the cases belonging to this period are antagonistic to the theory that an estoppel against pleading a want of power can be predicated from the mere fact of an acceptance of the benefits of a contract.³ It should be observed, however, that one of them affords some slight support to the doctrine discussed in §§ 9 *et seq.*, *supra*, that an action may be maintained upon a contract which amounts merely to an abuse of corporate powers, by a person who is not affected with notice of such abuse.⁴

In the few instances in which the point has been explicitly adverted to by the courts when dealing with the liabilities of companies organized under special acts or general statutes, it has been laid down that "no corporate body can be

¹ *Fairtitle ex dem. Mytton v. Gilbert* (1787) 2 T. R. 169, 100 Eng. Reprint, 91, 1 Revised Rep. 455, 11 Eng. Rul. Cas. 52.

² *St. Mary, Islington v. Hornsey Urban Dist. Council* [1900] 1 Ch. (Eng.) 695.

³ *Broughton v. Manchester & S. Waterworks* (1819) 3 Barn. & Ald. 1, 106 Eng. Reprint, 564, 22 Revised Rep. 278. The ground upon which assumpsit was held not to be maintainable on the indorsement of a bill by a trading company was that the contract violated a prohibitory statute.

In *Dickinson v. Valpy* (1829) 10 Barn. & C. 128, 109 Eng. Reprint, 399, 5 Mann. & R. 126, 8 L. J. K. B. 51, 19 Eng. Rul. Cas. 423, an action brought against a mining company by the indorsee for value of a bill of exchange was held not to be maintainable for the reason that there was no evidence to show that the company was authorized to draw such a bill. But the company in this instance was apparently unincorporated.

In *Hill v. Manchester & S. Waterworks* (1831) 2 Barn. & Ad. 544, 109 Eng. Reprint, 1245, Taunton, J., remarked: "A party is estopped by his own recital of a particular fact in a deed, and although there is an exception where fraud or an illegal purpose L.R.A.1917A.

can be shown, the pleas here do not bring the case within it."

⁴ In *Slark v. Highgate Archway Co.* (1814) 5 Taunt. 792, 128 Eng. Reprint, 904, a portion of the headnote runs as follows: "If a corporation is authorized to raise money on promissory notes for a particular purpose, semble that evidence may be received to impeach the notes by showing they were issued for another purpose." There is apparently nothing in the judgment itself which warrants this suggestion. But in the statement of what took place on the trial we are told that Gibbs, Ch. J., rejected the evidence of the purpose for which the notes were made, thinking that if the company was warranted by their act in issuing notes payable to order, it could not be the intention of the act that an innocent indorsee for a valuable consideration should be bound to look to a fact of which he must necessarily be ignorant, viz., the reasons which induced the company to issue those notes, or should be affected by the circumstances that the makers of the notes had it in their minds to apply the money therebv raised to one purpose or to another. He thought the statute must be considered as merely directory as to that point.

bound by estoppel to do something beyond their powers." ⁵ This theory, it is clear, necessarily results from the position taken by the English courts that the unauthorized contracts of such companies are absolutely void. See §§ 15 and 16, *supra*.

One of the consequences of this theory

⁵ Fry, L. J., in *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* (1887) L. R. 18 Q. B. Div. (Eng.) 719, 56 L. J. Q. B. N. S. 449, 57 L. T. N. S. 833, 35 Week. Rep. 590, 52 J. P. 150. This was one of the grounds upon which it was held that the defendant could not be held liable for loss arising from false and fraudulent representations made by its secretary with regard to the validity of certain debenture stock. Bowen, L. J., observed: "It is said that the secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted, for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so? The action against them, therefore, to be maintainable at all, must be an action of tort founded on deceit and fraud."

In *Bishop v. Balkis Consol. Co.* (1890) L. R. 25 Q. B. Div. (Eng.) 77, where the question involved was whether the defendant company was so estopped by its secretary's "certification" of a certain transfer of its shares, Vaughan Williams, L. J., adopted without any expression of doubt as to its correctness, the statement of Fry, L. J., in the above case, although he disagreed with the decision itself. Upon the facts of the case, which are not relevant to the present discussion, the action was held not to be maintainable, both by him and by the court of appeal. See (1890) L. R. 25 Q. B. Div. 512. That he was mistaken, however, in considering the case governed by the observations of Bowen and Fry, L. J., in the earlier one, was declared by Lindley, L. J., who pointed out that there was "nothing ultra vires in the case" before the court, as there was in that. So far as regards this part of his remarks, he evidently adopted the views of Sir H. Davey (afterwards Lord Davey), who in his argument as counsel thus referred to the earlier case: "The principle of that decision was that neither by contract nor by estoppel can a company be compelled to do that which is ultra vires. It is in no way inconsistent with *Re Bahia & S. F. R. Co.* (1868) L. R. 3 Q. B. (Eng.) 584, 9 Best. & S. 844, 37 L. J. Q. B. N. S. 176, 18 L. T. N. S. 467, 16 Week. Rep. 862, in which no such difficulty arose. Looking at the matter on principle, why should a

is that, in an action founded on an ultra vires contract, the right of recovery cannot be predicated from the fact that, by reason of that which has been done in pursuance of the contract, benefit has accrued to the defendant, or damage has been sustained by the plaintiff." ⁶ Having regard to the facts involved in the cases

company be bound by estoppel? A company is a legal corporation with certain strictly defined powers. It is difficult to see how they can be bound by estoppel to do that which they could not contract to do. A contract to increase their capital beyond the authorized amount would be illegal, and therefore void."

In *Re Companies Acts* (1888) L. R. 21 Q. B. Div. (Eng.) 302, Cave, J., said: "It is well established that a corporate body cannot be estopped by deed or otherwise from showing that it had no power to do that which it purports to have done,"—citing *Fairtitle ex dem. Mytton v. Gilbert* (1787) 2 T. R. 160, 100 Eng. Reprint, 91, 1 Revised Rep. 455, 11 Eng. Rul. Cas. 52, note 1, *supra*.

⁶ In *Norwich v. Norfolk R. Co.* (1855) 4 El. & Bl. 397, 119 Eng. Reprint, 143, Erle, J., made the following remarks: "In respect also of the subject matter of the suit, the question in equity is whether the interest of the shareholders is put into hazard to an unreasonable degree beyond what he is presumed to have assented to in subscribing? And, if so, his interest is protected according to equity. At law the question is whether a contract is in a class that is impliedly prohibited, and so void; if it is, whoever is defendant is entitled to unqualified success, and the judgment must be in his favor though he may have knowingly procured the unlawful contract, and have profited by it to the extent of receiving the consideration for the promise which he alleges to be void, or though he may have damaged the plaintiff by his negligence in the performance of that which the plaintiff supposed to be a lawful contract, but which, after judgment for the defendant, he must be taken in law to have known to be unlawful."

In *Ernest v. Nicholls* (1857) 6 H. L. Cas. 401, 10 Eng. Reprint, 1351, Lord Wensleydale made the following remarks in a case where one insurance company had taken over the business and accounts of another and received the premiums due to the latter: "It is a captivating argument for a jury, and jurymen are very often misled by it in these cases of joint-stock companies, but it is very likely to produce injustice, that the company has had the benefit of the plaintiff's goods or service or money, whereas, for the purpose of contract, the company exists only in the directors and officers acting by and according to the deed; and by the statute law the company is no more liable than a corporation by charter, for the act of one or more of its members, who are distinct persons by law."

Two of the propositions formulated in

reviewed in the following section, it is apparent that this doctrine, even when it was not explicitly referred to, must always have been taken for granted by the courts which decided them.

In one case we find the law stated as follows: "There is no ground whatever for the argument that a contract or instrument which fails in a court of law by reason of its illegality can nevertheless be enforced in equity, because money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but, as to any claims sought to be actively enforced on the footing of an illegal contract, the defense of illegality is as available in a court of equity as it is in a court of law."⁷

An important consequence of the theory adopted by the English courts is indicated by a decision of the privy council to the effect that a railway company

which had entered into an agreement beyond its powers, and had consented to a judgment against it in an action brought on that agreement, was nevertheless entitled to impeach both the agreement and the judgment.⁸

From the foregoing statement of the law, and the decisions reviewed in the following section, it is clear that the English authorities are entirely adverse to the application of the principle of estoppel, and that all the instances in which they have been cited by American courts are simply indicative of a misapprehension with regard to their actual purport.⁹

20. Illustrative decisions.

The cases which, either expressly or by implication, must be regarded as precedents adverse to the theory that a corporation which has received the benefits accruing from the performance of a contract by the other party is estopped from raising the defense of ultra vires, are

Brice on Ultra Vires are as follows: LVII. Contracts of this kind are not only objectionable beforehand, but, even if acted upon, they may be repudiated by, and cannot be enforced against, the corporations. p. 183. CCLIV. The mere fact that a corporation has received the consideration of, or otherwise derived advantage from, a contract ultra vires, does not involve it in any liability upon such contract. p. 767.

In Lindley on Companies, vol. 1, 6th ed. bk. 2, chap. 5, § 2, p. 292, the rule is laid down that, "if the directors of a company, enter into a contract which is not binding on the company, either upon the ground that the contract is ultra vires or upon any other ground, the company is not liable on the contract simply because it has had the benefit thereof."

⁷ Giffard, L. J., in *Re Cork & Y. R. Co.* (1869) L. R. 4 Ch. (Eng.) 748. In the same case Lord Hatherley said that a security issued ultra vires is "just as void in equity as at law, being contrary altogether to, and absolutely forbidden by, statute."

See also the statement of Buckley, L. J., which is quoted at the end of the following section.

⁸ *Great North-West C. R. Co. v. Charlebois* [1899] A. C. (Eng.) 114, 68 L. J. P. C. N. S. 25, 79 L. T. N. S. 35, reversing *Charlebois v. Delap* (1896) 26 Can. S. C. 221.

⁹ For example, in the leading case of *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504, the following decisions are cited: *Ex parte Chippendale* (1853) 4 DeG. M. & G. 19, 43 Eng. Reprint, 415, 18 Jur. 710; *Re National Permanent Ben. Bldg. Soc.* (1869) L. R. 5 Ch. (Eng.) 309; *Re Cork & Y. R. Co.* L. R. 4 Ch. (Eng.) 748, 39 L. J. Ch. N. S. 277, 21 L. T. N. S. 735, 18 Week. Rep. 26; *Fishmongers' Co. v. L.R.A.* 1917A.

Robertson (1843) 5 Mann. & G. 131, 134 Eng. Reprint, 510, 6 Scott, N. R. 56, 12 L. J. C. P. N. S. 185. How unwarrantable was the citation of the first and third of these cases is shown at the conclusion of § 22, *infra*. The effect of the second case is stated in § 20, note 13, *infra*. The fourth case did not involve an ultra vires contract at all, but merely one which was invalid for want of a seal. Owing to a similar mistake as to its purport, it was also cited as an authority on the subject of estoppel in *Hays v. Galion Gaslight & Coal Co.* (1876) 29 Ohio St. 330, and *Larwell v. Hanover Sav. Fund Soc.* (1883) 40 Ohio St. 274.

Nor is it easy to understand how the court which decided *North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank* (1890) 79 Wis. 31, 11 L.R.A. 845, 47 N. W. 300, could have imagined that the principle of estoppel was embodied in *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* (1852) 16 Beav. 441, 51 Eng. Reprint, 848. For the actual effect of that case, see § 20, note 12, *infra*.

The general statement in *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771, that the doctrine of estoppel "is supported by the authority of English cases" is so amazingly erroneous that the only apparent way of accounting for it is to assume that the court had never examined those cases for itself.

The review of the English cases in *Bath Gaslight Co. v. Claffy* (1896) 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390, although it does not contain any absolute errors similar to those noticed above, is so incomplete as to be misleading with regard to the real state of the authorities.

tabulated below with reference to the nature of the particular transactions under review.

Contracts incidental to the conduct of an unauthorized business or undertaking.¹

Purchase of shares of the corporation itself.²

Purchase of shares in another company.³

Purchase of the business and assets of another company.⁴

Contracts relating to the amalgamation of companies.⁵

Contracts involving the application of corporate funds. Decisions have been

¹ In *Sinclair v. Brougham* [1914] A. C. (Eng.) 398, 83 L. J. Ch. N. S. 465, 111 L. T. N. S. 1, 30 Times L. R. 315, 58 Sol. Jo. 302, affirming upon this point *Re Birkbeck Permanent Ben. Bldg. Soc.* [1912] 2 Ch. (Eng.) 183, 81 L. J. Ch. N. S. 769, 106 L. T. N. S. 968, 28 Times L. R. 451 (for a more complete statement of the facts, see §§ 4 and 6 of the note to *Crowder State Bank v. Aetna Powder Co.* post, 1026), it was held in proceedings for the winding up of a building society, that it had exceeded its powers in carrying on a banking business, that all contracts made in pursuance in that business were also ultra vires, and that for this reason no legal or equitable debts were created by the deposits which it had received while carrying on that business. For an earlier case involving similar contracts, see *Re Bottomgate Industrial Co-op. Soc.* (1892; Q. B. Div.) 65 L. T. N. S. (Eng.) 712, 40 Week. Rep. 139, 56 J. P. 216.

In *Birkbeck Permanent Ben. Bldg. Soc. v. Birkbeck* (1913) 29 Times L. R. (Eng.) 218, a certain sum was shown in the same proceedings to be due as dividends to one who was a customer of the society in the banking business carried on by it, and who occupied offices belonging to it. The liquidator agreed to treat this sum as a set-off against a claim for rent due in respect to the offices. After the above decision had been rendered, the official receiver sued for the full amount of the rent. Held, that the agreement with the liquidator was not a defense, because there was no debt due to the defendant from the society at the time when that agreement was made.

In *Re Birkbeck Permanent Ben. Bldg. Soc.* [1913] 1 Ch. (Eng.) 400, 82 L. J. Ch. N. S. 232, 108 L. T. N. S. 211, 29 Times L. R. 256, 20 Manson, 159, it was held in the same proceedings that certain clerks could not prove for the capital value of pensions stipulated to be paid in respect to services rendered while the society was engaged in the banking business.

In *Bateman v. Ashton-under-Lyne* (1858) 3 Hurlst. & N. (Eng.) 323, 27 L. J. Exch. N. S. 458, 6 Week. Rep. 829, where the right of an employee to recover for services was disputed on the ground that they had been rendered with respect to an undertaking which was illegal as regards the waterworks company, whose plant, etc., had been purchased by the defendant municipality, three members of the court held the action to be maintainable for the reason that the undertaking was legal. Bramwell, B., dissented on the ground that it was ultra vires.

² In *General Property Invest. Co. v. Matheson* (1888) 16 Sc. Sess. Cas. 4th series, L.R.A.1917A.

282, 26 Scot. L. R. 185, the transaction was set aside, after ten years, in liquidation proceedings, and the trustees of the deceased vendor were placed on the register.

³ In *Royal Bank of India's Case* (1869) L. R. 4 Ch. (Eng.) 252, 19 L. T. N. S. 805, 17 Week. Rep. 359, affirming (1868) L. R. 7 Eq. 91, 19 L. T. N. S. 444, a banking company, I., advanced money on a deposit of the shares of Company A., and subsequently had them transferred into its own name. It was registered as shareholder, sold some of the shares and received the purchase money, and received the dividends on the rest. In proceedings for the winding up of Company A., it was held that, although the acts of ownership exercised by Company I. over the shares would not have prevented its repudiating them if the transaction had been ultra vires, Company I. as rightly placed on the list of contributories, because the transaction was not ultra vires.

In *Ex parte Liquidators* (1878; C. A.) L. R. 8 Ch. Div. (Eng.) 679, where the B. N. Company had, in pursuance of a contract for the purchase of the business of the B. C. Company, whose deed of settlement contained no power to sell it, procured a transfer of all the shares of the B. C. Company and remained registered for several years as a shareholder, it was held that, as the transfer of the shares to the B. N. Company was ultra vires, it could not be placed in the list of contributories to the B. C. Company after an order had been made for winding it up.

⁴ *Ernest v. Nicholls* (1857) 6 H. L. Cas. 401, 10 Eng. Reprint, 1351, reversing *Re Sea Fire & Life Assur. Co.* (1854) 5 DeG. M. & G. 465, 43 Eng. Reprint 951 (action for money alleged to be due under the contract).

In the *Era Life & F. Assur. Co.'s Case* (1862) 1 De G. J. & S. 29, 46 Eng. Reprint, 12, affirming (1862) 2 Johns. & H. 408, 70 Eng. Reprint, 1117, the ground upon which the court of appeal proceeded was that the *Era Company's* purchase of another company's business was not ultra vires.

⁵ In *Balfour v. Ernest* (1859) 5 C. B. N. S. 601, 141 Eng. Reprint, 242, 28 L. J. C. P. N. S. 170, 5 Jur. N. S. 439, 7 Week. Rep. 207, it was held that an insurance company was not bound by a bill of exchange accepted by its directors on its behalf for a debt incurred by another insurance company, which had been amalgamated with the first, such amalgamation not being authorized by the deed of settlement of the company in whose behalf the bill had been accepted.

In the *Era Assur. Co. Case* (1862) 2 Johns. & H. 408, 70 Eng. Reprint, 1117.

rendered denying the right of action upon a contract to pay money to a landowner in consideration of his abandoning his opposition to the passage of a railway bill;⁶ upon a contract to pay money to a member of the House of Lords for his support in obtaining the passage of a railway bill;⁷ upon a contract as to the disposition of money remaining after the expenses of obtaining the passage of a railway bill had been defrayed;⁸ upon an absolute covenant to pay a specified sum within three months after the passing of a railway bill, as a personal compensation to the plaintiff for the assumed inconvenience and injury described in it;⁹ upon a contract by which a lessee railway company agreed to pay the lessor the costs incurred by the lessor in applications to Parliament made at the instance of the lessee, for the purpose of

obtaining powers which the lessee considered it desirable that the lessor should possess;¹⁰ upon a contract by which a railway company agreed that, unless certain works were completed within twelve months, whether an act of Parliament then agreed to be obtained should be passed or not, the defendant or another specified railway company would pay the plaintiffs a certain sum by way of liquidated damages;¹¹ and upon a contract by which two competing railway companies came to an agreement for dividing the profits earned by both, and for regulating the traffic on their lines.¹²

Contracts for the borrowing of money. The nonenforceability of transactions under this head has been predicated on one or other of the following grounds: (1) That the contract was made by a company which had no power at all to borrow;¹³ (2) that the contract had no

where a life and fire assurance society purchased the business of a life assurance company, taking all the assets and undertaking all the liabilities, it was held that the transaction was ultra vires; that securities under the seal of the purchasing company, given in carrying out this arrangement to creditors of the selling company, were void; and that such creditors were not entitled to prove against the purchasing company in winding-up proceedings.

⁶ *Preston v. Liverpool, M. & N. Junction R. Co.* (1856) 5 H. L. Cas. 605, 10 Eng. Reprint, 1037, 25 L. J. Ch. N. S. 421, 2 Jur. N. S. 241, 4 Week. Rep. 383. Compare also *Gage v. Newmarket R. Co.* (1852) 18 Q. B. 457, 118 Eng. Reprint, 173, 21 L. J. Q. B. N. S. 398, 16 Jur. 1136, 7 Eng. Ry. & C. Cas. 168.

⁷ *Shrewsbury v. North Staffordshire R. Co.* (1865) L. R. 1 Eq. (Eng.) 593, 35 L. J. Ch. N. S. 156, 12 Jur. N. S. 63, 13 L. T. N. S. 648, 14 Week. Rep. 220.

⁸ In *Mann v. Edinburgh Northern Tramways Co.* [1893] A. C. (Eng.) 69, 62 L. J. P. C. N. S. 74, 1 Reports, 86, 68 L. T. N. S. 96, 57 J. P. 245, the defendants were required to account for the sum which remained in their hands after defraying the expenses out of the amount transferred to them for that purpose,—a decision which obviously imports that, if that amount had still been in the possession of the company, the defendants could not have recovered it.

⁹ *Taylor v. Chichester & M. R. Co.* (1867) L. R. 2 Exch. (Eng.) 356 (action brought upon a covenant by which the defendants bound themselves, in the event of a bill then pending in Parliament being passed into an act, to pay to the plaintiff, within three months next after the passing of the bill, the sum of £2,000).

¹⁰ *East Anglian R. Co. v. Eastern Counties R. Co.* (1851) 11 C. B. 775, 138 Eng. Reprint, 680, 21 L. J. C. P. N. S. 23, 16 L.R.A.1917A.

Jur. 249, 22 Eng. Rul. Cas. 21, approved by Lord Cranworth in *Eastern Counties R. Co. v. Hawkes* (1855) 5 H. L. Cas. 331, 10 Eng. Reprint, 928, 24 L. J. Ch. N. S. 601, 3 Week. Rep. 609.

¹¹ *Norwich v. Norfolk R. Co.* (1855) 4 El. & Bl. 397, 119 Eng. Reprint, 143, 3 C. L. R. 519, 24 L. J. Q. B. N. S. 105, 1 Jur. N. S. 344.

¹² *Shrewsbury & B. R. Co. v. London & N.W. R. Co.* (1852) 16 Beav. 441, 51 Eng. Reprint, 848.

¹³ In *Re National Permanent Ben. Bldg. Soc.* (1869) L. R. 5 Ch. (Eng.) 309, the petition for a winding-up order, presented by a person from whom the directors of a benefit building society had borrowed a sum of money for the purpose of advancing it to the members on the security of their shares, was dismissed on the ground that the petitioner had no legal or equitable debt against the company. The grounds upon which it was held that there was no equitable debt are stated in § 22, *infra*.

In *Blackburn Bldg. Soc. v. Cunliffe* (1882; C. A.) L. R. 22 Ch. Div. (Eng.) 61, a benefit building society which had no power to borrow money were permitted by their bankers to overdraw their account to a large amount. Afterwards an agreement was signed by the officers of the society and confirmed by the directors, stating that certain deeds of borrowing members which had been deposited with the bankers were deposited not only for safe custody, but as a security for the balance from time to time due. In proceedings for winding up the society, the bankers claimed to retain the deeds as security for the balance of their account. The solicitors on both sides signed an admission that some part of the money overdrawn was applied in payment of members withdrawing from the society, and the remainder in payment of salaries, legal expenses, and expenses of mortgaged property. Held, that the overdrawing of

relation to any of the specific purposes for which the company was authorized to borrow;¹⁴ (3) that the conditions

precedent to the exercise of a granted power of borrowing were not fulfilled in the making of the contract;¹⁵ (4)

the bankers' account was ultra vires, and that the bankers had consequently no lien on the deeds, either under the agreement or by the course of dealing with the society. An appeal from this decision was dismissed in (1884) L. R. 9 App. Cas. 857. The only point presented was as to whether the bankers were entitled to claim to be creditors, and to hold the securities as such in respect to the overdraft, which the appellants contended did not amount to borrowing. The House of Lords decided that allowing the overdraft was equivalent to borrowing.

In *Re Guardian Permanent Ben. Bldg. Soc.* (1882) L. R. 23 Ch. Div. (Eng.) 440, 52 L. J. Ch. N. S. 857, 48 L. T. N. S. 134, 32 Week. Rep. 73, a rule of the society permitted the trustees or directors to borrow money from time to time as occasion might require, and directed that such money should be a first charge on the funds and property of the society. No express limit was prescribed as to the amount of the borrowing. The court of appeal held that this rule was invalid, because it purported to give an unlimited power to borrow, and that consequently borrowing was ultra vires of the society. But the decision upon this point was reversed in *Murray v. Scott* (1884) L. R. 9 App. Cas. (Eng.) 519, 53 L. J. Ch. N. S. 745, 51 L. T. N. S. 462, 33 Week. Rep. 173, on the ground that the power to borrow must be construed as being limited to borrowing for the proper objects of the society. This decision was followed by *Neville, J.*, in a judgment which was approved as a whole, in *Re Birkbeck Permanent Ben. Bldg. Soc.* [1912] 2 Ch. (Eng.) 183, 81 L. J. Ch. N. S. 769, 106 L. T. N. S. 968, 28 Times L. R. 451, affirmed as to this point in *Sinclair v. Brougham* [1914] A. C. (Eng.) 398, 83 L. J. Ch. N. S. 465, 111 L. T. N. S. 1, 30 Times L. R. 315, 58 Sol. Jo. 302, where the rule of the society in question empowered the directors to borrow to an unlimited extent.

In *Agnew v. Murray* (1884) L. R. 9 App. Cas. (Eng.) 519, 53 L. J. Ch. N. S. 745, 51 L. T. N. S. 462, 33 Week. Rep. 173, where the rule under review was held valid, the dictum of Lord Hatherley in *Laing v. Reed* (1869) L. R. 5 Ch. (Eng.) 4, 39 L. J. Ch. N. S. 1, 21 L. T. N. S. 773, 18 Week. Rep. 76, 34 J. P. 134, as to the invalidity of a rule purporting to grant an unlimited power of borrowing, was disapproved.

For other cases relating to the situation specified in the text, see *Re Professional, C. & I. Ben. Bldg. Soc.* (1871) L. R. 6 Ch. (Eng.) 661; *Re Companies Act* (1888) L. R. 21 Q. B. Div. (Eng.) 301.

In *Re Victoria Permanent Ben. Bldg. Invest. & Freehold Land Soc.* (1870) L. R. 9 Eq. (Eng.) 605, 39 L. J. Ch. N. S. 628, 22 L. T. N. S. 777, 18 Week. Rep. 967, 34 J. P. 532, the directors of a benefit building society received money on deposit from per-

sons who did not subscribe for shares in the society, and gave to each depositor a book called a "member's deposit book," which contained printed rules purporting to be "rules of the deposit branch," one of which provided that the general rules of the society should be binding on all persons who might make deposits. The society was wound up by the court, and the advanced shareholders, under an order in the winding-up, redeemed their shares. Held, that the rules of the society, in so far as they authorized borrowing money on deposit, were illegal under the Building Societies Act (6 & 7 Wm. IV. chap. 32), as no limit was fixed to the amount which might be borrowed; and that the depositors were not entitled to have a call made upon the members for the repayment of their deposits. Held, also, that the rules did not authorize the borrowing of money from persons who were not members of the society, and that the depositors were bound by the rules of the society, by which the advanced shareholders who had redeemed their shares were discharged from all connection with the society; and, consequently, on that ground also, the depositors were not entitled to have a call made on the advanced shareholders for the repayment of their deposits.

¹⁴In *Moye v. Sparrow* (1870) 18 Week. Rep. (Eng.) 400, 22 L. T. N. S. 154, the right of recovery was denied on the ground that the money in question had not been borrowed for the purpose which alone was authorized by the rules of the society.

In *Re Durham County Permanent Invest. Land & Bldg. Soc.* (1871) L. R. 12 Eq. (Eng.) 516, the first rule of a building society stated that it was organized for certain specified purposes. None of the rules contained any borrowing power, but subsequently they were altered so as to give the directors "power from time to time to borrow, for the purposes of the society, such sums and at such rates of interest and under such terms and conditions as they might think proper and expedient." Held, that the borrowing power thus conferred by this altered rule was strictly limited to the purposes of the society as stated in the first rule, and that persons who had lent money to the directors, which was employed in a loan to another society, could not enforce their claim under the winding up of the society.

¹⁵In *Chambers v. Manchester & M. R. Co.* (1864) 5 Best & S. 588, 122 Eng. Reprint, 951, 33 L. J. Q. B. N. S. 268, 10 Jur. N. S. 700, 10 L. T. N. S. 715, 12 Week. Rep. 980, it was held that no action could be maintained on a bond given for money which had, in contravention of the enabling act of the defendant, been borrowed before its capital had been all subscribed. This decision was approved in *Re Cork & Y. R. Co.* (1860) L. R. 4 Ch. (Eng.) 748, 39 L. J. Ch.

that the amount involved was greater than that which the company was expressly authorized to borrow.¹⁶ From whatever cause the invalidity of the contract arises, the lender "is a person who is unable, as against the borrower, to affirm that he holds a debt, either legal or equitable. Neither in a court of law nor in a court of equity can he affirm that he is a creditor . . .

or entitled to such a right or claim as would support a winding-up petition."¹⁷ Even the remedy of an action for money had and received is not open to him. See § 4 of the note to *Crowder State Bank v. Aetna Powder Co.* post, 1026. In a case which involved the borrowing of a larger amount than that authorized the argument that "the plaintiffs had no means of knowing or ascertaining wheth-

N. S. 277, 21 L. T. N. S. 735, 18 Week. Rep. 26, and in *Re Bagnalstown & W. R. Co.* (1870) Ir. Rep. 4 Eq. 525. In the latter case, Christian, L. J., adverted to the invalidity of debentures or other securities issued in violation of restrictive clauses providing that no addition shall be made to the loan capital of a railway company until the whole share capital has been subscribed for and one half of it actually paid up; or until the undertaking shall have begun to be productive by the opening of the line or of prescribed portions of it.

¹⁶ The general rule with regard to contracts of this description is that "if a company which has exhausted its borrowing powers purports to borrow further money, and thus obtains a supply of money, the loan so contracted is void and ultra vires, and the lender has no right of action against the company." *Vaughan Williams, L. J.*, in *Re Wrexham, M. & C. Q. R. Co.* [1899: C. A.] 1 Ch. (Eng.) 455, 68 L. J. Ch. N. S. 270, 47 Week. Rep. 464, 80 L. T. N. S. 130, 15 Times L. R. 122, 6 Manson, 218.

In *Wenlock v. River Dee Co.* (1883; C. A.) L. R. 36 Ch. Div. (Eng.) 675, note, 685, note, the action was brought by the executors of Lord Wenlock to recover a sum of £173,062, 11s. 11d. with interest, alleged to be due from the defendant company in respect to moneys lent to them at various dates between 1870 and 1878 by Lord Wenlock, and secured by certain indentures by which the defendants covenanted to repay the same with interest. The defendants denied that the moneys were received by the company, or borrowed for, or applied in payment of any debts of, or otherwise used for the purposes of, the company, and alleged that at the dates of the several indentures they had no power to borrow or to bind themselves to pay the moneys thereby expressed to be secured, except to the extent authorized by a statute which empowered the company to borrow at interest for the purposes of their acts, upon bond or mortgage of the lands recovered and inclosed by them, or partly upon bond and partly upon such mortgage, a sum not exceeding £25,000, and also a further sum not exceeding £25,000, upon mortgage of their tolls, rates, and duties. At the hearing before the court of appeal the company admitted the claim of the plaintiffs for this sum, and such further amount as they could show had been applied in payment or discharge of any debts or liabilities of the company. See (1883) L. R. 36 Ch. Div. 674. Judgment was given L.R.A.1917A.

on the footing that this admission defined the extent of the company's liability. On appeal this judgment was affirmed by the House of Lords. See (1885) L. R. 10 App. Cas. 362. The point decided at another hearing before the court of appeal was merely that the power conferred by the special act had not been extended by a subsequent general act. (1888) L. R. 38 Ch. Div. 534, 59 L. T. N. S. 485, 57 L. J. Ch. N. S. 946.

For other cases decided with reference to the general rule stated in the text, see also *Chapleo v. Brunswick Permanent Bldg. Soc.* (1881) L. R. 6 Q. B. Div. 711, 50 L. J. Q. B. N. S. 372, 44 L. T. N. S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366; *Fountaine v. Carmarthen & C. R. Co.* (1868) L. R. 5 Eq. 316, 37 L. J. Ch. N. S. 429, 16 Week. Rep. 476, 22 Eng. Rul. Cas. 132; *Neath Bldg. Soc. v. Luce* (1889) L. R. 43 Ch. Div. (Eng.) 158, 59 L. J. Ch. N. S. 3, 61 L. T. N. S. 611, 38 Week. Rep. 122, and the cases reviewed in § 22, infra.

In *Re Pooley Hall Colliery Co.* (1870) 18 Week. Rep. (Eng.) 201, the articles of association of the company intrusted the directors with power to borrow money on mortgage, bond, and other securities, but in such manner that the liabilities of the company should never, without sanction of a general meeting, exceed the sum of £8,000. Discussing the enforceability of the debentures in question, Lord Romilly, M. R., said that their validity "depends upon the fact whether the liabilities did, or did not, at the date of issue, exceed £8,000. It is impossible to say that the liabilities are not to be reckoned as including all debts incurred in the ordinary course of business. . . . I am therefore of opinion that, as the liabilities did exceed £8,000, the company had no power to issue these debentures, and that the debentures are not voidable, but absolutely void, and that the holders must come in *pari passu* with the simple contract creditors." The question whether the claimants were entitled to the benefit of a presumption that the loan had been validated by the consent of the shareholders signified in the manner prescribed was not raised. See § 8, supra. The decision was approved in *English Channel S. S. Co. v. Rolt* (1881) L. R. 17 Ch. Div. (Eng.) 715, 44 L. T. N. S. 135.

¹⁷ *Buckley, L. J.*, in *Re Birkbeck Permanent Ben. Bldg. Soc.* [1912] 2 Ch. (Eng.) 232.

er the society had exhausted its powers of borrowing, or whether, indeed, there was any limit to such power," was thus answered by Baggallay, L. J.: "The plaintiffs and everyone else who have dealings with a building society are bound to know that such a society has no power of borrowing except such as is conferred upon it by its rules, and if, in dealing with such a society, they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness. It may be that the plaintiffs in the present case have been misled, by the misrepresentations or conduct of others, into the belief that the company had full authority to accept the loan from them; that is a question which I shall have to consider when dealing with the other appeal. Such representations or conduct may doubtless give rise to a claim against the parties making such misrepresentations or so conducting themselves, but in my opinion they can in no way give rise to or support a claim against the society."¹⁸ The argument which was unsuccessful in this instance has prevailed in some American cases. See § 12, notes 5 and 6, supra.

21. Qualifications of the doctrine in equitable suits for affirmative relief.

(a) *Where the corporation is seeking to be released from the contract.* It is obvious that, in a case where a corporation brings suit to have a contract annulled on the ground of its being ultra vires, the ultimate and essential question presented is simply whether it is bound by the contract. In such a proceeding, therefore, the mere fact of its having received the benefit of the contract will not prevent it from obtaining the relief asked for.¹ But is well settled that "equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he seeks."²

(b) *Where specific performance of the contract by the company is asked.* There is some apparent authority for the doctrine that in a case where a plaintiff is asking for the specific performance of an ultra vires contract by the company, the fact that it has received the benefit of the contract may, under some special circumstances, constitute a reason for rendering a decree which in effect, though not directly, will enforce the execution of the contract.³

¹⁸ *Chapleo v. Brunawick Permanent Bldg. Soc.* (1881) L. R. 6 Q. B. Div. 711, 50 L. J. Q. B. N. S. 372, 44 L. T. N. S. 449, 29 Week. Rep. 529, 2 Eng. Rul. Cas. 366, where the action was brought after the agent who had received the loan had embezzled it.

¹ This was taken for granted in *Small v. Smith* (1884) L. R. 10 App. Cas. (Eng.) 119, where a bond of corroboration executed by the directors of the building society, and purporting to guarantee the payment of a prior encumbrance upon the estate of a person who had borrowed money from it on the security of the property, was "reduced" (Scotch expression for "annulled") in proceedings subsequently taken for the voluntary winding up of the society.

In *Canterbury v. Cooper* (1909) 100 L. T. N. S. (Eng.) 597, 73 J. P. 225, 53 Sol. Jo. 301, 7 L. G. R. 908, where the action was brought to recover possession of property which a corporation had leased in excess of its powers, it was declared by the divisional court that the plaintiff was not estopped to set up the invalidity of the lease. But this point was not explicitly referred to in the affirming judgment of the court of appeal.

² *Giffard, L. J.*, in *Re Cork & Y. R. Co.* (1869) L. R. 4 Ch. (Eng.) 748, 39 L. J. Ch. N. S. 277, 21 L. T. N. S. 735, 18 Week. Rep. 26.

In *Great North West C. R. Co. v. Charlebois* [1899] A. C. (Eng.) 114, reversing (1896) 26 Can. S. C. 221, where a company brought suit to set aside an ultra vires L.R.A.1917A.

contract and a consent judgment obtained thereon, it was held by the privy council that this relief would be granted only on the terms—which were consented to—that the plaintiff should pay to the respondent the balance due to him for construction on a quantum meruit.

³ In *Wilson v. Furness R. Co.* (1869) L. R. 9 Eq. (Eng.) 28, the defendant company agreed with certain landowners that, in consideration of their obtaining from the admiralty a waiver of an obligation imposed upon the company by its act to construct certain works, and upon their conveying the necessary land, it would make a carriage road between certain specified points, and also make and maintain a wharf for loading and discharging vessels at a specified place, of a stipulated length and of a suitable and convenient height. In pursuance of this contract the landowners obtained the stipulated waiver from the admiralty and conveyed the necessary land, and the company commenced, but did not finish the road, and did not commence the wharf. James, V. C., decreed the specific enforcement of the contract. He seems to have been of the opinion that, even assuming it to have been ultra vires, the plaintiffs were entitled to such relief, because the company, being under an onerous obligation to give a certain easement to the public, had agreed "to substitute something which it must have thought would be less onerous." But the precise position of the learned judge in this point of view is rather

(c) *Where a shareholder is seeking relief.* In one case the right of a shareholder to maintain a suit for the purpose of compelling the directors of a company to repay dividends which had been paid out of the capital was denied for reasons thus stated by Vaughan Williams, L. J.: "I start with the assumption one is bound to make, that if an act is done by a company which is ultra vires, no confirmation by shareholders—not even by every member of the company—can convert that which was ultra vires into something intra vires; it must always be ultra vires. . . . But to my mind it is a different thing where the action is brought by a shareholder on behalf of himself and other shareholders. . . . I think an action cannot be brought by an individual shareholder complaining of an act which is ultra vires, if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act."⁴

22. Rule in cases where money borrowed ultra vires has been applied to the payment of corporate debts.

In his treatise on Companies, Lord Lindley remarks that "there is . . . a very important exception to the general rule against liability by reason of benefits received;" viz., the doctrine which has been developed "to the effect that a company is liable in equity to refund money improperly borrowed by its directors on its behalf, but in fact bona fide applied in discharging debts or liabilities of the company which could have been enforced against it."¹ In a recent case Lord Parker observed: "It appears to be well settled that if the borrowed

money be applied in paying off legitimate indebtedness of the company or association (whether the indebtedness be incurred before or after the money was borrowed), the lenders are entitled to rank as creditors of the company or association to the extent to which the money has been so applied."²

In the earliest case in which this doctrine was recognized, the deed of settlement of a company formed in England for working mines in Germany provided for a specified amount of capital, and gave no power to the directors to raise money except by the creation of new shares. That capital was paid up and proved insufficient for working the mines. The wages of the miners being in arrear, and other debts being due, the managing directors obtained advances from some of the shareholders for the purpose of paying those debts and preventing the mines from being seized under the law of the country. The directors also borrowed other sums on their personal guaranty from the bankers of the company, not for payment of debts, but for carrying on the business of the company in its ordinary course, and they afterward repaid the bankers these advances. In winding-up proceedings it was held (1) that the advances made by the shareholders to pay debts of the company might be set off by them with interest against a call; and (2) that, although the advances made by the bankers did not constitute a debt due to them from the company, the directors having no power to borrow, the directors were entitled to be allowed the amounts repaid by them to the bankers, the directors being trustees, and in that character en-

obscure, and, as he also held that the contract was not ultra vires, the case is very far from being a clear authority for the doctrine of estoppel. To cite it in support of that doctrine, as was done in *People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co.* (1887) 20 Ill. App. 472, is obviously unwarrantable.

⁴ *Towers v. African Tug Co.* [1904; C. A.] 1 Ch. (Eng.) 558.

¹ See p. 292, vol. 1, 6th ed. bk. 2, chap. 5, § 2.

In *Portsea Island Bldg. Soc. v. Barclay* [1895; C. A.] 2 Ch. (Eng.) 298, the rule was thus formulated by Kay, L. J., with respect to one particular class of corporations. By the substitution of the word "corporation" for "society," the statement may readily be generalized: "Where a person advances money to a society whose borrowing powers are exhausted, although he cannot recover the money from the society directly, yet in cases where the L.R.A.1917A.

society has not increased its liability by the borrowing, but has applied the money in paying other debts, he may assert a right to stand in the position of a creditor who has been paid off with his money."

In *Re Wrexham, M. & C. Q. R. Co.* [1899] 1 Ch. (Eng.) 440, Vaughan Williams, L. J., adverted to the principle "that, although the borrowing power is exhausted, and the transaction which purported to be a loan to the company is as such ultra vires, and therefore null and void, so that the would-be lender can neither enforce repayment of the loan nor rely upon the securities which he has taken for the loan, yet, if the company apply the money in their hands to the payment of debts actually owing by them, there is thereupon a new transaction between the company and the person who has paid the money for the purpose of the ultra vires loan."

² *Sinclair v. Brougham* [1914] A. C. (Eng.) 440.

titled to an indemnity from their cestuis que trustent against expenses bona fide incurred.³ This decision has frequently been followed in later cases involving circumstances of a similar nature.⁴ In several of them relief was granted to lenders to whom the defendant companies had delivered obligations in writing

upon which, by reason of their illegality, no action was maintainable. "If the facts of the case give them the benefit of that equitable principle, it is consistent with justice and with authority to say that irregularity of either the form or the substance of their course of dealing shall not stand in the way of the

³ In *Re German Min. Co.* (1853) 4 De G. M. & G. 19, 43 Eng. Reprint, discussing the argument that the directors were not entitled to be repaid by the company the moneys they had paid in discharge of the amount due to the bankers, because they were in the position of agents with limited powers, Turner, L. J., said: "Although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees; and all trustees are entitled to be indemnified against expenses bona fide incurred by them in the due execution of their trust. There is no inconsistency in this double view of the position of directors. They are agents, and cannot bind their companies beyond their powers. They are trustees, and are entitled to be indemnified for expenses incurred by them within the limits of their trust. If, therefore, it appears that moneys advanced by the directors of companies have been duly applied for the purposes of the trust reposed in them (and it can make no difference whether the moneys were originally advanced, or were in the first instance borrowed and afterwards repaid by them), it may well be that they may be entitled to be repaid by their companies the moneys which they have so advanced, although the persons from whom they have borrowed for the purpose of making the advance may not be entitled to recover against the companies." It was also urged by counsel that, whatever might be the right of the directors to indemnity against the property of the company, they could have no such right against the shareholders personally; that the liability of the shareholders was limited to their respective shares of the £50,000. But Turner, L. J., said: "I think that, where parties place others in the position of trustees for them, they are in equity personally bound to indemnify them against the consequences resulting from that position. I may refer to the case of *Balsh v. Hyham* (1728) 2 P. Wms. 453, 24 Eng. Reprint, 810, 2 Eq. Cas. Abr. 741, pl. 4, 22 Eng. Reprint, 629, as a strong authority in support of that position." For a later case in which this precedent was followed, though not with regard to a corporate transaction, see *Hardoon v. Belilios* [1901] A. C. (Eng.) 124, 2 B. R. C. 355, 70 L. J. P. C. N. S. 9, 49 Week. Rep. 209, 83 L. T. N. S. 573, 17 Times L. R. 126. In *Lindley on Companies* vol. 1, 6th ed. p. 292, the learned author refers to other analogous cases of recoupment; viz., where a person who bona fide advances money to an infant is allowed, on the ad-

ministration of the infant's estate, to rank as a creditor in respect to so much of the money advanced as has in fact been expended in necessities (*Marlow v. Pitfield* (1719) 1 P. Wms. 558, 24 Eng. Reprint, 516); and where money lent to a married woman and expended in properly maintaining her is treated as being recoverable (*Jenner v. Morris* (1860) 1 Drew. & S. 218, 62 Eng. Reprint, 362; *Deare v. Soutten* (1869) L. R. 9 Eq. (Eng.) 151, 21 L. T. N. S. 523, 18 Week. Rep. 203). See also the remarks of Giffard, L. J., in *Re National Permanent Ben. Bldg. Soc.* (1869) L. R. 5 Ch. (Eng.) 313.

⁴ In *Lowndes v. Garnett & M. Gold Min. Co.* (1864) 3 New Reports (Eng.) 603, Wood, V. C. (afterwards Lord Hatherley), laid down the law as follows: "No company which carries on business as a going concern, involving large current expenditure, can so use any provisions in its deed of settlement, which fix the amount of its capital and calls or limit its borrowing powers, as to relieve itself from liability to creditors who have supplied labor or materials to carry on the business of the company. The only effect of such provisions is that, if the borrowing powers have been exhausted, the directors are disabled from borrowing money on the security of the company; in other words, if persons advance money to pay off these debts, they cannot acquire the rights of creditors against the company. But the company is not the less bound to pay these debts. Under these circumstances, any director or shareholder is justified in advancing money for the purpose of paying the debts; and, if he does so, he has an equity for contribution from the other shareholders; only this equity is postponed to the rights of the regular creditors of the company."

See also *Troup's Case* (1860) 29 Beav. 353, 54 Eng. Reprint, 664; *Hoare's Case* (1861) 30 Beav. 225, 54 Eng. Reprint, 874, 2 Johns. & H. 229; *Fountain v. Carmarthen & C. R. Co.* (1868) L. R. 5 Eq. 316, 37 L. J. Ch. N. S. 429, 16 Week. Rep. 476, 22 Eng. Rul. Cas. 132; *Re Victoria Permanent Ben. Bldg. Soc.* (1870) L. R. 9 Eq. (Eng.) 606, 39 L. J. Ch. N. S. 628, 22 L. T. N. S. 777, 18 Week. Rep. 967, 34 J. P. 532; *Re Harris Calculating Mach. Co.* [1914] 1 Ch. (Eng.) 920, 83 L. J. Ch. N. S. 545, 110 L. T. N. S. 997, 58 Sol. Jo. 455; *Ulster R. Co. v. Banbridge, L. & B. R. Co.* (1868) Ir. Rep. 2 Eq. 190; *Re Bagnalstown & W. R. Co.* (1870) Ir. Rep. 4 Eq. 505; and the cases cited in the following notes.

In *Re Norwich Equitable F. Assur. Co.* (1886; C. A.) 34 Week. Rep. (Eng.) 206,

justice due to them.”⁵ The case most frequently referred to as illustrating this situation was one in which it was held that, although the class of securities called Lloyd’s bonds were invalid as being in contravention of a statute, and consequently could not themselves constitute an indebtedness as against the

company issuing them, yet, nevertheless, they might be evidence of a contract between the company and the persons holding them, sufficient to entitle the holders to that security or right of repayment which the company might lawfully have given them under the actual circumstances of the case.⁶

affirming (1884) 32 Week. Rep. 1010, a director of an unlimited company, after a winding-up order had been made, handed over to the bankers of the company a sum equal to his proportion of the amount due on a promissory note which had been given to the bankers by the directors to secure overdrafts on the company’s account. At the same time he took from the bankers an assignment of the proportion of their debt. It was doubtful whether the purposes for which the overdrafts were made were within the company’s powers. Held, that, as his right to be repaid this sum by the company had not been established, he was not entitled to set it off against calls. Lindley, L. J., said: “I am sufficiently familiar with the case of *Re German Min. Co.* to know that nothing would be more dangerous than to assume that it applies to a director who has paid money for what he is pleased to call the benefit of the company. The principle of that case must be applied with the greatest caution, and, when looked at closely, one finds that it proceeded on this principle, that the money which the company is ultimately made to repay has been applied in the discharge of debts for which the company was liable. The liability does not depend on the mere fact that the money was borrowed from the bankers,—that is no debt at all in law,—but on the fact that the money itself was applied in discharging debts and liabilities which might otherwise have been enforced against the company. And I doubt whether, when the claim is investigated, the appellant will be able to bring himself within that case.”

For another case in which the doctrine was recognized, but not applied, see *Re Catholic Pub. & Bookselling Co.* (1864) 10 Jur. N. S. (Eng.) 192.

⁵ Lord Selborne in *Blackburn Bldg. Soc. v. Cunliffe* (1882) L. R. 22 Ch. Div. (Eng.) 61, 31 Week. Rep. 98, citing *Re Cork & Y. R. Co.* note 6, *infra*.

⁶ *Re Cork & Y. R. Co.* (1869) L. R. 4 Ch. (Eng.) 748. There the conclusion of the court was that the money received by the company for its property should not be distributed, in winding-up proceedings, to the shareholders without making provision in respect to the payments that had been made by moneys procured from one Lewis after the company, having expended the whole of its capital and reached the extent of its borrowing powers, found itself unable to discharge various debts, many of which were legally payable, being due to contractors and others for rolling stock and so forth. Lord Hatherley said: “If the money

was really applied for the legitimate benefit of the company, can it be possible that the company can hold this money as a surplus which is directed to be paid to them under the act, and treat these bonds as constituting no debt whatever by which they are in any way to be affected? They knew that there was a large sum of money which must be raised by some means, and for which the borrowing powers and subscription powers were not adequate; and although the bonds themselves may not be the proper instruments or mode by which that money ought to be raised, still they are instruments issued for the express purpose of inducing others to give faith and credit to Mr. Lewis as being a person to whom money was owing for the legitimate purposes of the company. . . . The proper course to be taken seems to me to be this, that, so far as the company have adopted the proceedings of their directors by allowing these moneys to be raised on the issue of these debentures, and so far as the money raised by the issue of the debentures has been applied in paying off debts which would not otherwise have been paid off, those who have advanced the moneys ought to stand in the place of those whose debts have been so paid off.”

In *White v. Carmarthen & C. R. Co.* (1863) 33 L. J. Ch. N. S. (Eng.) 93, 1 Hem. & M. 786, 9 L. T. N. S. 439, 12 Week. Rep. 68, where a railway contractor was willing to give his services, and to take his chance of being paid at some future time, after further power of borrowing had been obtained by the company, it was held by Lord Hatherley that the company were authorized in giving him a Lloyd’s bond acknowledging the amount of the debt. This decision was referred to by the learned judge in *Re Cork & Y. R. Co.* (Eng.) *supra*, as being adverse to the contention of counsel “that when a railway company is formed with a certain amount of capital, and is authorized to execute certain works, then, unless the works can be executed with exactly the prescribed amount of capital, no further work can be done at all; in other words, that no contractor who has entered into an engagement to make the 2 or 3 miles of line required for the purpose of completing the work would be able to recover in respect of the money, labor, and work expended by him on the company’s behalf.” The decision was distinguished in *Chambers v. Manchester & M. R. Co.* (1864) 5 Best & S. 588, 122 Eng. Reprint, 951, where certain Lloyd’s bonds which were “intended to enable companies to hand over to contractors to whom they were indebted

The form in which the doctrine has been enunciated imports that it cannot be invoked except in cases where it is shown that the corporation itself was the borrower,⁷ and that the money lent inured to its benefit and was applied to the payment of an existing debt owed by it.⁸

In a case where it had been ordered that judgment should be entered for so much, and so much only, of the sums advanced to the defendant company by the claimants as was employed in the payment of any debts or liabilities of the defendant company properly payable by them, with interest from the respective dates of such employment, it was held (1) that the order should be construed as covering not only the moneys which had been applied in payment of debts and liabilities properly payable by the company at the date of the advances,

but also those which had been applied in payment of debts and liabilities which arose or became properly payable at dates subsequently to the advances; and (2) that, apart from this particular aspect of the question, the equitable doctrine was not subject to any such limitation as would restrict its operation to debts already contracted when the advance was made.⁹

The burden of showing that he is entitled to anything lies upon the lender.¹⁰

Some of the cases reviewed in the present section have been cited by American courts as authorities for the general doctrine that a corporation which has accepted the benefits of a contract is estopped from setting up the plea of ultra vires in an action brought upon it. But having regard to the grounds upon which they were decided, it is clear that

for work executed under their contract something which was equivalent to money, and upon which money might be raised," were held not to be enforceable. "The scheme of issuing these bonds was resorted to for the purpose of raising money upon them in order to enable the plaintiff to discharge the liability into which he had entered on behalf of the company of which he was chairman. I am inclined to think that that transaction, which was the origin of the whole, and which was in substance a loan, was illegal."

⁷Portsea Island Bldg. Soc. v. Barclay [1895; C. A.] 2 Ch. (Eng.) 298, 64 L. J. Ch. N. S. 579, 12 Reports, 324, 72 L. T. N. S. 744, affirming [1894] 3 Ch. 86. There a building society which was prohibited by its rules from lending on property subject to any previous mortgage, but had power to release any portion of a mortgaged estate, if satisfied that the remainder would be a sufficient security, lent H. £17,000 upon first mortgage. Subsequently, having exhausted its borrowing powers and being in want of cash, it entered into an arrangement under which H. borrowed £6,000 from an insurance company upon the security of the property he had mortgaged to the society, and the society joined in the security and released the property so as to give the company a first charge for £6,000. The £6,000 was paid to H. and handed over by him to the society, which credited him with the amount in part discharge of the £17,000. Held, (1) that the transaction was ultra vires the society, and that its directors had no power to give the company any charge in priority to that of the society; (2) that the company had no equity to claim equality for their mortgage with that of the society; and (3) that the case was not one in which the court ought to impose any terms upon the society.

⁸In Chapleo v. Brunswick Permanent Bldg. Soc. (1881) L. R. 6 Q. B. Div. 711, 50 L. J. Q. B. N. S. 372, 44 L. T. N. S. 449, 29 L.R.A.1917A.

Week. Rep. 529, 2 Eng. Rul. Cas. 366, this situation was held not to exist, because the agent who had received the money in question had embezzled it.

In Re Durham County Permanent Invest. Land & Bldg. Soc. (1871) L. R. 12 Eq. (Eng.) 516, Bacon, V. C., there dealt with the contention that, inasmuch as the money in question, improperly borrowed and improperly invested, had been laid out in the purchase of land, the man who had lent his money had a right to follow it: "There may be such a principle, but it would require very distinct evidence on the part of the person so claiming to prove that his £100 went into the purchase of any land. No such principle is applicable to this case. Re German Min. Co. (1853) 4 DeG. M. & G. 18, 43 Eng. Reprint, 415, 18 Jur. 710, 2 Week. Rep. 543, and Re Cork & Y. R. Co. (1869) L. R. 4 Ch. (Eng.) 748, 39 L. J. Ch. N. S. 277, 21 L. T. N. S. 735, 18 Week. Rep. 26, were referred to, but they do not touch this case in the slightest degree. The principle upon which those cases were decided was that the company, being under an obligation to pay debts for which they might have been sued, had procured money which was applied in discharging those debts. But in this case the directors were under no obligation to enter into the transaction. They were under no liability."

⁹Wenlock v. River Dee Co. (1887; C. A.) L. R. 19 Q. B. Div. (Eng.) 155. The special grounds upon which this decision was rendered are such that it scarcely seems to be an authority for the proposition that, for the purposes of the application of the general rule, "it is immaterial whether the debts paid off out of the advance were in existence when the advance was made, or arose subsequently." Lindley, Companies, 6th ed. 1902, bk. 2, chap. 5, § 2, pp. 293, 294.

¹⁰Lord Selborne in Blackburn Bldg. Soc. v. Cunliffe (1882) L. R. 22 Ch. Div. (Eng.) 71, 31 Week. Rep. 98.

they cannot properly be treated as precedents for that doctrine.

23. Considerations to which this rule is referred.

The authorities are not in accord as to the principle upon which the person supplying the money is entitled to recoupment as against the company. The theory entertained upon this point is sometimes not material so far as regards the character of the relief to be granted; but it becomes extremely important where a court is called upon to determine questions of priority as between the claims of the lender and various other classes of creditors.

In one of the cases in which the doctrine was applied, Giffard, L. J., observed: "In so far . . . as the company has had the benefit of those loans for its legitimate purposes, it must be taken to have adopted the transaction. It cannot be heard to say the contrary, and to that extent must be held liable."¹ This language apparently imports that the learned judge regarded the equitable doctrine now under discussion as being referable to the notion either of a ratification or an estoppel. But such a view is so clearly inconsistent with the theory of the English courts as to the absolutely void character of ultra vires contracts that the words are presumably not to be taken in what seems to be their literal sense.

According to Lord Selborne, the consistency of the equity allowed under the

doctrine with "the general rule of law that persons who have no borrowing powers cannot, by borrowing, contract debts to the lenders, may be shown in this way: The test is, Has the transaction really added to the liabilities of the company? If the amount of the company's liabilities remain in substance unchanged, but there is, merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose, shall not retain that benefit so as, in substance, to make those other people pay their debts. I take that to be a principle sufficiently sound in equity; and if the result is that by the transaction which assumes the shape of an advance or loan nothing is really added to the liabilities of the company, there has been no real transgression of the principle on which they are prohibited from borrowing."²

Under another theory transactions of the class to which the doctrine is applicable are regarded as involving a substitution of creditors, and, as an incident of such substitution, a subrogation of the lender to the rights of the creditors who are paid off.³ The position at first taken by the court of appeal was that this

¹ *Re Cork & Y. R. Co.* (1860) L. R. 4 Ch. (Eng.) 748.

² *Blackburn Bldg. Soc. v. Cunliffe* (1882) L. R. 22 Ch. Div. (Eng.) 71.

³ In *Wenlock v. River Dee Co.* (1887; C. A.) L. R. 19 Q. B. Div. (Eng.) 165, Fry, L. J., speaking for the whole court, said: "This equity is based on a fiction which, like all legal fictions, has been invented with a view to the furtherance of justice. The court closes its eyes to the true facts of the case, viz., an advance as a loan by the quasi lender to the company, and a payment by the company to its creditors as out of its own moneys; and assumes, on the contrary, that the quasi lender and the creditor of the company met together, and that the former advanced to the latter the amount of his claim against the company and took an assignment of that claim for his own benefit."

In *Wenlock v. River Dee Co.* (1883; C. A.) L. R. 36 Ch. Div. (Eng.) 683, note, Cotton, L. J., laid it down that the plaintiffs had properly been allowed to amend in order that they might raise the "well-established equity that, even although the corporation had no power of borrowing money so as to L.R.A.1917A.

bind itself irrespective of the purposes for which the money is applied, yet if it appears that the money lent was in fact applied in payment of debts properly contracted by the corporation, then the party lending the money is entitled to stand as if he were the assignee of the creditors who were paid off, and he is entitled to stand in their place, and is entitled to have an inquiry whether any of the money advanced by him without statutory authority on the part of the corporation to borrow it was applied in paying off any debts and liabilities on which the corporation could have been sued."

In *Neath Bldg. Soc. v. Luce* (1889) L. R. 43 Ch. Div. (Eng.) 158, Chitty, J., referred explicitly to the "equity of subrogation" which arises in cases of this type.

In *Re Birkbeck Permanent Ben. Bldg. Soc.* [1912] 2 Ch. (Eng.) 183, one of the propositions formulated by Buckley, L. J., as being applicable to cases where an association having no borrowing power receives money by way of loan or advance, was as follows: "If the result of the transaction is that the indebtedness of the association is not increased because the new loan is applied in

subrogation was sufficiently extensive to enable the lender to claim the benefit of any securities which the corporation might have given the creditors.⁴ But upon this point the views of the court afterward underwent a change, and it held that "the person who has made the

advance is not entitled, by reason of its application, to any greater rights than if his advance had been in fact valid, and is not therefore entitled to the benefit of any securities held by the creditors who have been paid off out of the moneys advanced."⁵ This modified doctrine has

discharging an old debt, then it is not to be regarded as a borrowing transaction, for the invalid lender can be treated as standing in the place of those whose debts have been paid off."

⁴ In *Blackburn Bldg. Soc. v. Cunliffe*, note 2, supra, certain mortgages given to secure sums lent to members of the society out of money advanced by the bankers in question were treated as "property which they were entitled to claim." When the case was before the House of Lords (see (1884) L. R. 9 App. Cas. 806), Lord Blackburn stated that the general effect of the decision of the court of appeal was that, "though there was nothing that amounted to an assignment to the bankers of the claims of those who were paid off by the money advanced, yet if it could be shown that such claims were in fact paid off thereby, there was an equity in substance to give them, the bankers, the same benefit as if there had been such an assignment." But he pointed out that, as the decision had not been appealed against, it was not, and could not be, affirmed by the House.

⁵ *Lindley on Companies*, vol. 1, 6th ed. p. 294, citing a case in which he took part as one of the Lord Justices, *Re Wrexham, M. & C. Q. R. Co.* [1899; C. A.] 1 Ch. (Eng.) 440, 68 L. J. Ch. N. S. 270, 47 Week. Rep. 464, 80 L. T. N. S. 130, 15 Times L. R. 122, 6 Manson, 218, affirming [1898] 2 Ch. 665. There the Wrexham, M. & C. Q. R. Company had power to borrow money by the creation of three classes of debenture stock, A, B, and C, to the extent of £175,000 by A stock, £175,000 by B stock, and £145,000 by C stock. The A stock had priority as to both principal and interest over the B and C stocks, and the B stock had a similar priority over the C stock. In July, 1897, these borrowing powers were exhausted, the whole of the three classes of debenture stock having been created, and the company had no further power to borrow money. The company had not any funds to enable them to pay the half-year's interest which was about to become due on August 1 on the debenture stocks, and they applied to their bankers, the North and South Wales Bank, to advance them money for the purpose. This the bank consented to do, and the advance was made by their paying the interest warrants to the stockholders when they presented them for payments. The total sum thus applied was £9,672, of which £3,850 went to pay the interest due to the holders of A debenture stock, £3,380 to pay the interest on the B stock, and the residue to pay the interest on the C stock. On September 8, 1897, upon a petition under L.R.A.1917A.

the Railway Companies Act 1867, presented by the Great Central Railway Company, who were judgment creditors of the Wrexham Company, an order for the appointment of a receiver was made against that company. The receiver had in his hands enough money to pay a half-year's interest to the A stockholders and to leave some surplus for the B stockholders. The bank claimed, in the first instance, that, to the extent of the whole £9,672 which they had paid to the debenture stockholders, they should be subrogated to the rights of those stockholders, and should, out of any moneys in the hands of the receiver, be paid what they had advanced in priority to any payment to the debenture stockholders. *Romer, J.*, held that this claim was unfounded. The bank then claimed that, at any rate to the extent of the £3,850 paid to the A stockholders, they were entitled to stand in the shoes of those stockholders, and to be paid in priority to any payment to the B and C stockholders out of any surplus remaining after paying the interest due to the A stockholders. *Romer, J.*, decided against this claim also. The bank appealed against both decisions; but they were affirmed. *Rigby, L. J.*, said: "The claim in each case is rested on a supposed subrogation and right to stand in the place of, and with the right to the securities and priorities of, the creditors who have been paid off, and this is the only claim with which I propose to deal. I do not think that any right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers has ever been allowed, or can be justified in principle. . . . I think that the great preponderance of authority shows that the doctrine of subrogation has very little, if anything at all, to do with the equity really enforced in the cases, and that there is, at any rate, no authority for any subrogation to the securities or priorities of the creditors paid off. Dealing with this case independently of the authorities, I see no reason why the parties to an illegal lending should have anything more than bare justice dealt out to them; and this they get if they are allowed, as they have hitherto been allowed, to have that portion of the advance actually expended in payment of debts of the company treated as a valid advance. If the advance had been within the borrowing powers of the company, the bank could have had no right to the securities or priorities of the creditors paid off. It seems to be that it would be unjust to other creditors that a fiction should be invented for the purpose of making an invalid loan more valuable than a

not yet been ratified by the House of Lords.⁶

VI. Doctrine that a corporation cannot be estopped from pleading ultra vires; American decisions.

24. Formal statement of doctrine.

The nature and scope of the doctrine upon which a large number of American decisions proceed are indicated by the following statement in an opinion delivered by Justice Gray in a leading case: "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is ultra vires in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."¹

A few additional statements of the doctrine, which illustrate certain minor differences in the phraseology employed by the courts, are set out below.

"The general rule is that a corporation can do only those acts which are within the scope of its charter, and, if

the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of the corporation, it is void, and no subsequent act could make it valid by way of estoppel."²

"When the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws."³

"The law is well settled in this state that corporations can only exercise such powers as are conferred upon them by their charters, and that an act of a corporation not authorized by its charter is void, and the fact that the corporation has received the benefits of a contract, or the party with whom it deals has acted thereunder, does not estop the corporation from raising the defense, when sued upon such contract, of ultra vires."⁴

Those courts which accord to the doctrine of ultra vires "the largest field of action proceed upon the conception that a corporation, being the creature of the state, possesses no power whatever beyond that granted in its charter, and cannot directly or indirectly acquire rights or incur liabilities under any contract not hereby authorized. They refuse under any circumstances to enforce or give effect to an unauthorized contract as such, but, where it has been acted upon, will protect the parties against hardship and injustice by allowing whatever relief may be suited to the facts of the case."⁵

valid one. I entirely agree with what Romer, J., said about the unsatisfactory way in which such a doctrine as is contended for by the appellants would work in practice, and I do not consider it necessary to repeat it."

⁶In *Sinclair v. Brougham* [1914] A. C. (Eng.) 412, Lord Haldane, in his summary of the conclusions of the court of appeal, observed: "The majority went on to hold that in so far as the legitimate indebtedness of the society was not increased, for the reason that the money borrowed was applied in the payment of legitimate debts, the depositors could be treated as subrogated to the rights of these creditors, at all events to the extent of their debts, as distinguished from any securities for these debts." The distinction taken with respect to the securities was apparently approved. Lord Parker, after laying down the general principle, observed: "There appears to be some doubt as to whether this result is arrived at by treating the contract of loan as validated to the extent to which the borrowed money is so applied, on the ground L.R.A.1917A.

that to this extent there is no increase in the indebtedness of the company or association, in which case, if the contract of loan involves a security for the money borrowed, the security would be validated to a like extent; or whether the better view is that the lenders are subrogated to the rights of the legitimate creditors who have been paid off. . . . It is still open to your Lordships' House to adopt either view, should the question actually come up for determination."

¹*Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 59, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478.

²*Best Brewing Co. v. Klassen* (1900) 185 Ill. 37, 50 L.R.A. 765, 57 N. E. 20.

³*Steele v. Fraternal Tribunes* (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121.

⁴*Wood v. Supreme Ruling, F. M. C.* (1912) 212 Ill. 532, 72 N. E. 783.

⁵*Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123.

In cases involving an unauthorized lease of a railroad by one corporation to another, the doctrine that the lease cannot be made good by ratification or estoppel applies "not only when the lease is ultra vires of the lessor corporation, and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration upon which it received its charter from the state; but even if the lease is ultra vires of the lessee corporation only, and therefore not open to that particular objection."⁶

It has been laid down that a municipal corporation is not estopped from pleading ultra vires by the recitals in a deed executed by it as a part of the invalid transaction.⁷ A similar rule is doubtless applicable where a private corporation is concerned.

25. Decisions illustrative of this doctrine.

The cases in which the doctrine of estoppel has been explicitly rejected, or which are considered by the present writer to be, upon the facts as proved, inconsistent with that doctrine, are tabulated below with reference to the vari-

ous contracts under review. Further information as to these cases will be found in the subtitle in which the effect of the rulings in each state is discussed. In regard to guaranty and similar contracts, it may be advisable to mention here that they are not enforceable in some of the jurisdictions in which that doctrine prevails, unless it is proved that some specific benefit was received from the transaction by the corporation itself,—the advantage denied by the third party on whose behalf the transaction was entered into not being regarded as a sufficient basis for an estoppel against the corporation. See § 46, *infra*. Accordingly, where the receipt of such specific benefits is not one of the elements involved, the practical result, so far as the immunity of the corporation is concerned, will be the same whether the case arises in a jurisdiction in which the doctrine is rejected, or in a jurisdiction in which it is adopted. But, as the point of view is essentially different in each instance, judges and text writers are clearly not justified in including—as they sometimes have done—in the same list of precedents decisions rendered both by the courts which approve and by those which disapprove the doctrine.¹

⁶ McCormick v. Market Nat. Bank (1896) 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433, citing St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. (1891) 145 U. S. 393, 404, 36 L. ed. 738, 753, 12 Sup. Ct. Rep. 953.

⁷ Coffin v. Kearney County (1893) 6 C. C. A. 288, 12 U. S. App. 562, 57 Fed. 137. Compare the English case cited in § 19, note 1, *supra*.

1. Conveyance of real property.

National Home Bldg. & L. Asso. v. Home Sav. Bank (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619 (conveyance of land with stipulation by grantee to assume encumbrances); Stacy v. Glen Ellyn Hotel & Springs Co. (1906) 223 Ill. 546, 8 L.R.A.(N.S.) 966, 79 N. E. 133 (contract conferring on purchaser of lot from hotel company certain easements in respect to the company's property).

Traffic agreements between railroad companies.

Morris & E. R. Co. v. Sussex R. Co. (1869) 20 N. J. Eq. 542.

Lease of railroad.

East St. Louis Connecting R. Co. v. Jarvis (1899) 34 C. C. A. 639, 92 Fed. 735; Cox v. Terre Haute & I. R. Co. (1903) 123 Fed. 439.

Lease of other property.

McCormick v. Market Nat. Bank (1896) 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.
L.R.A.1917A.

Purchase of the company's own stock.
Hamor v. Taylor-Rice Engineering Co. (1898) 84 Fed. 392.

Purchase of the stock of another company.

De la Vergne Refrigerating Mach. Co. v. German Sav. Inst. (1899) 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. Rep. 20; Cooper Ins. Co. v. Hawkins (1896) 18 C. C. A. 81, 34 U. S. App. 428, 71 Fed. 372; Anglo-American Land, Mortg. & Agency Co. v. Lombard (1904) 68 C. C. A. 89, 132 Fed. 721; Mechanics' & W. Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co. (1855) 24 Conn. 159 (defendant having never become legally a stockholder of plaintiff corporation, plaintiff had no power to make a loan to defendant for a bonus); Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co. (1893) 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879 (see, however, the Mississippi case cited in § 90, note 8, *infra*).

For cases in which action to enforce the statutory liability of the purchasing company as stockholder in the other company were held not to be maintainable, see California Nat. Bank v. Kennedy (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, reversing (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039; First Nat. Bank v. Hawkins (1899) 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; First Nat. Bank v. Converse (1906) 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep.

26. Qualifications of the doctrine.

The general rule that a party to an ultra vires contract cannot be estopped

from setting up its invalidity as a defense was disregarded in a case where the contracting corporation had for a

306; *Schofield v. Goodrich Bros. Bkg. Co.* (1899) 39 C. C. A. 76, 98 Fed. 271 (action to enforce liability of company as stockholder); *Chemical Nat. Bank v. Havermale* (1898) 120 Cal. 601, 65 Am. St. Rep. 206, 52 Pac. 1071, following Federal decisions; *Converse v. Emerson, T. & Co.* (1909) 242 Ill. 619, 90 N. E. 269, affirming (1909) 148 Ill. App. 604, following Federal decisions.

For Federal decisions inconsistent with those above cited, see § 42, *infra*.

In *Burnes v. Burnes* (1904) 132 Fed. 485, the court answered in the affirmative the question, Has a corporation the right to cancel or purchase its own stock "when no creditor is affected, when the corporate assets are not diminished, then no harm is done any stockholder, but when it is to the very great advantage of every remaining stockholder?" The ratio decidendi, however, was that the transaction was not ultra vires.

Purchase of personal property of other kinds.

In the following cases it was held that no action was maintainable for the contract price of goods sold to the corporations: *Chewach Lime Works v. Dismukes* (1888) 87 Ala. 344, 5 L.R.A. 100, 6 So. 122; *Chicago Pneumatic Tool Co. v. H. W. Jones Mfg. Co.* (1900) 91 Ill. App. 547; *Bailey v. Methodist Episcopal Church* (1880) 71 Me. 472; *Downing v. Mt. Washington Road Co.* (1860) 40 N. H. 230; *Tennessee Ice Co. v. Raine* (1901) 107 Tenn. 151, 64 S. W. 29.

Borrowing of money on the security of mortgages and deeds of trust.

Standard Sav. & L. Co. v. Aldrich (1908) 20 L.R.A.(N.S.) 646, 89 C. C. A. 646, 163 Fed. 216; *National Home Bldg. & L. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 99, 72 Am. St. Rep. 245, 54 N. E. 619, approved in *Converse v. Emerson, T. & Co.* (1909) 242 Ill. 619, 90 N. E. 269; *National Trust Co. v. Miller* (1880) 33 N. J. Eq. 155.

Borrowing of money on the security of pledges.

Germania Safety-Vault & T. Co. v. Boynton (1896) 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 800; *Wheeler v. Home Sav. Bank* (1900) 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, reversing (1899) 85 Ill. App. 28 (pledge of corporate property to secure the debt of another in a matter in which the corporation had no interest and by which it was not benefited).

Lending of money.

Swindell v. Bainbridge State Bank (1907) 3 Ga. App. 364, 60 S. E. 13.

Carriage of passengers and goods.

Hood v. New York & N. H. R. Co. (1852) 22 Conn. 505, 9 Am. Neg. Cas. 149; *Converse v. Norwich & N. Y. Transp. Co.* (1865) L.R.A.1917A.

33 Conn. 180. See also the elaborate opinion of Selden, J., in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258.

Hiring of personal services.

Myers v. Equitable Bldg. & L. Soc. (1900) 92 Ill. App. 27; *Dresser v. Traders' Nat. Bank* (1895), 165 Mass. 120, 42 N. E. 567. See also *Hodges v. Buffalo* (1846) 2 Denio (N. Y.) 110 (action against a public corporation).

In *Oliver v. Gilmore* (1892) 52 Fed. 562, which held that there could be no recovery for services rendered in securing the execution of an illegal contract, the ratio decidendi was the distinction between illegal and merely unauthorized contracts. But no such distinction is recognized by the Federal Supreme Court. See § 68, *infra*.

Insurance of life and property.

Webster v. Buffalo Ins. Co. (1881) 2 McCrary, 348, 7 Fed. 399; *Leonard v. American Ins. Co.* (1884) 97 Ind. 299; *Steele v. Fraternal Tribunes* (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; *McCartney v. Supreme Tent, K. M.* (1907) 132 Ill. App. 15; *Smith v. Bankers' Union* (1908) 144 Ill. App. 384; *Society of St. Stephen v. Sikorski* (1908) 141 Ill. App. 1; *Andrews v. Union Mut. F. Ins. Co.* (1854) 37 Me. 256; *Miller v. American Mut. Acci. Ins. Co.* (1893) 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39; *Luthe v. Farmers' Mut. F. Ins. Co.* (1882) 55 Wis. 543, 13 N. W. 490 (applying a doctrine different from that of later Wisconsin cases; see § 110, *infra*).

Partnership.

Merchants' Nat. Bank v. Wehrmann (1906) 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613, reversing (1903) 69 Ohio St. 160, 68 N. E. 1004 (liability of corporation as partner denied in proceedings for dissolution).

Restrictive covenant.

Oliver v. Gilmore (1892) 52 Fed. 562 (stipulation of manufacturer not to use plant for a certain purpose).

Execution of negotiable instrument for accommodation.

Johnston v. Charlottesville Nat. Bank (1879) 3 Hughes, 657, Fed. Cas. No. 7425; *Park Hotel Co. v. Fourth Nat. Bank* (1898) 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742 (accommodation note); *Cook v. American Tubing & Webbing Co.* (1906) 28 R. I. 41, 9 L.R.A.(N.S.) 193, 65 Atl. 641 (accommodation draft).

In *Murphy v. Arkansas & L. Land Co.* (1899) 97 Fed. 723, the ratio decidendi was that a private corporation may execute accommodation paper with the assent of all its stockholders,—a doctrine which is essentially inconsistent with the position of the Supreme Court regarding ultra vires contracts.

considerable period acquiesced without any objection in a certain disposition of the property in question, made by a

court as an incident of receivership proceedings.¹

That rule was also treated as an ir-

Indorsement of negotiable instruments for accommodation.

National Bank v. Atkinson (1893) 55 Fed. 465, affirmed in (1894) 10 C. C. A. 87, 27 U. S. App. 88, 61 Fed. 809.

In Savannah Ice Co. v. Canal-Louisiana Bank & T. Co. (1913) 12 Ga. App. 818, 79 S. E. 45, the reason assigned for denying the right of action on an indorsement was that the contract was executory.

Discounting of notes, etc.

Philadelphia Loan Co. v. Towner (1839) 13 Conn. 249.

Guaranty.

Louisville, N. A. & C. R. Co. v. Louisville Trust Co. (1899) 174 U. S. 552, 567, 43 L. ed. 1081, 1088, 19 Sup. Ct. Rep. 817 (guaranty by one railroad company of the bonds of another); Seligman v. Charlottesville Nat. Bank (1879) 3 Hughes, 647, Fed. Cas. No. 12,642; Johnston v. Charlottesville Nat. Bank (Fed.) supra; Flannagan v. California Nat. Bank (1893) 23 L.R.A. 836, 56 Fed. 959; Humboldt Min. Co. v. American Mfg. Min. & Mill. Co. (1894) 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 356; Farmers' & M. Nat. Bank v. Smith (1896) 23 C. C. A. 80, 40 U. S. App. 690, 77 Fed. 129; Commercial Nat. Bank v. Pirie (1897) 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799; Bowen v. Needles Nat. Bank (1898) 87 Fed. 430, affirmed in (1899) 36 C. C. A. 553, 94 Fed. 925; Re S. P. Smith Lumber Co. (1904) 132 Fed. 620; Merchants' Bank v. Baird (1908) 17 L.R.A.(N.S.) 526, 90 C. C. A. 338, 160 Fed. 642; Barron v. McKinnon (1910) 179 Fed. 759; Re Liquor Dealers' Supply Co. (1910) 101 C. C. A. 367, 177 Fed. 197; Hoof Bros. Co. v. Jiffy Auto Curtain Co. (1914) 189 Ill. App. 506; Westinghouse Mach. Co. v. Wilkinson (1885) 79 Ala. 312; Davis v. Old Colony R. Co. (1881) 131 Mass. 258, 41 Am. Rep. 221; First Nat. Bank v. American Nat. Bank (1903) 173 Mo. 153, 72 S. W. 1059; Norton v. Derry Nat. Bank (1882) 61 N. H. 589, 60 Am. Rep. 334; Gross v. Brewster (1900) — Tex. Civ. App. —, 55 S. W. 590; Gaston v. J. I. Campbell Co. (1911) 104 Tex. 576, 140 S. W. 770, modified in (1911) 104 Tex. 585, 141 S. W. 515, reversing (1910) — Tex. Civ. App. —, 130 S. W. 222 (as to the precise significance of this case, see review of Texas cases in § 106, infra).

See also Commercial Nat. Bank v. First Nat. Bank (1904) 97 Tex. 536, 104 Am. St. Rep. 879, 80 S. W. 601, where a national bank represented that the signature of a note sent to it was genuine.

In Kellogg-Mackay Co. v. Havre Hotel Co. (1912) 118 C. C. A. 165, 199 Fed. 727, the doctrine of estoppel was rejected on the authority of the later decisions of the Supreme Court; but the fact of the defendants having received the benefits of the guaranty was treated as a sufficient reason

for invoking the principle approved in some of the earlier decisions of that court, that the defense of ultra vires should not be allowed to prevail "where it would defeat the ends of justice or work a legal wrong." But the fact that this principle led, under the given circumstances, to a conclusion fundamentally different from that indicated by the later decisions, may reasonably be regarded as demonstrating that the court was not warranted in applying it for the advantage of the claimant.

For cases in which the decisions of the Federal Supreme Court were treated as controlling in a state in which the doctrine of estoppel prevailed, see National Bank v. Sixth Nat. Bank (1905) 212 Pa. 238, 61 Atl. 889, followed in Bank of Barnwell v. Sixth Nat. Bank (1905) 28 Pa. Super. Ct. 413.

Suretyship and indemnity.

Rogers v. Jewell Belting Co. (1900) 184 Ill. 574, 56 N. E. 1017; Best Brewing Co. v. Klassen (1900) 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20; Wheeler v. Home Sav. Bank (1900) 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, reversing (1899) 85 Ill. App. 28; Kelley, M. & Co. v. O'Brien Varnish Co. (1900) 90 Ill. App. 287; Bailey v. Farmers' Nat. Bank (1901) 97 Ill. App. 66; Fidelity & D. Co. v. National Bank (1907) 48 Tex. Civ. App. 301, 106 S. W. 782.

Contract releasing a person from liability for negligence.

Alabama G. S. R. Co. v. Loveman Compress Co. (1916) — Ala. —, 72 So. 311.

¹ Union Trust Co. v. Illinois Midland Co. (1885) 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809. The precise purport of this case has been authoritatively explained in the following passage of the opinion delivered in Central Transp. Co. v. Pullman's Palace Car Co. (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478: "One railroad corporation had purchased of two others their connecting railroads and their franchises; a receiver had been appointed of all its property, including the three railroads, and, under the direction of the court, and without objection by any of the parties interested, had for years administered the whole as a unit, and incurred expenses and issued certificates accordingly. It was held that the holders of bonds secured by mortgage of one of the purchased railroads could not, for want of affirmative legislative authority for the sale and purchase of that road, claim a priority of lien upon it as against the holders of certificates issued by the receiver for necessary and proper expenses of the whole line: and this court, as declared in its opinion delivered by Mr. Justice Blatchford, rested this conclusion on the principle that nonaction on the part of the bondholders and their trustee, which

relevant factor in a case in which the material facts were that a corporation had sold its property to another which assumed all its debts, and that a creditor of the vendor, after having obtained a judgment against both corporations, was seeking to establish the priority of his judgment over a mortgage which had been given by the vendee after the sale and before the creditor had asserted his judgment, and which was then in course of foreclosure.²

In another case the refusal of the

allowed the court and the receiver to go on during the entire litigation contracting debts in respect to the whole line operated as a unit, and administering the property as one, under circumstances where, as shown, it was and is impossible to separate the interests as to expenditures and benefits in respect to the matters now questioned, and where important rights have accrued on the faith of the unity of the interests, amounts to such acquiescence as should operate as an estoppel.³ . . . The court in that case in no way maintained any suit on the contract supposed to be unlawful, but simply refused to set it aside at the demand of parties by reason of whose silence and omission to seasonably interpose any objection it had been acted upon as valid throughout a long course of judicial proceedings."

² *Fogg v. Blair* (1889) 133 U. S. 534, 33 L. ed. 721, 10 Sup. Ct. Rep. 338. The basis of the intervenor's claim was not that the old company was without authority to sell the property or the new without authority to purchase it, but only "that the old corporation could not transfer its property to the new corporation without the new corporation becoming trustee for all the creditors of the old company; that its property was thus affected with a trust, and could not be subjected to a mortgage so as to give priority to the bonds secured over the demands of creditors existing at the time of such transfer." Properly speaking, therefore, the question was one not of ultra vires, but of a fraudulent disposition of property as against creditors. But the court said: "We do not attach any weight to the objection that the transfer by the old company of its entire property to the new company was illegal and ultra vires, and therefore to be disregarded. However such a transfer might be considered in a suit to set it aside, the objection does not lie in the mouth of the appellant, for he has proceeded against the new company and obtained, upon the assumed validity of such transfer, a decree that it pay his judgment, which is founded upon a demand that company agreed to assume as part of the consideration of the transfer."

³ *Butler v. Cockrill* (1896) 20 C. C. A. 122, 36 U. S. App. 702, 73 Fed. 945. There the controversies arose over the distribution of the proceeds of some cotton mills which L.R.A.1917A.

court to enforce the rule was based upon the ground that the corporation in question had obtained money upon the faith of a specific representation that the transaction which was alleged to be ultra vires was valid, and consequently that its enforcement would have the effect of enabling the corporation to take advantage of its own wrong.³ But having regard to the facts under review, it is at least open to question whether this decision is consistent with the views held by the Supreme Court with regard to

were sold under an agreement by all the parties to the original suit that the money derived from the sale should be paid into the court below and should stand in the place of the real estate. The receiver of the First National Bank sought to recover the entire proceeds of this property by virtue of the following facts: Prior to June 29, 1889, the property belonged to another insolvent corporation, which conveyed it in trust for the First National Bank and the German National Bank, in satisfaction of debts owed to them. The property being unproductive, the directors of the First National Bank decided to organize the Little Rock Cotton Mills, to have the property conveyed to that corporation, to have that corporation operate the mills, and then to sell them for the highest price it could obtain. The purpose of this plan was to make the mill property more salable by putting it into operation; and the reason for placing the title to it in the Little Rock Cotton Mills was to have a corporation that could make bills receivable that could be discounted on the credit of this property, and to have a corporation to carry on a business which, under its charter, the bank might not be able lawfully to conduct. The new corporation having been organized, and the property conveyed, the First National Bank loaned money to it to enable it to repair, improve, and operate the mills, took its promissory notes for this money, and discounted three of them, with two other banks, under the representation that they were prime paper. The court said: "It goes without saying that this course of action was as much a representation by this bank that the title to this property was in the cotton mills, and that its notes were collectable from this real estate, as if it had expressly so stated. The cotton mills had no other property, and, if its notes charged any property, they charged this. If these notes were prime paper, it was because the cotton mills held the title to this property, and the notes were collectable from its proceeds. . . . Concede that the First National Bank had no power under its charter to repair, improve, and operate these mills, either in its own name or in the name of another; it was nevertheless within its power to cause Davis and Roots [trustees] to convey this property to a bona fide purchaser or to

the absolutely void quality of ultra vires contracts. Nor is it clear upon what ground deception can be predicated in respect to an assertion, where the person to whom it is made is presumed to have knowledge of the true character of the contract. See § 34, *infra*.⁴ But so far as one class of cases is concerned, viz., those involving negotiable instruments, this particular objection clearly does not apply where the representation has reference, not to the validity of the contract, but merely to the ownership of the instrument upon which the action is brought. Thus, the right to recover against a bank upon the indorsement of a note for the accommodation of a railroad company has been affirmed on grounds thus stated: "The indorsement of the defendant was therefore void in the hands of every person having notice of the facts. But if the proper officers of the defendant have negotiated it to the plaintiff, representing it to be a bill

belonging to their bank, and upon the faith of that representation the plaintiff has, in the usual course of its business, discounted it, advancing to the defendant the proceeds, the defendant is precluded, upon the principle just referred to, from setting up that it was indorsed without authority."⁵

In a case in which the action was brought to enforce the liability of the defendant company as a stockholder in another company, it was urged that, "while a corporation may not be estopped from asserting the invalidity of a contract made outside of its powers, such an estoppel can arise against a creditor of the corporation, because he is capable of contracting." But this contention did not prevail. "The true rule," said the court, "is that no one can make an enforceable contract with a corporation which is beyond its powers, and no action by others can give enforceable quality to such a contract."⁶

another trustee, and the presumption from the record of the deed was that it was lawfully made. The bank cannot now rebut that presumption for the purpose of defeating the right or remedy which an innocent stranger has acquired in reliance upon it. The doctrine of ultra vires cannot be successfully invoked to defeat the ends of justice or to work a legal wrong." The conclusion of the court was that there was no ground upon which the receiver of the First National Bank could be held to be entitled to any preference in the distribution of the proceeds over the two other banks which held notes of the cotton mills.

The theory with reference to which this decision was rendered was apparently taken for granted in *Commercial Nat. Bank v. Pine* (1897) 27 C. C. A. 171, 49 U. S. App. 596, 82 Fed. 799, where the court emphasized the fact that no oral representations had been made by the defendant with regard to the validity of the guaranty in question.

⁴The decision is inconsistent with the opinion of Mr. Justice Miller, who, when sitting as a circuit judge in *Webster v. Buffalo Ins. Co.* (1881) 2 McCrary, 348, 7 Fed. 399, held, against the dissent of Treat, C. J., that no facts upon which an estoppel against pleading ultra vires could be based were shown by a replication which alleged that the plaintiffs were led to believe by defendant's agent who issued the policy, and did believe, that the defendant had power, under its charter, to insure against perils of the sea; that defendant's agent insured them against those perils, etc.; and that no objection was made to the contract aforesaid by defendant or its agent, and no pretense was made that said contract was ultra vires until the loss had occurred and it was too late to insure in another company; and that for those reasons de-

endant should be held estopped from pleading that said contract was ultra vires.

⁵*Bank of Genesee v. Patchin Bank* (1855) 13 N. Y. 309. Referring to certain earlier cases, the court said: "It has been held that if a note made for the purpose of raising money is negotiated to an indorsee upon a discount greater than the legal rate of interest, by means of a representation by the indorser that it is business paper in his hands, that the indorser cannot set up the defense of usury against the indorsee. *Holmes v. Williams* (1843) 10 Paige (N. Y.) 326, 40 Am. Dec. 250; *Dowe v. Schutt* (1846) 2 Denio (N. Y.) 621; *Trustcott v. Davis* (1848) 4 Barb. (N. Y.) 495. This is carrying the principle of estoppel to the length of protecting a transaction prohibited by a positive law founded upon considerations of public policy. It is not necessary to affirm that doctrine in this case, for the objection here is not that the transaction itself was unlawful, but only that it was unauthorized in this particular case. I see no objection to applying to it the principle that where a party, has, by his declaration or conduct, induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his admission, if the consequence would be to work an injury to such other person." This decision is cited in the present subtitle, because it was rendered before the doctrine of estoppel as based upon receipt of benefits was definitively adopted in New York. It was followed in *Morford v. Farmers' Bank* (1857) 26 Barb. (N. Y.) 568, and *Bridgeport City Bank v. Empire Stone Dressing Co.* (1859; Sup. Ct. Gen. Term) 19 How. Pr. (N. Y.) 51.

⁶*Anglo-American Land, Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 89, 132 Fed. 721.

27. Courts of equity as well as of law, doctrine is observed by.

In one case where it was held that "the holders of bonds issued by a county in excess of its authority [could not], by an offer to surrender and cancel so much of such bonds as may upon inquiry be found to exceed the limit authorized by law, invest a court of equity with jurisdiction not only to ascertain the amount of such excess, but to declare the residue of such bonds valid and enforce the payment thereof against the county," the court laid down the following general propositions: "Where a contract is void at law for want of power to make it, a court of equity has no jurisdiction to enforce such contract, or, in the absence of fraud, accident, or mistake, to so modify it as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."¹

¹ *Hedges v. Dixon County* (1893) 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71.

² *Hood v. New York & N. H. R. Co.* (1855) 23 Conn. 609.

³ In *Standard Sav. & L. Assn. v. Aldrich* (1908) 20 L.R.A. (N.S.) 393, 89 C. C. A. 646; 163 Fed. 236, the court made the following remarks: "The fact that appellants hold certain mortgages made by borrowing shareholders of the Michigan Association as security for the money loaned to the Michigan Association does not materially improve its situation. The managers assigned these securities illegally, and appellants are constructively charged with knowledge of their want of power. Their utmost right to hold onto them is to retain them as security for so much of the loan as shall appear to have gone to the benefit of the Michigan Association by discharging legal debts and liabilities which would otherwise be valid claims against that company." The court cited *Blackburn Bldg. Soc. v. Cunliffe* (1882) L. R. 22 Ch. Div. (Eng.) 71, 52 L. J. Ch. N. S. 92, 48 L. T. N. S. 33, 31 Week. Rep. 98, and *Re National Permanent Benefit Bldg. Soc.* (1870) L. R. 5 Ch. (Eng.) 313.

In *Roberts v. W. H. Hughes Co.* (1912) 86 Vt. 76, 83 Atl. 807, certain bonds had been illegally issued to the Adirondack Company, which had furnished money for the purpose of paying the employees of L.R.A. 1917A.

As a court of law can take cognizance of a contention on the part of a plaintiff that a defendant corporation is estopped from setting up the defense of ultra vires, and grant such relief as may be appropriate on the basis of such an estoppel, a court of equity will not entertain a suit for the purpose of restraining the corporation from setting up that defense upon a new trial of a case in which judgment has been delivered against it.²

28. Rule where money borrowed ultra vires is applied to the payment of corporate liabilities.

The rule which has so frequently been applied in England with regard to the right of recovery under these circumstances (see §§ 22 and 23, supra) has been recognized in two cases.¹

29. Operation of doctrine in respect to the individual liability of stockholders.

The doctrine that the stockholders of a corporation are not estopped, any more than the corporation itself, from setting up the defense of ultra vires, has been held or assumed to be applicable in two different classes of cases:

(1) Those in which the action is brought for the purpose of enforcing the

an insolvent corporation. The court said: "The law recognizes in appropriate cases the equities of one who has provided money for the legitimate uses of a corporation, although under an arrangement which the corporation had no authority to make; and that, when the nature of the case is such that remedies at law would be ineffectual, equity will afford such other relief as the case may require. . . . In this case [*Re Cork & Y. R. Co.* (1869) L. R. 4 Ch. (Eng.) 748, 39 L. J. Ch. N. S. 277, 21 L. T. N. S. 735, 18 Week. Rep. 26] the loan was to the receiver for the benefit of the corporation, and the transaction between the corporation and the lender was a mere pledging of bonds as collateral to the loan. So, if relief is to be afforded here, it must be through an enforcement of the pledge."

The conception to which the right of action is referable in cases of this type is also illustrated by the decision in *Manhattan Hardware Co. v. Phalen* (1889) 128 Pa. 116, 18 Atl. 428, to the effect that the debts of a manufacturing corporation accruing in the employment of labor and the purchase of materials in the prosecution of its ordinary business, do not constitute such an increase of indebtedness as requires a previous meeting and the counsel of stockholders to validate them, under Pennsylvania Const. art. 16, § 7, and the Act of April 18, 1874.

statutory personal liability of stockholders.¹ In one case it was held by the Supreme Court of the United States, after a judgment had been rendered by default against a corporation in the state in which proceedings had been instituted, that a stockholder was entitled to avail himself of the plea of ultra vires in such an action.²

(2) Those in which suit is brought in the course of bankruptcy or insolvency proceedings for the purpose of enforcing the payment of due assessments on stock issued in excess of the corporate powers.³

30. Assent of stockholders to contract, effect of.

In any jurisdiction in which the doctrine now under discussion is accepted, the consent of all the stockholders to the making of an ultra vires contract will not estop the corporation from raising the defense of invalidity.¹ This rule, it is clear, is an appropriate complement of the theory that a corporation cannot estop itself by what it does in its cor-

porate capacity. Or it may be regarded as a necessary concomitant of the theory that an ultra vires cannot be ratified. See § 33, *infra*.

31. Doctrine considered with reference to the rule which precludes a tenant from denying his landlord's title.

In respect to one class of contracts, viz., unauthorized leases of railroads, the doctrine under discussion comes into collision with, and overrules, the common-law rule by which a tenant of real estate is estopped to deny his landlord's title. In a leading case it was observed by Gray, J., that this rule had never been considered by the Supreme Court of the United States to be "applicable to leases by railroad corporations of their roads and franchises." The learned judge added: "It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred,

¹ Schofield v. Goodrich Bros. Bkg. Co. (1899) 39 C. C. A. 76, 98 Fed. 271; Anglo-American Land, Mortg. & Agency Co. v. Lombard (1904) 68 C. C. A. 89, 132 Fed. 721, petition for writ of certiorari denied in (1905) 196 U. S. 638, 49 L. ed. 630, 25 Sup. Ct. Rep. 793; Pauly v. Coronado Beach Co. (1893) 56 Fed. 428.

² Ward v. Joslin (1902) 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807. The court said: "If, however, under the state decisions the corporation would be held estopped from denying the liability, it does not follow that the stockholders must therefore be held liable, if the obligation was in fact incurred without authority. In other words, alleged liabilities incurred without authority, and which do not come within the meaning of the word 'dues,' as used in the state Constitution, cannot be properly treated as brought within the scope of that word, simply because the corporation may be so situated as to be estopped from denying their validity. Whether in this case the corporation would have been held estopped if it had made the defense of ultra vires, it did not make it, and judgment went against it. We have held such judgments conclusive in proceedings under the Kansas Constitution. Hancock Nat. Bank v. Farnum (1900) 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506. But we did not there hold that it was not open for a stockholder to show that the judgment was not enforceable against him when rendered against the corporation on a contract beyond its power to make."

³ Scovill v. Thayer (1881) 105 U. S. 143, 26 L. ed. 968. This decision was one of the precedents cited in Laredo Improv. Co. L.R.A.1917A.

v. Stevenson (1895) 13 C. C. A. 661, 32 U. S. App. 97, 66 Fed. 633, wherein a receiver's suit to recover unpaid subscription for stock was held not to be maintainable. The law was thus stated: "Where a corporation has power to issue stock or to increase its capital stock, and this power is defectively or informally exercised, the acts and acquiescence of the stockholder may estop him from denying the validity of the stock or his liability therefor."

... But where the corporation is absolutely without power to issue the stock, or to increase the capital stock above a certain limit, no act or consent of the stockholder who receives stock issued without authority can estop him from denying the validity of the stock or his liability therefor. The holder of such stock is under no obligation to pay for it, because he has received no consideration for such an obligation. The stock issued to him is absolutely void. He is not estopped to deny its validity, as against a creditor of the corporation, for the foundation of estoppel is deceit, and the creditor cannot be deceived as to the power of a corporation to issue such stock. He is bound to examine and know the law which limits the powers of the corporation with which he deals, and, whether he examines it or not, he is charged by the law with the knowledge of it."

¹ In Savannah Ice Co. v. Canal-Louisiana Bank & T. Co. (1913) 12 Ga. App. 818, 79 S. E. 45, this rule was laid down on the authority of certain Federal decisions. The point affirmed in these decisions was that an ultra vires contract was not susceptible of ratification by the shareholders; but the distinction is not material.

the alienable franchise of the plaintiff, is unlawful and void for want of legal capacity in the plaintiff to make it."¹

On general principles it would seem that the operation of the common-law rule would also be controlled by that of the doctrine in cases involving leases of property other than that of railroad corporations. But the point has apparently not yet been considered by any court.

32. Estoppel of corporation to deny the legality of its organization.

The general rule is that "a party, individual or collective, which holds itself out as a corporation, acts as such in making a contract, and promises in a corporate name, may be sued on the contract and charged in that name, and will not be heard to deny the corporate character which it has thus assumed."¹

For the correlative rule applicable to actions by corporations, see § 9 (a) of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —.

VII. Rationale of the doctrine that a corporation cannot be estopped from pleading ultra vires.

33. Ultra vires transactions illegal and consequently void.

One of the grounds upon which the principle of an estoppel against setting up the defense of ultra vires has been rejected by the courts which disapprove of it is that, as a contract which a corporation is not authorized to make is essentially one which belongs to the category of those which are prohibited, either expressly or by implication, by the lawmaking body, it is absolutely void in the same sense and the same degree as any other description of prohibited contract.¹ This was the fundamental point in respect to which judicial opinion was divided in the well-known New York case in which the arguments for and against the admission of the principle of estoppel were elaborately marshaled by Chief Justice Comstock and Judge Selden.² The latter denied—and with good reason—that the former

was warranted in arguing on the assumption that certain earlier decisions which had declared ultra vires contracts to be nonenforceable rested not upon the circumstance that they were illegal, but "upon the ground that because corporations are artificial beings, having no natural powers, but only such as are conferred upon them by law, they cannot by possibility do any act beyond the limits prescribed by their charters, and hence that no such act, although done by their agents, in their name, and for their benefit, can be considered as a corporate act, but must in all cases be treated as the personal act of such agent." The correctness of the position taken by the learned judge is so obvious, and the latter authorities in favor of his view are so abundant, that it is somewhat surprising to find that the theory which he criticized has been revived in another New York case, and used as one of the links in a chain of reasoning which led up to an assertion of the doctrine of estoppel.^{3a}

The doctrine that an ultra vires contract is absolutely void manifestly involves the corollary that it cannot be ratified by the voluntary action of the corporation. "It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified."²

The second link in the chain of reasoning in this point of view is that a contract which is not susceptible of voluntary action cannot be rendered enforceable against the will of the corporation by its conduct in respect to the subject matter to which the contract relates. "If there is no power to make the contract, there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it and yet it may become legal and

¹ *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

¹ *Maxwell v. Akin* (1898) 89 Fed. 178, quoting *Thomp. Corp.* § 7650. See also *Lehman v. Warner* (1878) 61 Ala. 466.

¹ For a discussion of this aspect of the matter, see §§ 14 et seq., supra, where the conflicting views which prevail with regard to the juristic quality of an ultra vires contract are explained.

² *Rissell v. Michigan S. & N. I. R. Cos.* (1900) 22 N. Y. 258. L.R.A.1917A.

^{2a} *Vought v. Eastern Bldg. & L. Asso.* (1902) 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496. See § 61a, infra.

³ *California Nat. Bank v. Kennedy* (1897) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831. For other cases in which the impossibility of ratifying an ultra vires contract has been affirmed by courts which do not accept the principle of estoppel, see § 14, supra.

valid as a contract, by way of estoppel, through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power."⁴

In an English case it was unsuccessfully contended that, although the covenant in question might be ultra vires of the company, it was only so in the sense that individual dissentient shareholders might obtain relief in a court of equity, and that, the agreement being under seal, the company, as a company, are bound by their covenant in a court of law.⁵

34. Notice of invalidity of contract, party dealing with corporation chargeable with.

Another ground for the rejection of the principle of estoppel is indicated by the consideration that an essential prerequisite to the creation of an estoppel is that the party in whose favor the es-

toppel is to operate should, at the time when he entered into the contract, have been misled by the other party with regard to some material fact of which he had no knowledge, actual or constructive.¹ But it is clear that, so far as the extent of the powers of a corporation are concerned, the element of deception must necessarily be absent from any transaction with that corporation.

"Persons who deal with corporations and societies that owe their constitution to, or have their powers defined or limited by, acts of Parliament, or are regulated by deeds of settlement or rules deriving their effect more or less from acts of Parliament, are bound to know or to ascertain for themselves the nature of the constitution and the extent of the powers of the corporation or society with which they deal."² In other words "the powers delegated by the state to the corporation are matters of public law, of which no one can plead ignorance. A

⁴ National Home Bldg. & L. Asso. v. Home Sav. Bank (1899) 181 Ill. 43, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619.

⁵ Taylor v. Chichester & M. R. Co. (1867) L. R. 2 Exch. (Eng.) 369.

¹ For a case in which this general principle was treated as being fatal to the right of certain creditors to recover on the ground that an increase of stock was valid, see *Scovill v. Thayer* (1881) 105 U. S. 143, 26 L. ed. 968.

² Baggallay, L. J., in *Chapleo v. Brunswick Permanent Bldg. Soc.* (1881; C. A.) L. R. 6 Q. B. Div. 696, 2 Eng. Rul. Cas. 366.

In *East Anglian R. Co. v. Eastern Counties R. Co.* (1851) 11 C. B. 775, 138 Eng. Reprint, 680, Jervis, Ch. J., speaking of the special act under which the defendant railway company had been incorporated, said: "This act is a public act, accessible to all and supposed to be known to all, and the plaintiffs must therefore be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be."

In *Hood v. New York & N. H. R. Co.* (1852) 22 Conn. 505, 9 Am. Neg. Cas. 149, where the action was brought to recover for an injury received on a stage coach operated by a railway company, the court said: "The plaintiff must have known that the defendants were incorporated by the legislature for the purpose of making or using only a railroad. Their very name, as well as the location and business of their road, is sufficient notice that they are not incorporated for running stages throughout the state; and no person can assume or suppose the defendants are to go beyond the appropriate business of a railroad. The idea of an imposition on the public as to these stages running off from the road to and from Litchfield and other places, as the defendants' stages, is incredible and preposterous." L.R.A.1917A.

terous. The public know where the charter may be seen, and what it contains."

"Persons dealing with the managers of a corporation must take notice of the limits imposed upon their authority by the act of incorporation." *Pearce v. Madison & I. R. Co.* (1858) 21 How. (U. S.) 441, 16 L. ed. 184, followed in *Franklin Co. v. Leiston Inst. for Savings* (1877) 68 Me. 43, 28 Am. Rep. 9.

"With just limitations, the principle cannot be questioned that the limitations to the authority, powers, and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that when powers are conferred and defined by statute, everyone dealing with the corporation is presumed to know the extent of those powers." *Monument Nat. Bank v. Globe Works* (1869) 101 Mass. 57, 3 Am. Rep. 322, approved in *Ossipee Hosiery & Woolen Mfg. Co. v. Canney* (1874) 54 N. H. 325.

In *Bank of Hindustan, China & Japan v. Alison* (1870) L. R. 6 C. P. (Eng.) 71, the reason assigned by Bovill, Ch. J., for holding that no estoppel could be predicated, was that "there was no misleading of the plaintiffs by the defendant into a belief of the existence of a state of facts which did not exist."

"Neither is there anything in the case to permit the application of the doctrine of estoppel. The plaintiff was in nowise misled; it had full knowledge; it has parted with nothing." *Aetna Nat. Bank v. Charter Oak L. Ins. Co.* (1892) 50 Conn. 167.

For other cases in which the doctrine of imputed knowledge has been recognized in cases falling within the scope of this monograph, see *Salt Lake City v. Hollister* (1885) 118 U. S. 263, 30 L. ed. 178, 6 Sup. Ct. Rep. 1055; *St. Louis, V. & T. H. R. Co. v. Terre*

party dealing with a corporation having limited and delegated powers conferred by law is chargeable with notice of them and their limitations, and cannot plead ignorance in avoidance of the defense (i. e., of ultra vires)."³ It follows, therefore, that "if the contract be prohibited by statute, everyone dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized."⁴

The conclusion indicated in this point of view is that "a corporation is never estopped to deny its power to make a contract where the extent of its powers

and of the facts relevant thereto were or should have been known to the parties seeking to enforce the contract when it was entered into."⁵

35. Protection of shareholders.

A fourth reason assigned by the courts for holding the principle of estoppel to be inapplicable in respect of ultra vires contracts is that this doctrine is necessary for the proper protection of the stockholders.¹

36. Protection of creditors.

In a leading English case Lord Cairns, referring to the Companies Act, observed: "The provisions under which

Haute & I. R. Co. (1892) 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953; Louisville & N. R. Co. v. Kentucky (1896) 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Farmers' Nat. Bank v. Sutton Mfg. Co. (1892) 17 L.R.A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191; Cincinnati, H. & D. R. Co. v. McKeen (1894) 12 C. C. A. 14, 24 U. S. App. 218, 64 Fed. 36; Standard Sav. & L. Assn. v. Aldrich (1908) 20 L.R.A.(N.S.) 393, 89 C. C. A. 646, 163 Fed. 216; Re S. P. Smith Lumber Co. (1904) 132 Fed. 620; Miners' Ditch Co. v. Zellerbach (1869) 37 Cal. 543, 99 Am. Dec. 300; Myers v. Equitable Bldg. & L. Soc. (1900) 92 Ill. App. 27; Whittenton Mills v. Upton (1858) 10 Gray (Mass.) 582, 71 Am. Dec. 681.

Compare also Re Worcester Corn Exch. Co. (1853) 3 De G. M. & G. 180, 43 Eng. Reprint, 71, 22 L. J. Ch. N. S. 593, 17 Jur. 721, 1 Week. Rep. 171, where it was held that the shareholders of a company could not be held liable for a debt contracted by the directors, because one of the partners in the bank which furnished the money was himself a shareholder, and was thus aware that the liability of each shareholder was limited to the amount which had already been paid up. This case has no actual bearing on the principle of estoppel in relation to ultra vires transactions, although it has sometimes been cited as a precedent in that regard by American judges.

³ National Home Bldg. & L. Assn. v. Home Sav. Bank (1889) 181 Ill. 44, 64 L.R.A. 399, 72 Am. St. Rep. 245, 64 N. E. 619, quoted in Steele v. Fraternal Tribunes (1905) 215 Ill. 190, 106 Am. St. Rep. 180, 74 N. E. 121.

⁴ First Nat. Bank v. Converse (1906) 200 U. S. 425, 439, 50 L. ed. 537, 542, 26 Sup. Ct. Rep. 306.

⁵ Humboldt Min. Co. v. American Mfg. Min. & Mill. Co. (1894) 10 C. C. A. 415, 22 U. S. App. 334, 62 Fed. 356.

¹ "Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed. East Anglian R. Co. v. Eastern Counties R. Co. (1851) 11 C. B. 775, 138 Eng. Reprint, 680, 7 Eng. L. & Eq. Rep. 500, 7 Eng. Ry. & C. Cas. 150, 21 L. J. C. P. N. S. 23, 16 Jur. 249, 22 Eng. Rul. Cas. 21. L.R.A.1917A.

In Taylor v. Chichester & M. R. Co. (1867) L. R. 2 Exch. (Eng.) 356, Mellor, J., remarked: "However we may regret to give effect to the repudiation of a bargain entered into by the directors of a company, we cannot fail to see that the directors of railway companies, often, I fear, through indirect motives, do enter into contracts and engagements most ruinous to the interests of shareholders, who may have been led into a false security by the very limitations of the authority expressed or impliedly contained in the acts of incorporation."

"If the legislature accedes to such an application [for incorporation], the act, when passed, becomes the charter of the company, prescribing its duties and declaring its rights, and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the act, and liable to no obligations beyond those which are there indicated. If this be not the true principle, the legislature must be making itself ancillary to serious injury." Lord Cranworth, in Caledonian & D. R. Co. v. Helensburgh (1856) 2 Macq. H. L. Cas. (Scot.) 391, 2 Jur. N. S. 695, 4 Week. Rep. 671, reversing (1852) 15 Sc. Sess. Cas. 2d series, 148, quoted in Mann v. Edinburgh Northern Tramways Co. [1893] A. C. (Eng.) 69, 62 L. J. C. P. N. S. 74, 1 Reports, 86, 68 L. T. N. S. 96, 57 J. P. 245.

"One of the grounds on which the doctrine of ultra vires rests is that the interest of the stockholders ought not to be subjected to such risks [i. e., those not undertaken]. Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation." Ward v. Joslin (1902) 186 U. S. 142, 151, 46 L. ed. 1093, 1099, 22 Sup. Ct. Rep. 807.

The significance of this element was also adverted to in Davis v. Old Colony R. Co. (1881) 131 Mass. 258, 41 Am. Rep. 221; Whittenton Mills v. Upton (1858) 10 Gray (Mass.) 598, 71 Am. Dec. 681; Morris & E. R. Co. v. Sussex R. Co. (1869) 20 N. J. Eq. 562.

that system of limiting liability was inaugurated were provisions not merely—perhaps I might say not mainly—for the benefit of the shareholders for the time being in the company, but were enactments intended also to provide for the interests of two other very important bodies; in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and, secondly, the outside public, and more particularly those who might be creditors of companies of this kind.”¹ Obviously the security of creditors as a class will be imperfectly achieved if the mere fact that one particular member of that class has performed an ultra vires contract will enable him to maintain an action upon it. Everyone who deals with the company is warranted in assuming that its business has previously been, and will always be, carried on within the limits prescribed by its charter, or by the general law under which it was organized.

37. Effective limitation of the exercise of corporate powers.

Courts have sometimes pointed out

that the virtual effect of the doctrine is to enable corporations to extend their powers indefinitely by simply disregarding the restrictions imposed upon their authority.¹ It would be easy to exaggerate the importance of this consideration. Its significance consists in the fact that it emphasizes the theoretic consequences which an application of the doctrine of estoppel may by possibility produce. In practice corporations do not, generally speaking, travel very far outside the domain covered by the powers conferred upon them. It is evident, moreover, that the preventive authority of the state will always be called into action by any attempt to usurp powers or an extensive scale.

38. Honesty of the defense of ultra vires.

Certain judges speaking in jurisdictions in which the doctrine now under discussion prevails have declared that it is unconscionable to raise the plea of ultra vires in an action brought by a claimant who has performed the contract on his side.¹ So far as regards cases of the description ordinarily pre-

¹ Ashbury R. Carriage & Iron Co. v. Rich (1875) L. R. 7 H. L. 667, 2 Eng. Rul. Cas. 304.

¹ In Hood v. New York & N. H. R. Co. (1853) 22 Conn. 502, 9 Am. Neg. Cas. 149, the court said: “If the directors, even with all the stockholders at their side, transcend the limits of the charter, and make contracts foreign to their business, they only act for themselves. The reason is there can be no consent of the corporation. The consent of individual stockholders, however repeated, is not their consent, nor is it admissible proof to establish consent; so that, if it were true every stockholder had expressed his consent, it would make no difference in the case. If this is not so, there are no restrictions or limitations on chartered companies, and they may do anything and everything the directors please which is not absolutely unlawful. The exercise of power is held to prove itself, which is absurd.”

In Montgomery v. Montgomery & W. Pl. Road Co. (1857) 31 Ala. 76, the court said: “If this doctrine [i. e., estoppel] be established, then corporations, no matter how limited their powers, may make themselves omnipotent. They have only to induce persons to contract with them beyond the scope of their powers, and their very usurpations have the effect of conferring powers on them which the legislature have withheld. A proposition so erroneous can scarcely need argument to overturn it.” See also Westinghouse Mach. Co. v. Wilkinson (1885) 79 Ala. 312, where the court said that to permit the doctrine of estoppel to be in-

voked for the purpose of excluding the defense of ultra vires “would practically be giving the sanction of the court to the doctrine that a corporation can become omnipotent by arrogating to itself power forbidden by its charter, which is the vital source and origin of all corporate powers.”

In Standard Sav. & L. Co. v. Aldrich (1908) 20 L.R.A.(N.S.) 393, 89 C. C. A. 646, 163 Fed. 216, the court said: “A contract beyond the scope of the power of the Michigan association, express or implied, cannot be enforced by an appeal to the rules of estoppel. Any such application of the doctrine would be, in effect, to enlarge the power of the corporation in accordance with the discretion of its managers, violating thereby the rights of innocent shareholders and a sound public policy.”

In Schurr v. New York & B. Suburban Invest. Co. (1892) 45 N. Y. S. R. 645, 18 N. Y. Supp. 454, it was pointed out that “if the fact that a contract beyond the power of a corporation has been performed suffice to preclude the defense of ultra vires, then, manifestly, all legal restraint on the powers of corporations is virtually of no effect.” But, of course, the court was compelled to admit that the law in New York had been settled without any reference to this consideration.

¹ The best known of such expressions of opinion is the following statement: “In my opinion, nothing can be more indecent than for a great company like this to allege, by way of defense, that a solemn contract which they have entered into is void on the ground of its not being within their powers,

sented, this theory seems to have been satisfactorily disposed of by two eminent judges in the passages quoted below.² On the other hand, it seems impossible to deny that the interposition of this defense may be most unrighteous, not to say downright dishonest, where the directors who made the contract held all the corporate stock up to the time when the proceedings were instituted, and the claimant is seeking redress in an action at law.³ If adequate

relief is to be attained at all under such circumstances, resort must clearly be had to the more flexible remedies afforded by equity or to a suit in disaffirmance of the contract.

In a leading case, *Selden, J.*, took the uncompromising position that "the injustice which can ever accrue to individuals from permitting the defense in question is trifling, under the law as now settled, compared with the importance to the public of keeping corpora-

not from any mistake, misapprehension, or subsequent accident, but because they thought fit to enter into it, and meant to have the benefit of it, if it turned out for their benefit, and to take advantage of the illegality in case the contract should prove onerous and they should desire to get rid of it." *Lord St. Leonards in Hawkes v. Eastern Counties R. Co.* (1852) 1 DeG. M. & G. 759, 42 Eng. Reprint, 739. In *Shrewsbury & B. R. Co. v. London & N. W. R. Co.* (1852) 16 Beav. 451, 51 Eng. Reprint, 848, Lord Romilly approved this statement. It was also cited in *Monument Nat. Bank v. National Bank Globe Works* (1869) 101 Mass. 57, 3 Am. Rep. 322.

In *Seligman v. Charlotteville Nat. Bank* (1879) 3 Hughes, 647, Fed. Cas. No. 12,642, ultra vires was designated as an "odious defense."

² "I cannot help adding an observation on the objection made to the honesty of a defense of this description. It is said the company has contracted and the company repudiates its contract. There cannot be a more perfect fallacy. 'Persons without authority have affected to contract for the company, and the company repudiates the act,' is the true expression. A, B, and C are in partnership as hatters; A buys boots in the name of the firm, and the sellers sue A, B, and C, who say they did not contract. It may be wrong in A, but are B and C to blame? I do not say these corporation cases are cases of partnership, but the principle is the same. And when I consider the mischief that has been done by directors under the temptations offered by interested parties and other considerations, adding to the schemes in which parties have contributed their capital, I own, hard as it may be in a particular case, I am not sorry that a lesson should be read that those who deal with directors must see they have authority to bind their companies, or must trust the directors personally, a consideration which will make both parties more cautious in their speculations with other people's property." *Bramwell, B., in Bateman v. Ashton Under-Lyne* (1858) 3 Hurlst. & N. 340, 157 Eng. Reprint, 494. These remarks were made in a dissenting judgment; but they have nothing to do with the grounds on which the learned judge disagreed with his associates.

In *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 304, *Selden, J.*, said: "The L.R.A.1917A.

strength of the opposing views consists in the alleged injustice of permitting a corporation to avoid obligations by pleading its own want of power to incur them. But it should be remembered that this argument is just as applicable to the case of an individual who sets up the illegality of his own contract, and thus shields himself from responsibility upon it, as to that of a corporation. If it be said that in the case of illegal contracts between individuals, each party is a participant in the guilt, and hence the law will not interpose to protect either, this is equally true in respect to the unauthorized contracts of corporations. Their powers are prescribed by statute, and everyone who deals with them is presumed to know the extent of these powers."

³ Such was the situation in *Wenlock v. River Dee Co* (1883; C. A.) L. R. 36 Ch. Div. (Eng.) 674, note, where Lord Esher made the following emphatic remarks: "In this case Lord Wenlock's executors have brought an action against the River Dee Company in order to recover a very large sum with interest upon a covenant contained in a mortgage deed, and it is undoubted that Lord Wenlock did advance a very large sum upon a mortgage which was given to him under the seal of the company, and upon a contract which those who in fact made it with him represented to be a contract with the company. The defense is that, although the money was in fact advanced upon such representation, namely, that it was money to be advanced to the company, and although the mortgage and the covenant are a mortgage and covenant under the seal of the company, yet that the company is not liable to this action substantially in covenant, because it is alleged by the company that those who made that covenant and who made that mortgage had no authority to bind the company by the use of the seal for that purpose. If that defense be a valid one there can be no doubt the hardship thereby inflicted upon Lord Wenlock, and in this case a hardship much greater than usual, because this is not simply the case of directors either wilfully or inadvertently doing that which, if it were upheld, would bind a number of shareholders who are not directors, but actually in this case, if this covenant and this mortgage cannot be upheld, it is a covenant and a mortgage made by people who are said to be the agents of the company, but who

tions within their chartered limits."⁴ He expressed the opinion that the rule under which a corporation "may nevertheless be compelled in a suit brought in disaffirmance of the contract, and founded upon the equities of the case, to restore what it has obtained" by reason of the contract, "removes from corporations all temptation to engage in illegal transactions, and while it tends thus to promote the public policy of the state, it at the same time protects individuals from any gross injustice." There is also the general consideration to be taken into account, that, conceding the defense to be "an ungracious one," it is admitted not for the sake of the corporation, but for that of "the statute and the public."⁵

For some remarks concerning the alleged inadequacy of the remedies which may be pursued independently of an action on the contract, see § 2 of the note to *Crowder State Bank v. Ætna Powder Co.* post, 1021.

39. Analogy of the rules relating to married women and infants.

The doctrine that a party to an ultra

in truth and in fact are the only persons interested in the company. It is as if all the shareholders of the company were to make this representation and obtain money, and then put forward the defense, when an action is brought against the company, that although they, the shareholders, had misled the person into advancing his money, nevertheless the company is not liable. If this action were really the defense of those who induced Lord Wenlock to advance his money upon the representation made by them,—if this action is defended in the name of the company by them,—I hesitate to express the feeling which I have as to such conduct; but if this action is really defended, although in the name of the company, on behalf of the *Crédit Foncier*, I can pass no opinion upon whether it is a just or righteous defense or not, because I know nothing of the circumstances under which they became the persons having the command of this defense." The *Crédit Foncier* here referred to was another creditor of the company.

⁴ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 305.

⁵ *Safford v. Wyckoff* (1841) 1 Hill (N. Y.) 11.

¹ "An infant is never estopped, nor a married woman, nor ought a body of stockholders to be, united, as they are, under a specific charter." *Hood v. New York & N. H. R. Co.* (1852) 22 Conn. 505, 9 Am. Neg. Cas. 149.

In *Re Comstock* (1874) 3 Sawy. 229, Fed. Cas. No. 3,078, the court, after adverting to these rules, observed: "In the same way, L.R.A.1917A.

vires contract cannot be estopped from alleging its invalidity has sometimes been compared to the rules under which married women and infants cannot, by the operation of an estoppel, be rendered liable upon contracts which they have no legal capacity to make.¹ The analogy, though not exact, is useful as furnishing a ground for the argument that, if the principle of estoppel is held to be inapplicable where these merely common-law rules are concerned, the propriety of excluding it from consideration where a statutory incapacity is involved should be a fortiori recognized.

VIII. Doctrine that a corporation may be estopped from pleading ultra vires.

40. Formal statements of the doctrine.

The doctrine adopted by the majority of the American courts is that, in an action founded upon an ultra vires contract, the fact of its being unauthorized cannot be set up as a defense, where it has been performed by the plaintiff, and the benefits of such performance have been received by the defendant.

to allow this corporation, by means of an alleged estoppel which grows out of the very act prohibited, to indirectly do an act for which it had neither capacity nor right, would be practically to dispense with the limitation which the state has imposed upon its power of doing business therein."

"Who ever heard of its being claimed that, under the operation of the common law, a contract of a married woman or a person non compos mentis could be ratified, or they could be estopped, during the continuance of the disability? So of the contract of a minor, which may be only voidable. I presume it was never urged that such a contract could be rendered valid by a further contract, or the infant be estopped by his acts before arriving at his majority. And this is so because of the want of power to bind himself at the time of making the contract, and therefore a subsequent agreement, or the performance of acts, that otherwise would operate as an estoppel, cannot produce such results. And the same must be true, to its full extent, of corporate bodies acting without power. No well-founded reason or distinction can be taken. A rule that a party under disability, entering into a contract, may, during such disability, ratify it, or may so act as to become estopped, is not sanctioned by any rule, and is opposed to every well-founded legal principle; nor can any rule or principle be found that can sanction it as an exception." *East St. Louis v. East St. Louis Gas, Iron & Coke Co.* (1881) 98 Ill. 433, 38 Am. Rep. 97.

"Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpi*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it."¹

"Although a contract entered into by the agents or officers of a private corporation is *ultra vires*, and therefore not binding on the company so long as it remains executory, yet if the company in such case knowingly permits the other contracting party, without objection, to go on and perform the contract on his part, and thereby obtains and appropriates to its own use money, property, or labor in furtherance of some legitimate corporate purpose, it will be estopped from denying its liability on such contract."²

"Where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefits from such contract, it cannot invoke the doctrine of *ultra vires* to defeat an action brought against it on such contract."³

"Although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation, or of any statute prohibiting it, and the corporation has, by its promise, induced a party relying upon such promise, and in execution of the contract, to

expend money and perform his part of the contract the corporation is liable on the contract."⁴

"There is much conflict in the decisions of courts of last resort as to the doctrine urged, but in the jurisdictions where it prevails the rule is that when a corporation enters into a contract merely beyond its powers, which, if made by a private person, would have been binding upon him, and such contract has been performed by the other party thereto, the corporation will not be permitted to deny its power to make such contract, but the same may be enforced against it."⁵

"There are few rules better settled, or more strongly supported by authority, with fewer exceptions, in this country, than that, when a contract by a private corporation, which is otherwise unobjectionable, has been performed on one side, the party which has received and retained the benefits of such performance shall not be permitted to evade performance on the ground that the contract was in excess of the purpose for which the corporation was created."⁶

"The law is that for acts merely in excess of charter authority corporations cannot set up the defense of *ultra vires*, when the consideration has been received and the transaction executed by the other party."⁷

"The weight of modern judicial authority favors the rule that where a private corporation enters into a contract in excess of its granted powers, but expressly prohibited, and has received the benefits contracted for, it will be estopped from pleading a want of power to make the agreement, for the purpose of escaping performance on its part."⁸

"A corporation, when sued, cannot set up *ultra vires* as a defense to an action for breach of contract, or even for specific performance, when it has had the

¹ *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771.

² *Peoria & S. R. Co. v. Thompson* (1882) 103 Ill. 187. This statement embodies the earlier, not the present, doctrine of the Illinois supreme court. See § 80, *infra*.

³ *Bloomington Mut. Ben. Assn. v. Blue* (1887) 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331. For other Illinois cases in which the same doctrine was explicitly laid down, see *Heima Brewing Co. v. Flannery* (1891) 137 Ill. 309, 27 N. E. 286; *Kadish v. Garden City Equitable Loan & Bldg. Assn.* (1894) 151 Ill. 538, 42 Am. St. Rep. 256, 38 N. E. 236. But see remark in preceding note.

⁴ *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702.

⁵ *Franklin Nat. Bank v. Whitehead* L.R.A.1917A.

(1897) 149 Ind. 560, 29 L. R. A. 725, 63 Am. St. Rep. 302, 49 N. E. 592.

⁶ *Seymour v. Chicago Guaranty Fund Life Soc.* (1893) 54 Minn. 147, 55 N. W. 907.

⁷ *Lysaght v. St. Louis Operative Stonemason's Assn.* (1893) 55 Mo. App. 538, quoted in *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 371.

⁸ *Whitehead v. American Lamp & Brass Co.* (1905) 70 N. J. Eq. 581, 62 Atl. 554. In an earlier case this court made the following statement: "The basis upon which the enforcement of the contract in such cases rests is that the company is estopped from setting up its own unauthorized act and its own incapacity, to evade performance on its part, after receiving the fruits of the bargain." *Camden & A. R. Co. v.*

full benefit of the contract and the other party has duly performed it.”⁹

“Even if this contract were ultra vires, the defendant, after having made and received and retained the benefits of it, cannot be heard to interpose that as a defense. . . . It is a fully executed contract on the part of the plaintiffs, and it can be enforced against the defendant even though there was no authority to make it.”¹⁰

In some instances the phraseology employed by courts which apply the doctrine is so general as merely to suggest by implication the conception of an estoppel. Thus we find such statements as these; that “there is no rule of law which permits the defendant to retain both the benefits and the price;”^{10a} that “in equity neither party to an ultra vires transaction will be heard to allege its invalidity while retaining its fruits;”¹¹ that, “in order to be relieved of the burden which it has voluntarily assumed, the offending corporation must restore what it has received;”¹² and that “a corporation will not be permitted to retain the benefits resulting from that part of a contract which it affirms is legal, and escape the burden imposed by that part of the same contract which it asserts is ultra vires.”¹³ These forms of statement, it is clear, are especially appropriate in respect to cases in which the corporation is seeking as plaintiff to be released from the contract. See § 50, *infra*. It should be pointed out that the existence of an obligation to restore the benefits of the contract, as a condition precedent to being permitted to set up the defense of ultra vires, is a conception which cannot logically be entertained except in jurisdictions in which the doctrine of estoppel prevails. By the courts which reject that doctrine, the footing upon which restoration is en-

forced is that of an action independent of the contract itself. See §§ 11 and 12 of the note to *Crowder State Bank v. Etna Powder Co.* post, 1021. It is misleading, therefore, to declare in general and unqualified phraseology that there is a uniformity in the decisions that either party to an ultra vires contract, while retaining the benefits, is estopped to plead that the contract was ultra vires in order to defeat the recovery,¹⁴ or that “it is settled . . . that a corporation may not acquire and retain benefits under a contract to which it is a party, and then deny its legal effect.”¹⁵

The assignee of a corporate contract is, of course, estopped from pleading ultra vires in all cases where the corporation itself would have been so estopped, if the action had been brought against it.¹⁶

41. Same subject; statements of text-writers which have been judicially approved.

To the above statements of the doctrine, it may be advisable to append a few of those which have been formulated by text writers and approved most frequently by the courts.

“It must be further borne in mind that the invalidity of contracts made in violation of statutes is subject to the equitable exception that, although a corporation, in making a contract, acts in disagreement with its charter, where it is a simple question of capacity or authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits

May's Landing & E. H. City R. Co. (1886) 48 N. J. L. 530, 7 Atl. 523.

⁹ *Usher v. New York C. & H. R. R. Co.* (1902) 76 App. Div. 422, 78 N. Y. Supp. 508, affirmed in (1904) 179 N. Y. 544, 71 N. E. 1141.

¹⁰ *Curtis v. Natalie Anthracite Coal Co.* (1903) 89 App. Div. 61, 85 N. Y. Supp. 413, affirming (1903) 39 Misc. 586, 80 N. Y. Supp. 603 (decision of supreme court was affirmed without any opinion in (1905) 181 N. Y. 543, 73 N. E. 1122).

^{10a} *Oil Creek & A. R. Co. v. Pennsylvania Transp. Co.* (1876) 83 Pa. 160, 2 Mor. Min. Rep. 421. Compare the statement that “the instances are rare in which a corporation or individual has been permitted to set up its own wrong in order to retain both the property and its price.” *Wright v. Pipe L.R.A.* 1917A.

Line Co. (1882) 101 Pa. 204, 47 Am. Rep. 701.

¹¹ *Bell & C. Co. v. Kentucky Glass Works Co.* (1899) 106 Ky. 7, 50 S. W. 2.

¹² *Planters' Cotton Oil Co. v. Guaranty State Bank* (1916) — Tex. Civ. App. —, 188 S. W. 44.

¹³ *Mulford v. Torrey Exploration Co.* (1909) 45 Colo. 81, 100 Pac. 596 (contract as to exchange of stock).

¹⁴ *Tennessee Ice Co. v. Raine* (1901) 107 Tenn. 158, 64 S. W. 20. Tennessee is one of the states in which the theory has been rejected.

¹⁵ *Lilylands Canal & Reservoir Co. v. Wood* (1913) 56 Colo. 130, 136 Pac. 1029.

¹⁶ For a case in which this rule was taken for granted, see *Erb v. Yoerg* (1886) 64 Minn. 463, 67 N. W. 355.

of which he returns."¹ As this statement was inserted in a treatise published so long ago as 1857, and has been so frequently quoted by the courts as to have become a *locus classicus* in the law of ul-

tra vires contracts, the question whether it was justified by the authorities as they stood at that date is one of considerable importance. Some observations as to this point will be found in the footnote.²

¹ Sedgw. Stat. & Const. Law, 1st ed. p. 90, 2d ed. p. 73. This passage was approved in *Pine Grove Twp. v. Talcott* (1873) 19 Wall. (U. S.) 666, 22 L. ed. 227; *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 629, 25 L. ed. 188, 190; *St. Avit v. Kettle River Co.* (1914) 133 C. C. A. 76, 216 Fed. 875; *Argenti v. San Francisco* (1860) 16 Cal. 255; *Main v. Casserly* (1885) 67 Cal. 127, 7 Pac. 426; *Grangers' Business Asso. v. Clark* (1885) 67 Cal. 634, 8 Pac. 445; *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 411, 17 Am. Rep. 702; *Keokuk v. Ft. Wayne Electric Co.* (1894) 90 Iowa, 67, 57 N. W. 689; *Beach v. Wakefield* (1899) 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197; *United German Bank v. Katz* (1881) 57 Md. 128; *Farmers' Bank v. Burchard* (1860) 33 Vt. 346; *Lewis v. American Sav. & L. Asso.* (1898) 98 Wis. 204, 39 L.R.A. 559, 73 N. W. 793.

² The cases cited by Mr. Sedgwick are the following: *Palmer v. Lawrence* (1849) 3 Sandf. (N. Y.) 162, affirmed in (1851) 5 N. Y. 389; *Steam Nav. Co. v. Weed* (1853) 17 Barb. (N. Y.) 378; *Chester Glass Co. v. Dewey* (1819) 16 Mass. 94, 8 Am. Dec. 128; *Baltimore & P. S. B. Co. v. McCutcheon* (1850) 13 Pa. 13; *Potter v. Bank of Ithaca* (1843) 5 Hill (N. Y.) 490, affirmed in (1844) 7 Hill, 530; *Suydam v. Morris Canal & Bkg. Co.* (1843) 5 Hill (N. Y.) 491, note (a), affirmed in (1843) 6 Hill, 217; *Sacket's Harbor Bank v. Lewis County Bank* (1851) 11 Barb. (N. Y.) 213; *Mott v. United States Trust Co.* (1855) 19 Barb. (N. Y.) 568.

The first criticism suggested by this list of authorities is that it is very far from being complete, and that the learned author would scarcely have relied upon them so confidently as warranting the clear-cut doctrine which he formulated, if he had been aware of the number and weight of the rulings which were antagonistic to that doctrine. Obviously, he must have been entirely ignorant of the earlier English cases. See §§ 19 and 20, *supra*. Nor was he aware that the American decisions reported up to the time when he was writing were on the whole distinctly unfavorable to his views. See cases reviewed in subtitle XI, *infra*, under the following heads: Connecticut, Maryland, Massachusetts, New Jersey, New York, Tennessee; and the similar review in subtitle V. of the monograph appended to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —, under the following heads: Alabama, Connecticut, Kentucky, Maine, Massachusetts, Michigan, New York, Ohio, South Carolina. Furthermore, the investigator who examines the cases which Mr. Sedgwick cites will, it is apprehended, be disposed to question the L.R.A.1917A.

correctness of the statement of Swayne, J., in *Pine Grove Twp. v. Talcott* (1873) 19 Wall. (U. S.) 666, 22 L. ed. 227, that they all sustain the doctrine formulated. The principle upon which the decision in *Palmer v. Lawrence* turned was "that a defendant who has contracted with a corporation de facto is never permitted to allege any defect in its organization," or, in other words, that "no individual who has dealt with a corporation is permitted to say that it had no authority to contract and no capacity to sue." It is submitted that such doctrine is very far from being identical with that propounded by Mr. Sedgwick, although it is to some extent analogous. See § 9 of the monograph mentioned above. *Steam Nav. Co. v. Weed* was undoubtedly a clear authority in his favor; in fact the latter part of the first sentence quoted in the text is taken verbatim from the opinion of the court. In *Chester Glass Co. v. Dewey*, where it was simply laid down that one who purchased goods on credit from a manufacturing company was precluded, in an action brought for the price, from objecting that it was prohibited to carry on trade in this manner, it is reasonably clear from the language of the court that the conception relied upon was simply that the invalidity of the contract was a matter which concerned only the commonwealth. The doctrine thus invoked is essentially different from that propounded by Mr. Sedgwick, although its application produces similar consequences in respect of the right of recovery. The question of liability in *Baltimore & P. S. B. Co. v. McCutcheon*, turned simply upon the extent of the authority of the president of the company to make the lease in question, and therefore did not involve a question of ultra vires in the proper sense of that expression. The ratio decidendi in *Potter v. Bank of Ithaca*, *Suydam v. Morris Canal & Bkg. Co.*, and *Sacket's Harbor Bank v. Lewis County Bank* was simply that the transactions in question were not violations of the corporate charters. In *Mott v. United States Trust Co.*, where an injunction against the ultra vires contract in question was refused, the court proceeded partly on the ground that the complainant had been guilty of a breach of trust, and partly that the principle "he who seeks equity must do equity" precluded him from obtaining relief. It may be added that in *Steam Nav. Co. v. Weed* the court, in addition to the cases referred to by Mr. Sedgwick, cited *Silver Lake Bank v. North* (1820) 4 Johns. Ch. (N. Y.) 370, and *Indiana v. Woran* (1843) 6 Hill (N. Y.) 37, 40 Am. Dec. 378, which was founded on *Moss v. Rossie Lead Min. Co.* (1843) 5 Hill (N. Y.) 137. The second of these cases is

There would seem to be sufficient grounds for expressing the opinion that this able writer was led astray by his imperfect acquaintance with the existing precedents, and that he would probably have laid down the law differently,—or at all events in more qualified language than that which he used,—if his researches had been more extensive. In fact he may fairly be said to have furnished a very striking illustration of the pitfalls with which an inadequate knowledge of cases is apt to beset the path of an author who diverges, as he did from the subject which he undertook to discuss.

"After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having per-

formed the contract to recover compensation for a breach . . . by the other party."³

"The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."⁴

"It is now settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party and the corporation has had the full benefit of the performance of the contract."⁵

Some other passages which have been cited by judges are specified in the footnote.⁶

so strongly in favor of his doctrine that the reason why he failed to mention it is not apparent.

³ Morawetz, *Priv. Corp.* § 689. For cases in which this passage was quoted or cited, see *Towers Excelsior & Ginnery Co. v. Inman* (1895) 96 Ga. 509, 23 S. E. 418; *Bowman Dairy Co. v. Mooney* (1890) 41 Mo. App. 665; *Roane v. Union Pacific L. Ins. Co.* (1913) 67 Or. 264, 135 Pac. 897.

⁴ 5 *Thomp. Corp.* 1st ed. § 6016. The learned author has introduced the same statement into his monograph on Corporations in 10 *Cyc.* § 1156. From one or other of these works the passage has been quoted in full, or simply cited, in *American Nat. Bank v. National Wall-Paper Co.* (1896) 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 93; *Bowman v. Foster & L. Hardware Co.* (1899) 94 Fed. 592; *Bloom v. Home Ins. Agency* (1909) 91 Ark. 367, 121 S. W. 293; *American Nat. Bank v. Hammond* (1898) 25 Colo. 367, 55 Pac. 1090; *Towers Excelsior & Ginnery Co. v. Inman* (1895) 96 Ga. 506, 23 S. E. 418; *West Maryland R. Co. v. Blue Ridge Co.* (1905) 102 Md. 330, 2 L.R.A. (N. S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351; *Blackwood v. Lansing Chamber of Commerce* (1914) 178 Mich. 321, 144 N. W. 823; *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 371; *Smith v. Richardson* (1898) 77 Mo. App. 422; *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 195; *Williams v. Verity* (1903) 98 Mo. App. 654, 73 S. W. 732; *Roane v. Union Pacific L. Ins. Co.* (1913) 67 Or. 264, 135 Pac. 892; *Dorsett v. Black Hills Traction Co.* (1912) 30 S. D. 420, 138 N. W. 808, Ann. Cas. 1916A, 846; *Kincheloe Irrigating Co. v. Hahn Bros.* (1905) 105 Tex. 231, 146 S. W. 1187.

The passages in the 2d edition of this treatise which correspond to the above statement are the following:

"A party to a contract who has received the consideration, benefit, or fruits of it—*L.R.A.* 1917A.

all that the other party agreed to do, to refrain from, or to give up—is estopped to set up the defense that the contract was in excess of the power of the corporation which was a party to it." 3 *Thomp. Corp.* § 2787, approved in *Dunbar v. Cazort & McG. Co.* (1910) 96 Ark. 308, 131 S. W. 698; *Western & S. F. Ins. Co. v. Murphey* (1916) — *Okla.* —, 156 Pac. 892.

"A corporation which has received and retained the benefits of a contract in excess of its authority, but not expressly forbidden by law or contrary to sound public policy, cannot set up such want of authority to defeat a recovery on the contract." 3 *Thomp. Corp.* § 2788.

See also the remarks of the learned author in 10 *Cyc.* 1157, to the effect that corporations cannot, "with the consideration of the contract in their possession, disavow their acts to the damage and discomfiture of others, unless it clearly appears that there has been an absolute want of capacity to make the contract." This statement was approved in *Dorsett v. Black Hills Traction Co.* (1912) 30 S. D. 420, 138 N. W. 808, Ann. Cas. 1916A, 846.

⁵ *Waterman, Spec. Perf.* § 226, approved in *Wilks v. Georgia P. R. Co.* (1885) 79 Ala. 180; *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 19, 59 Am. Rep. 134, 9 Pac. 771; *Phoenix Land Co. v. Exall* (1913) — *Tex. Civ. App.* —, 159 S. W. 474.

⁶ *Beach, Priv. Corp.* § 425, quoted in *Lewis v. American Sav. & L. Asso.* (1898) 98 Wis. 224, 39 L.R.A. 559, 73 N. W. 793.

Bigelow, Estoppel, 5th ed. 463, approved in *Grangers' Business Asso. v. Clark* (1885) 67 Cal. 634, 8 Pac. 445; *Weill v. Crittenden* (1903) 139 Cal. 488, 73 Pac. 238.

Green's Brice's Ultra Vires, 2d Am. ed. p. 783, quoted in *Osmer v. Lemay-Wegmann Brokerage Co.* (1911) 155 Mo. App. 211, 134 S. W. 65.

2 *Herman, Estoppel*, § 1179, cited in

42. Decisions illustrating the doctrine of estoppel.

The American cases which are explicit authorities for the doctrine of estoppel or which having regard to the facts involved, are consistent with that

doctrine, are tabulated below with reference to the particular classes of contracts which were under discussion. For further information concerning these cases, see subtitles IX. and X., *infra*.¹

Texas Western R. Co. v. Gentry (1888) 69 Tex. 625, 8 S. W. 98; 27 Am. & Eng. Enc. Law, 363, quoted in *Lauder v. Peoria Agri. & Trotting Soc.* (1897) 71 Ill. App. 479. The similar language at pp. 46 and 50 of the 2d edition of this work is quoted in *Hough v. St. Louis Car Co.* (1914) 182 Mo. App. 718, 165 S. W. 1161; *Osmer v. Lemay-Wegmann Brokerage Co.* (Mo.) *supra*.

¹ Issue of stock.

Poole v. West Point Butter & Cheese Asso. (1887) 30 Fed. 513 (increase of capital stock); *Gasquet v. Crescent City Brewing Co.* (1892) 49 Fed. 496 (issue of stock not paid up); *St. John v. Iowa Business Men's Bldg. & L. Asso.* (1907) 136 Iowa, 448, 15 L.R.A.(N.S.) 503, 113 N. W. 863 (stipulation as to maturity of stock); *Winscott v. Guarantee Invest. Co.* (1895) 63 Mo. App. 367 (issue of preferred stock). Both of the Federal cases cited above are in conflict with the later decisions of the Supreme Court.

Conveyance of real property.

Palmer v. Cypress Hill Cemetery (1888; Sup. Ct.) 14 N. Y. S. R. 591.

Other contracts with respect to real property.

Kincheloe Irrigating Co. v. Hahn Bros. (1912) 105 Tex. 231, 146 S. W. 1187, affirming (1910) — Tex. Civ. App. —, 132 S. W. 78 (irrigation company agreed to furnish land as well as water).

Transfer of business and assets.

Schrimplin v. Farmer's Life Asso. (1904) 123 Iowa, 102, 98 N. W. 613 (transferee insurance company held liable for compensation of agent under a contract by which his commissions became a charge upon money paid upon policies issued by the transferring company); *Milborne v. Royal Ben. Soc.* (1897) 14 App. Div. 406, 43 N. Y. Supp. 1026 (action against transferee benefit society by holder of certificate in transferring society).

In *Holt v. California Development Co.* (1908) 88 C. C. A. 167, 161 Fed. 3, where the contract under review involved a surrender of corporate control to another company, the court recognized the principle of estoppel, but its applicability was denied for the reason that a receipt of benefits was not shown. This is one of the recent Federal cases in which the decisions of the Supreme Court have been unaccountably disregarded.

Other contracts for the sale of personal property.

Rehberg v. Tontine Surety Co. (1902) 131 Mich. 135, 91 N. W. 132 (sale of chattel on instalment plan); *Peterson v. People's L.R.A.* 1917A.

Bldg. Loan & Sav. Asso. (1900) 124 Mich. 573, 83 N. W. 606 (sale of shares); *Dorsett v. Black Hills Traction Co.* (1912) 30 S. D. 420, 138 N. W. 808, Ann. Cas. 1916A, 846 (contract by traction company to furnish water for irrigation); *Lottman Bros. Mfg. Co. v. Houston Waterworks Co.* (1896) — Tex. Civ. App. —, 38 S. W. 357 (action for failure to furnish water); *Krisch v. Inter-State Fisheries Co.* (1905) 39 Wash. 381, 81 Pac. 855 (sale of the company's own stock of which it had become the proprietor).

Leases of railroads.

Singer v. St. Louis, K. C. & N. R. Co. (1879) 6 Mo. App. 427 (railroad company estopped to deny liability to holder of its bonds on the ground that the lease by which they were secured was ultra vires); *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* (1886) 48 N. J. L. 530, 7 Atl. 523 (action for rent); *Doylestown & D. Turnp. Road Co. v. Philadelphia & E. Electric R. Co.* (1912) 49 Pa. Super. Ct. 381.

Leases of other kinds of property.

Actions for stipulated rent were held to be maintainable in *Northwestern Brewing Co. v. Manion* (1892) 44 Ill. App. 424; *Heims Brewing Co. v. Flannery* (1891) 137 Ill. 309, 27 N. E. 286; *National Brewing Co. v. Ahlgren* (1896) 63 Ill. App. 475.

Traffic agreements between railroad companies.

Canal & C. R. Co. v. St. Charles Street R. Co. (1892) 44 La. Ann. 1069, 11 So. 702 (action for sum stipulated to be paid for privilege of operating trains).

Purchase of the company's own stock.

Main v. Casserly (1885) 67 Cal. 127, 7 Pac. 426; *Citizens' Nat. Bank v. Greene & W. Teleph. Co.* (1904) 127 Iowa, 350, 69 L.R.A. 968, 109 Am. St. Rep. 387, 101 N. W. 742 (agreement to repurchase stock); *Siders v. Glenn City Concrete Co.* (1910) 33 Ohio C. C. 552, affirmed without opinion in (1913) 87 Ohio St. 519, 102 N. E. 124; *Western & S. F. Ins. Co. v. Murphey* (1916) — Okla. —, 156 Pac. 885; *Miller v. Washington Southern R. Co.* (1895) 11 Wash. 414, 39 Pac. 673; *San Antonio Hardware Co. v. Sanger* (1912) — Tex. Civ. App. —, 151 S. W. 1104.

In *Sweeney v. United Underwriters Co.* (1912) 29 S. D. 576, 137 N. W. 379, it was held that, even if a stipulation binding the defendant to repurchase its own stock at the option of the stockholder was void under the statute in question, the corporation could not repudiate that stipulation and yet retain the purchase money. The defendant could not "ignore the condition

43. Qualified form of doctrine of estoppel.

The doctrine of estoppel has not in-

frequently been enunciated in terms which import that it is applicable to contracts which involve an excessive or

and treat the remainder of the contract as valid."

In *Vent v. Duluth Coffee & Spice Co.* (1896) 64 Minn. 307, 67 N. W. 70, the ratio decidendi was that a similar stipulation was not ultra vires, but the court expressed the opinion that, if the provision were void, it would vitiate the whole contract, and would be a sufficient reason for the rescission of that contract and the return of the purchase price, which the plaintiffs were demanding.

Purchase of the stock of another company.

Kennedy v. California Sav. Bank (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, reversed in (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831 (the doctrine of the state court and the Federal court being different with regard to the principle of estoppel); *Towers Excelsior & Ginnery Co. v. Inman* (1895) 96 Ga. 506, 23 S. E. 418; *White v. Marquardt* (1898) 105 Iowa, 145, 74 N. W. 930; *Blue Rapids Opera House Co. v. Mercantile Bldg. & L. Asso.* (1898) 59 Kan. 778, 53 Pac. 781; *Dewey v. Toledo, A. A. & N. M. R. Co.* (1892) 91 Mich. 351, 51 N. W. 1063; *Hunt v. Hauser Malting Co.* (1903) 90 Minn. 282, 96 N. W. 85, same decision on rehearing (1905) 95 Minn. 206, 103 N. W. 1032; *Watts Mercantile Co. v. Buchanan* (1908) 92 Miss. 540, 46 So. 66 (see, however, the Mississippi case cited in § 25, note 1, supra); *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 365; *Hough v. St. Louis Car Co.* (1914) 182 Mo. App. 718, 165 S. W. 1161; *Wright v. Pipe Line Co.* (1882) 101 Pa. 204, 47 Am. Rep. 701.

The doctrine of estoppel was applied in *Bowman v. Foster & L. Hardware Co.* (1899) 94 Fed. 592; *United States Sav. & Loan Co. v. Convent of St. Rose* (1904) 66 C. C. A. 418, 133 Fed. 354. The former case was based on the authority of the Kansas case cited supra, but both cases are inconsistent with the Federal decisions as a whole (see §§ 68 et seq., infra), and also, so far as regards this particular description of contract, with the Federal decisions cited in § 25, note 1, supra.

Purchase of personal property of other kinds.

Union Hardware Co. v. Plume & A. Mfg. Co. (1889) 58 Conn. 219, 20 Atl. 455; *Towers Excelsior & Ginnery Co. v. Inman* (1895) 96 Ga. 506, 23 S. E. 418; *Peoria Star Co. v. Outright* (1904) 115 Ill. App. 492 (doctrine of estoppel wrongly applied in Illinois at this date); *Roush v. Illinois Oil Co.* (1914) 180 Ill. App. 346 (similar error); *Vermont Farm Machinery Co. v. De Sota Co-op. Creamery Co.* (1909) 145 Iowa, 491, 122 N. W. 930; *Sherman Center Town Co. v. Morris* (1890) 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569; *Albin Co. v. Com.* (1908) 128 Ky. 295, 108 S. W. 299; *Clement, B. & L.R.A.* 1917A.

Co. v. Michigan Clothing Co. (1896) 110 Mich. 458, 68 N. W. 224 (action for stipulated price of judgment sold to defendant); *Erb v. Yoerg* (1896) 64 Minn. 463, 67 N. W. 355 (assignee of corporation, as well as corporation itself, held to be estopped from denying liability for price of goods purchased by corporation in contravention of Minn. Gen. Stat. 1894, § 2793, prohibiting a diversion of corporate property to other objects than those specified in the articles); *Osmer v. Lemay-Wegmann Brokerage Co.* (1911) 155 Mo. App. 211, 134 S. W. 65 (action on note given for certain patent rights); *De Groff v. American Linen Thread Co.* (1860) 21 N. Y. 124.

"When a sale of a chattel made to a corporation is executed and complete in all things, except the performance of its own promise to pay the price, a plea that it ought not to have made the purchase is not to be entertained, especially so long as it retains, and insists upon retaining, all the benefit of the contract." *Parish v. Wheeler* (1860) 22 N. Y. 506.

In *Shawnee Nat. Bank v. Purcell Wholesale Grocery Co.* (1912) 34 Okla. 34, 41 L.R.A.(N.S.) 494, 124 Pac. 603, II, bought groceries from plaintiff which were used in carrying out the bridge contract, and the bank received the proceeds of the contract. Held, that, though the business of building bridges was ultra vires, the bank, having received through the bridge contract the proceeds of the groceries, was estopped to deny liability for their value. The court said it was "immaterial whether the obligation to pay is placed upon the ground that the contract by the trustee or agent of the bank bound the bank, or the ground that the bank, having received the property of the grocery company, is bound to pay for it."

In *American Nat. Bank v. National Wall-Paper Co.* (1896) 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85, a national bank was held liable for the price of goods irrespective of whether it was or was not authorized to buy them. But this ruling seems inconsistent with the decisions of the highest Federal tribunal, unless we assume that by the expression "price" the court meant mere "actual value."

Borrowing of money on the security of mortgages and deeds of trust.

Bowman v. Foster & L. Hardware Co. (1899) 94 Fed. 592 (decision inconsistent with rule applied by Federal Supreme Court); *Camp v. Land* (1898) 122 Cal. 167, 54 Pac. 839; *Darst v. Gale* (1876) 83 Ill. 136; *Peoria & S. R. Co. v. Thompson* (1882) 103 Ill. 187 (contract violating enactment which prohibited issue of securities except for money or money's worth); *Kadish v. Garden City Equitable Loan & Bldg. Asso.* (1894) 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *Millard v. St. Francis Xavier*

otherwise improper exercise of the powers conferred by the corporate charter or by the general law under which the

corporation was organized. In most instances language of this tenor merely has reference to the distinction which,

Female Academy (1880) 8 Ill. App. 341; Humphrey v. Patrons' Mercantile Asso. (1879) 50 Iowa, 607; Garrett v. Burlington Plow Co. (1886) 70 Iowa, 697, 59 Am. Rep. 461, 29 N. W. 395; Warfield, H. & Co. v. Marshall County Canning Co. (1887) 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467; Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & T. Co. (1916) 169 Ky. 840, 185 S. W. 156; Perkins v. Trinity Realty Co. (1905) 69 N. J. Eq. 723, 61 Atl. 167; Bettie v. Republic Sav. & L. Asso. (1906) 71 N. J. Eq. 613, 64 Atl. 176; Hays v. Galion Gaslight & Coal Co. (1876) 29 Ohio St. 330; Larwell v. Hanover Sav. Fund Soc. (1883) 40 Ohio St. 274; Union Trust Co. v. Mercantile Library Hall Co. (1899) 189 Pa. 263, 42 Atl. 129; Texas Western R. Co. v. Gentry (1888) 69 Tex. 625, 8 S. W. 98 (resolution to issue bonds not authorized or ratified by the vote of two thirds of the stock); Witter v. Grand Rapids Flouring Mill Co. (1891) 78 Wis. 543, 47 N. W. 729; North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank (1891) 79 Wis. 31, 11 L.R.A. 845, 47 N. W. 300.

Borrowing of money on the security of pledges.

Frese v. Mutual L. Ins. Co. (1909) 11 Cal. App. 387, 105 Pac. 265.

Borrowing of money on other kinds of security.

Bradley v. Ballard (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563 (action on note); Marshall Field Co. v. Oren Ruffcorn Co. (1902) 117 Iowa, 157, 90 N. W. 618 (action on note); Johnson v. Mason Lodge (1899) 106 Ky. 838, 51 S. W. 620 (action on note).

Borrowing without any security.

Grohmann v. Brown (1897) 68 Mo. App. 630.

"No court has ever decided that a corporation may borrow money, and keep it because it was forbidden by its charter to borrow money." Keokuk v. Ft. Wayne Electric Co. (1894) 90 Iowa, 67, 57 N. W. 689. Unless this statement is intended to take account of remedies independent of an action on the contract, it is plainly not correct.

Execution of negotiable instruments.

Citizens' Sav. Bank v. Globe Brass Works (1908) 155 Mich. 9, 118 N. W. 507 (promissory note given in payment of debt of stockholder).

Discounting of negotiable instruments.

Earle v. American Sugar Ref. Co. (1908) 74 N. J. Eq. 751, 71 Atl. 391.

Deposit of money.

First Nat. Bank v. Brooks (1896) 22 Ill. App. 238 (alleged excess of power consisted in a written promise inserted in the certificate of deposit, to fulfil certain orders L.R.A.1917A.

regarding the use of the money); Miles v. Macon County Bank (1914) 187 Mo. App. 230, 173 S. W. 713; Pattison v. Syracuse Nat. Bank (1880) 80 N. Y. 82, 36 Am. Rep. 582 (action maintainable for loss of special deposit); Ring v. Long Island Real Estate Exch. & Invest. Co. (1904) 93 App. Div. 442, 87 N. Y. Supp. 682, affirmed in Ring v. Howell (1906) 184 N. Y. 553, 76 N. E. 1107; Bushnell v. Chautauqua County Nat. Bank (1877) 10 Hun (N. Y.) 378, modified in (1878) 74 N. Y. 290 (action maintainable to recover money deposited with defendant on the understanding that it was to be held as security to plaintiff for the depositor's faithful performance of a contract of purchase); Taylor v. Empire State Sav. Bank (1893) 66 Hun, 538, 21 N. Y. Supp. 643 (full amount of individual deposit, which exceeded statutory limit, held to be recoverable).

Contracts of banks to pay overdrafts.

York v. Farmers' Bank (1904) 105 Mo. App. 127, 79 S. W. 968 (arrangement between cashier of bank and a certain person, whereby the former was to pay the latter's overdraft for live stock purchased, and the latter was to cover such overdrafts by posting his draft on his commission company to whom the stock so purchased was shipped).

Carriage of passengers and goods.

Fuller v. Naugatuck R. Co. (1852) 21 Conn. 557, 2 Am. Neg. Cas. 266; Bissell v. Michigan S. & N. I. R. Cos. (1860) 22 N. Y. 258 (opinion of Comstock, Ch. J., in favor of right to recover on the contract itself corresponds with doctrine of later New York cases); Buffett v. Troy & B. R. Co. (1869) 40 N. Y. 168 (for an earlier opinion of the supreme court in which the right of recovery was affirmed see (1862) 36 Barb. 421); Linkauf v. Lombard (1893) 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 47; Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co. (1876) 83 Pa. 160, 2 Mor. Min. Rep. 421; Bigelow v. Chicago, B. & N. R. Co. (1899) 104 Wis. 109, 80 N. W. 95.

Despatch of telegram..

Arkansas & L. R. Co. v. Stroude (1905) 77 Ark. 109, 113 Am. St. Rep. 130, 91 S. W. 18; Hanna v. Chicago, R. I. & P. R. Co. (1913) 89 Kan. 503, 132 Pac. 154.

Hiring of servants.

For cases in which actions were held to be maintainable on ordinary contracts of hiring, see Wayte v. Red Cross Protective Soc. (1909) 166 Fed. 372 (wrong decision having regard to Supreme Court rulings); Western Development & Invest. Co. v. Caplinger (1908) 86 Ark. 287, 110 S. W. 1039; Darknell v. Cœur D'Alene & St. J. Transp. Co. (1910) 18 Idaho, 61, 108 Pac. 536; Chapman v. Iron Clad Rheostat Co. (1898) 62 N. J. L. 497, 41 Atl. 690.

in respect of the operation of the doctrine, is taken between contracts which

are merely unauthorized, and contracts which are expressly prohibited or are

For cases in which actions were held to be maintainable on contracts by which, in consideration of their not prosecuting claims for damages in respect of injuries, servants were promised permanent employment, see *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 185; *Usher v. New York C. & H. R. R. Co.* (1902) 76 App. Div. 422, 78 N. Y. Supp. 508, affirmed in (1904) 179 N. Y. 544, 71 N. E. 1141.

Other contracts for the performance of personal services.

Kelly v. Ning Yung Benev. Asso. (1905) 2 Cal. App. 460, 84 Pac. 321; *McQuaig v. Gulf Naval Stores Co.* (1908) 56 Fla. 505, 131 Am. St. Rep. 160, 47 So. 2; *Gibson v. O'Gara Coal Co.* (1909) 151 Ill. App. 424; *Church v. Johnson Bros.* (1895) 93 Iowa, 544, 61 N. W. 916; *Blackwood v. Lansing Chamber of Commerce* (1914) 178 Mich. 321, 144 N. W. 823 (contract to hold Chautauqua meeting and furnish speakers and entertainers); *Ellis v. Howe Mach. Co.* (1880) 9 Daly (N. Y.) 78; *Schurr v. New York & B. Suburban Invest. Co.* (1892) 45 N. Y. S. R. 645, 18 N. Y. Supp. 454.

Contracts for construction work.

Cunningham v. Massena Springs & Ft. C. R. Co. (1892) 63 Hun, 439, 44 N. Y. S. R. 723, 18 N. Y. Supp. 600, affirmed in (1893) 138 N. Y. 614, 33 N. E. 1082; *Ramble v. Pennsylvania Coal Co.* (1911) 47 Pa. Super. Ct. 28 (action to recover balance of 10 per cent retained under a contract to cut and haul lumber).

Insurance of life and property by domestic corporations.

Denver F. Ins. Co. v. McClelland (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; *Twiss v. Guaranty Life Asso.* (1893) 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8 (action against corporation to which the assets and membership of another have been transferred); *Bloomington Mut. Ben. Asso. v. Blue* (1887) 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331 (decided with reference to earlier Illinois doctrine); *Watts v. Equitable Mut. Life Asso.* (1900) 111 Iowa, 90, 82 N. W. 441 (reinsurance of member of corporation with which defendant had consolidated); *Cathart v. Equitable Mut. Life Asso.* (1900) 111 Iowa, 471, 82 N. W. 964 (action on certificate of membership issued by defendant after it had taken over the property and assumed the obligations of another corporation); *Garner v. Mutual F. Ins. Co.* (1901) — Iowa, —, 86 N. W. 289; *Seymour v. Chicago Guaranty Fund Life Soc.* (1893) 54 Minn. 147, 55 N. W. 907; *Gruber v. Grand Lodge, A. O. U. W.* (1900) 79 Minn. 60, 81 N. W. 743; *Cass County v. Mercantile Town Mut. Ins. Co.* (1904) 188 Mo. 1, 86 S. W. 237 (reinsurance); *Adams v. Farmers' Mut. F. Ins. Co.* (1905) 115 Mo. App. 21, 90 S. W. 747; *Kammer v. Supreme Lodge, K. P.* (1912) 91 S. C. 572, 75 S. E. 177 (action on certificate); *Continental Fire Asso. v. Masonic Temple Co.* (1901) L.R.A.1917A.

26 Tex. Civ. App. 139, 62 S. W. 930; *Ledebuhr v. Wisconsin Trust Co.* (1902) 112 Wis. 657, 88 N. W. 607; *Wuerfler v. Grand Grove, W. O. D.* (1902) 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

Insurance of life and property by foreign corporations.

Minneapolis F. & M. Mut. Ins. Co. v. Norman (1905) 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229, 4 Ann. Cas. 1045 (company and sureties held liable).

Contracts between building associations and their members.

Field v. Eastern Bldg. & L. Asso. (1902) 117 Iowa, 185, 90 N. W. 717 (contract providing for the payment of the stock in full at the end of a stated period was attacked as being a violation of a statute forbidding the payment of dividends except from profits); *O'Malley v. People's Bldg. Loan & Sav. Asso.* (1895) 92 Hun, 572, 36 N. Y. Supp. 1016, reversing (1895) 13 Misc. 688, 35 N. Y. Supp. 14 (shareholder entitled to recover only amount which certificate issued in excess of power has earned).

Partnership.

Breinig v. Sparrow (1907) 39 Ind. App. 462, 80 N. E. 37; *Boyd v. American Carbon Black Co.* (1897) 182 Pa. 210, 37 Atl. 937 (demurrer wrongly sustained in suit for accounting); *Sabine Tram Co. v. Bancroft* (1897) 16 Tex. Civ. App. 170, 40 S. W. 837.

Contracts to give financial assistance to enterprises expected to benefit corporate business.

State Bd. of Agri. v. Citizens' Street R. Co. (1874) 47 Ind. 407, 17 Am. Rep. 702 (action for money which street railway company had promised to subscribe to fair); *Huntington Brewing Co. v. McGrew* (1916) — Ind. App. —, 112 N. E. 534 (promoting location of factories in town); *Charlotte Twp. v. Piedmont Realty Co.* (1903) 134 N. C. 41, 46 S. E. 723 (action for part of cost of bridge advantageous to suburban property of defendant); *Mobile & O. R. Co. v. Wisdom* (1871) 5 Heisk. (Tenn.) 125 (railroad company accepted subscription; for further information concerning this case, see review of Tennessee cases in § 105, infra).

Covenants restricting freedom of contract.

Bloom v. Home Ins. Agency (1909) 91 Ark. 367, 121 S. W. 293 (stipulation not to engage in a certain business); *People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co.* (1886) 20 Ill. App. 473 (injunction granted to restrain the doing of things stipulated against).

Obligation of innkeeper to guests.

Magee v. Pacific Improv. Co. (1893) 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772 (personal property was destroyed by fire).

otherwise illegal.¹ But sometimes the theory reflected by such statements is that the defense of ultra vires is excluded where the contract in question amounts merely to an abuse of the corporate powers, but not where it is entirely beyond the scope of those powers.

"Where a contract is ultra vires, not because the corporation may not make it under any circumstances, but by reason of the particular circumstances under which it is made, then it is never void, and the plea of ultra vires cannot be made by either party after the contract has been executed by the other party."²

"Where corporations have exercised powers incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any express right conferred, they will be estopped from denying that they had authority to make such contracts. Good faith to third parties who deal with such corporations, and who may have no accurate knowledge of the extent of their powers under their charters, requires the adoption of this salutary rule. The rule has its foundation in the plainest principles of natural justice. When such

corporations have received the benefit of a contract, if there is nothing in it that is contrary to public policy, there can be no just reason why they should not be required to perform it. Common honesty requires that when a corporation has conducted, through a series of years, a business incidental to and advantageous to the objects and purposes for which the corporation was created, although not within the express terms of their charter, they should be estopped to deny that they had rightful authority to make contracts in that regard, and should be held liable for the damages that may accrue in the breach."³

"The powers of a corporation are limited and delegated, and where a contract is ultra vires in the proper sense, as not being within the powers conferred upon the corporation by the legislature, or within the object of its creation, the contract is void. . . . But where the contract is one which the corporation has power to make, and is within the scope of its franchise, neither party to the contract, who has had the benefit of it, can set up as a defense that legal formalities were not complied with, or that the power was improperly exercised."⁴

Statements of this purport, if we re-

Grant of franchise to use streets for a railway.

Galveston & W. R. Co. v. Galveston (1896) — Tex. Civ. App. —, 37 S. W. 27.

Contract to pay a person money in consideration of his removing his business to another place.

Sherman Center Town Co. v. Fletcher (1891) 46 Kan. 524, 26 Pac. 951.

Representations concerning the financial responsibility of a third person.

American Nat. Bank v. Hammond (1898) 25 Colo. 367, 55 Pac. 1090 (action to recover balance of price of articles sold to person whom defendant bank had represented to be solvent).

Contract of bank to hold amount of bill out of money due to drawer.

Crowder State Bank v. Aetna Powder Co. 41 Okla. 394, 138 Pac. 392, post, 1021.

Guaranty and similar contracts, see § 46, *infra*.

¹ See, for example, Kennedy v. California Sav. Bank (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, reversed in (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, where the decision was rendered with reference to the doctrine under which the principle of estoppel is rejected; Union Hardware Co. v. Plume & A. Mfg. Co. (1889) 58 Conn. 219, 20 Atl. 455; Lysaght v. St. Louis Operative Stonemasons' Assn. (1893) 55 Mo. App. 538; Whitehead v. American L.R.A.1917A.

Lamp & Brass Co. (1905) 70 N. J. Eq. 581. 62 Atl. 554.

This seems to be the theory with relation to which the doctrinal statement of Judge Thompson which is quoted in § 41, *supra*, was formulated. But the language of the learned author is, it must be admitted, susceptible also of a construction which renders it as an expression of the rule embodied in the cases cited *infra*.

² Tourtelot v. Withed (1900) 9 N. D. 467, 84 N. W. 8 (purchase of the stock of another company). See also the statement of this doctrine in the syllabus written by the court.

³ Chicago Bldg. Soc. v. Crowell (1872) 65 Ill. 459 (contract to insure a building which had been mortgaged to defendant). This statement was approved in West v. Madison County Agri. Board (1876) 82 Ill. 205 (mortgage).

⁴ Lurton v. Jacksonville Loan & Bldg. Assn. (1901) 187 Ill. 141, 58 N. E. 218 (mortgage). Similar phraseology was used in National Home Bldg. & L. Assn. v. Home Sav. Bank (1899) 181 Ill. 35, 64 L. R. A. 390, 72 Am. St. Rep. 245, 54 N. E. 619 (purchase of lot and assumption of mortgages thereon), where a distinction was taken between a contract which is ultra vires not "for want of power in the corporation, but for want of power in the agent or officer, or because of the disregard of formalities which the law requires to be observed, or is an improper use of one of the enumerated pow-

gard them as amounting simply to a recognition of the difference between the qualities of contracts which are ultra vires in the stricter sense, and those which are ultra vires in the secondary sense, discussed in §§ 6-8, supra, are manifestly not open to any exception, and would not be questioned in any jurisdiction. This is apparently the construction which is to be placed upon the passage quoted from the opinions in the more recent Illinois cases. But it is obviously possible to ascribe to such ambiguous expressions as "abuse" or "improper use" of powers a meaning which

would bring within the domain of the principle of estoppel a considerable number of transactions which are unmistakably ultra vires in the stricter sense of that term.⁵

A modification of doctrine which produces this result augments the already superabundant complexities by which the law of the subject is encumbered, and seems to have very little to recommend it, whether we apply the test of logic or of expediency.

On the one hand, the fact that an abuse of a granted power is as much a contravention of the will of the legisla-

ers." See also *Steele v. Fraternal Tribunes* (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; *Stacy v. Glen Ellyn Hotel & Springs Co.* (1906) 223 Ill. 546, 8 L.R.A. (N.S.) 966, 70 N. E. 133; *Wood v. Supreme Ruling, F. M. C.* (1908) 212 Ill. 532, 72 N. E. 783.

For a recent Texas case in which the court relied on the distinction between a contract which merely constitutes an abuse of a granted power, and a contract which the corporation cannot make under any circumstances, see *Taylor Feed Pen Co. v. Taylor Nat. Bank* (1915) — Tex. Civ. App. —, 181 S. W. 534.

⁵ In *Citizens' State Bank v. Hawkins* (1896) 18 C. C. A. 78, 34 U. S. App. 423, 71 Fed. 369, the grounds upon which defendant bank was held to be liable as stockholder in another bank were that, as it had power under the banking law of Indiana to accept stock in another bank as security for a loan, or to acquire such stock by levy thereon and sale thereof under execution to satisfy a debt due to it, "the acquisition of such stock was within the general scope of its powers. The case is therefore one of an abuse of a general power, a wrongful exercise of conferred power, for purposes and under circumstances contrary to law, and not the case of the exercise of a power not in any event given."

It would be grievous wrong to permit a corporation to assert its own abuse of power to escape liability under the facts here disclosed. It held this stock for many years, taking any profits accruing therefrom. It must meet the liability resulting from the failure of the bank. It cannot appropriate and reprobate. It has received the benefits; it must bear the burdens."

In *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124, where the mortgagor and a subsequent lienholder appealed from a decree foreclosing a first mortgage executed to the trust company, it was held that the mortgagor could not avail itself of its violation of the statute, and the other appellants were in no better position. The court said: "This is a suit in equity. The terminal company has received the full benefit of the proceeds of these bonds, and it

obtained this money upon the faith of this mortgage. The creation of the debt and mortgage was not without the general scope of its powers, but it was the result of an excessive exercise of one of these powers. The corporation had, as we have seen, the general power to borrow money and to secure its repayment by a mortgage. . . .

The statute whose provisions the bonds and mortgage violate prescribed no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it, but the ouster and dissolution of the corporation at the suit of the state. The state alone can complain of it, and the debtor cannot usurp its functions.

. . . The creation of this indebtedness and the execution of these bonds and this mortgage involve no moral turpitude.

. . . The corporation does not offer to return the moneys which it received upon this mortgage, but seeks to retain all its benefits and to repudiate all its burdens. It will be soon enough for the chancellor to stay his hands from the enforcement of these contracts, and soon enough for him to set them aside, when the corporation returns to the complainant the moneys it received upon them. Until then, good faith, justice, and equity demand their enforcement. A man cannot plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains; nor is it any defense for a private corporation, against the enforcement of an executed contract whose benefits it holds, that, while its execution was within the general scope of its powers, it involved an excessive exercise of one of them. While it retains the benefits of such a contract, it silently affirms, and may not be permitted to deny, its validity. . . . Nor is the innocence or ignorance of the creditor essential to the maintenance of his suit to enforce such a contract." This decision was affirmed in (1898) 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341, but no opinion was expressed regarding the general reasoning of the court

ture as the exercise of a power not granted points very strongly, if not irresistibly, to the conclusion that, wherever the abuse is one which involves a matter of substance, and not merely of form, the rights and liabilities of the parties in respect to both of these descriptions of delinquencies should be determined on precisely the same footing. The difficulty of delimiting on any reasonably satisfactory basis the precise domains which each of them should be deemed to cover does not, to say the least, diminish the weight of this objection.

On the other hand, if we advert to the circumstance that the main reason for applying the doctrine of ultra vires is to be found in the necessity for protecting stockholders and such third persons as may have dealings with corporations, it becomes extremely difficult to escape the force of the consideration that, as transactions which, with reference to the doctrine now under review, would be treated as constituting a mere abuse of granted powers, are, relatively to transactions which involve the exercise of powers different in kind from those granted, not

only entered into far more frequently, but are also less likely to attract the attention of the parties whose interests may be prejudiced by them, those interests will be jeopardized in a much larger number of instances by the application of the doctrine of estoppel with respect to the former class of transactions than by its application with respect to the latter class. In this point of view it would seem that, if the desirability of not damaging those interests is to be treated as a controlling factor, and at the same time a distinction is to be predicated, with reference to the doctrine of estoppel, between the two classes of unauthorized transactions, the latter class, so far from being the one which it is proper to exclude from the operation of the doctrine, should alone be treated as falling within its scope.

For a discussion of the cases in which contracts involving an abuse of granted powers have been treated as enforceable on the ground that knowledge of the character of the contracts was not imputable to the plaintiffs, see §§ 9 to 12, *supra*.

of appeals, the affirmation being based on the particular ground mentioned in § 71, *infra*. That the exposition of principles by the lower court is not in harmony with the theory entertained by the Supreme Court with regard to ultra vires contract seems to be quite clear. See § 68, *infra*. The statements of the court of appeals have been quoted mainly because they furnish a clear presentment of the doctrine applied by many of the state courts.

The circuit court of appeals by which the above cases was decided applied the same doctrine in *H. Scherer & Co. v. Everest* (1909) 94 C. C. A. 346, 168 Fed. 822. There it was contended that the notes sued upon were void because the actual indebtedness of the corporation issuing them was known to the claimant to be greatly in excess of the legal limit when it took the notes. But the court said: "Let these facts be conceded, nevertheless the transfer company issued and authorized the sale or exchange of these notes by its agent, the Decatur company. Scherer & Company paid full value for them to this agent. The moment the title to them was transferred to the claimant and its payment received, these notes became executed contracts on the part of the claimant. It had performed its part of the agreements. It had paid the price for the commercial paper. The transfer company had the power to make promissory notes of this character. Their execution was within the scope of its corporate powers. It was but an excessive exercise of them."

In *Lyons, P. & Co. v. First Nat. Bank* (1898) 29 C. C. A. 45, 55 U. S. App. 747, L.R.A.1917A.

85 Fed. 120, it was declared to be "ultra vires of a commercial corporation and its officers to make accommodation paper or to guarantee the payment of the obligation of others." But the right to sue upon the indorsement in question was asserted on grounds thus stated: The indorsement "is merely an excessive exercise of one of those powers,—an excessive exercise of the power which it has, in proper cases, to make and indorse commercial paper. Where such an indorsement has been apparently made for the benefit of the corporation, and has been in fact made partly for its own benefit and partly for the accommodation of another, and the corporation has received and retained the benefits of the indorsement, the contract is not void, because it is no defense for a private corporation against the enforcement of an executed contract whose benefits it holds that, while its execution was within the general scope of its powers, it involved an excessive exercise of one of them. While such a corporation retains the benefits of such a contract, it silently affirms, and must not be permitted to deny, its validity." This case was approved in *Park Hotel Co. v. Fourth Nat. Bank* (1898) 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742, where, however, the circumstances were held to afford no basis for an estoppel.

It should be observed that, as the above cited decisions are inconsistent with the more recent rulings of the Federal Supreme Court, with regard to ultra vires contracts generally (see § 68, *infra*), they are not valid precedents except in such state courts as may approve the doctrine which they apply. As to the extent to which they are sup-

44. How far the doctrine has been applied in respect to illegal contracts.

In the opinion which Comstock, Ch. J., delivered in a leading New York case, we find the following remarks: "Let us now concede that the unauthorized contracts of a corporation are illegal in the sense contended for. It by no means follows that they are never to be enforced. An agreement declared by statute to be void cannot be enforced, because such is the legislative will. But when, without any such declaration, it is simply illegal, it is capable of enforcement where justice plainly requires it. Circumstances may, and often do, exist, which estop the offender from taking advantage of his own wrong. The contract may be entered into on the other side without any participation in the guilt, and without any knowledge even of the vice which contaminates it. An innocent person may part with value, or otherwise change his situation, upon the faith of the contract. A railroad corporation, for example, may purchase iron rails and give its obligation to pay for them with a design to sell them again on speculation, instead of using them for continuing its track. Such a transaction is clearly unauthorized, and is therefore said to be illegal. But if the corporation is deemed to make the contract,—in other words, if, as I have above shown, it is a legal possibility for corporations to make contracts outside of their just powers, how can its illegality be set up against the other party who knows nothing of the unlawful purpose? So an incorporated bank may purchase land, having power to do so for a banking house, but actually intending to

speculate in the transaction. This is also ultra vires, but can the want of authority be interposed in repudiation of a just obligation to pay for the same land, the vendor not being in *pari delicto*? Such a doctrine is not only shocking to the reason and conscience of mankind, but it goes far beyond the law in regard to the illegal contracts of private individuals."¹ But it is submitted that the transactions adverted to in this passage are not relevant illustrations. As the ulterior purpose for which a corporation makes a contract is a matter wholly distinct from the contract itself, it must follow that, except in cases where the other contracting party is a guilty participant in the promotion of this purpose, there is no juristic ground upon which his remedial rights can be affected by the unauthorized use to which the corporation puts the money or other property which it acquires by the contract. Owing, it may be, to the obvious weakness of this part of the learned judge's argument, his theory that an ultra vires contract comes within the scope of the doctrine of estoppel even if it is deemed to belong to the "illegal" class has not found much favor with the courts.

That doctrine was invoked in two later New York cases in which an illegal contract was involved.² But in neither of these does the point seem to have been specifically raised, that it should have been excluded as not being applicable where such a contract is concerned. The same remark may be made concerning some cases in which a recovery based on the grounds of estoppel has been allowed in other states.³

Not infrequently the principle of es-

ported by the rulings of that court regarding national banks, see § 70, *infra*.

¹ *Bissell v. Michigan S. & N. I. R. Co.* (1860) 22 N. Y. 273. In a later passage, the learned judge expressed the opinion that he had demonstrated this proposition among others: "Even illegal contracts, in the proper sense, are not universally and indiscriminately to be adjudged void; and especially this is not so where the offender alleges his own wrong to avoid just responsibility, the other party being innocent of the offense."

² In *Madison Ave. Baptist Church v. Baptist Church* (1878) 73 N. Y. 82, former appeal (1871) 46 N. Y. 131, where it was held that an unauthorized conveyance by a religious corporation of its real estate cannot be held valid on the ground that it has been executed and delivered, the purchaser put in possession, and the corporation paid the consideration therefor, the *Bissell Case*, is cited as an authority for the following L.R.A.1917A.

statement: "Corporations may incur responsibilities by acts which are ultra vires. But contracts which they are prohibited from making, whether executory or executed, cannot be held valid. They may sometimes be estopped from asserting the invalidity of such contracts, and thus be practically bound by them. But that is not because the contracts are valid, but because it would be a fraud upon the other party to assert their invalidity."

In *Diamond Match Co. v. Roeber* (1887) 106 N. Y. 473, 80 Am. Rep. 464, 13 N. E. 419, it was laid down that, as the defendant in an action by a corporation had retained the benefits of the contract in question,—one in restraint of trade,—he must abide by its terms.

³ *Lilylands Canal & Reservoir Co. v. Wood* (1913) 56 Colo. 130, 136 Pac. 1026 (contract violating statute which forbade corporations to issue stock or bonds except for labor done, etc., or money or property

toppel has been recognized with respect to contracts which, although they were designated as "illegal" or "unlawful," were invalid merely as being impliedly prohibited.⁴ But such phraseology reflects merely a lack of precision on the part of the courts which employed it, and the cases, in which it occurs are of no relevance for the purposes of the present discussion.

The writer has found only one instance in which the contention that an expressly prohibited contract is outside the scope of that principle has been explicitly rejected, and there the position taken simply reflected the view that the provision

infringed one which declared that no corporation organized under the statute should be permitted to rely upon the want of legal organization as a defense to an action against it,—simply embodied the common-law theory as to the effect of the element thus referred to.⁵ In the great majority of the cases in which an opinion upon the subject has been expressed in jurisdictions in which the principle has been adopted prevails, it has been declared to be inapplicable where the contract in question is illegal in the sense of being expressly prohibited or immoral or contrary to public policy.⁶ The list of decisions

actually received); *Meholin v. Carlson* (1910) 17 Idaho, 743, 134 Am. St. Rep. 286, 107 Pac. 755 (contract violating a provision forbidding bank to accept its own stock as collateral); *Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co.* (1900) 90 Ill. App. 460, affirmed in *Wells v. Northern Trust Co.* (1902) 195 Ill. 288, 63 N. E. 136 (contract violating enactment which prohibited issue of securities except for money or money's work).

In *Wright v. Pipe Line Co.* (1882) 101 Pa. 204, 47 Am. Rep. 701, where the action was brought by a bona fide transferee of a promissory note given by a corporation for the price of stock purchased by it in contravention of an expressly prohibitory provision of the organizing act, the court said: "After the plaintiffs had made out their case, the defendants set up their want of corporate power to buy the stock by way of defense. This with the stock transferred to them and unpaid for. The effect of this defense, if successful, would be to punish innocent parties who had no connection with the illegal transaction, for the wrongful act of the defendant corporations. It may be that as between the original parties the defendants could have rescinded the contract and declined to receive the stock. But they executed it; they accepted the stock and gave their note in payment, for which note the plaintiffs paid value in good faith. The defense of ultra vires by a corporation comes with a better grace if made before it has discovered that it has made a bad bargain. If, as the defendants allege, they have violated their charter, it is a matter that is within the cognizance of the attorney general."

⁴ See § 14, note 3, supra.

⁵ *Johnson v. Mason Lodge, I. O. O. F.* (1899) 106 Ky. 838, 51 S. W. 620.

⁶ *Kennedy v. California Sav. Bank* (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039 (arguendo); *Penn v. Borman* (1882) 102 Ill. 523, citing *Law v. People* (1877) 87 Ill. 385; *Durkee v. People* (1895) 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626; *Fritze v. Equitable Bldg. & L. Soc.* (1900) 186 Ill. 183, 57 N. E. 873 (contract by which vice president was to be paid for his serv-

ices); *Canton Masonic Mut. Benev. Soc. v. Rockhold* (1887) 26 Ill. App. 141, affirmed in (1889) 129 Ill. 440, 21 N. E. 794; *Franklin Nat. Bank v. Whitehead* (1898) 149 Ind. 560, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N. E. 592; *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* (1906) 38 Ind. App. 240, 70 N. E. 843; *Mutual Guaranty F. Ins. Co. v. Barker* (1899) 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868; *Beach v. Wakefield* (1899) 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197 ("no moral turpitude involved"); *Tierney v. Butler* (1909) 144 Iowa, 553, 123 N. W. 23; *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.* (1910) 149 Iowa, 141, 126 N. W. 190; *Smith v. Richardson* (1898) 77 Mo. App. 422; *Whitehead v. American Lamp & Brass Co.* (1905) 70 N. J. Eq. 581, 62 Atl. 554; *Otis v. Harrison* (1862) 36 Barb. (N. Y.) 210; *Bank of Salina v. Alvord* (1865) 31 N. Y. 473; *Crocker v. Whitney* (1877) 71 N. Y. 161; *Jemison v. Citizens' Sav. Bank* (1890) 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264 (principle not applicable to contracts that are "prohibited as against public policy or immoral"); *Simpson v. Greenfield Bldg. & Sav. Asso.* (1882) 38 Ohio St. 349; *Luthe v. Farmers' Mut. F. Ins. Co.* (1882) 55 Wis. 543, 13 N. W. 490; *Witter v. Grand Rapids Flouring Mill Co.* (1891) 78 Wis. 543, 47 N. W. 729; *Ledebuhr v. Wisconsin Trust Co.* (1902) 112 Wis. 657, 88 N. W. 607; *Wuerfler v. Grand Grove, W. O. D.* (1902) 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433 (principle declared not to be applicable where contract was in violation of written law or some public policy); *Eastman v. Parkinson* (1907) 133 Wis. 381, 13 L.R.A. (N.S.) 921, 113 N. W. 649 (principle held to be controlling if the contract "be not clearly prohibited by statute or contrary to sound public policy"); *Kilbourn City v. Southern Wisconsin Power Co.* (1912) 149 Wis. 168, 135 N. W. 499.

The "decisions where the party, having received the benefit of a contract, is not allowed to repudiate it because the other party had no power to make it," rest upon the principle "that the contract was an innocent or lawful one, and in this respect differs from a case where the act was illegal and expressly prohibited by law.

collected in the footnote, might be greatly extended by the inclusion of those cited in § 16, *supra*, in which the conception that ultra vires and illegal contracts are distinguishable in respect both to category and incidents is discussed. Cases in which the nonenforceability of the latter description of contracts was affirmed before the courts in question

had explicitly approved the doctrine of estoppel are not mentioned, because they are relevant only in an indirect sense to the purposes of the present discussion.

The effect of a constitutional provision declaring that "no corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been, or

Where there is fraud or illegality, the courts will not aid either party in enforcing the contract or in setting it aside, or in recovering back what has passed between them." *New York State Loan & T. Co. v. Helmer* (1879) 77 N. Y. 64.

"Transactions which are immoral, illegal, forbidden by statute, or contrary to public policy, are not embraced in this discussion (i. e., as to the principle of estoppel); they cannot furnish the basis for a legal cause of action." *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* (1886) 48 N. J. L. 530, 7 Atl. 523.

"The . . . principle that a corporation may not retain the benefit received under an ultra vires contract, and at the same time set up its own want of power to contract, . . . does not apply to contracts where the same are forbidden by statute or are contrary to public policy." *Franklin Nat. Bank v. Whitehead* (1897) 149 Ind. 579, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N. E. 592, quoted in *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* (1904) 38 Ind. App. 234, 70 N. E. 843, where the contract in question was held to be void as creating a monopoly and destroying competition.

One of the syllabi prepared by the court in *Montgomery v. Whitbeck* (1903) 12 N. D. 385, 96 N. W. 327, is as follows: "The doctrine of estoppel in pais does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing, and therefore a party to a contract with a mutual insurance corporation, made in violation of the letter and policy of the statute under which the corporation is organized and authorized to do business, is not estopped to show its illegality for the purpose of preventing a recovery upon it."

In *Weed v. Cumming* (1870) 198 Pa. 442, 48 Atl. 409, the effect of a statute which made it unlawful for any person, partnership, or association to issue a policy of fire insurance without authority expressly conferred by a charter of incorporation, and declared that "every such policy, contract, and guaranty hereafter made, executed, or issued shall be void," was thus discussed: "These words, in a statute forbidding an act on the ground of public policy, should be given their literal meaning. The intention of the legislature is too clear to admit of doubt, and there is no room for construction. Both parties are bound by the legislative prohibition. Presumably they both

knew the law and entered into the contract knowing they were doing a prohibited thing. The contract being unlawful and void in its inception, there is no ground of equitable estoppel because of the receipt of premiums by the insurer. The plaintiffs could not rightfully disregard the prohibition when the contract was made, and they cannot now ask to have it set aside in their favor."

In *Field v. Eastern Bldg. & L. Assn.* (1902) 117 Iowa, 185, 90 N. W. 717, a contract infringing a statute which declared the infringement to be a misdemeanor was treated as an ultra vires contract to which the principle of an estoppel was applicable. But this ruling is inconsistent with the other Iowa cases cited *supra*.

The mere fact that the defendant in an action brought by a corporation upon an illegal contract was a party to the contract manifestly does not constitute matter of estoppel, precluding him from setting up the defense of illegality. *Penn v. Bornman* (1882) 102 Ill. 523.

In *State ex rel. Hadley v. Bankers' Trust Co.* (1911) 157 Mo. App. 557, 138 S. W. 669, where the receiver of a bank intervened in quo warranto proceedings against the defendant, claiming to be entitled to some of its assets, the proceedings had been taken in consequence of the defendant's having purchased a controlling interest in the bank, and used its name and corporate machinery for its own purposes. Held, that a demurrer to the receiver's petition had been properly sustained. Replying to the two arguments of counsel, viz., that the execution of the contract estopped the respondents from interposing the defense of ultra vires, and that the state alone was entitled to raise the question of ultra vires, the court said: "The rules of estoppel and of the sole right of the state to complain obtain only in cases where the excessive act of the corporation is not absolutely void, but only voidable; not wrong *per se* or against public policy and good morals, but wrong merely because the act is not within the scope of the powers conferred by law on the corporation. We know of no case in this state where the rules under consideration have been applied where the corporation has become a party to a contract void for the reason that it was wrong in itself and a violation of sound public policy and good morals." The cases cited in the preceding notes show that the statement in the last sentence requires some modification.

hereafter may be, organized," has thus been defined: "A contract made in violation of this prohibition is unlawful and of no effect. No act of the corporation or the other contracting party, or of the stockholders or creditors of the corporation, can render the contract enforceable, because they are powerless to make lawful that which is made unlawful by the statutes and Constitution of the state."⁷

45. Circumstances justifying the application of the doctrine where the contract is made primarily for the benefit of the corporation itself.

The form in which the doctrine of estoppel is commonly enunciated (see §§ 40 and 41, *supra*) manifestly imports that it has no application to cases in which no benefit is derived by the de-

fendant from the performance of the contract by the plaintiff. Ordinarily the question whether this test is satisfied admits of a ready solution, for the court has simply to determine whether some positive advantage accrued to the defendant by reason of the payment of money, or the transfer of property, or the performance of services, or in some other manner. Examples of cases presenting this situation may be found *passim* in §§ 68 *et seq.*, in which the development of the law in each jurisdiction is discussed, and in § 42, in which the various descriptions of contracts with reference to which the doctrine has been applied are tabulated. But some decisions relating to facts of a disputable quality may be appropriately cited in the present connection.¹ Others are reviewed in the following section.

⁷ Anglo-American Land Mortg. & Agency Co. v. Lombard (1904) 68 C. C. A. 89, 132 Fed. 721, (Mo. Const. art. 12, § 7); Knowles v. Sandercock (1893) 107 Cal. 629, 40 Pac. 1047 (Cal. Const. art. 12, § 9).

1 Cases in which the action was held to be maintainable.

In *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771, the liability of the defendant insurance company was thus discussed from one point of view: "In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee so far as his right of action when brought was affected by it. He had paid a small portion of money on the amount of the premium agreed to be paid, and had given a promissory note for the balance. This was all he had agreed to do, all that had been exacted of him by the insurance company; and this he had performed. It matters not that the note had not been paid, for it was not due when his right of action accrued and when he brought his suit. It is not contended that the payment of the note was a condition precedent to his right of action against the company, since, at the time of bringing the action, the note lacked two months of maturity, and there was nothing to be done or performed by him under the contract. The performance already made by the appellee had been accepted by the appellant company, and, so far as it was concerned, the execution of the note was the same as a cash payment in full of the amount; the company had the benefit thereof."

In *Lauder v. Peoria Agri. & Trotting Soc.* (1897) 71 Ill. App. 475, the complete performance of a contract for the sale of land was inferred, where the vendor corporation had executed a warranty deed, and the vendee had received the instrument into his possession.

In *Lake Street Elev. R. Co. v. Carmichael* (1898) 82 Ill. App. 344, affirmed in (1900) L.R.A.1917A.

184 Ill. 348, 56 N. E. 372 (where, however, the ratio decidendi was that the ultra vires character of the transaction had not been proved), an action brought on a note executed to the plaintiff, Carmichael, for the price of the land, by Miller, an employee of the defendant railway company which guaranteed its payment, was held to be maintainable for the reason that it appeared from the evidence that Miller was merely a conduit for the title to pass through, and that he never had any real interest in the transaction, and that no one but the company reaped any of its benefits. The court said: "Having secured the full benefit of the transaction, appellant ought not to be permitted by a plea of ultra vires to defraud appellee out of her land and her money too. A plea of ultra vires cannot be successfully advanced to commit injustice and fraud, and in this respect it makes no difference whether it is interposed by or against a corporation. . . . The evidence is undisputed that the land was conveyed, and a mortgage upon a part of it for the deferred payment of the purchase price waived, upon the faith of appellant's guaranty. Now, to allow the plea would be to hold appellant may acquire land which it is authorized by its charter to acquire, and to keep it without paying for it, merely because its contract to pay for it took a form which it says it had no power to enter into."

In *Gause v. Commonwealth Trust Co.* (1904; Sup. Ct. Spec. Term) 44 Misc. 46, 89 N. Y. Supp. 723, it was held on demurrer that the plea of ultra vires was not available, as the declaration showed that the contract for the breach of which the action was brought, viz., to sell certain stocks and bonds before a certain date and for a certain price, had been fully performed by the plaintiff on his side, because he had placed the securities at the defendant's disposal. The judgment was reversed in (1905) 100 App. Div. 427, 91 N. Y. Supp. 847, but this por-

As the principle of estoppel is referable to the consideration that the con-

tract has been executed by claimant, and that the defendant has enjoyed the fruits

tion of the ruling of the lower court was not adverted to.

In *Continental Fire Asso. v. Masonic Temple Co.* (1901) 28 Tex. Civ. App. 139, 62 S. W. 930, a contract of insurance was held to have been executed on the part of the insured person when the premiums had been paid.

In *Kennedy v. California Sav. Bank* (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, the fact that the defendant bank was still asserting its ownership of certain stock purchased in excess of its powers, and had been regularly receiving the dividends, was held to estop it from alleging that it was not liable as stockholder. This decision was reversed in (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, on the ground that under the Federal doctrine there could be no estoppel in respect of an ultra vires contract.

In *First Nat. Bank v. Brooks* (1896) 22 Ill. App. 238, it was held that the obligation of the defendant bank to repay money deposited, in so far as it was based "on the grounds of estoppel, arose as soon as the money was received on deposit, and much more when mingled with the funds of the bank. It became a debt due from the bank which the law would not allow it to deny, and a cause of action arose after demand and refusal to pay."

In *York v. Farmers' Bank* (1904) 105 Mo. App. 127, 79 S. W. 972, an arrangement as to the allowance by a bank of overdrafts for the benefit of a dealer in live stock was held to have been executed on his part, as he had drawn the checks for the stock purchased and shipped, and after such shipment had given the bank his draft on his commission company for an amount amply sufficient to cover the checks so drawn on the bank.

In *Hurd v. Green* (1879) 17 Hun, (N. Y.) 327, affirmed in *Hurd v. Kelly* (1879) 78 N. Y. 588, 34 Am. Rep. 567, a bond purporting to be executed upon the consideration that a bank, upon the request of each obligor, should continue its ordinary business after a specified date, was held to be enforceable, the evidence being that the conditions had been fulfilled.

Cases in which the action was held not to be maintainable.

In *Jemison v. Citizens' Sav. Bank* (1890) 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 492, 25 N. E. 264, the right of the plaintiff to recover his commissions and the money expended by him at the defendant's request in the purchase of cotton futures was denied on grounds thus stated: "In the case at bar, the transaction, as we have seen, was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it. The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding L.R.A.1917A.

it upon the defendant's account. It was purchased under the rules of the cotton exchange of the city of New York, in which the members doing business therein with other members act as principals, and are liable as such. The most that can be claimed is that they held the cotton, or the contracts therefor, subject to the call or order of the defendant. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property, to the defendant. . . . We consequently are of the opinion that, under the circumstances of this case, the defense of ultra vires is still available to the defendant."

In *Twiss v. Guaranty Life Asso.* (1893) 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8, distinguished in *Schrimplin v. Farmers' Life Asso.* (1904) 123 Iowa, 102, 98 N. W. 613, an action brought by the beneficiary of an insurance policy, to recover the benefits from a company which had taken over the members of the one by which the policy had been issued, was held not to be maintainable, for the reason that "the record shows beyond all question that, if the contract had not been made between the two companies, the plaintiff's claim was absolutely worthless. That the position of the plaintiff was in any manner changed, to her prejudice, by the contract, not only does not appear, but the face of the transaction shows that it was not."

In *Bankers' Union v. Crawford* (1903) 67 Kan. 449, 100 Am. St. Rep. 465, 73 Pac. 79, an action brought by a widow for the recovery of a death loss against the Bankers' Union, which had assumed, under a consolidation agreement, the liabilities of the National Aid Association, of which her husband had been a member, was held not to be maintainable for the reasons thus stated: "Authorities are cited supporting the proposition that a corporation may be estopped from pleading the invalidity of its contracts as against one who has made part performance of such contract. We are free to grant the correctness of the principle, but find no opportunity for its application here, because there has been no part performance. There was no consolidation or merger; there could be none under the statute. No authority therefor is given. That four thousand of the members of the National Aid Association chose to become members of the Bankers' Union constituted no part performance on the part of the former association. It could not transfer a single member. Each individual acted for himself. The petition contains no allegation that any of the property of the National Aid Association ever came to the possession of the Bankers' Union. On the contrary, it does allege that all of the records and assets of the National Aid Association are in the hands of the receiver, Bird. Had the assets of the National Aid

of that execution, the conclusion seems to be unavoidable that it operates so as

to preclude a corporation from setting up the defense of ultra vires, irrespec-

Association gone into the hands of the Bankers' Union, such assets, perhaps, in a proper action, could have been subjected to plaintiff's claim, but we do not see how an estoppel by reason thereof could be invoked in favor of Mrs. Crawford. She never has paid anything for, or lost anything by reason of, the agreement upon which she counts. We must hold that the agreement which is sought to be enforced is ultra vires, and that the Bankers' Union is not estopped so as to assert it." By "part performance" the court no doubt meant performance on the side of the person contracting with the corporation. The expression is undesirable, to say the least, in such a connection, when we advert to the authorities cited in § 3, supra.

In *Keokuk v. Ft. Wayne Electric Co.* (1894) 90 Iowa, 67, 57 N. W. 689, where the defendant repudiated an invalid contract to furnish the plaintiff with a certain number of lights, the contention of counsel that the contract was an executed one, and that it would be unjust to allow the defendant to retain the fruits of the contract and at the same time to claim that the contract was void, was rejected on the ground that the plaintiff had made no payment for the lights in excess of the service rendered, and incurred no liability in advance for the lights which were furnished.

In *Kraniger v. People's Bldg. Soc.* (1895) 60 Minn. 94, 61 N. W. 904, a case of excessive borrowing, the operation of the rule as to the effect of a reception of benefits was held to be excluded by reason of the fact that the money in question had been embezzled by the officer to whom it had been delivered.

In *Greeley v. Nashua Sav. Bank* (1884) 63 N. H. 145, where it was held that the defendant was not estopped to claim that it was not authorized by its charter to receive for safe-keeping certain bonds delivered to a clerk of its treasurer, the ratio decidendi was that neither the bonds nor their avails had come to its possession.

In *St. Louis Carriage Mfg. Co. v. Hilbert* (1887) 24 Mo. App. 338, the superintendent of the plaintiff company, after having received from it a certificate for two fully paid shares, delivered this instrument to the defendant as security for a loan of \$200. Some months later the defendant, in pursuance of a previous arrangement with one Appel, called at the plaintiff's storerooms and bought from Appel, who purported to act for the plaintiff, a carriage of the value of \$250, and paid for it by turning over to Appel the two shares of stock held as security for Appel's debt, and \$25 in cash. The defendant then removed the carriage from the plaintiff's storerooms, and made immediate efforts to resell it. The court held that the company was entitled to maintain an action of replevin to recover the carriage, but said: "If it clearly appeared L.R.A.1917A.

that the corporation had in this case received the benefit of the otherwise illegal transaction, it might well be held estopped from setting up its illegality. Such, however, is not the case. As far as the record shows, the servant, Appel, who delivered the company's property in payment of his private debt, still holds the stock, and has spent the money, and the corporation has received neither stock nor money."

In *Planters' Cotton Oil Co. v. Guaranty State Bank* (1916) — Tex. Civ. App. —, 188 S. W. 38, Read, the manager of the plaintiff oil company, had, without consulting the board of directors, made an arrangement with the cashier of the defendant bank, by which it was to furnish him the money with which to pay for the cotton bought on the oil company's account during that cotton season. The account of these advances was kept on the books of the bank separate from all other charges made for money supplied to Read as the company's agent. As the cotton purchased was sold by Read the proceeds were applied as a credit on this particular account, none of it being used for any other purpose. By its cross bill the bank claimed the balance which remained after deducting all the credits from the cotton sales. But the court said: "The appellant did not receive any benefit from Read's transaction with the appellee for which it should be required to account before repudiating his acts. As we have seen, such benefits as may have resulted from a stimulated market, even if there was any proof that these accrued, would be too remote to constitute an estoppel. The unauthorized lending of money to an agent for the use of his principal is not a lending to the principal, unless ratified by the latter, or unless the money is used in the promotion of the business which the agent is authorized to conduct. In short, an agent cannot embark upon an unauthorized enterprise, borrow money for that purpose on the credit of his principal, exhaust the money so borrowed in that enterprise, and estop the principal from repudiating his whole conduct solely upon the ground that the principal had been the beneficiary of the transaction."

For other illustrative cases, see *Blitz & Co. v. Bank of Kentucky* (1900) 21 Ky. L. Rep. 1554, 55 S. W. 697 (petition not alleging receipt of benefits held to be demurrable); *Alexander v. Cauldwell* (1881) 83 N. Y. 486, 5 Mor. Min. Rep. 650; *Industry F. Ins. Co. v. Plum* (1903) 84 App. Div. 96, 82 N. Y. Supp. 550; *Whaley v. Bankers' Union* (1905) 39 Tex. Civ. App. 385, 88 S. W. 259; *Deaton Grocery Co. v. International Harvester Co.* (1907) 47 Tex. Civ. App. 267, 105 S. W. 556; *Mitchell v. Hydraulic Bldg. Stone Co.* (1910) 61 Tex. Civ. App. 131, 129 S. W. 148; *Washington Mill Co. v. Sprague Lumber Co.* (1898) 19 Wash. 165, 52 Pac. 1067; *Mooney v. Mooney Co.* (1912)

tively of whether the actual results of the execution were in point of fact advantageous or prejudicial. But there is very little direct authority upon the point.²

46. —where the contract is made primarily for the advantage of a third party.

The analogy of the general principles with reference to which it is determined whether a contract is supported by a

legal consideration seems to point to the conclusion that, for the purpose of the doctrine of estoppel, the same juristic consequences should be predicated whether, as a result of the performance of the contract in the manner contemplated, the promisor was to receive some specific advantage, or the promisee was to suffer some detriment. The view suggested by this consideration has been adopted in several cases.¹ But the impossibility of reconciling it in its entirety with all

71 Wash. 258, 128 Pac. 225³ (officer of corporation gave its note as a substitute for an outstanding note of his own).

²In *Garrison Canning Co. v. Stanley* (1907) 133 Iowa, 57, 110 N. W. 171, a company which had lent money to one of its directors, who afterward died insolvent, brought suit to have its claim against the decedent's estate in respect to this loan decreed to be a preferred claim. It was argued that the corporation was in no better position than if it had not made the unauthorized loan, since the director would have been in duty bound to pay interest on the funds of the corporation converted by him to his own use, and that it was consequently under no obligation to rescind the unauthorized transaction by returning the funds received by it, including interest thereon, in order to defeat the plea of estoppel. But the court said: "As it seems to us, this is to make the validity of the transaction depend on subsequent results. It cannot be questioned that the corporation did receive that which was contemplated as the benefit to inure to it out of the arrangement with Reeve, i. e., credit for the interest which he agreed to pay on monthly balances, and at the time of his death it had a valid claim against Reeve's estate for the full amount of the funds in his hands, including the interest with which it might have been credited. It is too late now, after a condition has arisen which was not anticipated, to say that the transaction was ultra vires, and escape the loss to which it is subject by reason of this unanticipated result."

In *Shawnee Nat. Bank v. Purcell Wholesale Grocery Co.* (1912) 34 Okla. 34, 41 L.R.A.(N.S.) 494, 124 Pac. 603, the question whether the defendant had made a profit or sustained a loss from its ultra vires purchase of goods was treated as being an immaterial factor.

In *Fitzgerald v. Burden Benev. Asso.* (1893) 69 Hun, 532, 23 N. Y. Supp. 647, where the defendant corporation had received a member not eligible under its charter, the court was unable to see how the corporators could be bound by an act "in the nature of an executory promise" to pay benefits to one not entitled to become a member. The theory that the case was governed by the familiar principle "that an individual acting sui juris can waive a statutory, or even a constitutional, pro-

vision in his own favor affecting his own property or alienable rights not involving considerations of public policy," was rejected for reasons thus stated: "Acts by an individual which would be waivers of a reserved right, and which would be an estoppel as to him, would, when performed by a corporation which derives its existence from, and can only act under and within, its charter, be ultra vires, and not binding upon the corporators without their individual consent." But it would seem that, as the plaintiff had paid initiation dues which would have entitled him to the benefits stipulated if he had been an eligible member, the contract had been fully performed on his side at the time when he received his injury. If this was the actual situation, it is plain that the decision should have been rendered with reference to the principle of an estoppel, as predicated from this performance, and that the executory character of the defendant's promise was not a conclusive factor.

³In *Maxwell v. Akin* (1898) 89 Fed. 178, the court quoted with approval the following passage in 5 *Thompson on Corporations*, 1st ed. § 6057: "The principle, properly understood and applied, extends to every case where the consideration of the contract has passed to the corporation from the other contracting party, which consideration may, on well-understood principles, consist either of a benefit to the corporation, or of a prejudice or disadvantage to the other contracting party. It is therefore not strictly necessary to the proper application of the principle that the corporation has received a benefit from the contract, but it is sufficient that the other party has acted on the faith of it to his disadvantage, —as where he has expended money on the faith of it. The reason of the rule is that honesty and fair dealing are the highest public policy, and that a private corporation, which is a mere collection of individuals, is no more privileged to repudiate its engagements and act dishonestly than a single individual is." The case in which this passage is quoted is one of those which are inconsistent with the decisions of the Federal Supreme Court with regard to the doctrine of estoppel. But it is admissible as a precedent in the jurisdictions in which that doctrine is accepted. The same statement was quoted by the court, arguendo, though without any distinct expression of

the decisions as they stand will be at once apparent from an examination of those which relate to guaranties and other contracts of a similar description, the characteristic feature of which is that they are entered into for the advantage primarily of a third party.

In cases where a contract of this type was, as between the promisor and prom-

isee themselves, supported by some definite consideration, separate from and independent of that benefit which was to accrue to the third party, it has always been taken for granted that the doctrine of estoppel is equally applicable whether the intention of the parties was that the promisor should receive some specific advantage,² or that the

approval, in *Bowen v. Needles Nat. Bank* (1899) 36 C. C. A. 553, 94 Fed. 925.

In *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.* (1910) 140 Iowa, 141, 126 N. W. 192, where an action brought on a contract providing that plaintiff should not ship any broken stone to Des Moines during the remainder of the year, and that defendant should pay 25 cents per cubic yard for all stone made use of in a certain job, was held not to be maintainable, the court said: "The case may be disposed of on the theory that there was a contract such as alleged, and that the plaintiff observed its negative requirements. . . . So far as the defendant is concerned, it derived not the slightest advantage from the transaction. The sole consideration was in plaintiff not doing what it otherwise would have done but for defendant's alleged promise. . . . Nor does it (the agreement) appear to have been entered into for the benefit of another, nor even that any other reaped any reward from the plaintiff's naked compliance with its promise of inaction. Nor can it be said from the record before us that such inaction, aside from not benefiting others, worked any injury to plaintiff save as this may be presumed. Possibly there may be cases where the circumstances are such that performance by one party to his detriment may estop the other from pleading *ultra vires* even though not benefited, but the detriment must be actual and with the latter's knowledge, not merely presumptive, as in the case before us. We are of the opinion that the contract was in excess of defendant's powers and that it was not estopped from so pleading." For earlier appeals of this case, see (1901) 114 Iowa, 574, 87 N. W. 406, (1905) — Iowa, —, 101 N. W. 1124.

See also the cases cited in notes 2, 3, and 4, *infra*.

2 Guaranty.

In *Kellogg-Mackay Co. v. Havre Hotel Co.* (1912) 118 C. C. A. 165, 199 Fed. 727, where the plaintiff, relying upon the guaranty of the defendant that the price would be paid, furnished materials to a contractor for the erection of the defendant's hotel building, the court thus stated its conclusions: "It would work a palpable injustice to the plaintiff if the hotel company was not required to pay the demand. In other words, it would defeat justice and work a legal wrong to permit the hotel company to escape on the plea that its contract of guaranty was beyond its power to make. We are of the opinion that under the condition.

tions attending the transaction the hotel company is estopped to deny its liability under the guaranty." This case, it should be observed, is one of the Federal decisions which are inconsistent with the rulings of the Supreme Court with regard to the doctrine of estoppel.

In *Jahp v. Elite Livery* (1915) 192 Ill. App. 249, the elements upon which an estoppel was held to be predicable were a compromise of bankruptcy proceedings, and the retention of property alleged to have been transferred in violation of the Bankruptcy Act. But in admitting the doctrine of estoppel the court of appeals was running counter to the more recent decisions of the Supreme Court.

In *Whitehead v. American Lamp & Brass Co.* (1905) 70 N. J. Eq. 581, 62 Atl. 554, the grounds upon which a portion of a claim based on a guaranty was allowed were thus stated: "The defendant company was engaged in a manufacturing business, to carry on which certain articles were being manufactured for its account by the Clark Brothers Glass Company, to produce which the materials furnished by the claimant were essential. They could not be had from the claimant without the guaranty of the defendant company, which was given for the purpose of continuing its own business, and resulted in a direct benefit to it in the prosecution of the business it was chartered to carry on, and if the act of guaranty was beyond its expressed powers, it is not prohibited by the corporation act of the state under which it was organized. Still, if the act was in excess of its authority, it having induced the claimant to part with its property relying upon the promised 'ultimate payment,' and being benefited by having the material manufactured for its account, it would be unconscionable to now permit it to interpose the plea it offers."

In *First Nat. Bank v. Greenville Oil & Cotton Co.* (1901) 24 Tex. Civ. App. 648, 60 S. W. 828, where a national bank promised to pay for any feedstuffs supplied on certain specified terms to a person to whom it had lent money, the grounds upon which it was held to be estopped from pleading *ultra vires* as a defense to an action on its agreement were that it held a mortgage on the debtor's cattle, that the value of the cattle was considerably augmented by the feed furnished on the strength of the guaranty, and that they could not have been placed on the market if it had not been furnished. For other Texas cases in which recovery was allowed by the court of ap-

peals because the promisor had received specific benefits, see *Waller v. Gorman Mercantile Co.* (1911) — *Tex. Civ. App.* —, 141 S. W. 833; *Taylor Feed Pen Co. v. Taylor Nat. Bank* (1915) — *Tex. Civ. App.* —, 181 S. W. 534.

In *Deaton Grocery Co. v. International Harvester Co.* (1907) 47 *Tex. Civ. App.* 267, 105 S. W. 556, the conclusion reached was that, if it were conceded that the maker of the notes guaranteed by the defendant was insolvent at the time when the contract of guaranty was made, and that by reason of the plaintiff's extension of time on its debt, the defendant collected more from the debtor than it otherwise would, still the contract of guaranty was not binding upon the defendant.

In *Bullen v. Milwaukee Trading Co.* (1901) 109 *Wis.* 41, 85 N. W. 115, the law was thus laid down: "If the corporation received consideration for the paper, it cannot be heard to deny liability thereon, even though its officers had no authority to make it and the corporation no legal authority to empower them to do it. The doctrine of ultra vires cannot be invoked by a corporation for the purpose of escaping a burden resulting from a contract so far executed that the corporation has received the benefit thereof."

Suretyship.

In *Wheeler, O. & Co. v. Everett Land Co.* (1896) 14 *Wash.* 633, 45 *Pac.* 316, where a contractor agreed to purchase lumber from a company in consideration of its becoming surety on the contractor's bond, the court laid down the law as follows: "As appellant, in consequence of going upon the bond, obtained direct and substantial benefits by reason of the sale of a large amount of material, and as the bond was accepted and relied upon in good faith by the respondent, appellant should not be allowed to invoke the doctrine of ultra vires, and so escape liability."

In *Wittmer Lumber Co. v. Rice* (1900) 23 *Ind.* App. 586, 55 N. E. 868, an action to foreclose a mechanics' lien upon a building for which the plaintiff company had supplied materials, the material facts were that the plaintiff became surety on the bond of a contractor in consideration of the profits it would derive from his purchase of the material for a house which he had stipulated to build; that the materials were so purchased; that they were those in respect to which the action was brought; that the building association accepted the bond and advanced the money by reason of the plaintiff having executed the bond as surety; and that in the bond the plaintiff and the contractor agreed with the landowner and the association not to file liens or claims against the real estate for material or work done. On grounds thus stated the plaintiff company was held to be estopped from denying its power to execute the bond: "The consideration thus moving to appellant was a valuable consideration, and was in furtherance of its own corporate purposes. It is L.R.A.1917A.

also shown that the contract, as between appellant and the building association, was executed. It has received the benefit accruing to it through the acceptance of the bond by the association and the making of the loan by the association, which loan it was induced to make because of the bond. The contract has been fully performed by the building association."

See also *Lucas v. White Line Transfer Co.* (1886) 70 *Iowa*, 541, 59 *Am. Rep.* 449, 30 N. W. 771 (court stated, arguendo, the legal consequences of a retention of benefits); *National Surety Co. v. Hall-Miller Decorating Co.* (1913) 104 *Miss.* 626, 46 *L.R.A.(N.S.)* 325, 61 *So.* 700 (for facts, see § 90, *infra*).

Indemnity.

In *Butterworth v. Kritzer Mill Co.* (1897) 115 *Mich.* 1, 72 N. W. 990, it was held that the plaintiff company, after having discharged certain obligations of the defendant of which it had become guarantor in order to secure the services of a person then in the defendant's employment was entitled to enforce a mortgage of indemnity given by the defendant.

In *Timm v. Grand Rapids Brewing Co.* (1910) 160 *Mich.* 371, 27 *L.R.A.(N.S.)* 186, 125 N. W. 357, it was held that the plaintiff, who had become surety on a liquor dealer's bond, and had been compelled to pay a judgment against such dealer, was entitled to maintain assumpsit on the bond of indemnity which the company had given in order to induce him to enter into the contract of suretyship.

In *Bushnell v. Chautauqua County Nat. Bank* (1877) 10 *Hun (N. Y.)* 378, modified in (1878) 74 N. Y. 290, recovery was allowed where plaintiff had entered into a contract with a third person on the faith of a promise by the defendant that he should be compensated out of money deposited with the defendant for any damage he might sustain from the third person's failure to perform the contract.

See also *Hyde v. Equitable Life Assur. Soc.* (1908; *Sup. Ct. Spec. Term*) 61 *Misc.* 518, 116 N. Y. *Supp.* 219.

Execution of accommodation note.

In *First Nat. Bank v. Guardian Trust Co.* (1905) 187 *Mo.* 494, 70 *L.R.A.* 79, 86 S. W. 109, it was held that the execution of the note on which the action was brought was not purely a matter of accommodation, but was induced by reason of the defendant's interest in the railroad company in question, "not only as a stockholder, but also as a creditor, and that the procuring of the money upon this note to pay the pressing indebtedness on the part of the railroad company was not only of interest to the defendant as a stockholder, but at least increased the chances of finally realizing from its debts against said company." The court thus stated its conclusions: "The defendant had been for a number of years financing the Belt Railroad Company. By the execution of this note it had received

promisee should suffer some specific detriment.³

In this point of view the liability of the corporation is restricted to an accounting for the benefit which it actually received from the transaction.⁴

On the other hand, a conflict of judicial opinion is disclosed by the rulings as to contracts under which no specific advantage was to accrue to the promisor,

the benefit from the plaintiff in the performance of an undertaking it had long been engaged in, of furnishing the Belt Railroad Company with finances; and, having received the full consideration from the plaintiff in aid of the performance of a duty it had undertaken to perform in the interest of the Belt Railroad Company, it is in no position now, the contract having been fully executed on the part of the plaintiff, to say that its act was not within the powers conferred upon it by the statute."

*** Guaranty.**

In *Richeson v. National Bank* (1910) 96 Ark. 594, 132 S. W. 913, the court thus stated its conclusions: "In the case at bar the loan of the money by the loan company to the lumber company, the assumption by it of the indebtedness of the lumber company to the bank, and the extension by the bank of the time of payment of its debt, constituted one transaction, and the mutual benefits and obligations growing therefrom to the parties became indivisible. . . . The bank, by virtue of the assumption by it of the bank's debt against the lumber company, extended the time of the payment thereof. It could have taken steps to enforce its collection, but it stayed its hand by reason of the execution of this contract, and thereby it was caused to act to its disadvantage. It actually performed the contract on its part by thus granting the extension of the time of payment of the debt due to it. On the one part, therefore, benefits have been received, and on the other part the contract has been actually executed."

In *Arkansas Valley Town & Land Co. v. Lincoln* (1895) 56 Kan. 145, 42 Pac. 706, the syllabus prepared by the court runs as follows: "Where a town company induced L. to remove his store building and stock of goods at great expense, from a village a short distance to a new town site, by a contract of guaranty made by its general agent in the usual way, that a railroad would be constructed and in operation to the town site within a given time, such company cannot be relieved from liability for a breach of the contract on the ground of the want of power to make it, nor because the board of directors did not formally confer authority on the general agent to enter into it."

In *Flint & W. Mfg. Co. v. Kerr-Murray Mfg. Co.* (1900) 24 Ind. App. 350, 56 N. E. 858, an action on the guaranty of a contract for the performance of work was held to L.R.A.1917A.

and no detriment was to be sustained by the promisee apart from that incident to carrying out the contemplated transaction with the third party. There is some authority for the theory of itself that this description of detriment affords of itself a sufficient basis for predicating an estoppel in respect to the promisor.⁵ But in most of the cases in which the evidence was of such a nature

be maintainable on the ground that the plaintiff had, in pursuance of the defendant's request, and in reliance upon its guaranty, incurred expense for labor and material for the benefit of the defendant. "The appellee having gained a pecuniary benefit from the performance of the contract on the part of the appellant, and at the expense of the appellant incurred in such performance, the appellee is equitably bound upon the contract."

Cases like the foregoing should be carefully distinguished from those which were decided not on the ground of an estoppel against pleading ultra vires, but on the ground that, having regard to the relationship between the business of the guarantor and that of the person whose obligation was guaranteed, the guaranty was intra vires. See, for example, *Holm v. Claus Lipsius Brewing Co.* (1897) 21 App. Div. 204, 47 N. Y. Supp. 518 (guaranty by brewing company of the rent to be paid by a saloon keeper); citing *Fuld v. Burr Brewing Co.* (1892) 45 N. Y. S. R. 649, 18 N. Y. Supp. 456, involving similar facts.

Suretyship.

In *Rounds & P. Lumber Co. v. Thompson* (1915) — Okla. —, 153 Pac. 648, where a property owner was induced to award a construction contract to a person employed by a lumber corporation, in consequence of the corporation's agreeing to become surety on the contractor's bond, it was held, in an action by the corporation to enforce a lien for materials used in the building erected by the contractor, that the corporation was estopped to allege that it had exceeded its powers in becoming surety.

Indorsement for accommodation.

In *Waller v. Gorman Mercantile Co.* (1911) — Tex. Civ. App. —, 141 S. W. 833, it was not ultra vires as being for accommodation merely, but that, if it had been of that character, the principle of estoppel should, upon the facts shown, be applied.

⁴*Gaston v. J. I. Campbell Co.* (1910) — Tex. Civ. App. —, 130 S. W. 222.

⁵In *Seeber v. Commercial Nat. Bank* (1897) 77 Fed. 957, it was held, on demurrer, that the defendant was liable on a guaranty given to indemnify the plaintiff, for a loss he had incurred as surety on an attachment bond. This case, it should be observed, is one of those in which the rulings of the Federal Supreme Court as to the doctrine of estoppel have been disregarded.

as to present the question, it has been held or assumed that an estoppel cannot be predicated where it is merely shown that the promisee was induced by the

agreement of the promisor to do or refrain from doing something with regard to the third party.⁶ The rationale of such cases has been thus explained:

In *Hutchins v. Planters' Nat. Bank* (1901) 128 N. C. 72, 38 S. E. 252, the court stated its conclusions in these words: "Here, if it be conceded that the guaranty was ultra vires, it was not expressly prohibited nor illegal, the plaintiff acted on it, and relying on it he parted with his property and shipped the hides. The defendant is estopped on both reason and precedent to aver that it was not empowered to give the guaranty. It does not lie in the defendant's mouth to say that it had no authority to do what it did after the plaintiff has shipped his hides relying upon the defendant's promise that the draft should be paid."

It would seem that this is the position which the court intended to take in *CREDITORS' CLAIM & ADJUSTMENT CO. v. NORTHWEST LOAN & T. Co.* ante, 787, where, it will be observed, the liability of the guarantor corporation was held to be determinable with reference to the general principle that "the receiving and retention of a benefit, or the suffering of a detriment, is sufficient to take away the defense of ultra vires." One of the cases upon which the court relied, *Farmers' & M. Nat. Bank v. Illinois Nat. Bank* (1908) 146 Ill. App. 136, was, so far as the principle of estoppel was concerned, not really a precedent in point, for it proceeded upon the ground that the guaranty under review was *intra vires*.

In *Bowen v. Needles Nat. Bank* (1899) 36 C. C. A. 553, 94 Fed. 925, where the plaintiff had, in reliance upon the guaranty of the defendant bank, cashed certain checks of a third person, it was remarked that "there is authority for holding that under such circumstances the bank is estopped to deny its liability on the guaranty, notwithstanding that the contract was ultra vires." But none of the cases cited by the court relate to contracts of guaranty. The statement is therefore significant merely as indicating its opinion that the doctrine applied in those cases might conceivably be regarded as controlling where such contracts are concerned. But the liability of the bank was denied under the circumstances. See next note.

6 Guaranty.

Bowen v. Needles Nat. Bank (1899) 36 C. C. A. 553, 94 Fed. 925, affirming (1898) 87 Fed. 430; *Evans v. Johnson* (1906) 79 C. C. A. 488, 149 Fed. 978; *Re S. P. Smith Lumber Co.* (1904) 132 Fed. 620; *M. V. Monarch Co. v. Farmers' & T. Bank* (1899) 105 Ky. 430, 88 Am. St. Rep. 310, 49 S. W. 317; *Greene v. Middlesborough Town & Lands Co.* (1905) 121 Ky. 355, 89 S. W. 228, 11 Ann. Cas. 888; *Knickerbocker v. Wilcox* (1890) 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123; *Bacon v. Farmers' Bank* (1899) 79 Mo. App. 406; *Sturdevant Bros. v. Farmers' & M. Bank* (1901) 62 Neb. 472, 87 N. W. L.R.A.1917A.

156; *Crowder State Bank v. Aetna Powder Co.* (Okla.) post, 1021; *South Texas Nat. Bank v. Lagrange Oil-Mill Co.* (1897) — Tex. Civ. App. —, 40 S. W. 328; *Groos v. Brewster* (1900) — Tex. Civ. App. —, 55 S. W. 590; *W. C. Bowman Lumber Co. v. Pierson* (1911) — Tex. Civ. App. —, 139 S. W. 618.

It should be observed that the Federal cases cited above, in so far as they are based upon the ground that there were no elements upon which to base an estoppel, reflect a theory inconsistent with that which is adopted in all the more recent decisions of the Supreme Court; viz., that the plea of ultra vires cannot be excluded on the ground of an estoppel.

In *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1885) 118 U. S. 291, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094, the court made the following remarks: "Whatever may be said in regard to the Indianapolis & St. Louis Company, there is wanting in the case of the guarantying companies one of the strongest reasons usually urged in support of the estoppel, as it is sometimes called; namely, that the recalcitrant party has received the money or the property of the other. For, so far from these guarantying companies having received of the plaintiffs any money or property, they are the parties who have been paying money and the plaintiffs receiving it for rent of its road. They are not therefore estopped on any principles of that doctrine from ceasing to pay money on an illegal contract because they have heretofore done so. On the contrary, as we have already said, the duties of these directors to their stockholders is to cease to perform a contract to which they were never bound." This case, it should be observed, was decided before the date when the principle of estoppel was definitively discarded by the Supreme Court.

In *Ellett-Kendall Shoe Co. v. Western Stores Co.* (1908) 132 Mo. App. 513, 112 S. W. 4, where the action was brought to enforce a guaranty on the faith of which credit had been given to a third person, the court said: "If this were a case where the defendant corporation had entered into an ultra vires contract which had for its object the conferring of some benefit on the corporation, and the contract had been executed by the other party, the decisions in this state relied on by plaintiff would be in point. . . . The case in hand belongs to a different class and is controlled by a different rule. Here the contract was in no sense for the benefit of defendant and was executed solely for the benefit of another. . . . Consequently, while the fact that the Joplin Company was a customer and debtor of defendant doubtless influenced Mr. Shelley to sign the contract, it did not constitute a consideration in the

"Where the contract has been executed, the corporation is presumed to have received the benefit, and should not be permitted to escape the burden; but where

the benefit is alleged and proven to have been rendered to another, and at the request of the party benefited, the rule does not apply."⁷ The nonliability of

legal meaning of that term, for the execution of the contract by the corporation."

The rule that a corporation will not be permitted to set up the ultra vires of a contract from which it has received a profit does not apply where an officer of a trust company undertook without authority, to guarantee the sale of securities of a stranger in case he would come into a pooling agreement to be organized to maintain the price of such securities, if the corporation never received the securities and the pooling agreement was never consummated, so that the purposes of the guaranty failed. *Gause v. Commonwealth Trust Co.* (1909) 196 N. Y. 134, 24 L.R.A.(N.S.) 967, 89 N. E. 476, affirming (1908) 124 App. Div. 438, 108 N. Y. Supp. 1080, which affirmed (1907) 55 Misc. 110, 106 N. Y. Supp. 288.

In *Fidelity & D. Co. v. National Bank* (1908) 48 Tex. Civ. App. 301, 106 S. W. 782, the right to maintain the action was denied on the authority of some of the cases in which the doctrine of estoppel was treated as erroneous. But these were manifestly not appropriate precedents in a state in which, as in Texas, the principle of estoppel prevails. The ruling obviously might have been based on the same ground as the other decisions of the same court which are cited above.

The cases in which the right of recovery was affirmed on the ground that the claimants were not chargeable with notice of the invalidity of contracts of this type are collected in § 12, supra.

Suretyship.

Best Brewing Co. v. Klassen (1900) 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20; *Willett v. Farmers' Sav. Bank* (1898) 107 Iowa, 69, 77 N. W. 519; *Filon v. Miller Brewing Co.* (1891) 38 N. Y. S. R. 602, 15 N. Y. Supp. 57; *Culver v. Reno Real Estate Co.* (1879) 91 Pa. 367.

In *Sturdevant Bros. v. Farmers' & M. Bank* (1901) 62 Neb. 472, 87 N. W. 156, it was held that the defendant bank could not be held liable on its undertaking in replevin, given in a suit in which it had no interest. Decision affirmed on rehearing in (1903) 69 Neb. 226, 95 N. W. 819. The following remarks were made by the court: "It is said also that the bank is estopped to claim that the act was beyond its powers, because the property replevied was taken away from the now plaintiffs by virtue of the undertaking. But the bank did not deprive the plaintiffs of any property. The sheriff was not bound to, and should not have, delivered the property upon such an undertaking. The parties should not have acquiesced in his so doing by failure to except as required by law, or to make objection at any time. The insufficiency of the surety on the undertaking was palpable, and the sheriff and the plaintiffs herein are fully as much to blame as

the bank. Having themselves to blame for resting so long upon such doubtful security, plaintiffs may not invoke the rule as to incidence of liability where one of two innocent parties must suffer."

In *Northside R. Co. v. Worthington* (1895) 88 Tex. 562, 53 Am. St. Rep. 778, 30 S. W. 1055, here the transaction in question was held to be essentially one in which the defendant and another corporation agreed that a certain sum of money, to be divided between them, should be borrowed on the security of joint bonds, and that each should become security for the other in respect to the amount received. The court said that, as corporations like those in question could not bind themselves by accommodation paper for the benefit of another party, it followed that, if either corporation was to be held liable for more than its proportionate amount of the debt incurred, such liability must be based upon the ground that the corporation had power to further the business of the other. The existence of such power was denied.

Execution of note for accommodation.

El Dorado Co. v. Citizens' Bank (1908) 85 Ark. 185, 107 S. W. 676.

Indorsement for accommodation.

Savannah Ice Co. v. Canal-Louisiana Bank & T. Co. (1913) 12 Ga. App. 818, 79 S. E. 45; *Lafayette Sav. Bank v. St. Louis Stoneware Co.* (1876) 2 Mo. App. 299; *Preston v. Northwestern Co.* (1903) 67 Neb. 45, 93 N. W. 136; *National Bank v. Wells* (1880) 79 N. Y. 498, reversing 15 Hun, 57; *National Park Bank v. German-American Mut. Warehousing & Secur. Co.* (1889) 116 N. Y. 281, 5 L.R.A. 673, 22 N. E. 567, reversing (1886) 21 Jones & S. 367; *Fox v. Rural Home Co.* (1895) 90 Hun, 365, 35 N. Y. Supp. 896, affirmed in (1898) 157 N. Y. 684, 51 N. E. 1090; *Carney v. Duniway* (1899) 35 Or. 131, 57 Pac. 192, 58 Pac. 105 (no one except a bona purchaser entitled to recover); *South Texas Nat. Bank v. Lagrange Oil-Mill Co.* (1897) — Tex. Civ. App. —, 40 S. W. 329.

In some of the cases under this head, the actual ground upon which the right of action was denied was that the plaintiff was not a bona fide purchaser. *Pick, Bloch & Joel v. Ellinger* (1896) 66 Ill. App. 570; *El Capitan Land & Cattle Co. v. Boston-Kansas City Cattle Loan Co.* (1902) 65 Kan. 359, 69 Pac. 332. See also *Simmons Nat. Bank v. Dilley Foundry Co.* (1910) 95 Ark. 368, 130 S. W. 162, where suit was brought upon a note executed for accommodation.

In *Oppenheim v. Simon Reigel Cigar Co.* (1904) 90 N. Y. Supp. 355, a verdict for the plaintiff was reversed on the ground that the defendant, a manufacturing company, had no power to advance money for accommodation merely.

⁷ *Morris v. Ernest & Co.* (1909; Sup. Ct. App. Term) 65 Misc. 18, 119 N. Y. Supp.

the promisor would seem to be preferably based upon the conception thus suggested rather than upon another which has been put forward; viz., that he is liable or not according as he was or was not privy to the given transaction.⁸ Whether the presence or absence of the element thus indicated can with propriety be regarded as an appropriate test for purposes of differentiation is, to say the least, disputable. There would seem to be adequate grounds for contending that, where a guaranty or similar contract is in question, the party who assumes responsibility for the obligation, existing or contemplated, of the third party, is always in privity with that party no less than the obligee himself. It is submitted that, in their essence, if not in their technical form, transactions of this sort are tripartite agreements. If this is conceded to be their real character, it would seem to follow that the specific detriment which the promisee incurs by assuming, in reliance upon the promisor's undertaking, the risks incident to becoming the obligee of the third party, should, for the purposes of the application of the principle of estoppel, be deemed to constitute specific detriment as between the promisor and promisee also. In this point of view the conclusion is indicated that the principle ought to be treated as controlling even though no such detriment is disclosed by the particular portion of the agreement which affects merely the promisor

and promisee themselves. But in none of the cases in which the liability of the promisor has been denied was the attention of the court directed to this aspect of the matter.

The foregoing discussion has reference merely to cases in which the action is brought by the promisee against the promisor. An essentially different situation is presented where recoupment is claimed from the person for whose advantage the contract was made by the promisor, after the obligation undertaken by him has been discharged. Under such circumstances the defendant is obviously the recipient of benefits which will raise an estoppel, irrespectively of the nature of the views held by the court with regard to the matters considered in the preceding paragraph.⁹

Although, strictly speaking, the point is outside the scope of this monograph, it may be advisable to refer in passing to the rule thus laid down in a New York case with regard to the liability of a guarantor or surety of an ultra vires contract: "The defendant cannot be permitted to show that this bond is invalid on the ground that it was issued by the corporation for a purpose not authorized by its charter. The guaranty of payment of the bond by the defendant imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers."¹⁰

163 (corporation promised to pay rent owed by third person, if the plaintiff would cancel that person's lease).

⁸In *Baltimore United German Bank v. Katz* (1881) 57 Md. 128, the court, commenting upon *Lazear v. National Union Bank* (1879) 52 Md. 78, 36 Am. Rep. 355, remarked: "We do not understand that case to establish that where there is entire privity between the parties recovery may not be had. In that case the suit was upon the guaranty of the defendant, and he was not found to have been privy to the transaction by which the money was procured. The distinction is material and substantial. It is the person who actually participates in the contract that is to be held liable in the case of an executed contract, under the rule laid down in the authorities cited." The case before the court was distinguished on the ground that the defendant had indorsed the note in question with the knowledge that it was to be discounted by the plaintiff bank when he had indorsed it. "Whether he received the money personally or not is immaterial, if by his procurement someone else did get the money on the faith of what he did. It was all one transaction."

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In *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (1905) 102 Md. 307, 2 L.R.A. (N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351 (guaranty of hotel company's bonds by railway company), it was laid down that, in order that the principle of estoppel may operate, "the fruits or benefits of the contract must have been received from the other contracting party, and not from outside parties."

⁹In *St. Louis Drug Co. v. Robinson* (1888) 10 Mo. App. 588, a company which had been compelled to pay a note indorsed by it for accommodation of defendant was held to be entitled to recover. Only a memorandum report of this case is given, and it is not stated whether the contention was raised that the payment by the plaintiff was voluntary in such a sense as to preclude him from enforcing his claim. It is apprehended that this defense was available, in view of the doctrine previously laid down by the court in *Lafayette Sav. Bank v. St. Louis Stoneware Co.* (1876) 2 Mo. App. 299 (see note 6, supra), there being, so far as the report shows, no independent consideration moving between the indorser and payee.

¹⁰*Remsen v. Graves* (1869) 41 N. Y. 471,

47. Express representation by the corporation that the contract was valid, effect of.

The fact that the corporation had expressly assured the other party that the contract in question was within the corporate powers, and that this representation was relied upon, has sometimes been adverted to as an element which furnished an appropriate foundation for an estoppel.¹ Clearly it cannot in any event possess more than a merely cumulative significance in any case where the rest of the evidence is such as to justify the predication of an estoppel either on the ground that the defendant had received the benefits of the contract, or on the ground that the plaintiff had suffered a positive detriment from entering into it. But reliance upon it as a distinct element would seem to be logically indefensible, for the reason that the person to whom the representation was made must be assumed to have the same means as the corporation itself regarding the extent of its contractual capacity. See § 34, *supra*, and § 58, *infra*.

48. Applicability of doctrine in respect to public corporations.

In a treatise of very high authority we find the following statement: "Up-

on a contract which is ultra vires in the true sense of that expression, that is, upon a contract relating to matters wholly outside of the chartered powers of the corporation, there is no liability upon the contract; and the corporation is not estopped to set up the defense."¹ Proceeding upon the theory thus propounded, some of the courts by which the doctrine of estoppel has been adopted have explicitly declared that there is in respect to its applicability a distinction between public and private corporations.² A general discussion of this theory would carry us beyond the scope of the present monograph. All that is here necessary is to remind the practitioner that it is not universally accepted.³

49. Applicability of doctrine in respect to quasi public corporations.

The theory that the doctrine of estoppel is not applicable to quasi public corporations, and that they are distinguishable in this respect from private corporations, has been propounded in some cases.¹ The consideration to which this theory is referred is that it is expedient to prevent them from doing acts which may disqualify them from discharging their duties to the public.² But

followed in Minneapolis F. & M. Mut. Ins. Co. v. Norman (1905) 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229, 4 Ann. Cas. 1045. As to the general rule that sureties are estopped from denying the recitals of their bonds, see Brandt on Suretyship, § 50.

¹ Williams v. Verity (1903) 98 Mo. App. 654, 73 S. W. 732; CREDITORS' CLAIM & ADJUSTMENT CO. v. NORTHWEST LOAN & T. Co. ante, 737.

² 2 Dill. Mun. Corp. 4th ed. § 935.

³ See, for example, Brewer, J., in Chicago, R. I. & P. R. Co. v. Union P. R. Co. (1891) 47 Fed. 16; United States Sav. & L. Co. v. Convent of St. Rose (1904) 66 C. C. A. 416, 133 Fed. 354; Kellogg-Mackay Co. v. Havre Hotel Co. (1912) 118 C. C. A. 165, 199 Fed. 727; Burnes v. Burnes (1904) 132 Fed. 485; Bradley v. Ballard (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563; East St. Louis v. East St. Louis Gaslight & Coke Co. (1881) 98 Ill. 433, 38 Am. Rep. 97 (Walker, J., in concurring opinion); Valparaiso v. Valparaiso City Water Co. (1903) 30 Ind. App. 316, 65 N. E. 1063; Athearn v. Independent Dist. (1871) 33 Iowa, 105.

For some remarks with regard to the Federal cases above cited, see § 69, *infra*.

⁴ For cases in which the doctrine of estoppel was declared to be applicable in respect to municipal corporations, see Pine Grove Twp. v. Talcott (1873) 19 Wall. (U. S.) 666, 22 L. ed. 227; San Antonio v. Mehaffy (1877) 96 U. S. 312, 24 L. ed. 816 (arguendo); Hitchcock v. Galveston (1877) L.R.A.1917A.

96 U. S. 341, 24 L. ed. 659; Detroit v. Detroit City R. Co. (1893) 56 Fed. 867; Argenti v. San Francisco (1860) 16 Cal. 255; Fremont County v. Warner (1900) 7 Idaho, 367, 63 Pac. 106; Weber v. Scott County Agri. Soc. (1876) 44 Iowa, 239; Coit v. Grand Rapids (1898) 115 Mich. 499, 73 N. W. 811; Wilkins v. New York (1894; Com. Pl.) 9 Misc. 610, 62 N. Y. S. R. 89, 30 N. Y. Supp. 424; Kansas City ex rel. Diamond Brick & Tile Co. v. Schroeder (1906) 196 Mo. 281, 93 S. W. 405; Allegheny City v. McClurkin (1850) 14 Pa. 82.

In Charlotte Twp. v. Piedmont Realty Co. (1903) 134 N. C. 41, 46 S. E. 723, it was laid down that the doctrine of estoppel applies even where the contract in question was made with a municipal corporation in direct violation of constitutional restriction, or of the law of public policy. But it is apparent that quite apart from the significance, if any, to be ascribed to the public character of the corporation, this extreme theory is irreconcilable with the rule generally recognized, that the doctrine is not applicable to expressly prohibited contracts.

⁵ United States Sav. & L. Co. v. Convent of St. Rose (1904) 66 C. C. A. 416, 133 Fed. 354; Quinby v. Consumers' Gas Trust Co. (1905) 140 Fed. 362; Kellogg-Mackay Co. v. Havre Hotel Co. (1912) 118 C. C. A. 165, 199 Fed. 727.

⁶ Bowman v. Foster & L. Hardware Co. (1899; C. C.) 94 Fed. 592, cited in White-

the possibility of such disqualification seems altogether too remote a risk to furnish the basis of a general rule; and the preponderance of authority is decidedly in favor of the view that corporations of this kind come within the scope of the principle of estoppel.³

50. Estoppel as affecting the right of a corporation to be released from an ultra vires contract.

It is obvious that, where a corporation brings a suit of which the specific purpose is the annulment of an ultra vires contract, or in which a claim is advanced

which cannot be enforced unless the contract is treated as nonobligatory, the ultimate and essential question presented is whether the defendant could maintain an action upon the same contract against the plaintiff. This consideration is indicative of one of the grounds upon which courts which accept the doctrine of estoppel have proceeded in determining the remedial rights of the corporation in such a suit; viz., that it "cannot repudiate an executed contract of which it has received the benefits on the ground that such contract is ultra vires."¹

But, as a suit of this description is

head v. American Lamp & Brass Co. (1905) 70 N. J. Eq. 581, 62 Atl. 554.

³ In the following cases the principle was applied without any question being raised as to its applicability: *Arkansas & L. R. Co. v. Stroude* (1905) 77 Ark. 109, 113 Am. St. Rep. 130, 91 S. W. 18; *Peoria & S. R. Co. v. Thompson* (1882) 103 Ill. 187; *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702; *Hanna v. Chicago, R. I. & P. R. Co.* (1913) 89 Kan. 503, 132 Pac. 154; *Canal & C. R. Co. v. St. Charles Street R. Co.* (1892) 44 La. Ann. 1069, 11 So. 702; *Dewey v. Toledo, A. A. & N. M. R. Co.* (1892) 91 Mich. 351, 51 N. W. 1063; *Singer v. St. Louis, K. C. & N. R. Co.* (1879) 6 Mo. App. 427; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* (1886) 48 N. J. L. 530, 7 Atl. 523; *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258 (under theory of Chief Justice Comstock); *Buffett v. Troy & B. R. Co.* (1869) 40 N. Y. 168; *Cunningham v. Massena Springs & Ft. C. R. Co.* (1892) 63 Hun. 439, 44 N. Y. S. R. 723, 18 N. Y. Supp. 600, affirmed in (1893) 138 N. Y. 614, 33 N. E. 1082; *Usher v. New York C. & H. R. Co.* (1902) 76 App. Div. 422, 78 N. Y. Supp. 508, affirmed in (1904) 179 N. Y. 544, 71 N. E. 1141; *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* (1876) 83 Pa. 160, 2 Mor. Min. Rep. 421; *Dorsett v. Black Hills Traction Co.* (1912) 30 S. D. 420, 138 N. W. 808, Ann. Cas. 1916A, 846; *Texas Western R. Co. v. Gentry* (1888) 69 Tex. 625, 8 S. W. 98; *Lottman Bros. Mfg. Co. v. Houston Waterworks Co.* (1896) — Tex. Civ. App. —, 38 S. W. 857; *Miller v. Washington Southern R. Co.* (1895) 11 Wash. 414, 39 Pac. 673; *Bigelow v. Chicago, B. & N. R. Co.* (1899) 104 Wis. 109, 80 N. W. 95.

In *Beach v. Wakefield* (1899) 107 Iowa, 567, 76 N. W. 688, where a railway company had incurred a debt exceeding the statutory limit, the court thus dealt with the contention that the doctrine of estoppel was not applicable: "It is true that a railroad corporation has a dual character, that in many respects it is of a public nature, and that the courts will not enforce against such a corporation a contract which will disable it from performing its duties to the government or the people. . . . But we repeat that this mortgage has no such L.R.A.1917A.

effect. On the other hand, a railroad company is in many respects a purely private corporation. It is organized in this state under the same section of the Code which provides for the incorporation of all other companies for pecuniary profit. The restriction as to indebtedness applies to all corporations organized under this section. Under ordinary circumstances, we see no reason for distinguishing between them."

¹ *Fidelity Ins. Co. v. German Sav. Bank* (1905) 127 Iowa, 591, 103 N. W. 958. There the court rejected the contention that the acquisition of certain stock by the plaintiff company in the defendant bank was ultra vires, and that plaintiff was therefore entitled to disregard it, and recover from the defendant the balance of plaintiff's deposit in the bank of which the defendant was the successor.

In *Mahaska County R. Co. v. Des Moines Valley R. Co.* (1870) 28 Iowa, 437, where one railroad company sought to recover the franchises, right of way, and roadbed which it had sold to another company, the grounds upon which the plaintiff was held to be estopped from claiming the property were thus stated: "The stockholders and directors stood by with a full knowledge of all the facts, of all that was done, of their claims, of the thousands of dollars being expended by defendant, of the fact that defendant was day after day placing its property, upon the faith of this agreement, in a condition that constitutes it a part, and a large part, of a very extensive and valuable public work; and upon no legal or equitable principle can they be allowed now to recover this property."

In *Iowa Drug Co. v. Sowers* (1908) 139 Iowa, 72, 19 L.R.A.(N.S.) 115, 117 N. W. 300, the reasons assigned for holding that an action for the cancellation of the shares held in the plaintiff company by the defendant, who had sold his business to the company when it appointed him to be its manager, was not maintainable, were thus stated: "It would be most inequitable for the court to hold that the plaintiff could rescind the transaction on the ground of ultra vires, after the value of defendant's retail business had been destroyed in consequence of the express request of plaintiff's board of directors, in order to secure for

essentially equitable in its nature, it is clear that, in another point of view, the inability of the corporation to obtain relief unless it consents to restore the benefits which it received under the contract may also be predicated with reference to the general principle, "He who seeks equity must do equity."² Compliance with this principle will be enforced by means of an injunction, if the circumstances are such as to render that method appropriate.³

51. Stockholders' assent considered as an element raising an estoppel against the corporation itself.

An adoption of the principle of estoppel, as predicated from the conduct of a corporation acting in its corporate capacity, seems to involve, as a necessary concomitant, an acceptance of the doctrine that an estoppel may be created by assent of all the individual stockholders to the ultra vires transaction and what

was subsequently done with reference to it. For this view there is explicit authority.

The rule prevailing in New York has been thus stated in a leading case: "In the application of the doctrine of ultra vires, it is to be borne in mind that it has two phases: One, where the public is concerned; one, where the question is between the corporate body and the stockholders in it, or between it and its stockholders, and third parties dealing with it and through it with them. When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail. . . . A corporation may do acts which affect the public to its harm, inasmuch as they are per se illegal or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal,

itself the value of defendant's exclusive services."

In *Tierney v. Butler* (1909) 144 Iowa, 553, 123 N. W. 213, an action brought by the trustees in bankruptcy of a company to procure the rescission of a repurchase of the defendant's shares, effected in pursuance of an option reserved, was held not maintainable.

In *Brown v. Atchison* (1888) 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465, where suit was brought by a municipal corporation to have certain bonds canceled, the decision was based upon the principle thus enunciated: "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the corporation to make it, or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity toward the other party, by either rescinding the contract and placing the other party in *statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit." The court cited *Paul v. Kenosha*, 22 Wis. 272, 94 Am. Dec. 598, where the plaintiff, who had purchased the bonds of the defendant, which were void for want of power to issue them, was L.R.A.1917A.

held to be entitled to recover the amount paid.

In *Graton & K. Mfg. Co. v. Redelsheimer* (1902) 28 Wash. 370, 68 Pac. 879, where the action, which was held not to be maintainable, was brought to recover the amount of three checks drawn in favor of the plaintiff company and payable to its order, the allegation being that these checks were wrongfully and without its authority indorsed in its name by its agent, and delivered to the defendant, who collected the amounts and absconded after having refused to turn over the proceeds to the plaintiff, the court said: "The doctrine of ultra vires, so far as we are aware, has never been invoked successfully when the purpose was to permit a corporation to recover money paid by it for the purchase of goods which it had received and appropriated to its own use."

See also *Garrison Canning Co. v. Stanley* (1907) 133 Iowa, 57, 110 N. W. 171; *Northland Produce Co. v. Stephens* (1911) 116 Minn. 23, 133 N. W. 95.

² For cases decided on this footing, see *Memphis & L. R. Co. v. Dow* (1884) 22 Blatchf. 48, 19 Fed. 388, affirmed in (1886) 120 U. S. 287, 30 L. ed. 595, 7 Sup. Ct. Rep. 482, on the ground that the bonds which the plaintiff sought to annul were *intra vires*; *Jenson v. Toltec Ranch Co.* (1909) 98 C. C. A. 60, 174 Fed. 86; *Wright v. Hughes* (1889) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Thompson v. Lambert* (1876) 44 Iowa, 239; *Buford v. Keokuk Northern Line Packet Co.* (1879) 69 Mo. 611; *Pocantico Waterworks Co. v. Low* (1897; Sup. Ct. Spec. Term) 20 Misc. 484, 46 N. Y. Supp. 633; *Pittsburg, J. E. & E. R. Co. v. Altoona & B. C. R. Co.* (1900) 196 Pa. 452, 46 Atl. 431.

³ *Atlantic & P. Tele. Co. v. Union P. R. Co.* (1880) 1 McCrary, 541, 1 Fed. 748.

though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance upon those acts."¹

This statement may be supplemented by another, extracted from the opinion in a New Jersey case: "In a case in which no question of public policy is concerned, and therefore the rights of the state or of the public are not involved, and where no creditors exist, and all of the stockholders have assented to the action, I do not see upon what basis the plea of ultra vires can be rested. When the rights of the state, the public, and creditors are eliminated, and only the rights of stockholders are involved, the form of the fictional body termed a corporation does not hamper the court in the least in dealing with the rights of the parties. And that which the individuals composing the corporation might do, and will be held to have

done among themselves, will be dealt with without regard to the immaterial fact that they were members of a fictional body. No citation of cases is necessary to establish the well-settled doctrine that courts of equity will disregard the corporate form where justice requires it, and its retention is not needed to protect some interest requiring protection. To permit stockholders of corporations to unanimously make a disposition of the corporate property where no one else's rights are in any way prejudiced, and afterwards to repudiate their action upon the ground that it was beyond the power of the fictional body to do the act, could serve no useful purpose, and would be merely available in aid of fraud."²

Similar views have been expressed in cases decided by other courts.³

In order to create an estoppel against the corporation on this footing, it is of course necessary that all the stockholders should have assented to the contract in question.⁴

¹ *Kent v. Quicksilver Min. Co.* (1879) 78 N. Y. 159, 4 Mor. Min. Rep. 47. This exposition of doctrine was approved in *Martin v. Niagara Falls Paper Mfg. Co.* (1890) 122 N. Y. 165, 25 N. E. 303; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.* (1882) 90 N. Y. 607.

For a case in which the same doctrine was applied by an inferior court, see *Pocantico Waterworks Co. v. Low* (1897; Sup. Ct. Spec. Term) 20 Misc. 484, 46 N. Y. Supp. 635.

In *First Nat. Bank v. Guardian Trust Co.* (1905) 187 Mo. 494, 70 L.R.A. 79, 86 S. W. 109, the court, after quoting the passage in the text, remarked: "The conclusions reached in this case, however, do not rest upon the doctrine of ratification, and it is unnecessary to express an opinion as to our approval of this sweeping rule announced in the case cited by the New York court upon that subject; the weight of authority and the better reasons seem to be that, where the corporation has absolutely no authority to perform the act, the ratification by the stockholders would not make it valid." This language presumably refers to the later of the New York cases, and as nothing was said about the earlier one, we are left in doubt as to whether the court intended to intimate that its expression of disapproval covered only the theory that an ultra vires contract can be ratified, or to condemn also the notion of an indirect validation by means of an estoppel.

² *Perkins v. Trinity Realty Co.* (1905) 69 N. J. Eq. 731, 61 Atl. 167. One of the precedents cited was *Breslin v. Fries-Breslin Co.* (1903; Err. & App.) 70 N. J. L. 274, 58 Atl. 313. There the invalidity of the contract L.R.A.1917A.

in question arose from a merely formal defect; but the court adopted the general statement in 4 *Thompson on Corporations*, § 5269, which is quoted at the beginning of the next section. The *Kent Case*, note 1, supra, was also cited with approval.

³ *Central Trust Co. v. Columbus, H. Valley & T. R. Co.* (1898) 87 Fed. 815; *Murphy v. Arkansas & L. Land & Improv. Co.* (1899) 97 Fed. 723; *Butterworth v. Kritzer Mill. Co.* (1897) 115 Mich. 1, 72 N. W. 990; *Boyce v. Montauk Gas Coal Co.* (1892) 37 W. Va. 73, 16 S. E. 501.

"If for any cause all of the shareholders in a corporation are not entitled to this defense, it will necessarily result that their trustee [i. e., the corporation] could not invoke it for their benefit." *Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & T. Co.* (1916) 169 Ky. 840, 185 S. W. 158, citing the *Perkins Case*, note 2, supra, and approving the following statement in *Cook on Corporations*, 7th ed. vol. 1, § 3, p. 16: "The old theory of a corporation was that it could not legally do anything in excess of its express and implied powers, but the modern view is that a private corporation may if all its stockholders assent and if creditors are paid."

The above cited Federal cases are, it should be observed, some of the rather large number of those in which the inferior Federal courts have disregarded the theory of the Supreme Court with regard to estoppel. They are therefore of no weight as precedents except in state courts which accept the principle of estoppel.

⁴ *Pittsburg & S. R. Co. v. Allegheny County* (1875) 70 Pa. 211, where it was observed that, while the assenting shareholders

52. — against the assenting stockholders.

(a) In cases where it is sought to charge stockholders with liability on the contract.

In a well-known text-book it is laid down that "the body of stockholders are in substance the corporation, that estoppels are concurrent as between the stockholders and the corporation—in other words, that whatever will estop the stockholders will estop the corporation, and whatever will estop the corporation will estop the stockholders."¹ This general rule has been applied in several cases in which it was held or assumed that stockholders were individually liable, because the defense of ultra vires was not available to the corporation it-

self under the given circumstances.² This consideration is manifestly operative and controlling irrespective of whether the defendant stockholder has or has not acted so as to create an estoppel against himself personally. But such conduct may constitute, and has often been specified as constituting, an independent ground for imposing liability upon him. In this point of view he will be precluded from alleging the invalidity of the contract, where the evidence establishes his assent to the contract in question,³ or his acceptance of benefits accruing from it,⁴ or both these facts, as is usually the actual situation, whether they are both mentioned or not.⁵ He may also be held liable on the ground of his having participated as an

might be estopped from impugning the validity of a subscription contract, yet, "as it could not affect such as did not assent to it, or those who subsequently subscribed, an estoppel could not be worked against the company."

¹ 4 *Thomp. Corp.* 1st ed. § 5269, quoted with approval in *Breslin v. Fries-Breslin Co.* (1903) 70 N. J. L. 274, 58 Atl. 313.

* *Main v. Casserly* (1885) 67 Cal. 127, 7 Pac. 426; *Ossipee Hosiery & Woolen Mfg. Co. v. Canney* (1874) 54 N. H. 295; *Indiana v. Woram* (1843) 6 Hill (N. Y.) 33, 40 Am. Dec. 378. See also *Kipp v. Miller* (1910) 47 Colo. 612, 135 Am. St. Rep. 236, 108 Pac. 164, where, however, the court was clearly mistaken in distinguishing the case of *Ward v. Joslin* (1901) 186 U. S. 142, 46 L. ed. 1093, 23 Sup. Ct. Rep. 807, as being one in which liability was denied for the reason that neither the bank in which the defendant was a stockholder, nor the defendant himself, derived any benefit from the transaction under review. That case really proceeded upon the broad doctrine, accepted by the Federal Supreme Court, that the defense of ultra vires cannot be excluded by the operation of the principle of estoppel. See § 68, *infra*.

In *Shiflett v. John W. Kelly & Co.* (1915) 16 Ga. App. 91, 84 S. E. 606, where the action was brought to recover for supplies furnished to the steward of a locker club operated by a fraternal insurance company, he was held liable as having warranted his authority. The liability of all the individual members of the club was also affirmed.

For a case in which a stockholder was held to be estopped from denying the validity of the organization of the corporation, see *McDonnell v. Alabama Gold L. Ins. Co.* (1888) 85 Ala. 401, 5 So. 120.

* *Lurton, J., in Central Trust Co. v. Columbia, H. Valley & T. R. Co.* (1898) 87 Fed. 815; *Wells v. Northern Trust Co.* (1902) 195 Ill. 288, 63 N. E. 136; *Fourth Nat. Bank v. Olney* (1886) 63 Mich. 63, 29 N. W. 513; *Clark v. E. C. Clark Mach. Co.* (1908) 151 Mich. 416, 115 N. W. 416; *Cole v. Cole L.R.A.* 1917A.

Realty Co. (1912) 169 Mich. 347, 135 N. W. 329; *Live Stock Assn. v. Levy* (1886) 22 Jones & S. (N. Y.) 32.

* *Citizens' State Bank v. Hawkins* (1896) 18 C. C. A. 78, 34 U. S. App. 423, 71 Fed. 369 (receipt of dividends: but this decision is not consistent with the more recent rulings of the Supreme Court); *Mitchell v. Beckman* (1883) 64 Cal. 117, 28 Pac. 110 (receipt of dividends); *Kipp v. Miller* (1910) 47 Colo. 598, 135 Am. St. Rep. 236, 108 Pac. 164 (receipt of profits of ultra vires business which stockholders knew to be carried on); *Browning v. Mullins* (1890) 12 Ky. L. Rep. 41, 13 S. W. 427; *Heironimus v. Sweeney* (1896) 83 Md. 146, 33 L.R.A. 99, 55 Am. St. Rep. 333, 34 Atl. 823 (enjoyment of benefits of loan); *McNab v. McNab & H. Mfg. Co.* (1891) 62 Hun, 18, 16 N. Y. Supp. 448, affirmed in (1892) 133 N. Y. 687, 31 N. E. 627 (receipt of dividends); *Leighton v. Leighton Lea Assn.* (1911) 74 Misc. 229, 131 N. Y. Supp. 563, reversed in (1911) 146 App. Div. 255, 130 N. Y. Supp. 935 (enjoyment of benefits of certain method of transacting business).

For cases in which the receipt of benefits was assigned as the ground for enforcing the liability of companies as stockholders in other companies, see *Strong v. O'Neill* (1879) Fed. Cas. No. 13,543a; *McCarthy v. Lavasche* (1878) 89 Ill. 270, 31 Am. Rep. 83 (estoppel against averring that charter was unconstitutional); *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 365; *Hunt v. Hauser Malting Co.* (1905) 95 Minn. 206, 103 N. W. 1032.

In *Assets Realization Co. v. Howard* (1911; Sup. Ct. Eq. Term) 70 Misc. 651, 127 N. Y. Supp. 798, it was held that a stockholder in a bank, who was also a depositor, did not, by accepting payment of his deposit, estop himself from contesting the validity of a liquidation agreement involving a transfer of the bank's assets to another bank.

* "It is equally well settled that when the stockholders assent to such contract, and the avails of the contract are used for their

official of the corporation in the execution of the contract.⁶

(b) In cases where stockholders are seeking an annulment of the contract.

The authorities so far cited include only cases in which it was sought to affect shareholders with a personal liability. But the discussion of the subject would be incomplete without a reference to the analogous cases in which the principle of an estoppel, as predicated from the acceptance of benefits, is treated as a ground for refusing relief to stockholders who are seeking to have an ultra vires contract annulled,^{6a} or to restrain its performance.⁷ The estoppel

in such cases manifestly takes effect only as regards such stockholders as have assented, expressly or impliedly, to what has been done in pursuance of the contract.⁸ Moreover, if the contract is divisible, their assent does not create any estoppel except in respect of the portion which has been already executed. This partial performance does not prevent them from maintaining a suit for the cancellation of the unperformed residue.⁹ Compare the cases cited in § 3, supra.

The principle of estoppel may also be successfully invoked where the object of the stockholders was to procure a declaration that the corporation was an illegal body,¹⁰ or that the transaction of

benefit, they cannot avoid such contract." *Witter v. Grand Rapids Flouring Mill Co.* (1891) 78 Wis. 546, 47 N. W. 729.

In *Sumner v. Marcy* (1847) 3 Woodb. & M. 105, Fed. Cas. No. 13,609, the conclusions of the court were thus stated: "I think the company transcended its legitimate powers in buying the shares, but do not think that a stockholder can, in law, be exonerated from his statutory responsibility in cases generally, however much he may individually resist or protest against a purchase. If he still continues a member, not selling out or abandoning his membership before the purchase, and the purchase is found to have been legal, the legal consequences must attach to him, however indisposed he was towards the transaction. He must not remain a member, in such a case, and take the benefit of the purchase. If he does, he must bear its burden as imposed by law, when the purchase is legal."

⁶ In *Moss v. Averell* (1853) 10 N. Y. 449, where the action was brought against the president of a company, the court thus stated its conclusions: "The defendant signed the contract and the notes as president of the corporation. He thus affirmed the transaction to have been authorized by the corporation, and to be such a one as they had a right to enter into. On well-settled principles, he is estopped to assert its invalidity. The act on his part amounts to an assertion that the corporation had a right to make the purchase, and that the proper managing agents of the corporation had authorized it to be made."

^{6a} *Dimpfel v. Ohio & M. R. Co.* (1879) 9 Biss. 127, Fed. Cas. No. 3,918; *Bridges v. Southern Bell Teleph. Co.* (1911) 136 Ga. 251, 71 S. E. 161; *Traer v. Lucas Prospecting Co.* (1904) 124 Iowa, 107, 99 N. W. 290; *Kent v. Quicksilver Min. Co.* (1879) 78 N. Y. 159, 4 Mor. Min. Rep. 47; *Hill v. Atlantic & N. C. R. Co.* (1906) 143 N. C. 539, 9 L.R.A.(N.S.) 606, 55 S. E. 854; *McCampbell v. Fountain Head R. Co.* (1903) 111 Tenn. 55, 102 Am. St. Rep. 731, 77 S. W. 1070; *Steger v. Davis* (1894) 8 Tex. Civ. App. 23, 27 S. W. 1068.

In *Wormser v. Metropolitan Street R. Co.* L.R.A.1917A.

(1906) 184 N. Y. 83, 112 Am. St. Rep. 596, 76 N. E. 1036, 6 Ann. Cas. 123, affirming (1904) 98 App. Div. 29, 90 N. Y. Supp. 714, the law was thus laid down: "Where the objection to the acts of a corporation is that they are ultra vires, without being either mala prohibita or mala in se, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi estoppel, as Mr. Bigelow puts it (Bigelow, *Estoppel*, 4th ed. chap. 19), or be denominated merely an acquiescence or an election or the assumption of a position inconsistent with an attack, makes no essential difference here. The point is that the seeking and acceptance of a substantial benefit which would be unavailable to the stockholders except as a result of the acts which he would attack as ultra vires preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, after he has knowingly sought and obtained pecuniary advantages, pay, or compensation under and by virtue of such contract."

⁷ *Venner v. Atchison, T. & S. F. R. Co.* (1886) 28 Fed. 581.

⁸ *McConnell v. Combination Min. & Mill. Co.* (1904) 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194, affirmed on rehearing in (1905) 31 Mont. 563, 79 Pac. 248.

⁹ *Tippecanoe County v. Lafayette, M. & B. R. Co.* (1875) 50 Ind. 85 (suit to avoid traffic agreement extending over ninety-nine years).

¹⁰ *Johnson v. Mercantile Trust & D. Co.* (1894) 94 Ga. 324, 21 S. E. 576 (on demurrer). The conclusions of the court were thus stated: "These stockholders who are now complaining stood by and saw the powers of this company increased by the legislature and its name changed, and made no objection. They knew for nearly five years that it was performing all the acts of a corporation, running its road, con-

the corporate business in another state was unauthorized.¹¹

It is scarcely necessary to point out that in many of the cases in which the ratio decidendi has been an estoppel, the evidence is such as to justify also the inference of such laches as will justify a court in holding the action not to be maintainable.¹²

52a. Doctrine of estoppel treated as a ground for refusing injunction to restrain an action at law.

If the circumstances are such as to create an estoppel against interposing the defense of ultra vires in a pending action against the corporation, there is clearly no ground upon which a court can entertain an application for an injunction to restrain the proceedings.¹

53. Doctrine of estoppel considered with reference to the common-law rule which precludes a tenant of real estate from denying his landlord's title.

In a case involving a claim for the rent accruing under a lease of the property and privileges of a corporation, it was held that, irrespective of whether the lease was ultra vires or not, the lessee was, so far at all events as the contract had been executed, estopped under an elementary principle of the law of landlord and tenant, from contesting the validity of the conveyance by which he had acquired possession of the leased property.¹ Contrast the doctrine laid down in § 31, supra.

54. Applicability of doctrine in cases where the state is the complainant.

In a case where proceedings instituted by a corporation to cancel a tax imposed for the privilege of exercising its franchise were held not to be maintainable, the court proceeded upon the ground

that "the relator chose to avail itself of the advantages of having the title to the 230 acres taken, held, and conveyed by a corporation, and it is therefore estopped to claim as against the state that it has no franchise authorizing it to deal in real property."¹

IX. Rationale of the doctrine that a corporation which has received the benefits of an ultra vires contract cannot resist an action brought to enforce it.

55. Doctrine based upon an assumed distinction between ultra vires and illegal contracts.

This aspect of the doctrine under review has been discussed in an earlier subtitle, and does not require any further notice in the present connection.

56. Doctrine referred to the conception of an estoppel.

The inability of a defendant to avail himself of the plea of ultra vires in an action brought upon a contract which the plaintiff has performed on his side is, in the great majority of instances, referred explicitly to the conception of an estoppel predicated from the receipt and retention of the benefits of the contract. The cases which sustain this statement have been tabulated in § 42, supra.

57. Objections to this theory: (1) Predication of an estoppel virtually operates so as to validate a prohibited contract.

A court which declares that a corporation may be estopped from interposing the defense of ultra vires virtually commits itself to the theory that a contract invalid in its inception may in effect be validated by subsequent conduct. Such a theory is plainly opposed to all legal

tracting debts, and issuing bonds; and now that the corporation has failed to pay the interest on its bonds and has been put into the hands of a receiver, these stockholders come forward and claim that it was an illegal corporation, and that their part of the property belonging to the original corporation is not bound for these debts. To allow this claim would be manifest injustice, and no court of conscience should allow it."

¹¹ Rio Grande Cattle Co. v. Burns (1891) 82 Tex. 50, 17 S. W. 1043.

¹² See, for example, Lancaster County v. Lincoln Auditorium Assn. (1910) 87 Neb. 87, 127 N. W. 226; Hill v. Atlantic & N. C. R. Co. (1906) 143 N. C. 582, 9 L.R.A. (N.S.) 606, 55 S. E. 854. L.R.A.1917A.

¹ For a case involving such a situation, see Bradley v. Bullard (1870) 55 Ill. 417, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563.

¹ Woodruff v. Erie R. Co. (1883) 93 N. Y. 609.

¹ People ex rel. Coney Island Jockey Club v. Sohmer (1913) 155 App. Div. 842, 140 N. Y. Supp. 507, affirmed in (1914) 210 N. Y. 549, 104 N. E. 1137. See also People ex rel. Tiffany & Co. v. Campbell (1894) 144 N. Y. 166, 38 N. E. 990, and People ex rel. Western Electric Co. v. Campbell (1895) 145 N. Y. 587, 40 N. E. 239. In these, however, the conception of an estoppel was not explicitly relied upon.

analogy.¹ In any jurisdiction in which it is held that the contract cannot be validated by a voluntary ratification,—the only position which is tenable from a strictly logical standpoint,—this objection seems to be decisive. It is palpably inconsistent to take the position that liability may be predicated on the ground of what is, for practical purposes, though of course not in a precise juristic sense, a ratification predicated in invitum, but cannot be asserted on the

ground of a voluntary ratification.² Yet the anomaly of such a position has never, so far as the present writer is aware, been discussed by any of the courts which apply the doctrine of estoppel.³ They have simply ignored the anomaly, or, it may be, failed to realize its existence.⁴

This difficulty, of course, does not present itself in any jurisdiction in which the doctrine is avowedly accepted, "that a corporation may ratify even an ultra

¹ In *Hood v. New York & N. H. R. Co.* (1853) 22 Conn. 502, 9 Am. Neg. Cas. 149, the court said: "It is a question of power under the charter; and however individuals may be liable and estopped, who untruly hold themselves out as clothed with power, the defendants cannot be estopped on any such principle of law known to the court. The notion of an estoppel in pais, to which class, if any, this estoppel belongs, proceeds on the idea of acquiescence or consent; a consent expressly or impliedly given by the party claimed to be estopped. Of course, there must be a legal possibility, or there can be no real or supposed acquiescence and consent." There is an obvious want of precision in this statement, so far as it bases the notion of an estoppel upon a consent, expressed or implied. But it is suggestive of the real situation; viz., that the domains of fact within which the concepts of acquiescence and estoppel are operative are coextensive.

In *East St. Louis v. East St. Louis Gas-light & Coke Co.* (1881) 98 Ill. 415, Walker, J., made the following remarks in a concurring opinion: "It must follow that if a contract by a corporate body is void for the want of power to make it, such a body is equally powerless to ratify it, or to perform acts that would estop it from asserting its invalidity. There must be the same quantum of power to ratify a void, as is required to enter into a binding, contract. The stream can never rise higher than its source, and a contract void for want of power cannot be ratified or the body estopped, where the power is only the same and no greater than when it was first executed. This would seem to be axiomatic; but I am fully aware that some courts of respectability have announced an opposite rule, and some text writers have followed such decisions. But I can never indorse the doctrine, and dissent to it in its entire length and breadth."

In *Platter v. Elkhart County* (1885) 103 Ind. 361, 2 N. E. 544, the court remarked: "The acts of officers cannot bind the local public by estoppel where the officers performing these acts cannot bind them by a direct contract. It would be strange, indeed, if an estoppel could validate a sale of property made in violation of law, since, to allow an estoppel to so operate, would frustrate the purpose of the statute and enable the officers to do by indirect means

what they could not do by direct proceedings." The significance of this statement lies largely in the fact that it was made in a state in which the principle of estoppel is fully recognized with regard to private corporations.

² Nevertheless, in a state in which the doctrine of estoppel is fully accepted, we find the opinion expressed that, if the leases which it was the object of the suit to annul were ultra vires, the plaintiff had no power to ratify them by accepting rent. *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.* (1875) 4 Hun (N. Y.) 288, 6 Thomp. & C. 488. See also the Indiana case cited in note 1, supra.

³ The remarks of Walker, J., quoted in note 1, supra, were, it will be noticed, neither indorsed nor criticized by the other members of the court, who apparently approved the principle of estoppel.

⁴ It seems somewhat strange to find such remarks as the following in opinions delivered in cases in which the doctrine of an estoppel was recognized.

"A contract ultra vires the charter is void, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make, they cannot confirm. A void act can never become valid, merely because it remains unquestioned." *Tippencanoe County v. Lafayette, M. & B. R. Co.* (1875) 50 Ind. 112.

"Nor does the liability of the company rest upon the doctrine of ratification. In its ordinary legal acceptance ratification applies to such contracts as a party has authority to make. Repeated affirmations of a contract by one who has no authority to enter into it cannot supply the requisite authority. But acquiescence in it, upon which the other party acts, may, and does, upon settled legal principles, preclude the parties from starting the question of power as between themselves. There is, in fact, a subsisting contract actually executed in due and legal form, which, under the rule stated, is unimpeachable except at the instance of the state. It is thus, in legal contemplation, impressed with the vigor and incidents of a valid contract as between the parties, and there is no difficulty in enforcing it in a suit at law." *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* (1886) 48 N. J. L. 569, 7 Atl. 523.

vires act so as to bind itself when it has received and retained benefits on account thereof."⁵ Nor does it cause any embarrassment to a court which applies the doctrine that an ultra vires contract is binding upon the corporation whenever the evidence shows that it was made with the assent of all the stockholders of the corporation in question (see § 50, *supra*); or that they took no active steps to protect their interests after having had an opportunity to ascertain that it had been made, or that the agent of the corporation had with their acquiescence

engaged in the unauthorized business or enterprise to which it was incident.⁶ If their contemporaneous assent or subsequent acquiescence is regarded as operating so as to validate the contract, it would be an unreasonable refinement to deny that such validation may be effected by the subsequent conduct of the corporation itself, acting as such. But while a court which accepts one or other of the doctrines just adverted to may escape the dilemma which besets a court which adheres to the doctrine of estoppel and at the same time refuses to

⁵ *Bobzin v. Gould Balance Valve Co.* (1908) 140 Iowa, 744, 118 N. W. 40.

⁶ In *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258, Comstock, Ch. J., observed: "If these acts were an abuse of power, the shareholders had ample opportunity to prevent or arrest the abuse. But no complaint from them has ever been heard, and their acquiescence must be presumed."

In *Buffett v. Troy & B. R. R. Co.* (1862) 36 Barb. (N. Y.) 420, affirmed in (1869) 40 N. Y. 168, the two grounds upon which the defense of ultra vires was held not to be available were thus stated: "(1) The defendant had been long engaged in this stage business,—indeed, ever since it had existed as a corporation. This appears from the evidence. It must be presumed to have been known to the stockholders, who never in any way arrested it. (2) It must also be presumed, from the absence of evidence to the contrary, that the stockholders participated in the benefits of this arrangement, and thus approved and adopted the unauthorized acts of their directors and managers. In this particular instance they did the same thing as taking the money of the plaintiff and agreeing to transport him safely to Troy."

In *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563, the court, contrasting the liabilities of municipal and private corporations, said with regard to the latter: "If, to increase their profits, they embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers when they transgress the limits of their chartered authority."

In *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 26, 59 Am. Rep. 134, 9 Pac. 771, the court said: "While admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers, either expressly or by silence impliedly, assent to acts done on their behalf in excess of authority, they should be held estopped to deny that such acts were authorized." L.R.A.1917A.

In *Sherman Center Town Co. v. Morris* (1890) 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569, it was observed: "After a corporation has enjoyed the benefit of a contract or other arrangement made in good faith with any of its regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company. Under these circumstances, the acquiescence of the shareholders may often be presumed," the court citing 2 Morawetz, Priv. Corp. § 632.

In *Watts v. Equitable Mut. Life Assn.* (1900) 111 Iowa, 90, 82 N. W. 441, the court declared that "it is the duty of stockholders or members of a corporation to know what their own officers or managers are doing, and how they are and have been conducting the business of the corporation," and that, if the plaintiff was actually chargeable with notice, "it is but fair that his comembers shall be held to have had full knowledge of the contract with him."

In *Continental F. Assn. v. Masonic Temple Co.* (1901) 26 Tex. Civ. App. 139, 62 S. W. 930, the court reasoned thus: "The members of this corporation were presumably cognizant of the fact that the company was insuring outside of the state, and must have known that in so doing it was acting beyond its powers. They could have taken steps to prevent the exercise of such acts by electing officers who would keep its business within its charter, or by taking proceedings to dissolve the corporation for such excesses. Under these circumstances it would be more just and equitable that the loss should fall upon them rather than that the one thus insuring in good faith should lose his insurance."

In *Hunt v. Hauser Malting Co.* (1903) 90 Minn. 282, 96 N. W. 85, the court reasoned thus: "Assuming, as we must, that the defendant had no right to purchase the stock, it was open to the stockholders to repudiate such action when they heard of it, or for the state to interfere; but under the allegations of the complaint these acts were adopted and ratified by defendant's officers and stockholders, and we are unable to find any good argument, resting upon just considerations of fair play and common honesty, which should relieve it from the burdens it would not have incurred but for its own wrongful conduct."

concede that an ultra vires contract can be validated by ratification, it is nevertheless obvious that these doctrines are themselves of very disputable soundness, to say the least. It is not easy to see upon what logical ground a contract which, ex hypothesi, never acquired a legal existence, can be held to be convertible into an enforceable obligation either through the subsequent conduct of the corporation itself, or by the action of persons who, in a juristic sense, are distinct from it.

55. —(2) Estoppel predicated as to a situation which lacks an essential element of that concept.

Another objection to the admission of the principle of estoppel as a controlling factor in cases of the type under discussion is suggested by the consideration that one of the essential elements of an

estoppel, as it is commonly defined and understood, is the misleading of the party in whose favor the estoppel is predicated.¹ Where an ultra vires contract is in question, there is apparently no ground upon which such misleading can be implied consistently with the general rule that one who deals with a corporation is presumed to have notice of the extent and character of its powers. See §§ 2 and 34, supra. So far as appears from the language ordinarily used by the courts, the presumption contemplated by this rule is one of law, and not merely of fact. Even in jurisdictions in which the doctrine of an estoppel prevails, the imputation of notice has been affirmed without qualification, and in a form which renders immaterial the question whether the statute which defines the powers of a given corporation is public or private.² The difficulty of reconciling the doctrine with the pre-

1 "An estoppel can never arise by implication alone except from some conduct which induces action in reliance upon it, to an extent that renders it a fraud to recede from what the party has been induced to expect." *Security Ins. Co. v. Fay* (1871) 22 Mich. 468, 7 Am. Rep. 670, quoted with approval in *Montgomery v. Whitbeck* (1903) 12 N. D. 385, 96 N. W. 327.

"It is well settled that where both the parties to a transaction have equal knowledge, or means of knowledge, of all the facts, there can be no valid estoppel." *Leonard v. American Ins. Co.* (1884) 97 Ind. 299, quoted in *Platter v. Elkhart County* (1885) 103 Ind. 360, 2 N. E. 544.

"The rule is that, to constitute a valid estoppel by conduct, there must be knowledge on the part of the person to be estopped, and a want of knowledge on the part of the party relying on the estoppel, and there can be no estoppel when there is notice or knowledge on the part of the person relying upon the estoppel." *Franklin Nat. Bank v. Whitehead* (1898) 149 Ind. 560, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N. E. 592.

The notion of a deception practised upon a person with imperfect knowledge of the conditions is clearly involved by implication in the following passage, which is a locus classicus upon the subject: "Where one by his word or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." *Lord Denman in Pickard v. Sears* (1837) 6 Ad. & El. 469, 112 Eng. Reprint, 179, 11 Eng. Rul. Cas. 78.

Compare also the following words of Lord Blackburn in *Burkinshaw v. Nicolls* (1878) L. R. 3 App. Cas. (Eng.) 1026: "When L.R.A.1917A.

a person makes to another the representation, 'I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist,' and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that, between those two parties, their rights should be regulated not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel in pais or homologation."

In *Laws of England* (Halsbury), sub voce "Estoppel," vol. 13, p. 323, we find the following statement: "Where one has either by word or conduct made to another a representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that other has acted on such representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be."

"Everyone knows that corporations are artificial creations existing by virtue of law, and organized for purposes defined in their charters; and he who deals with one of them is chargeable with notice of the purpose for which it was formed; and when he deals with agents or officers of one of them, he is bound to know their powers and the extent of their authority. Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority." *Alexander v. Cauldwell* (1880) 83 N. Y. 480, 4 Mor. Min. Rep. 650. See also *Jemison v. Citizens' Sav. Bank* (1890)

sumption is manifest.³ In fact the present writer has no hesitation in saying that it seems to him to be insuperable, as long as the presumption of knowledge concerning the powers of a corporation is regarded as one of law.^{3a}

Some courts which have recognized the impropriety of predicating an estoppel

in cases where knowledge of the actual condition is imputable have advanced the somewhat surprising proposition that the application of that principle, although logically erroneous under such circumstances, is defensible on the ground that it is productive of equitable results.⁴ This loose method of dealing

122 N. Y. 140, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264, in which similar phraseology was used.

In *Veeder v. Mudgett* (1884) 95 N. Y. 296, the court thus expressed its approval of the decision in *Scovill v. Thayer* (1881) 105 U. S. 143, 26 L. ed. 968: "Under the law of Kansas, no company like that then before the court could increase its capital to more than double an amount originally authorized. The capital was sought to be increased in excess of that amount. As against creditors it was claimed to be a valid increase by the operation of an estoppel, but the court ruled otherwise, and justly, for the very foundation of an estoppel, the misleading of creditors to their injury, was wanting. The latter knew and were bound to know that no power existed to so increase the capital, and therefore that it was not increased; and hence they were not, and could not be misled."

So far as regards the question of imputed notice, these New York cases have apparently destroyed the authority of *Moss v. Averell* (1853) 10 N. Y. 449, where a ruling that the indorsee of a note was not chargeable with knowledge of the extent of the powers of the corporation by which it was made was put upon the ground that the corporation was a *private* one.

It would seem that no attempt has yet been made to reconcile the language quoted above with the position taken in the New York cases cited in note 6, *infra*.

For another case in which the doctrine of estoppel has been assumed to be consistent with the rule respecting imputed notice, as formulated in the above quoted passages, see *First Nat. Bank v. D. Kiefer Mill. Co.* (1893) 95 Ky. 97, 23 S. W. 675. See also *American Southern Nat. Bank v. Smith* (1916) 170 Ky. 512, 186 S. W. 482, where a lender was held to be chargeable with constructive notice of the charter limitation upon the corporate power of borrowing. But the doctrine itself was not applied in the case.

Confusion of thought could scarcely be carried further than in the following remark: "The contract was one which the company had no power to make; and, as the assured must take notice of the laws of the state and the articles of incorporation adopted thereunder, it follows that appellant cannot recover, *unless it be on the theory of estoppel.*" *Mutual Guaranty F. Ins. Co. v. Barker* (1899) 107 Iowa, 148, 70 Am. St. Rep. 149, 77 N. W. 868 (the italics are ours).

³ So manifest that Mr. Morawetz has deemed himself warranted in declaring that L.R.A.1917A.

the doctrine under which a claimant is entitled to enforce an ultra vires contract which he has performed on his side "is not founded on the doctrine of estoppel, as has sometimes been asserted." *Priv. Corp.* § 692. This statement was quoted in *Bowman Dairy Co. v. Mooney* (1890) 41 Mo. App. 665; but a sufficient answer to it is that the majority of the American courts have actually declared that that doctrine is the basis of the rule. The weight of judicial authority for the theory rejected by the learned author is therefore too great to be ignored, whatever may be the opinion of a critic regarding its merits. The alternative basis favored by Mr. Morawetz is discussed in § 60, *infra*.

^{3a} The following remarks are worth quoting in this connection, although the court which made them was one of inferior jurisdiction merely: "Since the plaintiff is conclusively presumed to know the limits of defendant's powers (*Alexander v. Cauldwell* (1881) 83 N. Y. 480, 5 Mor. Min. Rep. 650), it might be difficult to understand how, consistently with familiar principles, he can be admitted to say that he acted upon the faith of the validity of the contract; i. e., in the belief that it was not in excess of the corporate powers. The defense of ultra vires is proposed to be excluded by operation of an estoppel; but the authority of a corporation to contract depends on the construction of its charter, and that is matter of law. But a mistake of law merely cannot be the foundation of an estoppel, because, since all are conclusively held to know the law, the party alleging the estoppel cannot pretend to have incurred detriment by reliance on a misunderstanding or misrepresentation of the law. Ignorantia juris, quod quisque scire tenetur, neminem excusat, is an operative principle throughout the whole province of jurisprudence. *Broom, Legal Maxims*, 233." *Schurr v. New York & B. Suburban Invest. Co.* (1892; C. P.) 18 N. Y. Supp. 454.

⁴ In *Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123, after stating that certain cases cited had been criticized for the use they make of the word "estoppel" as descriptive of the principle upon which they were based, continued thus: "It is argued that, as a corporation must know the terms of its own charter, and as one dealing with it is charged with like knowledge, neither party to an ultra vires contract can be misled in that respect, and therefore there must always be lacking an essential element of what could with technical accuracy be called 'estoppel.' This, however, is a

with legal concepts is extremely unsatisfactory. It is somewhat strange, moreover, that a court which doubted whether the expression "estoppel" could be accurately used in this connection should not have been led to question the correctness of the rule which is based upon the supposition that an estoppel may be predicated.

Other courts have taken refuge in the theory that the rule as to imputed notice of corporate powers holds only "in cases where the act done was wholly void, because of an absolute want of power to sustain it, and in cases where considerations of public policy intervene," and not in cases where "the act is voidable only," a description which in the case cited was assumed to be applicable to the borrowing of an unauthorized amount of money.⁵ But manifestly there is no juristic ground upon which such a distinction can be based, if the

general principle is accepted that a person dealing with a corporation is bound to acquaint himself with the extent of its contractual powers. Other courts have evaded the logical dilemma by treating the presumption of knowledge as being merely one of fact. This was in effect the position taken by Comstock, Ch. J., in the leading case, in which he laid it down that "the corporation would . . . be estopped from setting up the defense in a case where the other party to the contract could not be presumed to be cognizant of the excess of power."⁶ The same conception also underlies the reasoning of the courts in other cases.⁷ But no adequate reason has yet been suggested why ultra vires contracts should be excepted from the operation of the general principle that, where the remedial rights of parties to contracts prohibited by the legislature are in ques-

mere question of terminology. The requirement that one shall be consistent in conduct, shall not occupy contradictory positions, shall not retain the advantages of a transaction and reject its burdens, is often spoken of as a form of estoppel. The term is convenient, and, if inaccurate, is not misleading. This rule of estoppel affords a good working hypothesis to accomplish just results. If it fails to accomplish all that might be desired in a practical way, it is because it is not made sufficiently far-reaching."

⁵ *Beach v. Wakefield* (1899) 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197.

⁶ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258. This remark was approved in *Boyce v. Montauk Gas Coal Co.* (1892) 37 W. Va. 73, 16 S. E. 501. For another case in which stress was laid upon the impossibility of discovering the illegality of the transaction, see *Washington L. Ins. Co. v. Clason* (1900) 162 N. Y. 305, 56 N. E. 755.

⁷ In *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771, the right of the plaintiff to maintain an action upon an unauthorized policy of insurance was affirmed in an elaborate opinion which contains the following passage: "The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicates the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract. While, as a general proposition, this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Everyone may have access to the statutes of the states affecting companies incorporated there-
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under, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation, to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. . . . That the appellee [plaintiff] was ignorant of the truth of the matter of want of authority in the company is not denied by the appellant company, except by an inference which, it is argued, is to be drawn, that the articles of incorporation and the record thereof furnished constructive notice of the extent of authority of said company. But it seems to us that such an inference is rebutted by the presumption fairly arising from the nature of the transaction, that the appellee would not have paid his money for the performance of a promise which he knew was void; that its performance could not be enforced, and that his money would be utterly thrown away. That the offer of the appellant to insure, and the representations made to induce the appellee to enter into the contract of insurance, were made with the intent that the appellee should act thereon, is self-evident from the nature of the transaction and the acceptance by the appellee of the offer so made by the appellant; and that the appellee was induced to act upon the offer and representations so made is equally apparent, for the act was an obvious sequence of the inducement."

This decision was followed in *Watts v. Equitable Mut. Life Assn.* (1900) 111 Iowa, 90, 82 N. W. 411, where it was unsuccessfully contended by the defendant that a life insurance contract was not enforceable because "the articles of incorporation were in themselves notice to him that his contract was not in strict accord with their terms, and that he was paying smaller as-

tion, the presumption of knowledge as to of their character is irrebuttable. Apparently it is only in cases which involve ultra vires contracts that courts have expressed the opinion that the difficulty which, under the given circumstances, would have been experienced in ascertaining the fact of illegality, was an element to be considered in determining whether knowledge of that illegality should be imputed.⁸

59. — (3) Estoppel ordinarily predicated from acts which transcend the powers both of the corporation and of the corporate agents.

A third objection to an acceptance of the theory of an estoppel is that, in most of the instances in which it has been recognized, its application has involved a contravention of the general rule of law that, where an agent has exceeded his authority in making a contract, the principal cannot be charged with liability on the ground of estoppel, unless his subsequent conduct was such as to preclude him from denying that the agent was acting as his representative.

assessments than some of the other members of the association. . . . It is not claimed that Watts had any actual knowledge of the articles of incorporation, and it is hardly to be presumed that he would keep paying assessments and dues upon a contract that he understood to be of no validity."

In *Continental F. Asso. v. Masonic Temple Co.* (1901) 26 Tex. Civ. App. 139, 62 S. W. 930, the court reasoned thus: "It is common knowledge that insurance companies generally transact their business in foreign countries. A corporation chartered to transact a certain business may lawfully do business elsewhere than in the country where it receives its charter, unless the terms of its charter or the laws of such country restrain it. This corporation was organized for fire insurance, and was engaged in soliciting such insurance outside of the state. Persons taking its policies in a distant country do not know, and could not be expected to know, the terms of its charter, nor the laws of the state chartering it."

⁸ In this point of view the following remark made by Comstock, Ch. J., in the *Bissell Case*, note 6, *supra*, where the action was brought to recover for injuries received by a passenger on a train running on a line the operation of which was beyond the powers of the defendant, ceases to possess any real cogency: "A traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations."

¹ The following remarks of the court in *L.R.A.1917A*.

So far as can be ascertained from the reports of cases of the class with which we are now concerned, that acceptance of the benefits which was held to estop the corporation from raising the defense of ultra vires has usually been, as a matter of fact, an acceptance not by the corporation itself acting in a corporate capacity, but by its directors or executive officers, either those who originally entered into the contract or their successors. Under these circumstances it is clear that the conditions contemplated by the rule just mentioned do not exist. In cases of this type, therefore, the inference of liability on the defendant's part is drawn with reference to a situation which seems clearly to import non-liability; viz., that certain corporate agents transcended their authority in making the contract, that there was no acceptance of its benefits by the corporation itself acting in a corporate capacity, and that everything done by the corporate agents in pursuance of the contract was as much beyond the scope of their powers as the original making of the contract.¹

Hood v. New York & N. H. R. Co. (1853) 22 Conn. 511, 9 Am. Neg. Cas. 149, may usefully be quoted in this connection: "Many cases were read on the argument to prove that a corporation is considered for civil purposes as a person, and subject to the same rules of law. We do not question this, but we do not see how it helps the plaintiff's case. They hold that a principal that can give authority, whether a corporation or person, may, when one assumes to act for him, and he does not object to it, be estopped denying his agency; but an infant is never estopped nor a married woman, nor ought a body of stockholders to be, united as they are under a specific charter; especially when the directors have disregarded it, and assumed to act according to their own pleasure. Could the company, by legal possibility, do the act, it would be otherwise. . . . Again, it is said, the defendants ought not to be permitted to call in question the acts of their agents. Why not, as much as other principals whose agents transcend their authority and abuse their trust? If it is replied the directors have suffered this course of things for months, when they could have arrested it, at once we ask, Whose agents they were? Certainly not of the innocent stockholders. The directors represent them only while they act within the scope of the charter; the charter is the measure of their power, and sad would it be if directors could trample upon this, and yet bind the stockholders as firmly as if they were acting within it. If the directors have done wrong, let them suffer the consequences."

This aspect of the matter has seldom been adverted to by the courts which have adopted the principle of estoppel, and in the only case in which it has been discussed with any degree of elaboration, its significance seems to have been strangely misunderstood.²

60. Doctrine referred to public policy.

In a well-known text-book the reasons upon which the doctrine which enables a party who has performed an ultra vires contract on his side, to maintain an action for its enforcement, are based, have been summed up as follows: "The common-law prohibition against the unauthorized exercise of corporate powers is founded upon general grounds of public policy, and the legal effect of this prohibition depends upon the requirements of public policy. If a corporation departs from its chartered purposes in violation of the common-law prohibition, it may be punished by for-

feiture of its franchises at the suit of the state. If a contract is made by a corporation in excess of its chartered powers, either party to the contract may withdraw, so long as a rescission can be effected without injustice. But after a contract of this character has been performed by either of the parties, the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform the agreement on his side."¹ This statement has been approved in the cases cited below.³ But it is by no means convincing. There is much difficulty in accepting the argument that, because public policy is the ground on which the legislatures have circumscribed the powers of corporations, public policy may and should be treated as an element to be weighed in determining the extent of the corporate liability under the statutes which actually define those powers. If the courts were en-

¹ In *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* (1886) 48 N. J. L. 530, 7 Atl. 523, the court said: "A man may become bound by the act of an unauthorized agent, and be held liable to the contract made for him, not on the ground that the agent in fact had any authority, but for some conduct on the part of the alleged principal which precludes him from raising the question of authority. . . . It is true that a person cannot by his own act acquire a right against another; the other must in some way bind himself. The acquiescence in the contract, in virtue of which the other party performs, and the acceptance of its benefits, constitute the binding acts, and raise the estoppel. I am unable to see how, upon a just conception of the legal principles involved, a different rule can be applied where the corporation has acquiesced in the contract, and the other party, by performance on his part, has been led into a position from which he cannot be extricated." This reasoning indicates that the attention of the court was not directed to the vital distinction between the position of individual and corporate principals. It is simply begging the question to assert of a principal of the latter description that it has accepted the benefits of an ultra vires transaction because its agents have accepted them. There is clearly no juristic ground upon which the corporation itself can be affected by an estoppel, unless the evidence that the acceptance was authorized or approved by corporate action taken with a full knowledge of the circumstances constitutes such ground.

² Morawetz, *Priv. Corp.* 2d ed. § 689.

³ It was quoted verbatim in *Memphis & L. R. R. Co. v. Dow* (1884) 22 Blatchf. 48, 19 Fed. 388; *Towers Excelsior & Ginnery Co. v. Inman* (1895) 96 Ga. 510, 23 S. E. 418; *Dewey v. Toledo, A. A. & N. M. R. Co.* L.R.A.1917A.

(1892) 91 Mich. 362, 51 N. W. 1063; *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 371. In the case last cited the court expressed its agreement with the language of Judge Thompson in an article published in the *American Law Review*, June, 1894, vol. 28, p. 376, entitled, "The Doctrine of Ultra Vires in Relation to Private Corporations."

For other passages in his treatise in which Mr. Morawetz has expressed the opinion that the principle of estoppel has been improperly invoked as a ground for excluding the defense of ultra vires, see § 591, cited in *Grohmann v. Brown* (1897) 68 Mo. App. 630; and § 692, cited in *Bowman Dairy Co. v. Mooney* (1890) 41 Mo. App. 665.

In *York v. Farmers' Bank* (1904) 105 Mo. App. 127, 79 S. W. 968, the court declared that "an enlightened public policy required" that the ultra vires contract, having been executed by the other party, should "be upheld and enforced rather than evaded."

Compare also the following remarks in *Auerbach v. Le Sueur Mill Co.* (1881) 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799: Where "the unauthorized contract has been executed by the corporation, and it has reaped the benefits of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law."

In *Seeber v. Commercial Nat. Bank* (1897) 77 Fed. 957, it was laid down that the acts of a corporation "in the new business, provided there be no legislative prohibition, will only be held void so far as public policy requires it. The rule itself, being based on public policy, will not be permitted to be invoked to perpetrate a wrong."

titled to apply their ideas of public policy as a standard for the construction and operation of statutes, it is manifest that untold confusion would result. The only admissible guide to the intention of the legislatures, after it has been embodied in statutes, is the language of those statutes themselves. Moreover the last sentence of the passage above quoted is nothing but the bare statement of an individual opinion which was not sustained either by the citation of precedents or by analogy or by general reasoning. Where the abstract correctness of a disputed doctrine is under discussion, something more than such a statement may reasonably be demanded, even though it may have been subsequently stamped with the seal of judicial approval.

The unsatisfactory results of invoking public policy for the purpose of justifying a differentiation between the incidents of executory and executed contracts are still more manifest when we examine the cases for information regarding the grounds of public policy which are relied upon.

In one case the propriety of such a differentiation was referred to the consideration that, having regard to modern commercial conditions, "the safety of men in their daily contracts requires that this doctrine of ultra vires should be confined within narrow bounds."³ But the doctrine under discussion clearly cannot derive any considerable support from a reason so vague as this.

In another case the court, after remarking "that the public, which confers the corporate powers upon such companies, has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits," continued thus: "But whether, to afford such protection, the defense of ultra vires is always necessary in such cases, is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom

these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which will allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrongdoing. Such policy would rather seem to offer a premium for dishonest dealing."⁴ The theory here propounded that fraud must necessarily be encouraged by the operation of a doctrine which prevents a person from enforcing an ultra vires contract after it has been performed on his side is manifestly based upon nothing firmer than mere assumption. The court has overlooked the possible alternative, that fair dealing in respect to third persons may be reconciled with the due protection of the shareholders by means of remedies which are independent of the contract. See note to *Crowder State Bank v. Aetna Powder Co.* post, 1021. That alternative has also been ignored in several other cases. In one of these it was laid down that "the reason of the rule is that honesty and fair dealing are the highest public policy, and that a private corporation, which is a mere collection of individuals, is no more privileged to repudiate its engagements and act dishonestly than a single individual is."⁵ In another the general principle propounded was that "a man who enjoyed a privilege has no right to say that, because he ought not to have enjoyed it, he will not pay for it. However unlawful the act, it would be unsound policy to give him this immunity."⁶ In another the court, referring to an earlier ruling, remarked it had in effect determined "that public policy in cases of ultra vires, in the absence of positive restriction or inherent vice, does not tempt to dishonesty or reward it, but looks at the situation in all its phases, and exacts the justice which the final situation requires, viewed in the light of all the causes leading to it and

³ *First Nat. Bank v. Guardian Trust Co.* (1905) 187 Mo. 534, 70 L.R.A. 79, 86 S. W. 109, quoting the statement of Lord St. Leonards in *Eastern Counties R. Co. v. Hawkes* (1855) 5 H. L. Cas. 370, 10 Eng. Reprint, 943, 24 L. J. Ch. N. S. 601, 3 Week. Rep. 609, 35 Eng. L. & Eq. Rep. 8, where, however, there was no question of the application of the doctrine of estoppel.

⁴ *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 20, 59 Am. Rep. 134, 9 Pac. 771.

⁵ *American Nat. Bank v. National Wall-L.R.A.1917A.*

Paper Co. (1896) 23 C. C. A. 33, 40 U. S. App. 649, 77 Fed. 85, quoting 5 Thomp. Corp. 1st ed. § 6017.

⁶ *Northampton County's Appeal* (1858) 30 Pa. 305. This case was cited with relation to the present topic in 5 Thompson on Corporations, 1st ed. § 6015, and quoted from that treatise in *American Nat. Bank v. National Wall-Paper Co.* (1896) 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 93; *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 365.

the consequences to follow from it." ⁷ In another it was observed with regard to a particular form of contract: "Sound public policy cannot be promoted by offering a premium for wrongdoing, and such would be the effect of an authoritative announcement that a corporation may send its agents out among the people inducing them to invest their small savings in its stock, and then, having received the agreed consideration, escape liability because it has promised to do more than it was legally authorized to do. With that doctrine established, it would be to the interest of every corporation to exceed its lawful powers in every contract, as the readiest means of paying its debts without depleting its assets." ⁸

In a Pennsylvania case we find this sweeping statement: "The law never sustains a defense of this nature out of regard for a defendant; it does so only where an imperative rule of public policy requires it. The instances are rare in which a corporation or individual has been permitted to set up its own wrong in order to retain both the property and its price." ⁹ Taken literally, the first sentence of this passage seems to import an adoption of a general principle to the effect that the allowance of the defense of ultra vires should be deemed the exception, not the rule, and that public policy determines the limits of the exception. But, having regard to the second sentence, it may be inferred that the court intended its observation to apply merely to those cases in which the defendant has received the benefits of the contract.

61. Doctrine intended for the promotion of justice.

As the judicial statements in which this element has been adverted to are not of the same tenor, it will be advisable to classify them under different heads.

The theory embodied in some of them is simply that, in cases where an ultra vires contract has been executed on the side of the plaintiff, the doctrine of estoppel should be applied, for the reason that it is the only one which, under such circumstances, yields results consistent with fairness and honorable dealing.

The doctrine of estoppel is "founded on the plainest principles of justice." ¹

"The ends of justice may require, as in this case, that the corporation which has exceeded its powers should be estopped by its own acts from pleading, in defense of its assumed obligations, that they were ultra vires. To apply the principle of estoppel is not to enlarge the powers of the corporation; nor does it give warrant to a corporation to disregard or violate the restrictions which have been expressly imposed upon it, or which exist in the absence of power conferred." ²

Where the illegal act is not inherently wrong, though *malum prohibitum*, "defendant should be estopped from asserting is misconduct in violating its charter duties, when the rights of third parties and the public intervene or become affected thereby. The strongest reasons which equity and conscience suggest should prevent it, after availing itself of the substantial advantages it had derived from its investment, from repudiating the liability sought to be imposed." ³

⁷ *Washington L. Ins. Co. v. Clason* (1900) 162 N. Y. 305, 56 N. E. 755, citing *Bath Gaslight Co. v. Claffy* (1896) 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390, where this language was used: "Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust."

⁸ *Field v. Eastern Bldg. & L. Asso.* (1902) 117 Iowa, 185, 90 N. W. 717.

⁹ *Wright v. Pipe Line Co.* (1882) 101 Pa. 204, 47 Am. Rep. 701. This language was quoted in *Union Trust Co. v. Mercantile Library Hall Co.* (1899) 189 Pa. 263, 42 Atl. 129. It was also adopted in the syllabus written by the court in *Meholin v. Carlson* (1910) 17 Idaho, 742, 134 Am. St. L.R.A. 1917A.

Rep. 286, 107 Pac. 755; *Wright v. Hughes* (1889) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Huntington Brewing Co. v. McGrew* (1916) — *Ind. App.* —, 112 N. E. 534.

¹ *Keokuk v. Ft. Wayne Electric Co.* (1894) 90 Iowa, 67, 57 N. W. 689.

² *Auerbach v. Le Sueur Mill Co.* (1881) 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799, where the court quoted the statement in *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563, that "this doctrine [estoppel] is applied only for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act ultra vires has been accomplished."

³ *Hunt v. Hauser Malting Co.* (1903) 90 Minn. 282, 96 N. W. 85. Similar language was used in the second appeal (1905) 95 Minn. 206, 103 N. W. 1032.

"The court simply refuses to entertain the defense which common honesty forbids the company to make. . . . The law forbids the defense on account of the flagrant injustice which would otherwise be done."⁴

The essential conception which determines the form of other statements is that the cases in which the rights and liabilities of the parties to an ultra vires contract are adjustable with relation to the requirements of justice belong to an exceptional category. So far as the present writer has been able to ascertain, the earliest distinct authority for this theory is a New York case in which it was laid down that "the plea of ultra vires should not, as a general rule, prevail, whether interposed for or against

a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong."⁵ From that case the Federal Supreme Court adopted the statement in the slightly altered form: "The doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."⁶ In all those cases cited in the footnote, it is to be understood as embodying a conception virtually coextensive in respect of its scope and application with that of an estoppel as predicated from the receipt of the benefits of an ultra vires contract. But sometimes it is expressive of a comprehensive principle of which such an estoppel is merely one particular ex-

⁴ Camden & A. R. Co. v. May's Landing & E. H. City R. Co. (1886) 48 N. J. L. 530, 7 Atl. 523. The court also remarked: "No reason is perceived why the rules of fair dealing which are so rigorously applied to natural persons shall not pertain as strictly to private corporations. No instance is known where a natural person can set up in his own behalf, and for his own advantage, his want of authority to do an act for which he has received the consideration from the other party." The court had evidently forgotten the rules relating to infants and married women. See § 39, supra.

⁵ Whitney Arms Co. v. Barlow (1875) 63 N. Y. 62, 20 Am. Rep. 504.

⁶ Ohio & M. R. Co. v. McCarthy (1877) 96 U. S. 258, 24 L. ed. 693. The language of another case decided about the same time is as follows: "The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided." San Antonio v. Mehaffy (1877) 96 U. S. 312, 24 L. ed. 816. The language of one or other of these cases—that of the latter most frequently—has been quoted in many others. Campbell v. Argenta Gold & S. Min. Co. (1892) 51 Fed. 8; Citizens' State Bank v. Hawkins (1896) 18 C. C. A. 78, 34 U. S. App. 423, 71 Fed. 369; Butler v. Cockrill (1896) 20 C. C. A. 122, 36 U. S. App. 702, 73 Fed. 945; Seeber v. Commercial Nat. Bank (1897) 77 Fed. 957; Old Colony Trust Co. v. Wichita (1903) 123 Fed. 762; Re Waterloo Organ Co. (1904) 128 Fed. 517; St. Avit v. Kettle River Co. (1914) 133 C. C. A. 76, 216 Fed. 875; Leon v. Citizens' Bldg. & L. Asso. (1912) 14 Ariz. 294, 127 Pac. 721, Ann. Cas. 1914D, 1151; Minneapolis, F. & M. Mut. Ins. Co. v. Norman (1905) 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229, 4 Ann. Cas. 1045; Richeson v. National Bank (1910) 96 Ark. 594, 132 S. W. 913; Neilsville Bank v. Tut-hill (1886) 4 Dak. 295, 30 N. W. 154; Burke Land & Livestock Co. v. Wells, F. & Co. L.R.A.1917A.

(1900) 7 Idaho, 42, 60 Pac. 87; Meholin v. Carlson (1910) 17 Idaho, 742, 134 Am. St. Rep. 286, 107 Pac. 755; Darst v. Gale (1876) 83 Ill. 136; Alexander v. Tolleston Club (1884) 110 Ill. 72; Kadish v. Garden City Equitable Loan & Bldg. Asso. (1894) 151 Ill. 538, 42 Am. St. Rep. 256, 38 N. E. 236; People ex rel. Jackson v. Suburban R. Co. (1899) 178 Ill. 594, 49 L.R.A. 650, 53 N. E. 349; Carson City Sav. Bank v. Carson City Elevator Co. (1892) 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; Coit v. Grand Rapids (1898) 115 Mich. 493, 73 N. W. 811; Timm v. Grand Rapids Brewing Co. (1910) 160 Mich. 371, 27 L.R.A. (N.S.) 186, 125 N. W. 357; Blackwood v. Lansing Chamber of Commerce (1914) 178 Mich. 321, 144 N. W. 823; Auerbach v. Le Sueur Mill Co. (1881) 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799; National Surety Co. v. Hall-Miller Decorating Co. (1913) 104 Miss. 626, 46 L.R.A. (N.S.) 325, 61 So. 700; First Nat. Bank v. Guardian Trust Co. (1905) 187 Mo. 526, 70 L.R.A. 79, 86 S. W. 109; Linkauf v. Lombard (1893) 137 N. Y. 423, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472; Hough v. St. Louis Car Co. (1914) 182 Mo. App. 718, 165 S. W. 1161; Earle v. American Sugar Ref. Co. (1908) 74 N. J. Eq. 751, 71 Atl. 391; Hurd v. Kelly (1879) 78 N. Y. 588, 34 Am. Rep. 567; affirming Hurd v. Green (1879) 17 Hun, 327; Rider Life Raft Co. v. Roach (1884) 97 N. Y. 378; Leslie v. Lorillard (1888) 110 N. Y. 531, 1 L.R.A. 456, 18 N. E. 363; Jemison v. Citizens' Sav. Bank (1890) 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; Noll v. Archer-Pancoat Co. (1901) 60 App. Div. 414, 69 N. Y. Supp. 1007; Usher v. New York C. & H. R. R. Co. (1902) 76 App. Div. 422, 78 N. Y. Supp. 508, affirmed in 179 N. Y. 544, 71 N. E. 1141; Hutchins v. Planters' Nat. Bank (1901) 128 N. C. 72, 38 S. E. 252; Hill v. Atlantic & N. C. R. Co. (1906) 143 N. C. 539, 9 L.R.A. (N.S.) 606, 55 S. E. 854; Galveston & W. R. Co. v. Galveston (1896) — Tex. Civ. App. —, 37 S. W. 27; Phoenix Land Co. v. Exall (1913) — Tex.

ample.⁷ An objection which has been taken to the second of these statements, and which is, of course, equally applicable to the first, is that it "is misleading, and, if literally construed, would result in an enormous practical extension of the powers of corporations;" that "a result required by adherence to the law would not be either unjust or a legal wrong," and that, by the language used, it was "doubtless intended to be understood that the defense would be a legal wrong only when the law did not require its consideration by the court."⁸ But, having regard to the fact that, in nearly all the cases in which words of this tenor have been used, the doctrine of estoppel was expressly or impliedly approved, there can be but little doubt that the phrase, "legal wrong," should be regarded as connoting simply that result upon which the advocates of the doctrine lay stress; viz., that unless the plea of ultra vires is excluded, the defendant will receive the benefits of the contract without paying the stipulated consideration. If this view is correct, it is clear that the soundness of the principle embodied in statements of this type is really a matter which depends not upon the literal meaning of the words, "legal wrong," but upon the general reasons which determine whether the doctrine shall be accepted or rejected.

Various other propositions differing

more or less in phraseology from those quoted above, but of essentially the same purport, are found in the reports.

"Such a defense . . . necessarily rests upon the violation of trust or duty towards the shareholders, and is not to be entertained where its allowance will do a greater wrong to third parties."⁹

"The plea of ultra vires is not to be understood as an absolute and peremptory defense in all cases of excess of power, without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons."¹⁰

"The doctrine of a want of power cannot be invoked to aid a party to perpetrate wrong and injustice."¹¹

"Like natural persons, corporations must be held to the observance of the recognized principles of common honesty and good faith, and these principles render the doctrine of ultra vires unavailing when its application would accomplish an unjust end, or result in the perpetration of a legal fraud."¹²

"For defendant to refuse to discharge its obligations growing out of the contract, when plaintiff had in good faith discharged his, would work an injustice."¹³

"If justice did not invoke the application of other principles of law, the defense of ultra vires might be sufficient;

Civ. App. —, 159 S. W. 474; *Lewis v. American Sav. & L. Asso.* (1898) 98 Wis. 203, 39 L.R.A. 559, 73 N. W. 793.

⁷ Thus, in *Relfe v. Columbia L. Ins. Co.* (1881) 10 Mo. App. 150, the court, referring to *Whitney Arms Co. v. Barlow*, note 5, supra, and proceeding upon the ground that "the plea of ultra vires ought not to be allowed for the purpose of accomplishing a wrong," held that, even though the defendant, the transferee of the assets of another company, might have exceeded its powers in executing the trust deed securing certain notes which, subsequently to the transfer, it deposited with the state insurance department in place of the securities which the transferring company had originally deposited, the policy holders of the latter company who had not assented to the transfer were nevertheless entitled to subject the notes to the trust with which the original deposit was affected.

In *Bear River Valley Orchard Co. v. Hanley* (1897) 15 Utah, 506, 50 Pac. 611, the court relied on both of the cases cited in notes 5 and 6, supra, as authorities for a ruling the essence of which was that Hanley should "not be permitted to retain the property, or the stock which represented it, secured by his fraudulent designs and actions."

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⁸ *Buckeye Marble & F. Co. v. Harvey* (1892) 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427. Mr. Morawetz's (Priv. Corp. § 581) comment is as follows: "These statements, however, refer merely to the effect of the legal prohibition against unauthorized corporate acts; they mean that the fact that a transaction is in excess of the charter of a corporation should not be a defense, if there would be a liability according to the general principles of law applicable to unincorporated companies. It certainly cannot be maintained that the application of the established principles of the law of agency would 'accomplish a legal wrong.'"

⁹ *Comstock, Ch. J., in Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 250, quoted in *Boyce v. Montank Gas Coal Co.* (1892) 37 W. Va. 73, 16 S. E. 501.

¹⁰ *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 11, 59 Am. St. Rep. 134, 9 Pac. 771.

¹¹ *Twiss v. Guaranty Life Asso.* (1893) 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8.

¹² *Wright v. Hughes* (1880) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907.

¹³ *Blackwood v. Lansing Chamber of Commerce* (1914) 178 Mich. 321, 144 N. W. 823.

but the doctrine of estoppel, as a principle of law, is as positive and well-recognized as is the law that a corporation may not exceed its corporate powers, and, although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to him who has been misled by its acts performed within the general scope of its powers."¹⁴ The consideration here emphasized, that the doctrines of estoppel and of ultra vires are on an equality so far as regards judicial recognition, is manifestly irrelevant. In cases of the class under discussion, the essential question is simply which of these two doctrines shall be treated as controlling. Obviously, the situation is in no respect different from that which is presented whenever a choice has to be made between one or other of two doctrines which clash under the particular circumstances with which the court is dealing.

In one case it was observed: "The claim that a contract is void because beyond the charter power of a corporation is seldom recognized as a defense to an agreement otherwise unobjectionable, and never except as a shield against wrong."¹⁵ In this point of view the cases in which the plea of ultra vires may be allowed to prevail belong to an excepted category. But the authorities relied upon do not sustain the statement of the court.¹⁶ Its language is perhaps intended to express in a somewhat loose form the fact that, owing to the extensive application of the doctrine now under discussion, the operation of the defense of ultra vires is being more and more restricted in practice.

61a. Doctrine referred to the notion of corporate capacity to exceed statutable powers.

In a New York case the court reasoned as follows: "Corporations, like

natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes nor facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power."¹⁷

The first part of this extract is obviously founded upon some remarks of Chief Justice Comstock in a leading case.¹⁸ There his argument against the view that ultra vires contracts are not enforceable under any circumstances proceeded upon the assumption that the basis of this view is the conception that corporations, being artificial beings, cannot by possibility do any act beyond the limit of their charters. But such an assumption was manifestly unwarrantable, for, as was stated by Selden, J., in the same case, and as the later authorities show conclusively, the primary reason why such contracts are treated as non-enforceable by the courts which have rejected the doctrine of estoppel is that they are illegal as having been prohibited, expressly or impliedly, by the legislature. See §§ 15, 16, supra. Taking this position, such courts have no occasion to trouble themselves with the no-

¹⁴ *Auerbach v. Le Sueur Mill Co.* (1881) 28 Minn. 296, 41 Am. St. Rep. 285, 9 W. 799.

¹⁵ *International Trust Co. v. Davis & F. Mfg. Co.* (1899) 70 N. H. 118, 46 Atl. 1054.

¹⁶ The cases cited are *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 69, 20 Am. Rep. 504, and *Lewis v. American Sav. & L. Asso.* (1898) 98 Wis. 203, 39 L.R.A. 559, 73 N. W. 793. But it is manifest from what has been said above that these embody a theory precisely the opposite of that propounded by the New Hampshire court.

¹⁷ *Vought v. Eastern Bldg. & L. Asso.* (1902) 172 N. Y. 508, 92 Am. St. Rep. L.R.A.1917A.

761, 65 N. E. 496. See also Mr. Pepper's article, on *Exercise of Corporate Power*, 9 Harvard L. Rev. 255.

¹⁸ "Like natural persons, they [corporations] can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong. . . . The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons." *Bissell v. Michigan S. & N. J. R. Cos.* (1860) 22 N. Y. 258, quoted in *Harris v. Independence Gas Co.* (1907) 76 Kan. 750, 13 L.R.A.(N.S.) 1171, 92 Pac. 1123.

tion that it is a juristic impossibility for a corporation to do any acts except those which are authorized by its charter. But, as a matter of fact, their attitude with regard to the element of possibility is essentially the same as that of the New York court. They do not deny that an ultra vires act can be done. They simply assert that such an act is like any other illegal act in this respect, that it cannot serve as the basis of any remedial rights. It is evident, therefore, that, with regard to the first step in the argument above quoted, there is no controversy between the two schools of thought. The disagreement between them has reference merely to the consequences which the New York court regards as being deducible from the fact of corporate capacity. The obvious inference is that, for the purposes of an inquiry into the opposing views with regard to the doctrine of estoppel, nothing whatever is gained by making that fact the starting point of the discussion.

62. Doctrine referred to equitable principles of general scope.

It has been laid down that the doctrine which precludes a defendant from interposing the plea of ultra vires "does not rest upon the principle of estoppel," but "upon the rule that he who seeks equity must do equity, and upon the principle that he may not at the same time accept the benefits and repudiate the burdens of his contract."¹ But this statement is subject to criticism as regards both its branches. The "rule" mentioned clearly has no application to a case in which the defendant is, ex hypothesi, relying upon an alleged legal right, and not asking for any affirmative relief. The "principle" adverted to,

however conclusive a ground it may furnish for allowing such remedies to be enforced as may be pursued independently of the contract, cannot, without disregarding the analogy of the decisions which relate to other descriptions of prohibited contracts, be treated as a reason for predicated a right of action upon the contract itself.

In one case the theory was advanced that the doctrine of estoppel is based upon the principle that "no one shall take advantage of his own wrong."² But manifestly this principle does not necessarily involve the consequence which is here assumed to be deducible from it, viz., that the existence of a right to maintain an action upon the ultra vires contract itself should be predicated.

63. Doctrine intended to prevent fraud.

The following statement in a textbook has been judicially approved: "When a transaction of the kind now in consideration is complete on the part of the other contracting party, every principle of common sense and equity requires that the corporation should not be permitted to repudiate payment therefor, or the other due completion thereof by itself, on the ground that the transaction, though admitted to be within its possible capacities, is outside its actual powers then called into existence. The very defense discloses fraud."³ But it is clear that, even if it should be conceded that fraud may be predicated from the mere fact that a defendant seeks to evade his alleged liability by taking the ground that a contract prohibited by the law is void, because it is so prohibited, the existence of such fraud would not necessarily point to the conclusion that the

¹ *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1897) 27 C. C. A. 82, 49 U. S. App. 523, 82 Fed. 124 (borrowing in excess of corporate powers). This statement was accepted as correct in *Beach v. Wakefield* (1899) 107 Iowa, 589, 70 N. W. 688, 78 N. W. 197. There it was said to be "only an indirect assertion of the doctrine of estoppel." But evidently this interpretation of the words is not correct. The domain covered by that doctrine is not coextensive with that within which the "rule" and the "principle" are operative.

The following passage presumably reflects the same conception as that quoted in the text: "It is inequitable to permit one who has received the proceeds and benefit of the contract to repudiate it on the ground that the corporation from which he has obtained the benefit had no power to make L.R.A.1017A.

the contract." *United German Bank v. Katz* (1881) 57 Md. 128. There, it will be observed, the action was brought by, not against the corporation.

² *Tippecanoe County v. Lafayette, M. & B. R. Co.* (1875) 50 Ind. 85.

³ *Green's Brice, Ultra Vires*, 2d Am. ed. § 784, quoted in *Osmer v. Lemay-Wegmann Brokerage Co.* (1911) 155 Mo. App. 211, 134 S. W. 65.

In *Hunt v. Hauser Malting Co.* (1903) 90 Minn. 282, 96 N. W. 85, it was observed that to allow the defendant company to disclaim its responsibility as stockholder in another company, after it had enjoyed the advantage of its position, "would seem to encourage the execution of a fraud, and sanction a wrong opposed to the well-considered adjudications of this court and the highest behests of natural justice."

courts should allow an action to be maintained on the contract itself; it would simply constitute a reason for granting relief in some form which would preclude the defendant from deriving any profit from his fraud.

In one case the court remarked that "the principle of estoppel by conduct is the same principle which is applied by courts in holding that the Statute of Frauds, by which, under the general rule, a contract would be void, is never to be used for the protection of a fraud."² But it is submitted that the incidents of a contract within the purview of the Statute of Frauds are so essentially different from those of an ultra vires contract that the court was not justified in arguing by analogy from the one to the other. The invalidity of the former description of contract is predicated from the omission to comply with a merely formal requirement; the invalidity of the latter arises from the nature of the subject matter. The only analogy which could carry any weight in this connection would be an example of a transaction which, although invalid as regards its subject matter, has been held to be enforceable simply on the ground that its enforcement was necessary for the purpose of preventing fraud. This criticism is, of course, independent of the more general objection to which the view of the court is open; viz., that it is a manifest *petitio principii* to take it for granted that the only way of preventing fraud where an ultra vires contract has been executed on one side is to allow an action to be maintained on the contract itself.

64. Defense of ultra vires an unconscionable one.

The defense of ultra vires has not infrequently been characterized as "unconscionable" by the courts which hold that the defense of ultra vires should not be allowed in cases where the claimant has performed the contract on his side.¹

65. Resumé of objections to the doctrine.

The discussion in the preceding sections may, it is submitted, be fairly said to lead up to these conclusions:

(a) The doctrine under review cannot be based on the ground of an estoppel

unless we are prepared to assume the correctness of three propositions, all of which are apparently untenable in point of logic, and irreconcilable with elementary legal principles; viz., (1) that a contract which, *ex hypothesi*, was void at the time when it was made, and which consequently cannot, without disregarding the analogies of the law in regard to other descriptions of void contracts, be deemed susceptible of a voluntary ratification, may, on the ground of an estoppel, be in effect validated against the will of the corporation; (2) that this estoppel may be predicated, although one of the essential elements of such a concept, that is to say, the misleading of the party who is seeking to enforce the contract, must necessarily be absent, owing to the fact that he is chargeable with notice of the extent of the corporate powers; and (3) that a corporation may be estopped from denying its liability^{*} in respect to a contract entered into by its agents, even in a case in which they have transcended their authority and abused their trust, with regard both to making the contract and to their acts performed in pursuance of it, and in which the corporation itself, as distinguished from its agents, has not done anything which can be construed as an adoption of the contract. It is unquestionably true that, as Lord Halsbury remarked in a well-known case, the law "is not always logical at all."¹ But it will readily be admitted by every lawyer that no unnecessary additions should be made to the unfortunate antinomies which provoked this candid criticism. So far as regards doctrines which have come down to us from the earlier period of the development of the law, their illogicality, being usually susceptible of an adequate and reasonable explanation on historical grounds, does not always constitute a sufficient reason for discarding them. But when the application of the logical test to a theory which originated less than seventy years ago discloses such serious flaws as those above specified, its unsoundness is, to say the least, very strongly indicated.

(b) The other considerations to which the doctrine has been referred cannot with propriety be treated as grounds for allowing an action to be maintained on

² *Denver F. Ins. Co. v. McClelland* (1885) 9 Colo. 24, 59 Am. St. Rep. 134, 9 Pac. 771.

¹ See, for example, *Goodland v. Bank of Darlington* (1898) 74 Mo. App. 365; *York v. Farmers' Bank* (1904) 105 Mo. App. 127, 79 S. W. 968. By the courts which reject the principle of estoppel the propriety of *L.R.A.* 1917A.

this designation is not conceded, except with respect to one particular class of cases. See § 38, *supra*.

¹ *Quinn v. Leathem* [1901] A. C. (Eng.) 495, 1 B. R. C. 197, 70 L. J. P. C. N. S. 76, 65 J. P. 708, 50 Week. Rep. 139, 85 L. T. N. S. 289, 17 Times L. R. 749.

the contract itself, however forcible they may be as reasons for holding a claimant to be entitled to such relief as he may be able to obtain independently of the contract.

From the foregoing general statement, it is apparent that the ground upon which the advocates of the doctrine of estoppel have chosen to rest it are by no means satisfactory. Nor is the case in its favor at all improved when we proceed to examine the positive objections to which it is open.

In the first place, the adoption of the doctrine involves, with respect to one particular species of contracts, a disregard of two general principles which otherwise are of general application; viz., that there cannot be an estoppel to show a violation of a statute, even to the prejudice of an innocent party;² and that "there cannot be an estoppel involved in the act to which the incapacity relates, that can take away that incapacity."³

Secondly, the doctrine seems to require for its support an acceptance of the theory that, in cases where the effect of statutes defining the extent of corporate powers is in question, the incidents of contracts which are expressly prohibited are different from those of contracts which are merely prohibited by implication. The analogies of the law are entirely opposed to this theory. See § 14, *supra*.

Thirdly, the effect of the doctrine is to impair the usefulness of the restrictions placed by statutes upon the power of corporations, or even to render those restrictions entirely nugatory. See § 37, *supra*. This objection has never been satisfactorily met, so far as the present writer knows. A "sufficient answer" to it is, according to one court, supplied by the consideration "that the state may interpose its authority at any time and compel an abandonment of the act in excess of power, and, if need be, revoke the

charter of the company for its usurpation."⁴ Much weight would certainly be attributable to this consideration, if, in point of fact, the state regularly exercised over private corporations a control so vigilant and unremitting that such corporations would in the normal course of affairs be checked immediately after they undertook to engage in enterprises, or to enter into contracts, which exceeded their powers. But such control is not exercised at present, and probably never will be exercised under any system of administration that is likely to be adopted in a democratic country. Government supervision is virtually dormant so far as current operations are concerned, and seldom becomes effective unless the corporate delinquencies are deemed to be sufficiently serious to warrant the institution of proceedings for the purpose of annulling the charter. As long as these conditions remain unchanged, the right of the state to prevent corporations from transcending their powers, and to compel them to discontinue their business if those powers have already been transcended, cannot, it is submitted, be regarded as a factor of any real importance in a discussion of the principle of estoppel. Whether it has ever been actually exercised with such promptitude and in such a manner as to safeguard adequately the interest of the members and creditors of a corporation (see below) may reasonably be doubted. Nor does there seem to be much force in the argument that the objection based upon the consequences of the doctrine of estoppel in amplifying the granted powers of corporations may warrantably be disregarded, for the reason that that doctrine is necessary for the promotion of justice, honesty, public policy, and other somewhat vaguely defined objects of a kindred nature.⁵ Such a necessity, even if it were a demonstrable fact, is simply a matter proper for the legislatures to weigh in considering

² This is the general principle underlying *Steadman v. Duhamel* (1845) 1 C. B. 838, 135 Eng. Reprint, 792, 14 L. J. C. P. N. S. 270, where the court rejected the contention that the defendant, whose acceptance of a bill was dated in a foreign city, was estopped from setting up the defense that it was an inland bill, and consequently not producible in evidence for want of a stamp.

³ *Keen v. Coleman* (1861) 39 Pa. 299, 80 Am. Dec. 524, where it was held that a judgment bond was not made good by the fact that the obligor, a married woman, had represented herself to be single.

⁴ *Camden & A. R. Co. v. May's Landing L.R.A.* 1917A.

& *E. H. City R. Co.* (1886) 48 N. J. L. 530, 7 Atl. 523.

⁵ In *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563, the court said: "Neither is it correct to say that the application to corporations of the doctrine of equitable estoppel, where justice requires it to be applied, as when, under a claim of corporate power, they have received benefits for which they refuse to pay from a sudden discovery that they had not the powers they had claimed, can be made the means of enabling them indefinitely to extend their powers. If that were true, it would be an insuperable objection to the application of the doctrine, even for the pur-

whether their enactments relating to corporations shall be modified, and not a reason for the virtual nullification of those enactments by the courts. It must not be forgotten, moreover, that the statutes relating to corporate organization and management usually contain provisions which specify a certain procedure by means of which the scope of corporate powers may be enlarged. There is a manifest propriety in insisting that the managing agents of corporations, whenever they contemplate making a contract which is not clearly *intra vires*, should resort to this procedure, and thus give shareholders an opportunity of expressing an opinion as to the desirability of exposing their investments to a new risk.

Fourthly, the doctrine wholly ignores the interests of "innocent shareholders,"—a term which in this connection imports those who have not authorized, either expressly or by implication, the formation of the *ultra vires* contract or the subsequent acts upon which the alleged estoppel is founded. That this situation exists in respect of any shareholders who neither knew, nor had any means of knowing, that the contract was being made, is a necessary inference from the fact that their shares are deemed to have been purchased on the supposition that the corporation was to carry on a certain description of business, and that it would not enter into any contracts except those which were incident in a reasonable sense to that business.⁶ Under such circumstances, the presumption cannot warrantably be entertained that they consented to any particular *ultra*

vires contract.⁷ Manifestly, therefore, it is unjust that they should be prejudicially affected by the making of the contract or by what is done in pursuance of it. Yet, it is easy to see that the application of the doctrine under discussion may often produce this consequence. The value of their shares may be diminished, or in extreme cases entirely destroyed, if the contract should eventually prove to be unprofitable. Nevertheless, so far as can be gathered from the decisions, the doctrine does not afford them any redress under such circumstances, except such as can be obtained in a suit to enforce the personal liability of the corporate agents who have violated their trust. The courts seem to treat as a wholly immaterial factor the question whether the consequences of what was done in pursuance of the contract were, in the ultimate outcome, harmful, or the reverse. The broad ground upon which the right of action is predicated is simply that the other party has performed the contract on his side, and by such performance has conferred certain benefits upon the corporation. In this point of view the party contracting with its corporation is allowed to enforce the contract upon precisely the same footing as if it were valid. No account is taken of the effect which the imposition of the liability upon the corporation may have upon the interests of those individual stockholders who cannot, upon any possible view of the evidence, be held to have sanctioned the making of the contract, or acquiesced in what was done under it.⁸ So far as regards such shareholders, therefore, it is

pose of preventing injustice in individual cases. But it is not true. This doctrine is applied only for the purpose of compelling corporations to be honest, in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished."

⁶ It is scarcely necessary to sustain this assertion by judicial authority; but the following passage from the opinion in *Day v. Spiral Springs Buggy Co.* (1885) 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628, may be quoted: "Neither had the corporators of the defendant consented that their interests might be put in jeopardy by such dealings.

... Every stockholder was entitled in his own interest to insist on its being repudiated, for he had not consented to put his share of the capital at the risk of any such venture."

⁷ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 281, laid stress upon the fact that "the shareholders had ample op-

portunity to prevent or arrest the abuse. But no complaint from them has ever been heard, and their acquiescence must be presumed." There is much difficulty in appreciating the standpoint of a judge who could take this position with regard to the shareholders of two railroad companies. Considering that a large part of the shareholders may have been, and probably were, resident in other states, or even in foreign countries, it would seem to have been wholly unwarrantable to base any general presumption upon the fact that none of them had attempted to restrain the corporate officers from making the *ultra vires* contract in question.

⁸ The singularly loose and perfunctory manner in which the liability of the corporation in this point of view is sometimes dealt with is illustrated by such statements as the following (the italics are ours):

"These profits, *we are at liberty to presume*, have gone to swell the dividends of the stockholders." *State Bd. of Agri. v.*

clear that, in cases where the unauthorized transaction proves to be unprofitable or causes loss indirectly by diverting the funds of the corporation from authorized transactions which would or might have produced profits, the principle of estoppel is so far from being recommended by the "justice" of its operation, that it may, and often does, operate most unfairly.⁹ In fact, the only ground upon which, in this point of view, its operation can be defended would seem to be that suggested by a very extreme application of the general principle of law "that whenever one of two innocent persons must suffer by the acts of a third, he who enables

such third person to occasion the loss must sustain it."¹⁰ Obviously, however, the existing law of agency would be revolutionized if this principle could be invoked for the purpose of imposing liability in respect to the unauthorized acts of corporations.

Fifthly, the application of the doctrine may and frequently does operate to the prejudice of third persons whose dealings with the corporation have reference to matters which are within the scope of its corporate powers. The courts have paid even less attention to this feature of the doctrine than to the one discussed in the preceding paragraph.¹¹ Yet its importance is indisputable, and the argument which it fur-

Citizens' Street R. Co. (1874) 47 Ind. 407, 17 Am. Rep. 702.

"It may well be doubted whether any injury can come to any innocent party by denying to respondent its plea. It has fortified itself against possible loss by demanding security for its indemnity in the \$2,000 note. It may safely be assumed that, before accepting this note, the bank well knew that it was a good note, collectable on condition broken, so that, in fulfilling its contract, the bank would work no hardship upon its stockholders, deprive them of assets in which they had the right to share." CREDITORS' CLAIM & ADJUSTMENT CO. v. NORTHWEST LOAN & T. Co. ante, 737.

Surely, in such cases "presumption," "doubt," and "assumption" as to vital facts are wholly out of place, especially when those facts can be readily verified.

⁹ The possible extent of that injustice may be illustrated by a concrete case suggested by the facts in Bissell v. Michigan S. & N. I. R. Cos. (1860) 22 N. Y. 258, where two railway companies were held responsible for injuries received by a man while traveling over a line on which neither of them was empowered to operate trains. For the purposes of the present argument, let us suppose that the accident had been one of the more serious description by which scores of passengers have often been killed and maimed. If any considerable number of the victims had been persons whose lives were of exceptional value, the claims against the defendant companies would have amounted to hundreds of thousands of dollars, instead of the small sum for which suit was actually brought. Such a drain upon their resources would probably have entailed at the very least the passing of some dividends, and might even have resulted in the insolvency of one or both of them. It is difficult to see in what way "justice" would have been subserved by compelling an innocent shareholder to suffer to this degree for the misconduct of the directors or managing officials of the companies. Yet, under the broad doctrine laid down by Comstock, Ch. J. (whose views have been adopted in later New York L.R.A. 1917A.

cases), such a shareholder could not have claimed in the action, as brought, any differential treatment which would, so far as he was concerned, have averted the consequences of the payment of damages.

Other significant illustrations of the manner in which the value of the investments of innocent shareholders may be impaired, even to the extent of complete destruction, are furnished by the cases in which companies have been held liable as shareholders in other companies; or in respect of money borrowed unlawfully; or upon a policy of insurance covering a class of property which the defendant was not authorized to insure; or upon a policy which a company authorized to insure the lives of persons within certain age limits issues to a person whose age exceeds the higher limit. See § 42, supra.

¹⁰ Ashurst, J., in Lickbarrow v. Mason (1787) 2 T. R. 70, 100 Eng. Reprint, 35, 1 H. Bl. 357, 126 Eng. Reprint, 209, 6 East, 21, 102 Eng. Reprint, 1192, 1 Revised Rep. 425, 4 Eng. Rul. Cas. 756.

¹¹ How little it has been considered is apparent from such a passage as the following: "In the granting of charters, the legislature is presumed to have had in view the public interest, and public policy is (as the interest of stockholders ought to be) concerned in the restriction of corporations within chartered limits, and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public or to the stockholders." Leslie v. Lorillard (1888) 110 N. Y. 531, 1 L.R.A. 456, 18 N. E. 363. Here, it will be observed, no reference at all is made to the possibility of prejudice to third persons.

In Kentucky it has been held that "a contract made in violation of law, while enforceable as between the parties, is not enforceable by either participant as against the rights of third persons." First Nat. Bank v. D. Kiefer Mill. Co. (1893) 95 Ky. 97, 23 S. W. 675, followed in Bell & C. Co. v. Kentucky Glass Works Co. (1899) 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180. The court did not advert to the interests of creditors as an element which constitutes one of the reasons for rejecting the prin-

nishes against the doctrine is in one respect even more cogent than that which is derived from a consideration of the interests of stockholders. Stockholders have, by reason of their position with respect to the corporation, various opportunities of learning whether its powers are being exceeded, and if we assume that their assent is to be treated as an element affecting its liability, the possession of such knowledge as will justify the inference of an assent may often be readily inferred. On the other hand, it is clear that third persons who enter into contracts which are intra vires of the corporation are justified in acting upon the supposition that it has not previously made, and will not subsequently make, any contracts which are not of that description. In other words, it is a presumption of fact that, when they trust the corporation, they do so only in so far as it shall be engaged in carrying on the kind of business for which it was organized, and shall continue to avoid the risks, wholly incalculable in extent, of responsibilities not incident to that business. In this point of view, the question of constructive knowledge is, so far as they are concerned, a negligible factor for the purposes of the present discussion. Furthermore, it is not irrelevant to point out that cases may conceivably occur in which the enforcement of an ultra vires contract on the ground of estoppel will operate so as to prevent the enforcement of another contract which is intra vires, and thus put the more deserving claimant in a less favorable position than the one who, presumptively, if not actually, has notice that he is participating in a

ciple of estoppel. It is apparent, moreover, that the doctrine laid down is one which does not afford any protection to a creditor of a corporation which has, as a result of what it did in pursuance of the contract, become insolvent. The same remark may be made with regard to a case in which it was said that the mortgage in question "could not be sustained if attacked by any creditor of the corporation or by any stockholder who did not assent to it. But since it is not shown that there are any creditors, and no question of public policy intervenes, and every stockholder assented to this disposition of the company's property, I find that this mortgage, given for a valuable consideration, should not be declared invalid at the instance of this defendant." *Perkins v. Trinity Realty Co.* (1905) 69 N. J. Eq. 723, 61 Atl. 167.

In a very recent Kentucky case the court remarked, *arguendo*, that "the purpose of the limitation [as to extent of indebtedness] is to not allow the officers of the L.R.A.1917A.

violation of the law.¹² The fact that such a singular distortion of remedial rights may result from giving effect to the doctrine indicates another situation with respect to which the validity of the claim that it is pre-eminently one which prevents injustice is seen to be more than dubious.

66. Concluding remarks.

The considerations adverted to in the preceding section may fairly be said to show not merely that, in a purely juristic point of view, the foundations of the doctrine of estoppel are by no means so solid as many judges and text writers assume them to be, but also that it may, and often does, fail to produce even those equitable results which by some critics who are not satisfied with the technical grounds suggested for it are deemed to constitute of themselves a sufficient reason for applying it. The present writer ventures to express the opinion that the law of the subject would now be in a much more satisfactory position, if all the courts had consistently refused to entertain actions brought upon the ultra vires contracts themselves, and concentrated their attention upon the task of evolving a body of rules calculated to develop to the fullest extent those descriptions of relief which may be granted independently of such actions. It is undeniable that, if this course had been followed, the interests of innocent shareholders and of creditors would now be safeguarded more effectively than is the case in the jurisdictions in which the doctrine of estoppel prevails. Those interests cannot be completely protected except in

bank to have an opportunity to misappropriate, by way of unauthorized dividends, or otherwise, the proceeds of an unauthorized borrowing, and thus imperil the security of creditors by unlawfully increasing the indebtedness of the corporation." *American Southern Nat. Bank v. Smith* (1916) 170 Ky. 512, 186 S. W. 482. There, however, the rationale of the doctrine of estoppel was not under discussion. The actual point decided being that the receiver of an insolvent corporation which had borrowed money beyond the amount allowed by its charter was entitled, in behalf of the creditors, to disaffirm the contract as against the lender.

¹²In the first of the concrete instances adverted to in note 8, *supra*, the effect of applying the doctrine in favor of a large number of claimants might well be the inability of the railway company to pay the interest on its secured debts, to say nothing of the unsecured ones.

an equity suit, and, if the doctrine of estoppel had never been adopted, this consideration would have tended to make such a suit the customary method of procedure. As the formation of an ultra vires contract imports prima facie a breach of trust in respect to shareholders, it is evident that a court would always be justified in insisting that the rights and liabilities of the various parties concerned should be determined in a suit of this character, irrespective of the nature of the action instituted by the claimant himself.

That both shareholders and creditors are entitled to safeguard themselves by intervening in a pending action brought upon ultra vires contracts is undisputable. But it is obvious that the recognition of their right to take this step, as moving parties, is insufficient to insure in every case that they will not suffer damage. That result can be achieved only by the regular and consistent use of a form of procedure which in its normal course will operate so as to bring them before the court.

Another not improbable consequence of a rejection of the doctrine of estoppel would have been the bestowal of more attention upon the question whether, consistently with recognized legal principles, some means could not have been devised by which a third person would have been enabled to hold delinquent directors and executive officers personally accountable in respect to the ultra vires contracts made by them. The obvious difficulty, of course, is that the conception of an implied warranty of authority could not be invoked for this purpose, because anyone who deals with corporate agents is chargeable with notice that their powers are not of wider scope than those of the company itself. See § 7, *supra*. But, even as matters stand, it is perhaps deserving of consideration, whether a liability similar in kind to that which, under appropriate circumstances, is enforceable by virtue of this conception, should not be extended by legislation to cases in which ultra vires contracts are involved. Enactments imposing such a liability would not only afford a much needed means of redress for third persons who may

be prejudiced by the misconduct of directors and other agents of corporations, but also bring about a distinct improvement in the methods of corporate administration.

X. Historical review of the decisions of the American Federal courts.

67. Introductory.

The historical review of the cases discussed in this and the following subtitles is designed to show the position which the various American courts have taken with respect to the doctrine of estoppel during the period within which their reported decisions which bear upon the subject have been rendered. The cases cited include not only those in which the doctrine has been explicitly approved or disapproved, but also those in which it was not referred to in terms, but which, having regard to the facts involved, are either consistent or inconsistent with it. The summary would, it is obvious, be seriously defective if the cases belonging to the latter category were omitted. The authorities in some of the jurisdictions are singularly conflicting; but it may be stated that, wherever a distinct change of views has occurred, it has nearly always been in the direction of an acceptance of the doctrine. Illinois, in which it has recently been repudiated, constitutes a noteworthy exception to this rule.

The summaries contained in the following sections should, of course, be read in connection with the corresponding ones in the monograph relating to actions by corporations, which is appended to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —.

68. Decisions of the Federal Supreme Court.

In the earliest case in which the fact of a corporation's having received the benefits of a contract which it had no power to make was suggested as a reason for charging it with liability on the contract, the circumstances under review were such as to render it unnecessary to determine the general question.¹ But both in an opinion of Supreme Court itself,² and in a leading case decided in one of the states in which the principle

¹ In *Pearce v. Madison & I. R. Co.* (1858) 21 How. (U. S.) 441, 16 L. ed. 184, the assignee of notes executed by two railroad companies for the price of a steamboat purchased for the purpose of operating a steamboat line in connection with the railroads argued that because the steamboat had been delivered to the defendants and

converted to their use, they were responsible. To this contention it was deemed to be a sufficient reply that the plaintiff was not the owner of the boat; that he did not claim under an assignment of the owner's interest; and that his suit was instituted on the notes as an indorsee.

² *De la Vergne Refrigerating Mach. Co.*

of estoppel is accepted,³ the ruling has been cited as an authority for the doctrine that no estoppel can be predicated from such a fact.

The majority of the cases which bear

upon the doctrinal position of the court during the ensuing period relate to public corporations. In some of these the principle of estoppel was repudiated;⁴ in others it was approved.⁵ To recon-

v. German Sav. Inst. (1899) 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. Rep. 20.

³ See p. 278 of the opinion of Comstock, Ch. J., in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258.

⁴ In *Nashville v. Ray* (1873) 19 Wall. (U. S.) 468, 22 L. ed. 164, the theory that municipal orders, drafts, certificates, and other documents of the sort are free from all legal and equitable defenses in the hands of a bona fide holder was disapproved for reasons thus stated: "Every holder of a city order or certificate knows that, to be valid and genuine at all, it must have been issued as a voucher for city indebtedness. It could not be lawfully issued for any other purpose. He must take it, therefore, subject to the risk that it has not been lawfully and properly issued. His claim to be a bona fide holder will always be subject to this qualification. The face of the paper itself is notice to him that its validity depends upon the regularity of its issue. The officers of the city have no authority to issue it for any illegal or improper purpose, and their acts cannot create an estoppel against the city itself, its taxpayers or people."

In *Citizens' Sav. & L. Asso. v. Topeka* (1874) 20 Wall. (U. S.) 656, 22 L. ed. 455, where the action was brought for the recovery of the interest on certain municipal bonds, the court said: "We do not attach any importance to the fact that the town authorities paid one instalment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they have once been illegally levied for that purpose."

In *Parkersburg v. Brown* (1882) 106 (U. S.) 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442, the court used this language: "There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the city, under any state of facts, any doctrine of estoppel or ratification by reason of its having paid some instalments of interest on the bonds, . . . or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust. No such acts can give validity to the statute or to the bonds, however they may affect the status of the property dealt with or the relation of the city to such property."

See also *Marsh v. Fulton County* (1870) L.R.A.1917A.

10 Wall. (U. S.) 676, 19 L. ed. 1040 (where the actual question was as to the effectiveness of a ratification).

⁵ In *Pine Grove Twp. v. Talcott* (1873) 19 Wall. (U. S.) 666, 22 L. ed. 227, an action of assumpsit to recover from a township the amount of bonds issued by it to further the construction of a railway, the precise point upon which the decision turned was the constitutionality of the enactment authorizing the issue of the bonds. But Swayne, J., quoted with approval a general statement in Sedgwick on Statutory & Constitutional Law, p. 73 (discussed in § 41, supra), which has often been judicially treated as an exposition of the principle of estoppel. The case has, moreover, been regarded by some of state courts as an authority for that principle. See, for example, *Union Hardware Co. v. Plume & A. Mfg. Co.* (1889) 58 Conn. 222, 20 Atl. 455; *Beach v. Wakefield* (1899) 107 Iowa, 585, 76 N. W. 688, 78 N. W. 197.

In *San Antonio v. Mehaffy* (1877) 96 U. S. 312, 315, 24 L. ed. 816, 817, where the bonds upon which the action was brought were held to be authorized by a certain provision in the charter of a municipal corporation, Swayne, J., observed: "If that clause were wanting, we should have no difficulty in holding that the city was, under the circumstances, estopped from denying their validity. The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided." This case has been cited as an authority for the principle of estoppel in *Kellogg-Mackay Co. v. Havre Hotel Co.* (1912) 118 C. C. A. 165, 199 Fed. 727; *Seeber v. Commercial Nat. Bank* (1897) 77 Fed. 957; *Ward v. Johnson* (1880) 95 Ill. 240; and disapproved because it proceeded on that principle in *Buckeye Marble & F. Co. v. Harvey* (1892) 92 Tenn. 124, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427.

In *Hitchcock v. Galveston* (1877) 96 U. S. 341, 24 L. ed. 659, where recovery was allowed for work done under a contract for the improvement of sidewalks, the actual decision proceeded upon the ground that, even if the bonds issued to the plaintiffs, upon which the action was brought, were ultra vires, the contract itself was not; that the city had received and now enjoyed the benefit of what they had done and furnished; that for these things the city promised to pay; and that, after having received the benefit of the contract, the city had broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra

cile, upon any broad ground, the language used in these two groups of cases, seems to be scarcely possible. They are inconsistent with respect both to the general question whether an estoppel can be predicated on the ground of an acceptance of the benefits of an ultra vires contract, and also with respect to the special question whether a public corporation can be affected by an estoppel of this description.

The apparent confusion is still further augmented by what was decided or said in other cases belonging to the same period. In one of these cases it was held that no action could be maintained against an insurance company on a policy made by its agent on terms which rendered it ultra vires not merely of the agent, but also of the company itself.^{5a} In another, in which a corporation was the plaintiff, the right of

recovery was affirmed partly on the ground of an estoppel.⁶ In another it was laid down that "the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."⁷ This statement was made, arguendo, in a case involving a claim for damages in respect to the breach of a contract of affreightment, and does not in terms amount to an explicit affirmation of the principle of estoppel. But it becomes extremely significant for the purposes of the present discussions, when we observe that one of the precedents cited in support of it was a New York case in which that principle was adopted,⁸ and that it has been treated as an authority for that principle by the Supreme Court itself,⁹ by some of the inferior Federal courts,¹⁰ and by many of the

vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful." (The case was followed as to this point in *Ft. Worth City Co. v. Smith Bridge Co.* (1893) 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339.) But the court also made the following remarks: "The present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was therefore, at farthest, only ultra vires; and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return." This statement, taken in connection with the fact that the court quoted with approval a passage in *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702, which unmistakably embodies the principle of estoppel, may reasonably be regarded as justifying the citation by some state courts of the *Hitchcock Case* as a precedent for that principle. See, for example, *Detroit v. Detroit City R. Co.* (1893) 56 Fed. 867; *Bowman v. Foster & L. Hardware Co.* (1899) 94 Fed. 592; *Bond v. Terrell Cotton & Woolen Mfg. Co.* (1891) 82 Tex. 309, 18 S. W. 601. Compare also *Whitney v. Wyman* (1879) 101 U. S. 392.

^{5a} *Hoffman v. John Hancock Mut. L. Ins. Co.* (1875) 92 U. S. 161, 23 L. ed. 539. See § 7, note 4, supra.

⁶ *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188, where the passage is cited.

sage in *Sedgwick on Statutory & Constitutional Law*, referred to in note 5, supra, was cited.

⁷ *Ohio & M. R. Co. v. McCarthy* (1877) 96 U. S. 258, 267, 24 L. ed. 693, 695.

⁸ The statement in the text was taken with some slight verbal changes from *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504.

⁹ In *Daniels v. Tearney* (1880) 102 U. S. 415, 26 L. ed. 187, the actual question considered was whether an action could be maintained on a bond void as having been executed in pursuance of certain unconstitutional legislation. But the court, relying on the *McCarthy Case*, laid it down, arguendo, that a corporation is estopped from setting up the defense of ultra vires, where, after having "enjoyed the fruits of a contract fairly made, it denies, when called to account, the existence of the corporate power to make it. . . . The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong or oppression, and it often gives triumph to right and justice, where nothing else known to our jurisprudence can by its operation secure those ends. Like the Statute of Limitations, it is a conservator, and without it society could not well go on."

¹⁰ *Seeber v. Commercial Nat. Bank* (1897) 77 Fed. 957; *Bowman v. Foster & L. Hardware Co.* (1899) 94 Fed. 592.

In *Bowen v. Needles Nat. Bank* (1899) 36 C. C. A. 553, 94 Fed. 925, it was remarked: "While the language of these expressions of the court may be said to be sufficiently broad and inclusive to justify the contention of the plaintiff in error, the court, in its adjudications, has limited the application of the principle to cases in which a corporation has, by the plea of ultra vires, sought to retain unjustly the

state courts which accept the principle.¹¹

From the summary contained in the preceding paragraph it is apparent that, up to the date of the latest of the cases mentioned, the opinions of the Supreme Court were, to say the least, in a very unsettled condition with regard to the applicability of the principle of estoppel. Before that date, however, it had repudiated definitively the doctrine that a corporation may be estopped by the partial performance of an ultra vires contract from denying its liability in respect to the unperformed residue of the contract.¹² The adoption of this position, it is obvious, did not necessarily involve a disapproval of the principle of estoppel as predicated from the complete performance of a contract on one side, or from the complete performance of that part of it which it is the object of the action to enforce. But the case has an important bearing upon the views of the court with regard to that principle, because it was explicitly based upon a theory concerning the juristic quality of an ultra vires contract which corres-

ponded with that which has always prevailed in England; viz., that such a contract is absolutely void. One of the authorities specially relied upon was a decision by which that theory had, only a few years previously, been stamped with the approval of the House of Lords.¹³ An indorsement of this decision logically involved the total rejection of the principle of estoppel,—in so far at least as it is predicated on the mere ground of an acceptance of the benefits of the contract. Such a rejection was distinctly indicated in a case decided about ten years afterward, in which the court took occasion to remark that its affirmation of the right of one railway company to recover from another the balance of tolls due under a contract for the use of a bridge was based upon the consideration that the contract was independent of the lease which had been executed between the companies, and was therefore binding as between the parties to the suit, whether the lease was valid or invalid. The judgment, it was stated, did "not rest in any degree upon the ground suggested

fruits of a contract which has been performed by the other party thereto. In all such cases the action has been maintained not upon the contract, nor to enforce its terms, but upon an implied obligation resting upon the defendant, resulting from the fact that it has received money or property which it ought either to return or make compensation for." This passage indicates that the writer of the opinion was somewhat embarrassed by the apparent conflict between the position taken by the Supreme Court in the earlier and in the later cases. His attention had evidently not been directed to the fact that there had been a change of front on the part of that court, and that the language used by Mr. Justice Swayne is quite consistent with other language used during the period which preceded that change.

Nor was that fact adequately appreciated by the court in *Kellogg-Mackay Co. v. Havre Hotel Co.* (1912) 118 C. C. A. 165, 199 Fed. 727, a decision which in part proceeded upon the theory that the doctrine of estoppel is technically distinguishable from that propounded in *Ohio & M. R. Co. v. McCarthy*, note 7, *supra*, but that, so far as regards their practical consequences, they are similar in this respect, that the latter doctrine, as well as the former, precludes a corporation from interposing the defense of ultra vires in an action brought upon a contract of which it has received the benefits. The position thus taken was apparently inconsistent with that which is indicated by the language quoted in note 9, *supra*, from the opinion in *Daniels v. Tearney*.

¹¹ See, for example, *Automatic Phonograph Exhibition Co. v. North American* L.R.A.1917A.

Phonograph Co. (1891) 45 Fed. 2; *Detroit v. Detroit City R. Co.* (1893) 56 Fed. 867; *Union Hardware Co. v. Plume & A. Mfg. Co.* (1889) 58 Conn. 219, 20 Atl. 455; *Wright v. Hughes* (1889) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907; *Auerbach v. Le Sueur Mill Co.* (1881) 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799; *National Surety Co. v. Hall-Miller Decorating Co.* (1913) 104 Miss. 626, 46 L.R.A.(N.S.) 325, 61 So. 700; *First Nat. Bank v. Guardian Trust Co.* (1905) 187 Mo. 494, 70 L.R.A. 79, 86 S. W. 109; *Earle v. American Sugar Ref. Co.* (1908) 74 N. J. Eq. 751, 71 Atl. 391; *Hurd v. Kelly* (1879) 78 N. Y. 588, 34 Am. Rep. 567; *Hutchins v. Planters' Nat. Bank* (1901) 128 N. C. 72, 38 S. E. 252; *Texas & St. L. R. Co. v. Robards* (1883) 60 Tex. 545, 48 Am. Rep. 268; *North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank* (1891) 79 Wis. 45, 11 L.R.A. 845, 47 N. W. 300; *Zinc Carbonate Co. v. First Nat. Bank* (1899) 103 Wis. 132, 74 Am. St. Rep. 845, 79 N. W. 229.

See also the following cases, where the liability of public corporations was involved: *Detroit v. Detroit City R. Co.* (1893) 56 Fed. 903; *Warner v. New Orleans* (1898) 31 C. C. A. 238, 59 U. S. App. 131, 87 Fed. 836; *Lancaster County v. Cheraw & C. R. Co.* (1887) 28 S. C. 142, 5 S. E. 338.

¹² *Thomas v. West Jersey R. Co.* (1879) 101 U. S. 71, 25 L. ed. 950. As to this phase of the subject, see further § 2, *supra*.

¹³ *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. (Eng.) 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794.

in argument, that, the bridge contract and the lease having been executed, the . . . companies, having received the benefits of them, were estopped to deny their validity." It was also observed that the doctrine deducible from previous decisions of the court was that "a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover, as on a quantum meruit, the value of what the defendant has actually received the benefit of."¹⁴ Only four cases were cited in support of this assertion, and, in so far as it purported to be a general statement of the effect of the earlier rulings, it was obviously defective and inaccurate. But it shows very plainly that the court was now prepared to apply the doctrine thus propounded, whenever a case should arise which directly involved the point. Such a case was presented two years afterwards, and the whole question was discussed in an elaborate opinion delivered by Mr. Justice Gray, which has ever since been re-

garded as an authoritative exposition of the law.¹⁵ It was argued in behalf of the plaintiff that, "even if the contract sued on [a lease] was void, because ultra vires and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period." The reply to this contention was that, though sustained by decisions in some of the state courts, it found no support in the judgments of the Supreme Court itself.¹⁶ An extract from the opinion is quoted in § 24, supra. For the purposes of the present summary it will be sufficient to state that the doctrine as explained in that passage is, in brief, "that a contract made by a corporation beyond the scope of its powers, expressed or implied, cannot be enforced, or rendered enforceable, by the application of the principle of estoppel."¹⁷ To this doctrine the court has adhered in nearly all the later judgments in which it has had occasion to express an opinion upon the subject.¹⁸

¹⁴ *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (1888) 131 U. S. 371, 33 L. ed. 157, 9 Sup. Ct. Rep. 770. The cases cited were *Pennsylvania R. Co. v. St. Louis, A. & T. R. Co.* (1885) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Louisiana v. Wood* (1880) 102 U. S. 294, 26 L. ed. 153; *Parkersburg v. Brown* (1882) 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Chapman v. Douglas County* (1882) 107 U. S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62; *Salt Lake City v. Hollister* (1883) 118 U. S. 256, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055.

¹⁵ *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

¹⁶ It is submitted that, having regard to several of the decisions reviewed in the earlier part of this section, this unqualified assertion was not warranted. The learned judge brushed aside, as being merely "passing remarks," the statements in *Ohio & M. R. Co. v. McCarthy* (1877) 96 U. S. 258, 24 L. ed. 693 (note 7, supra), and *San Antonio v. Mehaffy* (1877) 96 U. S. 312, 24 L. ed. 816 (note 5, supra). But when the origin of those statements is considered, and due weight accorded to the construction which has been placed upon them with reference to the principle of estoppel, this depreciatory appraisement of their significance as precedents would seem to be by no means warrantable. The attention of the learned judge was apparently not directed at all to the express approval of that principle in *Pine Grove Twp. v. Talcott* (1873) 19 Wall. (U. S.) 666, 22 L. ed. 227 (note 5, supra); L.R.A.1917A.

Daniels v. Tearney (1880) 102 U. S. 415, 26 L. ed. 187 (note 9, supra); and *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188 (note 6, supra). He cited *Hitchcock v. Galveston* (1877) 96 U. S. 341, 24 L. ed. 659, and explained the actual ground upon which it was decided, but, strangely enough, did not refer at all to the passage quoted in note 5, supra, in which the principle was distinctly enunciated. On the whole, therefore, it would seem that his attempt to show that the court had never countenanced the principle, and thus to absolve it from the charge of inconsistency, must be pronounced unsuccessful.

¹⁷ *Ward v. Joslin* (1902) 186 U. S. 142, 46 L. ed. 1093, 22 Sup. Ct. Rep. 807, repeating almost verbatim a statement in *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* (1895) 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173.

¹⁸ *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* (1891) 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953 (where the doctrine was contrasted with that which declares that a corporation may be estopped to deny the validity of a merely informal or irregular contract); *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* (1895) 163 U. S. 564, 581, 41 L. ed. 265, 271, 16 Sup. Ct. Rep. 1173 (arguendo, in a case involving a lease of a railway which was held to be *intra vires*); *Jacksonville, M. P. R. & Nav. Co. v. Hooper* (1896) 160 U. S. 514, 40 L. ed. 515, 16 Sup. Ct. Rep. 379 (arguendo); *McCormick v. Market Nat. Bank* (1896) 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep.

"Whatever doubts might have been once entertained as to the power of corporations to set up the defense of ultra vires to defeat a recovery upon an executed contract, the rule is now well settled, at least in this court, that where the action is brought upon the illegal contract, it is good defense that the corporation was prohibited by statute from entering into such contract, although in an action upon a quantum meruit it may be compelled to respond for the benefit actually received."¹⁹ In one case, however, a passage was quoted in which the New York court of appeals had enunciated the principle of estoppel.²⁰ The comment of the Supreme Court upon this passage was that the views expressed in it "commended themselves," in its judgment, as being "intrinsically sound," and that it was unnecessary to add any observations of its own to "these satisfactory declarations of the law of New York." As a resort to the principle of estoppel was, strictly speaking, not required for the support of the judgment as rendered, these expressions might

perhaps be regarded as being technically mere obiter dicta. This is possibly the footing upon which the court, if it should hereafter undertake to explain the apparent conflict between its position on this case and others by which it was immediately preceded and followed, will endeavor to harmonize its rulings. That it does stand in need of some explanation is apparent from the fact that it has already been treated in several cases as an authority for the principle of estoppel.²¹

Some other inconsistencies in the views of the court seem to be indicated by its decisions concerning national banks. See § 70, *infra*.

69. *Decisions of the inferior courts.*

The doctrine which is now applied by the Supreme Court of the United States has been duly recognized in a large proportion of the cases in which the inferior Federal courts have discussed the effect of the execution of a contract upon the remedial rights of the party by whom the corporation is sued.¹

433 (lease of building to national bank); California Nat. Bank v. Kennedy (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, reversing (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039 (purchase by national bank of stock of another company); Pullman's Palace Car Co. v. Central Transp. Co. (1898) 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808 (lease of railway); First Nat. Bank v. Hawkins (1899) 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739 (purchase by national bank of stock of another company); Louisville, N. A. & C. R. Co. v. Louisville Trust Co. (1899) 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817 (arguendo, in a case in which the invalidity of the guaranty in question arose from irregularities merely); First Nat. Bank v. Converse (1906) 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306 (purchase by national bank of stock of another company); Merchants' Nat. Bank v. Wehrman (1906) 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613 (partnership entered into by national bank); Citizens' Cent. Nat. Bank v. Appleton (1909) 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364 (guaranty by national bank).

¹⁹ De la Vergne Refrigerating Mach. Co. v. German Sav. Inst. (1899) 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. Rep. 20, reversing (1898) 28 C. C. A. 681, 49 U. S. App. 777, 84 Fed. 1016 (acquisition of stock of another company).

²⁰ Eastern Bldg. & L. Asso. v. Williamson (1902) 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. Rep. 527. There the court affirmed the judgment in a South Carolina case (1898) 54 S. C. 582, 71 Am. St. Rep. 822, 32 S. E. 765, and (1901) 62 S. C. 390, 38 S. E. 616, in which the right of William-L.R.A.1917A.

son, a member of the defendant association, incorporated in New York, to recover the face value of twenty-five shares, less the sum borrowed by him from it, was referred partly to the principle of estoppel. The Federal Supreme Court quoted, as showing the views of the New York court of appeals with regard to the liability of the association in a similar contract, the following passage from opinion in Vought v. Eastern Bldg. & L. Asso. (1902) 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496, reversing (1901) 61 App. Div. 613, 70 N. Y. Supp. 1150: "It is now well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. . . . It may be that while a contract remains unexecuted on both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power."

²¹ Re New York Wheel Works (1905) 141 Fed. 434 (transfer of stock; court adopted as its own opinion the report of a master in which the Williamson Case had been relied upon); First Nat. Bank v. Alexander (1907) 152 Ala. 585, 44 So. 866; Drewery v. Columbia Amusement Co. (1910) 87 S. C. 445, 69 S. E. 879, 1094; Lancaster v. Southern L. Ins. Co. (1911) 89 S. C. 179, 71 S. E. 864.

¹ Humboldt Min. Co. v. American Mfg. Min. & Mill. Co. (1894) 10 C. C. A. 415, 22

On the other hand, those courts have in many instances applied or recognized the principles of estoppel. Some of the rulings and judicial statements which reflect this point of view may be accounted

for by the fact that they belong to the earlier period, during which, as has been shown in § 68, *supra*, the position of the Supreme Court had not yet been definitely settled.² But this explanation is not

U. S. App. 334, 62 Fed. 356 (guaranty); *Hamor v. Taylor-Rice Engineering Co.* (1897) 84 Fed. 392 (action on note given for purchase price of company's own stock); *Park Hotel Co. v. Fourth Nat. Bank* (1898) 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742 (execution of accommodation note); *Bowen v. Needles Nat. Bank* (1898) 87 Fed. 430, affirmed in (1899) 36 C. C. A. 553, 94 Fed. 925 (guaranty); *Schofield v. Goodrich Bros. Bkg. Co.* (1899) 39 C. C. A. 76, 98 Fed. 271 (purchase of another company's stock); *Anglo-American Land, Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 89, 132 Fed. 721, petition for writ of certiorari denied in (1904) 196 U. S. 638, 49 L. ed. 630, 25 Sup. Ct. Rep. 793 (purchase of stock in another company); *Doherty v. Arkansas & O. R. Co.* (1904) 5 Ind. Terr. 537, 82 S. W. 899, point was not referred to in the reversing decision in (1905) 73 C. C. A. 328, 142 Fed. 104; *Standard Sav. & L. Co. v. Aldrich (receiver)* (1908) 20 L.R.A.(N.S.) 303, 89 C. C. A. 646, 163 Fed. 216 (borrowing to meet claims of withdrawing shareholders of building association); *Merchants' Bank v. Baird* (1908) 17 L.R.A.(N.S.) 526, 90 C. C. A. 338, 160 Fed. 642 (guaranty); *Santa Cruz v. Wykes* (1913) 120 C. C. A. 485, 202 Fed. 357, affirming (1911) 184 Fed. 752 (suit to foreclose mortgage); *Vandagriff v. Rich Hill Bank* (1908) 90 C. C. A. 129, 163 Fed. 823 (action to enforce liability of bank as stockholder in bank of which plaintiff was receiver); *Hamilton v. Savannah, F. & W. R. Co.* (1892) 49 Fed. 412 (sale of corporate franchises); *Oliver v. Gilmore* (1892) 52 Fed. 562 (action on restrictive covenant); *Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery* (1902) 119 Fed. 709 (note given for price of commodities).

For a case in which the doctrine was applied in favor of a public corporation, see *Coffin v. Kearney County* (1893) 6 C. C. A. 288, 12 U. S. App. 562, 57 Fed. 137 (county not estopped by recitals in bonds).

In *Holt v. California Development Co.* (1908) 88 C. C. A. 167, 161 Fed. 3 (stockholder's bill in equity for cancellation of contract), the court, citing *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478 (see preceding section), laid it down that a contract which is ultra vires in the proper sense of the word cannot be validated on the ground of an estoppel. Yet it was also declared, somewhat inconsistently, that the defense of estoppel was not applicable to the facts as alleged.

² In *Dimpfel v. Ohio & M. R. Co.* (1879) 9 Biss. 127, Fed. Cas. No. 3,918, where a stockholder in the defendant company brought suit for the purpose of obtaining

a declaration that a mortgage and a contract for the operation of the line of another company were void, the court laid it down, while discussing a demurrer, that "one of the principles which now seems to be established by the adjudication of the courts as to powers of corporations is that, where a corporation has acted under a contract and received the benefits arising from it, it is not competent for it to deny its validity as being ultra vires." But the court was also of opinion that, having regard to the fact "that the courts in recent times have been extremely liberal in the construction of powers of railroad corporations to accomplish the general scope and objects of their creation, and that the question of ultra vires has not been, of late years, construed with that strictness that existed in former times," the contract by which the other line was purchased by the defendant could not be considered as ultra vires.

In *Western U. Teleg. Co. v. St. Joseph & W. R. Co.* (1880) 1 McCrary, 565, 3 Fed. 430, an injunction restraining a railway company from seizing a telegraph line erected along its road in pursuance of a contract with a telegraph company was granted on grounds thus stated: "If the defendants, after years of acquiescence in the contract in question, after receiving its benefits, and after a property had been built up under it to which others made claim, became suddenly convinced that it was a void contract, it was their duty to apply to the courts for relief, praying a cancellation of the contract and a full and fair settlement of all accounts growing out of its execution in the past. Until they seek some such remedy, and until a fair settlement upon full accounting can be had, they will be enjoined from attempting to eject the plaintiff, or to seize the property." A similar decision was rendered in *Atlantic & P. Teleg. Co. v. Union P. R. Co.* (1880) 1 McCrary, 541, 1 Fed. 745.

In *Memphis & L. R. Co. v. Dow* (1884) 22 Blatchf. 48, 19 Fed. 388, Wallace, J., approved the statement in *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504, that "a corporation cannot avail itself of the defense of ultra vires where the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract." He also stated that "the decided weight of modern authority favors the conclusion that neither party to a transaction ultra vires will be permitted to allege its invalidity while retaining its fruits."

In *Holt v. Winfield Bank* (1885) 25 Fed. 812, Mr. Justice Brewer observed, arguendo: "It may be considered as settled law to-

available with respect to several of the more recent cases, in which the authority of the higher tribunal has been disregarded to a surprising extent.³

day that, where a corporation goes outside the scope of its legitimate business and makes a contract, and that contract is executed and the corporation has received the benefits of the contract, the courts will never listen to a plea of ultra vires. . . . It may also be laid down as a third proposition, that, wherever a contract has been entered into which is beyond the powers of the corporation, and other parties have acted upon the faith of that contract and parted with money or value, and the relations of parties have become so changed that the status ante the contract cannot be restored, the courts will not listen to a plea of ultra vires."

³ Chicago, R. I. & P. R. Co. v. Union P. R. Co. (1891) 47 Fed. 16. Mr. Justice Brewer, alluding to the distinction taken by some authorities between private and quasi public corporations, remarked: "But a milder rule applies when a corporation seeks to repudiate a contract into which it has formally entered. It is not seemly for a corporation, any more than for an individual, to make a contract and then break it; to abide by it so long as it is advantageous, and repudiate it when it becomes onerous. The courts may well say to such corporation: 'As you have called it a contract, we will do the same. As you have enjoyed the benefits when it was beneficial, you must bear the burden when it becomes onerous.'" Yet in an earlier part of his opinion the learned judge had cited the leading case, Central Transp. Co. v. Pullman's Palace Car Co. (1890) 139 U. S. 34, 35 L. ed. 60, 11 Sup. Ct. Rep. 478. See preceding section, note 15. It is difficult to see how the doctrine there laid down can be reconciled with his statement of the law.

In *Farmers' Loan & T. Co. v. Chicago & N. P. R. Co.* (1895) 68 Fed. 412, one of the grounds upon which a suit brought to foreclose a mortgage given by the Chicago & Northern Pacific Railroad Company—the Northern Pacific Railroad Company, which had leased the mortgaged property and assumed the mortgage debt, being made a defendant—was held to be maintainable, was thus stated: "The mortgagor company executed this trust deed to the complainant to secure certain bonds which it put forth upon the market as secured thereby. The Northern Pacific Company, in consideration of the lease, covenanted to pay the interest of these bonds. The mortgagor company is estopped, as against the bondholders, to assert that the trustee has not performed the acts necessary to entitle it to assume the trust. It asserted to the world the legal capacity of its appointee. It marketed its obligations upon the faith of that representation. It cannot be permitted now to assert to the contrary. It cannot be allowed to assert a violation of law by itself or by the trustee of its appointment as ground for the nonenforcement of its legal L.R.A.1917A.

obligation. It is not the conservator of the dignity of the state of Illinois. The Northern Pacific Company took the lease subject to the mortgage, covenanted to pay the interest on the bonds thereby secured, and is in no position to assert its invalidity. It also is estopped."

In *American Nat. Bank v. National Wall-Paper Co.* (1896) 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85, the following passage was quoted as containing a correct statement of the law: "The great mass of judicial authority seems to be to the effect that, where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it." 5 Thomp. Corp. 1st ed. § 6016.

In *Bowman v. Foster & L. Hardware Co.* (1899) 94 Fed. 592, Rogers, J., discussing the contention that, in subscribing for stock in the plaintiff building and loan association, the Foster & Logan Hardware Company exceeded its charter powers, made these remarks: "The Foster & Logan Hardware Company complied with the rules and regulations required by the plaintiff building and loan association in order to become a borrower, and executed the note and mortgage sued on, and accepted the stock. It used the money so borrowed in constructing its business house. So far as the plaintiff building and loan association was concerned, the contract was an executed contract. All the plaintiff building and loan association could do was done. Can the Foster & Logan Hardware Company, after having received and used the plaintiff's money under this executed contract, be heard to say that it had no power to become a member of the association, and that its act was therefore ultra vires? I think not. . . . The Foster & Logan Hardware Company, if in existence and a defendant, could not avail itself of the plea of ultra vires, and, if it could not, neither can its vendees, assignees, or mortgagees."

In *United States Sav. & L. Co. v. Convent of St. Rose* (1904) 66 C. C. A. 416, 133 Fed. 354, where the action was brought to enforce a contract under which the defendant corporation (appellee) became a shareholder in the plaintiff corporation (appellant) for the purpose of securing a loan, the court thus stated its position: "The mortgage in this case was given under and in pursuance of the contract made between the parties. It was an executed contract. Appellant paid \$7,000 to appellee, and did everything which it agreed to do. Appellee has received the fruits and benefits of the contract, but has not paid all the money agreed to be paid thereon by the terms of the written contract. Can it now successfully defeat the contract by the plea of ultra vires?" The court then quoted the

The theory has been advanced by some of the courts which rendered the decisions belonging to the second of these classes, that the doctrine adopted by the Supreme Court was formulated with

reference to the special obligations of public and quasi public corporations, and is applicable only to corporations of one or other of these descriptions.⁴ But there are some conclusive reasons why no Fed-

passage in 5 Thompson on Corporations, § 6016, which is referred to under the first case cited in this footnote, and continued thus: "The decisions in the state of Washington, wherever the question has been raised, are to the effect that, where a corporation has accepted the benefits of a contract, it is estopped from denying the validity of the instruments by which those benefits came to it. . . . If, under the facts of this case, appellee is estopped from pleading that the contract was ultra vires, then it follows that, if the contract was valid, it can be enforced. A different contract cannot be made between the parties simply because of the plea of ultra vires, unless the plea can be held good." The authorities in the state of Washington did not change any of the terms of the original contract or agreement. The parties were held estopped from asserting the plea of ultra vires, solely because they had received money or property on the faith of the contract or transaction, and could not, under circumstances similar to the case at bar, in equity and good conscience, deny their contract, because they were estopped by their own acts and conduct from doing so." In his dissenting opinion Gilbert, J., endeavored to show that, assuming the decisions of the state court to be controlling, they were not inconsistent with those of the Federal Supreme Court, but his reasoning is scarcely satisfactory.

In *Burnes v. Burnes* (1904) 132 Fed. 485, the court was of opinion that the arrangement in question, under which a corporation was to pay an annuity to the widow and daughter of a decedent, and purchase the shares of its stock which he had held, was not ultra vires. But the following remarks were also made: "If there were any doubt about these questions, such doubts would be removed because of the long delay, the death of the actors in the transactions, the long acquiescence, either with knowledge of the facts or without knowledge of such facts, which, if put to use, would have uncovered the entire situation. The fact that the corporation, as such, seeks by interested officers to urge the defense, is not controlling. After having the advantageous contract, and enjoying the benefits for years, it will not be allowed to urge the defense of ultra vires."

In *Wayte v. Red Cross Protective Soc.* (1909) 166 Fed. 372, the plaintiff had expended large sums of money in traveling over the state for the purpose of securing a charter to enable the defendant company to write insurance in New York similar to that which it was writing in Pennsylvania, and when he secured a proposition from another New York company it was satisfactory to the defendant. In an action to L.R.A.1917A.

recover compensation for his services, it was objected that his employment for the purposes stated was ultra vires, and that therefore a recovery could be had. But the court said that, "whether or not the result of his services was the submission of a proposition which subsequently turned out to be beyond the power or the right of the defendant company to accept, yet he had performed the work for them. . . . The officers of the defendant were aware of the employment of the plaintiff, and knew of the work he performed, and they are now estopped from setting up the defense that the employment was ultra vires, and thereby escape the payment of their just debts. The law, as established by the numerous decisions of the state courts and Federal courts, is aptly stated in 5 Thompson on Corporations, 1st ed. § 6025: 'Where a party has made a contract with a corporation, and has fully performed what he agreed to do on his part, and is suing the corporation for the compensation which it agreed to pay or to render as the consideration of the contract, then the corporation will be estopped from setting up the defense that it had no power to enter into the contract, or that it was prohibited by statute from doing so.' " Reliance was also placed upon the doctrine that "except in cases where the rights of the public are involved, the plea of ultra vires, whether interposed for or against a corporation, will not be allowed to prevail when it will not advance justice, but will accomplish a legal wrong. 10 Cyc. 1156." The last statement is evidently a mere modification of the oft-cited remark of Mr. Justice Swayne in *Ohio & M. R. Co. v. McCarthy* (1877) 96 U. S. 258, 24 L. ed. 693. See preceding section.

See also *Gasquet v. Crescent City Brewing Co.* (1892) 49 Fed. 496 (issue of stock not paid up); *Re Waterloo Organ Co.* (1904) 67 C. C. A. 255, 134 Fed. 341, reversing (1904) 128 Fed. 517 (applicability of principle denied, because no benefits had been received by the corporation).

For further information as to the following cases, which also reflect a theory difficult, if not impossible, to reconcile with that of the Supreme Court, see § 43, supra: *Citizens' State Bank v. Hawkins* (1896) 18 C. C. A. 78, 34 U. S. App. 423, 71 Fed. 369; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Lyon, P. & Co. v. First Nat. Bank* (1898) 29 C. C. A. 45, 55 U. S. App. 747, 85 Fed. 120; *Park Hotel Co. v. Fourth Nat. Bank* (1898) 30 C. C. A. 409, 58 U. S. App. 674, 86 Fed. 742; *H. Scherer & Co. v. Everest* (1909) 94 C. C. A. 346, 168 Fed. 822.

⁴In *Quinby v. Consumers' Gas Trust Co.* (1905) 140 Fed. 362, where the suit was

eral court of inferior jurisdiction is justified in taking this position; viz., (1) that, during the period when the principle of estoppel was still being recognized to some extent by the Supreme Court, it was treated as being applicable in respect of public corporations;⁵ (2) that the phraseology of the statements in which the Supreme Court has explained its later position is entirely general and unqualified; (3) that several of the cases in which it has repudiated the principle related to private corporations.⁶ The theory that the position of private and public corporations is essentially different in respect to the applicability of the principle of estoppel has recently been pronounced by one of the circuit courts of appeals to be "without merit."⁷

70. Decisions with regard to the liability of national banks.

(a) Generally.

In the monograph appended to Calu-

brought by a stockholder to remove a cloud created on the title of the company by an option contract entered into with the city in which it was carrying on operations, the court remarked: "There is a difference in the rights of corporations to take advantage of a defect or deficiency in corporate powers, depending upon the nature of the act in question. If a corporation is engaged in a purely private business, the circumstance that it has received and retained benefits under a contract which was beyond its corporate powers may frequently preclude it from denying the legality of the contract. If a corporation organized by private persons for gain is engaged in performing some service for the public, and makes a contract beyond its charter powers, it may be estopped from asserting the invalidity of the contract if the performance thereof does not affect its discharge of its duties to the public. Such was the nature of the case of *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702, and of the other estoppel cases cited. But such a corporation cannot be estopped if the performance of the contract involves the violation of a statute or a declared rule of public policy." The decisions proceeded upon the ground that the gas company, being endowed with the capacity to accept the privilege of using the streets, was from the time of its incorporation a quasi public company, and, consequently, that "the contract in question belonged to the class in which estoppel cannot be used to smother the fact that the contract is void.

See also in *Kellogg-Mackay Co. v. Havre Hotel Co.* (1912) 118 C. C. A. 165, 199 Fed. L.R.A.1917A.

met & C. Canal & Dock Co. v. Conkling, L.R.A.1917B, —, it is shown that, in the leading case with regard to the remedial rights of a national bank in respect of contracts which are prohibited, expressly or impliedly, by the regulating statutes which define its powers, the principal ground upon which the action was held to be maintainable was that the effect of the violation of these statutes is not to invalidate the transaction itself, but simply to render the bank liable to a forfeiture of its charter.¹ But the court also affirmed without any qualification the principle of estoppel, and, so far as this class of cases is concerned, has never expressed any doubt regarding its soundness.

Subsequently, in cases where banks were the defendants, the former of these conceptions was treated, both by the Supreme Court itself and by one of the circuit courts of appeals, as a reason for allowing recovery.² By another court of appeals, the latter conception was relied

727, where the court expressed the opinion that the doctrine of estoppel is "not strictly applicable, unless in exceptional cases, where the corporations involved are of a public or quasi public character; but it would seem to be suited, with strong reason and emphasis, to the operation of merely private corporations, when such corporations have received the benefits of the obligations which they are seeking to repudiate; and has been so applied in a variety of cases." The court cited a large number of authorities, both state and Federal; but the only statements of the Supreme Court which were referred to were the remarks of Swayne, J., quoted in § 68, note 5, *supra*. The later decisions of that court were not mentioned.

The two classes of corporations were also distinguished, with respect to the principle of estoppel, in *United States Sav. & L. Co. v. Convent of St. Rose* (1904) 86 C. C. A. 416, 133 Fed. 354.

⁵ See § 68, note 5, *supra*. For a later case in which the principle of estoppel was held to be applicable to a public corporation, see *Detroit v. Detroit City R. Co.* (1893) 56 Fed. 867.

⁶ See § 68, note 18, *supra*.

⁷ *Converse v. Gardner Governor Co.* (1909) 98 C. C. A. 16, 174 Fed. 30, followed in *Converse v. Emerson, T. & Co.* (1909) 242 Ill. 619, 90 N. E. 269, which affirmed (1909) 148 Ill. App. 604.

¹ *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188.

² *Thompson v. St. Nicholas Nat. Bank* (1892) 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66, affirming (1889) 113 N. Y. 325, 21 N. E. 57, which affirmed (1888) 47

upon as a ground for affirming the liability of the bank.³

But the theory upon which the more recent decisions of the Supreme Court have proceeded is that the unauthorized contracts of national banks are utterly

void in the same sense as the unauthorized contracts of other corporations, and consequently not susceptible of being validated by the operation of an estoppel.⁴ In one of the opinions we find

Hun, 621. There the provision violated (U. S. Rev. Stat. § 5208, Comp. Stat. 1913, § 9770) was one declaring it to be "unlawful" to certify a check, unless the drawer has on deposit an amount equal to the amount of the check. The decisions relating to banks as plaintiffs were declared to have established the rule that, "where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties." But the actual ground upon which the affirmance of the judgment of the state court proceeded was that the agreement enforced was independent of the one which violated the statute.

In *Weber v. Spokane Nat. Bank* (1894) 12 C. C. A. 93, 29 U. S. App. 97, 64 Fed. 208, reversing (1892) 50 Fed. 735, an action was held to be maintainable on a note given by a bank for a debt which exceeded the limits fixed by U. S. Rev. Stat. § 5202, Comp. Stat. 1913, § 9764. The position taken was that the inhibited debt was not void, and that the bank could not retain the property which it had acquired, and deny its liability for the stipulated consideration.

³In *American Nat. Bank v. National Wall-Paper Co.* (1896) 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85 (decided in the same year as the first of the cases cited in note 4, *infra*, but independently of it), a suit for the price of goods was held to be maintainable. The statement of the doctrine of estoppel in 5 *Thompson on Corporations*, 1st ed. § 6016, was approved.

⁴In *McCormick v. Market Nat. Bank* (1896) 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433, it was held that a lease of an office executed before the Comptroller of the Currency had authorized the defendant to commence the business of banking "was void, could not be made good by estoppel, and would not support an action against the bank for anything beyond the value of what it had actually received and enjoyed."

In *First Nat. Bank v. Hawkins* (1899) 174 U. S. 304, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739, reversing (1897) 24 C. C. A. 444, 33 U. S. App. 747, 79 Fed. 51, the defendant bank, which had, without authority of law, purchased and held as an investment shares of stock in the Indianapolis National Bank, was declared not to be liable in an action brought by the receiver of the latter bank to enforce the stockholders' liability arising under an assessment by the Comptroller of the Currency. The precedents relied upon L.R.A.1917A.

were the cases in which the doctrine of an estoppel, as predicated from a receipt of the benefits of the contract, was rejected. It was sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory. But the court said: "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation. However, whether, in the case of persons *sui juris*, this liability is to be regarded as a contractual incident to the ownership of the stock, or as a statutory obligation, does not seem to present a practical question in the present case. If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to Congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank as would have resulted from a lawful act."

In *California Nat. Bank v. Kennedy* (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, reversing (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, where the California National Bank was made a defendant for the purpose of enforcing its alleged liability as a stockholder in the Savings Bank, the judgment in favor of the national bank was rested explicitly upon the ground that, as the transfer of the stock in question was unauthorized by law, the fact that, under some circumstances, the bank might have legally acquired stock in the corporation did not estop it from setting up the illegality of the transaction. In another part of its opinion the court remarked: "The claim that the bank, in consequence of the receipt by it of dividends on the stock of the Savings Bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void, but merely voidable."

For another case in which an action brought by a receiver to enforce an assess-

the following remark: "Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nulli-

ty of an act which is an ultra vires act."⁵

It would seem, however, that this broad statement must be taken to be subject to an important qualification, for in another part of the opinion two cases involving actions in which national

ment upon a national bank as shareholder in the company which he represented was held not to be maintainable, see *First Nat. Bank v. Converse* (1906) 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306.

In *Robinson v. Southern Nat. Bank* (1900) 180 U. S. 295, 45 L. ed. 536, 21 Sup. Ct. Rep. 383, the court, advertent to the first two of the above cases, said: "While not disposed, as at present advised, to push the principle of these cases so far as to exempt such banks from liability as other shareholders, where they have accepted and hold stock of other corporations as collateral security for money advanced (a proposition which we withhold from decision), we think there is a presumption in such cases against any intention on the part of the lending bank to become an owner of the collateral shares. This was the view taken in the case of *Baker v. Old Nat. Bank* (1898) 86 Fed. 1006, and *Nevada Nickel Syndicate v. National Nickel Co.* (1900) 103 Fed. 391."

In *Merchants' Nat. Bank v. Wehrmann* (1906) 202 U. S. 295, 50 L. ed. 1036, 26 Sup. Ct. Rep. 613 (suit for dissolution of partnership and an accounting), the ratio decidendi was that, "as the bank was not estopped by its dealings to deny that it was a partner, it was not estopped to deny all liability for partnership debts."

For cases in which it was held that no action could be maintained on an ultra vires guaranty of a national bank, see *Seligman v. Charlottesville Nat. Bank* (1879) 3 Hughes, 647, Fed. Cas. No. 12,642; *Johnston Bros. v. Charlottesville Nat. Bank* (1879) 3 Hughes, 657, Fed. Cas. No. 7,425; *Farmers' & M. Nat. Bank v. Smith* (1896) 23 C. C. A. 80, 40 U. S. App. 600, 77 Fed. 120; *Commercial Nat. Bank v. Pirie* (1897) 27 C. C. A. 171, 49 U. S. App. 506, 82 Fed. 799; *Bowen v. Needles Nat. Bank* (1898) 87 Fed. 430, affirmed in (1899) 36 C. C. A. 553, 94 Fed. 925; *Merchants' Nat. Bank v. Baird* (1908) 17 L.R.A.(N.S.) 526, 90 C. C. A. 338, 160 Fed. 642.

But the first and second of the above cited rulings of the Supreme Court were apparently not known to the judge who decided *Seher v. Commercial Nat. Bank* (1897) 77 Fed. 957. There the position was taken that the rule which declares that a contract in excess of corporate power, "being based on public policy, will not be permitted to be invoked to perpetrate a wrong. So far as neither party has executed the contract, it is entirely consistent with public policy to avoid it. But where the other party has executed the contract, or has altered his position on the faith of it, the repudiation of the con-

tract by the corporation is inconsistent with that honesty which is the highest public policy. In such a case the contract should be enforced, even if, by its terms, the consideration did not move to the corporation." The authorities relied on were *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702; *Ohio & M. R. Co. v. McCarthy* (1877) 96 U. S. 267, 24 L. ed. 695; *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504. The decisions of the two state courts, here referred to, were rendered in jurisdictions in which the doctrine under which an estoppel is predicated from performance of the contract has been adopted.

In *Sioux Falls Nat. Bank v. First Nat. Bank* (1888) 6 Dak. 113, 50 N. W. 829, a national bank issued its cashier's check to a county treasurer in order that he might effect a settlement of his accounts with the board of county commissioners, which had no notice of any defense to the instrument. It was held by the territorial court that on the settlement the check immediately became the property of the county, and that the bank could assert no want of power to issue it, nor the existence of any fact that might be a defense between itself and the treasurer. No cases were cited, and the precise rationale of the decision is not quite apparent. But it seems to be, upon the facts, inconsistent with the decisions of the Federal Supreme Court.

In *National Bank v. First Nat. Bank* (1894) 10 C. C. A. 87, 27 U. S. App. 88, 61 Fed. 809, affirming (1893) 55 Fed. 465, the following rule was laid down: "The law is unquestioned that an accommodation indorsement of a national bank, from which it derives no benefit, made by an officer without authority, and out of the ordinary course of the business of the bank, is void in the hands of the original payee of the paper, when he takes it with full knowledge of the character of the indorsement." But, having regard to the broad doctrine of the Supreme Court with respect to the non-enforceability of ultra vires contracts, it is apprehended that the qualifying clauses here introduced as to the element of "no benefit derived" and "full knowledge" are out of place. It seems clear that, under that doctrine, the action must still have failed even if these elements had been exchanged for their opposites, "benefit received," and "no knowledge."

⁵ *California Nat. Bank v. Kennedy* (1897) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831, reversing (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039.

banks were the plaintiffs⁶ were distinguished on the ground that the particular contract then under discussion was one "entirely outside of the powers conferred upon the banks, and was in no wise the transaction of bank business, or incidental to the exercise of powers conferred upon the banks." From this language the only possible inference seems to be that in the view of the court there are, so far as national banks are concerned, two categories of ultra vires contracts; viz., those involving merely an abuse of the powers expressly or impliedly granted, and those involving an exercise of powers which have no relation to the corporate business; that it is only in respect to the latter description of contracts that the operation of the principle of estoppel is excluded; and that the apparent conflict between the decisions with respect to national banks will disappear if they are examined with reference to the distinction thus indicated. But, in resorting to such a method of reconciling those decisions, we are at once confronted by a serious difficulty. In the leading case by which the right of a national bank to sue on an unauthorized contract was established, the principle of estoppel was propounded in perfectly general terms.⁷ On the other hand, in the other, and more recent case, in which the court, referring to corporations of all descriptions, held that principle to be inapplicable, its position was defined in terms equally general.⁸ Clearly the essentially antagonistic doctrines thus advanced cannot be harmonized in any other way than by assuming that either the former or the latter needs some qualification. The passage quoted above virtually imports, as it would seem, that, in the opinion of the court, the latter is the one in respect to which the necessary qualifications should be predicated. Having regard to the importance of the question, some explanation of the grounds upon which this opinion was based might well have been expected. There is no apparent reason why the former doctrine should not have been the one selected for the requisite modification. Indeed, this is not putting the matter strongly enough,

for that doctrine is on its face inconsistent with the fundamental rule that a contract forbidden by the legislature is wholly void. This consideration indicates that, in ignoring the conclusion to which that rule points, and resorting to the refined conception of two categories of ultra vires contracts, the court has chosen the less desirable method of reconciling its decisions. It is evident, moreover, that an attempt to harmonize the cases on such a footing must inevitably lead to difficulties fully as serious as those supposed to be obviated. The task of determining what kind of contracts is assignable to each category opens up an interminable vista of controversy. The very case in which the distinction was taken between the two categories of ultra vires contracts is itself strikingly suggestive of the embarrassing questions which this task will present to the inquirer. The contract under review was a purchase of the stock of another corporation, and this, as we have seen, was treated as being one of those transactions to which the principle of estoppel is not applicable. How extremely fine a point is involved in such a decision will be apparent when we advert to the fact that, under the doctrine adopted by the court, a national bank, although it has no power to acquire the stock of another corporation, may, as an incident of its power to lend money on security of personal property, accept such stock as collateral either for a previous indebtedness or for a contemporaneous advance of money.⁹ Having regard to the position thus taken, it might plausibly be contended that a direct purchase of stock constitutes a transaction amounting simply to an improper method of exercising a power which the bank is entitled to exercise under certain circumstances as an incident of its business. If the transaction is really one of that character, it would manifestly be assignable to the same category as the mortgage of real estate which, in the contrasted case, was held to be enforceable by the bank, and consequently there would be no valid basis for the distinction relied upon.

But whatever may be thought of this particular point and others of a similar

⁶ *Union Nat. Bank v. Matthews* (1878) 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney* (1880) 103 U. S. 99, 26 L. ed. 443.

⁷ *Union Nat. Bank v. Matthews* (U. S.) *supra*, where the statement in *Sedg. Stat. & Const. Law*, p. 73, was relied upon. See § 41, *supra*. L.R.A.1917A.

⁸ *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478. See § 68, note 15, *supra*.

⁹ *Germania Nat. Bank v. Case* (1878) 99 U. S. 628, 25 L. ed. 448.

nature, it seems to be at least clear that, quite apart from the question whether the court has or has not been successful in its endeavor to reconcile the cases discussed in the present section with those in which the remedial rights of national banks as plaintiffs have been considered, the manner in which it has dealt with that question will almost certainly occasion some embarrassment when it is required to determine whether its repudiation of the principle of estoppel in respect to other classes of corporations shall be qualified in any degree. It seems to have reached a doctrinal impasse of such a nature that, in order to harmonize its decisions, it must either explicitly relegate the national bank cases to a separate and distinct category, or abandon, in respect to other cases, the clear, simple, and logical theory that an ultra vires contract is absolutely void, and consequently cannot, as a general rule, become enforceable through the operation of an estoppel.

(b) Federal and state decisions collected.

In Massachusetts, a jurisdiction in which the general doctrine adopted with regard to the nonenforceability of ultra vires contracts is the same as that accepted by the Supreme Court of the United States, that doctrine has been applied in an action brought against a national bank.¹⁰ The decision to this effect was rendered before the earliest of those cited in note 4 to the preceding subsection. But the court adverted to

some of the cases in which the theory that, "if a national bank acts in excess of its powers, this can be taken advantage of only by the government, and not a party to the action," had been recognized with respect to actions brought by corporations. These were distinguished on the narrow ground of the particular facts to which they had reference. Apparently it did not occur to the court to consider whether there might not be an essential antagonism between the Federal decisions relating to actions brought by national banks, and those which embody the doctrine that, in actions brought against corporations, there can be no estoppel against pleading ultra vires.

In a Vermont case decided before the Supreme Court of the United States had propounded the doctrine that, in an action brought by a national bank, the defense of ultra vires cannot be set up, the liability of the defendant bank in respect to certain bonds which had been deposited with it and stolen was denied on the broad ground that the alleged contract of bailment "was ultra vires, and imposed no legal obligation or duty upon the corporation as bailee."¹¹

In some of the cases in which the state courts have had occasion to express an opinion since the Federal Supreme Court defined its position, its decisions have been avowedly followed, as being of controlling authority, irrespective of the general views prevailing in the jurisdictions in question with regard to the availability of the plea of ultra vires in actions founded on executed contracts.¹² In other cases the judgments were in

¹⁰ *Dresser v. Traders' Nat. Bank* (1895) 165 Mass. 120, 42 N. E. 567 (action to enforce contract by which, for the purpose of securing a customer, defendant stipulated to furnish to a third person fire insurance of a specific amount).

¹¹ *Wiley v. First Nat. Bank* (1875) 47 Vt. 546, 19 Am. Rep. 122, s. c. (1877) 50 Vt. 388, 28 Am. Rep. 503. A special point decided in the second appeal was that the usage of the cashier, with the approval of the directors, could not confer upon the bank power to become a bailee.

¹² *Chemical Nat. Bank v. Havermale* (1898) 120 Cal. 601, 65 Am. St. Rep. 206, 62 Pac. 1071 (national bank held not to be liable as a stockholder in savings bank); *First Nat. Bank v. American Nat. Bank* (1903) 173 Mo. 153, 72 S. W. 1059 (defendant held not to be liable on a guaranty).

In *Converse v. Emerson, T. & Co.* (1909) 242 Ill. 619, 90 N. E. 269, affirming (1909) 148 Ill. App. 604, the court followed the decision in *First Nat. Bank v. Converse* (1906) 200 U. S. 425, 50 L. ed. 537, 26 Sup. L.R.A.1917A.

Ct. Rep. 306, note 4, supra, relating to the same transaction. But the Illinois cases repudiating the principle of estoppel were also referred to.

In *Appleton v. Citizens' Cent. Nat. Bank* (1908) 190 N. Y. 419, 32 L.R.A.(N.S.) 543, 83 N. E. 470, reversing (1906) 116 App. Div. 404, 101 N. Y. Supp. 1027 (involving the right of action on a guaranty), the gist of the opinion is contained in the following passage: "We may assume that the contract was ultra vires. We may further assume that in transactions by national banks we should adopt the law of ultra vires as it prevails in the Federal courts, and not the local law on the subject. Yet the defendant, in our opinion, became plainly liable for the amount which it received under the ultra vires contract. . . . In a great many cases the difference between the law prevailing in the Federal courts and that in our own would lead to great difference in results. In this case, however, as the plaintiff disclaims any right to recover beyond the amount actually received by the defendant, the result is exactly the

harmony with those decisions, but were, so far as the reports show, rendered independently of them.¹³

71. To what extent Federal courts are bound by decisions of state courts.

The reports contain very little explicit information with regard to the question whether the availability of the defense of estoppel in actions based upon the ultra vires contracts of corporations is a point of general law within the meaning of the rule under which the decisions of the state courts in regard to such a point are not binding upon the Federal courts.¹ In one case, where an appeal was taken from a state court to the Federal Supreme Court, it was considered to be unnecessary under the circumstances to express a definite opinion as to this question.²

In another case the following remarks

same whether we adopt one rule or the other. Whatever the difference of view there may be as to the effect of ultra vires on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract."

¹³ *Thilmany v. Iowa Paper Bag Co.* (1899) 108 Iowa, 333, 79 N. W. 68 (action on guaranty not maintainable); *Norton v. Derry Nat. Bank* (1882) 61 N. H. 589, 60 Am. Rep. 334 (same decision).

¹ The rule was thus stated in one of the cases reviewed in the present monograph: "When the highest judicial tribunal of a state has determined the extent of the powers and liabilities of corporations created under its laws, that decision is conclusive in the national courts in all cases in which no question of general or commercial law, and no question of right under the Constitution of the United States, is involved." *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1897) 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 133.

² *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* (1899) 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341. The following extract from the opinion will show the ingenious manner in which the main question was evaded: "It is claimed, however, that this court is not obliged to follow the Iowa decisions interpreting the statute of that state, because it is assumed that those decisions proceed alone upon the principle of estoppel. Estoppel, it is argued, is a matter of general and not of local law, upon which this court must form an independent conclusion, even although in doing so it may disregard the rule established in the state of Iowa by the supreme court of that state. Whatever it is argued, may be the rule in state courts, in this court it is settled that a corporation cannot be estopped from asserting that it is not bound by a corporate act which is abso-

were made by one of the Federal courts of appeals: "In the absence of any established rule of decision in the state of Missouri in respect of the effect of corporate acts which are ultra vires (and no local rule of decision has been called to our attention by counsel), we must apply to this case the rule recognized in the Supreme Court of the United States. . . . A fixed and settled rule of decision in a state court of last resort establishes the law of the state in such manner as to bind the Federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City court of appeals, while entitled to great respect and regarded as persuasive authority, are not controlling upon the Federal courts, because they do not settle the law of the state."³ From these passages, as well as from others in the opin-

lutely void. . . . But we are not called upon, in the case before us, to decide the question thus raised, since it rests upon an assumption that the court of Iowa has decided that the corporation was by estoppel prevented from complaining of a void act. But the supreme court of Iowa has not so decided. On the contrary, whilst in the course of its opinions it has referred to the doctrine of estoppel, it expressly, in the cases cited, made the application of the doctrine depend upon the legal conclusion found by it, that the act of a corporation in contracting a debt in excess of the statutory limit was not void, but merely voidable, and for this reason the corporation, or those holding under it, could not be heard to assail the act in question. The decisions of this court which are relied upon considered the application of the doctrine of estoppel to corporate acts absolutely void, and not its relation to contracts which were merely voidable. Whether, as an independent question, if we were enforcing the Iowa statute, we would decide that the issue of stock by a corporation in excess of a statutory inhibition was not void, but merely voidable, need not be considered, since, as we have said, in applying an Iowa law, we follow the settled construction given to it by the supreme court of that state." This line of argument seems to be scarcely satisfactory, when we advert to the consideration that the Iowa decisions, taken as a whole, show that, in the cases referred to, the supreme court of that state was not applying a doctrine applicable merely to the statute in question, but a general principle which was regarded as controlling in respect to all ultra vires transactions. See § 82, *infra*.

³ *Anglo-American Land, Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 105, 132 Fed. 721.

In the dissenting opinion delivered by Gilbert, J., in *United States Sav. & L. Co. v. Convent of St. Rose* (1904) 66 C. C. A.

ion, it may apparently be inferred that, in the view of the court, the question whether the defense of estoppel is available to a corporation after the contract has been performed by the other party thereto is a matter of local law with respect to which the decisions of the state courts are binding upon the Federal courts. A similar construction may, it is apprehended, be placed upon the language used and the decision rendered by another of the Federal courts of Appeals in a later case.⁴ In neither of these cases was any allusion made to an earlier one in which a judge of first instance had, without citing any authorities, assumed it to be an established doctrine that this question was one of general law.⁵ It is certainly remarkable that a matter of so much importance should not yet have been settled by a distinct pronouncement of the Federal Supreme Court.⁶ But on examination the cases in which it has repudiated the principle of an estoppel shows that many of them were appeals from districts corresponding to states in which that principle is accepted. To this extent it may fairly be said to have by implication pronounced in favor of the

theory that Federal courts are, generally speaking, not bound by the decisions of the state courts which are based upon that principle.

XI. *Historical review of the decisions of the American state courts.*

72. *Alabama.*

Having regard to the decisions as they stood until quite recently, it might have been laid down with full confidence that the doctrine accepted in this state was that a corporation could not be sued upon an ultra vires contract by a party who had performed it on his side. This doctrine was referred to two distinct grounds; viz., (1) "That a contract made by or with a corporation, which is outside of the pale of its corporate authority, confers no rights; and that the making of such contract does not estop the party promising from invoking the defense of ultra vires;"¹ and (2) that "a corporation is not estopped, by reason of having received the benefits of a contract which is ultra vires, from setting up its invalidity in defense of a suit brought to enforce it."²

422, 133 Fed. 354, it was observed: "This established rule of the Supreme Court must control the decision in the present case, unless the supreme court of the state of Washington had, prior to the time when the contract in the present case was entered into, announced a different rule as to contracts ultra vires made by corporations of that state." The doctrine here taken for granted seems to have been also accepted by the other two members of the court; but it was not explicitly referred to in the majority opinion.

⁴ *Vandagriff v. Rich Hill Bank* (1908) 90 C. C. A. 129, 163 Fed. 823, where it was observed: "The powers of a corporation in these respects being governed by the law of the state creating it, and defendant's corporate authority being acquired under the laws of Missouri, if the supreme court of that state has construed the Constitution and statutes of the state in these respects, the decision of that court is binding upon this." The conclusion arrived at was thus stated: "While we are inclined to think that under the Constitution and laws of Missouri, as construed by the supreme court of that state, the officers of the defendant bank had no authority to bind the bank by a subscription to the stock of the Bates National Bank, and that the defendant bank is not estopped because of having received dividends from pleading the ultra vires character of the subscription contract, yet it is unnecessary to place the decision in this case upon that ground, as we think the judgment must be affirmed for another reason." L.R.A. 1917A.

⁵ *Taylor v. South & North Ala. R. Co.* (1882) 4 Woods, 575, 13 Fed. 152 (decision of state court at most would be persuasive).

⁶ In *Hale v. Lewis* (1900) 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677, the court dismissed a writ of error taken from the decision in *Lewis v. American Sav. & L. Assn.* (1898) 98 Wis. 203, 39 L.R.A. 559, 73 N. W. 793, a case in which the principle of estoppel was applied. But there is nothing to show on what grounds the dismissal was based.

Alabama.

¹ *Sherwood v. Alvis* (1887) 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. 307. This doctrine was laid down, arguendo, in a case in which the court declined to extend its application so as to cover a contract made by a foreign corporation which had not complied with a constitutional provision, declaring that it should "do no business in the state without having at least one known place of business, and an authorized agent or agents therein."

² *Chewacla Lime Works v. Dismukes* (1888) 87 Ala. 344, 5 L.R.A. 100, 6 So. 122 (action for price of goods).

In *Southern Bldg. & L. Assn. v. Casa Grande Stable Co.* (1900) 128 Ala. 624, 29 So. 654 (suit by borrowing corporation to cancel a mortgage), it was laid down, arguendo, that "the doctrine of estoppel cannot be invoked by the defendant to bar the right of the corporation itself or of any of its stockholders to raise the question of its own ultra vires and void act, against the enforcement of the loan by the lender."

In a recent case, however, language was used which seems to be susceptible of the construction that the court had in mind, and was arguing with reference to the theory, that a corporation cannot raise the plea of ultra vires in an action brought upon the contract after it has been fully performed by the other party.³ But, as the unequivocal decisions discussed under the preceding paragraph were not explicitly overruled, or even mentioned, it would be unjustifiable to treat this case as one which evinces a definitive alteration of doctrine. An intention to adhere to the original doctrine is also inferable from

position taken in a very recent case.⁴ A similar conclusion is also indicated by the fact that the authorities which affirm the inapplicability of the principle of estoppel to actions brought by corporations have never been questioned. See § 19 of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —.

73. Arkansas.

The doctrine upon which an early case in this state proceeded was that a corporation to which money had been advanced under an illegal contract of pledge was bound in equity and good conscience to repay the loan upon the redelivery of

In *Florence R. & Improv. Co. v. Chase Nat. Bank* (1895) 106 Ala. 364, 17 So. 720, where the defense of ultra vires was held not to be available in an action brought upon a promissory note given for accommodation, the ratio decidendi was that the defendant was presumptively authorized to execute negotiable paper for its own uses and purposes, and that there was nothing on the face of the note to indicate its real character. A case decided on these special grounds does not furnish any information as to the position of the court with regard to the remedial rights of a party who enters into a contract which he knows, actually or constructively, to be ultra vires. In fact the court explicitly refused to consider how far the defense of ultra vires might have been available if the plaintiff had acquired the instrument with knowledge of the purpose for which it had been executed.

³In *First Nat. Bank v. Alexander* (1907) 152 Ala. 585, 44 So. 866, the appellant, a bank, sued the appellee on a non-commercial promissory note alleged to have been made by the defendant to one J. M. Minnis, and by him indorsed to plaintiff before maturity. The only assignment of error was to the overruling of plaintiff's demurrer to one of the defendant's pleas, the only point raised by the demurrer being that the facts set up in the plea showed an agreement made by the bank which it had no authority to make, and which was ultra vires. The court said: "There is no question about the proposition that a corporation may defend against executory contracts by showing that the contract was either made by an officer of the bank who had no authority to make it, or that the contract was ultra vires. 29 Am. & Eng. Enc. Law, 2d ed. 49. It is true that after a contract has been executed, and the corporation has received the benefit of the agreement, it cannot hold the benefit and at the same time claim release from the agreement on the ground that it is ultra vires or beyond the power of the officer to make it. . . . But plea 6 does not show that the corporation ever received any bene- L.R.A.1917A.

fit from the work which was done on the railroad. There is only an intimation that there was an agreement between the maker and the payee that the note was to be paid in work, and, if there was such an agreement, yet it would not amount to a binding agreement so long as it was executory. *Patrick v. Petty* (1887) 83 Ala. 423, 3 So. 779; *Tuskaloosa Cotton Seed Oil Co. v. Perry* (1887) 85 Ala. 187, 4 So. 635. Consequently, when the bank received the note, it was not bound to accept payment in anything but money, and no officer of the bank had the authority to agree to receive anything but money in payment thereof. *Bank of Commerce v. Hart* (1893) 37 Neb. 197, 20 L.R.A. 780, 40 Am. St. Rep. 479, 55 N. W. 631. This being the law, and there being no principle of estoppel set out in the pleading, as above stated, it results that the demurrer to plea 6 should have been sustained." The remarks made in this passage with regard to the situation which supervenes after an ultra vires contract has been executed seem to be scarcely consistent with what was said and decided in earlier cases, and apparently are not referable to the doctrine which is accepted in those jurisdictions in which the principle of an estoppel is rejected; viz, after the execution of the contract by the party contracting with the corporation, he is entitled to any relief to which he may be entitled without relying on the contract itself. The precise meaning of the passage is rendered still more obscure by the fact that no reference is made to the earlier Alabama cases mentioned in this section.

⁴In *Alabama G. S. R. Co. v. Lovenan Compress Co.* (1916) — Ala. —, 72 So. 311, where the action was brought against a railroad company to recover for damage caused by a fire resulting from its negligence, it was held that the trial court had properly ruled out the plea that the plaintiff had agreed to hold the defendant harmless in respect to injuries thus caused. It was laid down that an ultra vires contract cannot be ratified by the action or acquiescence of the shareholders.

the property pledged.¹ Such a decision, it is clear, might, without any inconsistency, be rendered in a jurisdiction in which the plea of ultra vires is available as a defense to an action upon a contract, irrespectively of whether it has or has not been executed by the claimant. But more recent cases show that the supreme court has fully accepted the doctrine that a corporation is precluded from setting up this defense in an action brought upon a contract which the claimant has performed on his side.²

"A corporation will not be permitted to plead that it had exceeded its charter powers in making a contract, where it has received the fruits and benefits of such contract. If the corporation has received the profits resulting from the compliance of the other party with the contract, it would be wholly unjust to allow the corporation to escape performance of the contract by which it realized these profits."³

74. California.

In the earliest case which bears upon the subject under discussion we find the following general statement: "It is well settled in relation to the contracts of corporations, that, where the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot be permitted, in an action founded upon it, to

question its validity. . . . This rule applies with equal force to all corporations, whether public or private."¹

In a later case where the plaintiff company was held not to be entitled to recover possession of certain property which had formerly belonged to it, and which, after its transfer to another company, had been mortgaged to the defendant, the court proceeded upon the theory that, when the controversy is between a corporation and strangers, the essential question to be determined is "whether the act in question is one which the corporation is not authorized to perform under any circumstances, or one that may be performed by the corporation for some purposes, but may not for others. In the former case the defense of ultra vires is available to the corporation as against all persons, because they are bound to know from the law of its existence that it has no power to perform the act. But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test, as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers, and if the court can see that the

Arkansas.

¹ *Whitney v. Peay* (Receiver) (1862) 24 Ark. 22 (action on quantum meruit).

² See case cited in the next note, and also *Arkansas & L. R. Co. v. Stroude* (1905) 77 Ark. 109, 113 Am. St. Rep. 130, 91 S. W. 18 (action for damages in respect to pain and anguish resulting from the non-delivery of a telegram); *Western Development & Invest. Co. v. Caplinger* (1908) 86 Ark. 287, 110 S. W. 1039 (action on contract of service); *Bloom v. Home Ins. Agency* (1909) 91 Ark. 367, 121 S. W. 203 (suit to restrain corporation from violation of restrictive covenant); *Arkadelphia Lumber Co. v. Posey* (1905) 74 Ark. 377, 85 S. W. 1127 (suit by servant to enforce contract of master to insure him).

In *Minneapolis F. & M. Mut. Ins. Co. v. Norman* (1905) 74 Ark. 190, 109 Am. St. Rep. 74, 85 S. W. 229, 4 Ann. Cas. 1045 (action on policy of insurance), the court quoted the following statement of the law from the opinion in *Lewis v. American Sav. Assn.* (1898) 98 Wis. 203, 39 L.R.A. 559, 73 N. W. 793: "It is well settled that a corporation cannot avail itself of the defense of ultra vires when the contract in question has been in good faith fully performed by the other party and the cor-

poration has had the full benefit of the performance of the contract. And in general the plea of ultra vires will not be allowed to prevail whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong."

³ *Richeson v. National Bank* (1910) 96 Ark. 595, 132 S. W. 913 (appeal from decree determining priority of liens of creditors on property of insolvent company, the question of priority being dependent upon the enforceability of a guaranty). The court quoted with approval the following statement in *Wright v. Hughes* (1889) 119 Ind. 324, 12 Am. St. Rep. 412, 21 N. E. 907: "The rule is now too thoroughly established to be longer open to question that, where a contract has been executed and fully performed on the part of the corporation or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation."

California.

¹ *Argenti v. San Francisco* (1860) 16 Cal. 255. This statement was adopted from *Sedgw. Stat. & Const. Law*, p. 73. See § 41, *supra*.

act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract cannot be enforced; otherwise it can."² As the point under discussion in this case was virtually whether the transaction impugned should be annulled, the decision itself has no direct bearing upon the principle of an estoppel. But, having regard to the circumstances with which the court was dealing, its language may seemingly be taken as implying that the fact of the contract's having been executed was not viewed by it as an element which affected the right of a corporation to interpose the plea of ultra vires as a defense to an action brought for the

enforcement of the contract. If this was the theory of the court, the doctrine indorsed was inconsistent with that propounded by it in the earlier case. But whatever may have been its actual position in this instance, the principle of an estoppel was unquestionably adopted by it in the next case in which the availability of that plea was considered.³

The subsequent decisions are, on the whole, in accord with that principle.⁴ But an analysis of some of them discloses a certain amount of inconsistency, which seems to call for further explanation on the part of the court.⁵

² *Miners' Ditch Co. v. Zellerbach* (1869) 37 Cal. 543, 99 Am. Dec. 300.

³ *Main v. Casserly* (1885) 67 Cal. 127, 7 Pac. 426 (action on promissory note). The court relied on *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563, and *Sedgwick v. Stat. & Const. Law*, p. 73, the weight of which, as an authority, is considered in § 41, supra.

⁴ *Magee v. Pacific Improv. Co.* (1893) 98 Cal. 678, 35 Am. St. Rep. 199, 33 Pac. 772, (liability of corporation as innkeeper, enforced in favor of a guest whose property was destroyed by fire); *Camp v. Land* (1898) 122 Cal. 167, 54 Pac. 839 (suit to determine conflicting claims to land, which were affected by a trust deed); *Kelly v. Ning Yung Benev. Asso.* (1905) 2 Cal. App. 460, 84 Pac. 321 (action for services); *Freese v. Mutual L. Ins. Co.* (1909) 11 Cal. App. 387, 105 Pac. 265 (suit on insurance policy pledged as security).

⁵ In *Kennedy v. California Sav. Bank* (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039, where the action was brought on certificates of deposit issued by the California Saving Bank, the stockholders of that bank were made parties, for the purpose of recovering from them their proportion of the indebtedness. The California National Bank, one of the defendants, appealed upon the ground that, by virtue of the statutes under which it was organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder was so far ultra vires that it could not be made liable for any portion of the indebtedness of the corporation. But the court said: "The defense of ultra vires is looked upon by courts with disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed merely in excess of the powers conferred upon it, and not in violation of some express prohibition of the statute. Courts are inclined to treat the corporation as estopped from setting up this defense in all cases where it has received and retains the benefits of the transaction, and seeks by this plea to avoid its correlative obligation. Having had the benefit of the transaction, and still enjoy-
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ing its fruits, it is estopped from denying a liability which is correlative to such benefits and fruits, and dependent thereon." It should be observed, however, that the court also relied, somewhat inconsistently, upon the consideration indicated in the following passage: "As the appellant herein could have taken the stock of the savings bank in satisfaction of a loan for which it had been pledged to it as security, it was within the scope of its power to become a stockholder therein, so that it cannot be said that it was prohibited by statute from becoming such stockholder. Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law." It is apprehended that in this class of cases the conception of a "holding out" is entirely irrelevant. The essential question is simply whether the transaction in question was actually beyond the powers of the corporation, and the belief entertained by third persons with regard to its quality is a wholly immaterial factor. It is not apparent why a court which regards the performance of the contract as creating an estoppel should have adverted to a consideration which, even if it reflected a sound theory, was unnecessary for the decision of the case. The decision of the state court was reversed in (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831 (see § 70, supra), which was followed as a controlling authority in *Chemical Nat. Bank v. Havermale* (1898) 120 Cal. 601, 65 Am. St. Rep. 200, 52 Pac. 1071, where an action brought against Havermale and the California National Bank, as stockholders in the California Saving Bank, was held not to be maintainable.

In *Knowles v. Sandercock* (1895) 107 Cal. 629, 40 Pac. 1047, it was held that, as a corporation organized for

75. *Colorado.*

The doctrine adopted in this state is that the defense of ultra vires cannot

the purpose of manufacturing, etc., furniture, could not hold stock in a hotel corporation, its subscription to its stock is ultra vires and void, and it could not be charged with liability as a stockholder of the hotel corporation. Reliance was placed upon the following provision in art. XII, § 9, of the state Constitution: A corporation is forbidden to engage in any business other than is expressly authorized in its charter or the law under which it is organized. The court said: "A stockholder is engaged in the business of the corporation within the meaning of this section of the Constitution. He has a voice in the management; may, in fact, control such business; and is, of course, liable for the debts incurred while he is a stockholder. The above provision makes all acts which are wholly without the business of the corporation unlawful. The only reply made by respondent to this point is that the subscription is sustained by *Kennedy v. California Sav. Bank* (1894) 101 Cal. 495, 40 Am. St. Rep. 69, 35 Pac. 1039. In this, I think, counsel is mistaken. It was there held that the bank rightfully invested its funds in the shares of other corporations." This statement is correct so far as it goes (see *supra*); but the court, apparently by inadvertence, failed to observe that the principle of estoppel was categorically enunciated in the earlier case, and evidently regarded as one of the grounds of the decision. It is submitted, therefore, that the contention of counsel that the earlier decision was controlling precedent should not have been rejected. Between the two cases as they stand, there is an essential inconsistency, resulting from the fact that the principle approved in the earlier one was ignored in the later one.

In *Laidlaw v. Pacific Bank* (1902) 6 Cal. Unrep. 849, 67 Pac. 897, the essence of the transaction under review was that the plaintiff's assignor, the president of the defendant bank, raised money on his own property for the purpose of discharging the claims of a depositor, and was credited on its books with this amount. Soon afterward the bank closed its doors, and at the time when the appeal was heard was still in process of liquidation. The liability of the defendant, as affected by a clause in the statute incorporating it, which provided that "it should not be lawful" for the bank to contract "any debt or liability against it for any purpose whatever," was thus discussed: "If we were to assume that the appellant could not, under the language of § 10, herein quoted, make a valid contract binding it to pay McDonald the money so paid out to its use, it would not change the result. There is no claim of fraud in the transaction, and not even a suggestion of any such thing. The plaintiff's assignor in good

be set up by a corporation in an action brought against it on a contract which has been performed by the other party

faith paid his money for the use and benefit of appellant. It received the benefit of such payment, and has never repaid the amount. The appellant not only consented to, but requested, the payment. This is not an action to enforce an executory contract, but to recover the amount paid, the benefit of which the appellant has received. The appellant, having requested the payment of the money for its use and benefit, cannot now be heard to refuse payment upon the ground that it cannot legally be bound by a contract to pay. The principles of natural justice and common honesty demand that it shall be held liable for the money so paid to it or to its use." From this passage it would seem that the court was referring its decision not to the principle of an estoppel, but to the conception that the plaintiff was entitled to relief independently of the contract, on the footing of an action for money had and received. It is merely a matter of conjecture—nothing being said as to this phase of the matter—that this conception was relied upon because the contract was "unlawful," and the court assumed that, in respect to such a contract, as distinguished from one which is merely ultra vires, a corporation cannot be estopped from setting up the defense of invalidity. See § 44, *supra*. On rehearing, (1902) 137 Cal. 392, 70 Pac. 277, no reference was made to the language used in the previous opinion; the judgment being simply that the finding of the trial judge should have been in favor of the defendant, because his conclusion that the Pacific Bank became indebted to plaintiff's assignor in respect to a certain sum of money theretofore expended by that assignor for the use and benefit of the bank, and at its request, was not supported by the evidence. The court said: "It was never contemplated that the corporation should become a borrower of money and a payor of interest, and unless the act is so construed, then the provision against the contracting of 'any debt' must go for naught. As we have seen, the borrowing of money is not made an exception to this general provision by any other provision of the act, and if, by construction, such an indebtedness is to be excepted from its operation, by similar construction indebtedness for any and every other purpose can be excepted, and thus the institution be turned entirely away from the purpose of the law in which it has its foundation. The corporation had no power to request or contract for the payment of its debts by a third person, but under the act it should pay its own debts out of its own funds, and when it could not do this it was time for it to close its doors. Its contract with McDonald was therefore ultra vires, and cannot be enforced under the circumstances here presented. McDonald's payment of the

thereto.¹ "A corporation must act through its agents, who can only bind it within the scope of the powers for which it was created. . . . But where, through its agents assuming to act in its behalf, it reaps and retains the fruits of an unauthorized transaction, this doctrine is no longer applicable, for it cannot interpose the defense of ultra vires and still retain the benefits thus acquired."²

In one case it was held that a suit brought by a subscriber to the stock of a corporation, for the purpose of securing his rights under the contract in pursuance of which the subscription was effected, could not be successfully resisted on the ground that the contract was "illegal and void" as being in violation of an expressly prohibitory provision.³ The theory that the principle of estoppel is applicable to a case involving such a provision is in conflict with that which is accepted by most of the courts by which that principle has been adopted. See § 44, *supra*.

76. Connecticut.

In a concurring opinion delivered during the earlier part of the nineteenth century, we find these words: "A corporate body, by transgressing the limits

People's Home Savings Bank must be treated as a mere voluntary act on his part, which, to say the least, created no right against the Pacific Bank that should be permitted in any way to impair the rights of nonstockholding depositors clearly intended to be secured to them by the statute." One difficulty suggested by this passage is that, by thus designating an "unlawful" contract as "ultra vires," the court explicitly repudiated that distinction, the assumed existence of which seems to constitute the only apparent reason why it should have referred the plaintiff's right of recovery to the notion of a liability as for money had and received, and not to the principle of estoppel. Another difficulty is that, as this distinction was not recognized by the court, the defendant would, on the authority of the earlier Californian decisions, have been estopped to deny the validity of the contract, and consequently bound to repay the money advanced. In this point of view the decision would clearly be erroneous, for there is no authority for the doctrine that the operation of the equitable principle of estoppel with which this monograph deals may be qualified by the common-law rules regarding voluntary payments.

Colorado.

¹ Union Gold Min. Co. v. Rocky Mountain Nat. Bank (1873) 2 Colo. 248 (borrowing); Denver F. Ins. Co. v. McClelland (1885) 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. L.R.A.1917A.

of its charter, may doubtless incur a forfeiture of its privileges and powers; but whoever imagined that it could thus acquire immunity to the prejudice of third persons?"¹ In a leading New York case,² this passage was cited by Comstock, Ch. J., as an authority for the doctrine advocated by him, that the defense of ultra vires is not available to a corporation in an action brought upon a contract after it has been performed by the other party. The language used is undoubtedly very broad, and, taken as it stands, would justify the construction placed upon it by the learned judge. But its real significance must be appraised with reference to the consideration that the contract under discussion was invalid merely in respect to its having been informally executed, and not in respect to its being ultra vires in the proper sense of that expression. The case, therefore, does not belong at all to the category of those which turn upon the effect of a wholly unauthorized contract.³

In the first case in which that point was actually presented, the court proceeded upon the theory that no action could be maintained upon the contract itself.⁴ On the other hand, the position was taken some years afterward that,

771 (insurance policy); Mulford v. Torrey Exploration Co. (1909) 45 Colo. 81, 100 Pac. 506 (doctrine recognized, arguendo, in a case where the given transaction was held not to be illegal); Kipp v. Miller (1910) 47 Colo. 508, 135 Am. St. Rep. 236, 108 Pac. 164 (bank which had received profits of branch banks held to be precluded, in an action by a creditor, from alleging that the establishment of the branches was ultra vires).

² American Nat. Bank v. Hammond (1898) 25 Colo. 367, 55 Pac. 1090 (representation by bank as to solvency of party to whom plaintiff had sold the chattels for the price of which the action was brought).

³ Lilylands Canal & Reservoir Co. v. Wood (1913) 56 Colo. 130, 136 Pac. 1026, where the provision under review was one which forbade corporations to issue stock except for money or money's worth.

Connecticut.

¹ Gould, J., in Bulkley v. Derby Fishing Co. (1817) 2 Conn. 255, 7 Am. Dec. 271 (policy of insurance was not countersigned by the company's secretary, as the statute required).

² Bissell v. Michigan S. & N. I. R. Cos. (1860) 22 N. Y. 258.

³ See remarks in Hood v. New York & N. H. R. Co. (1852) 22 Conn. 508, 9 Am. Neg. Cas. 149.

⁴ Philadelphia Loan Co. v. Towner (1839) 13 Conn. 249 (no recovery on note given for loan and discounted).

in an action for personal injuries received by a railway passenger, it was not necessary to allege that the defendant company had power, under its charter, to become a common carrier. "So far as third persons are concerned, they must be presumed to have authority to do the business they hold themselves out as competent to do. They will not be presumed to be engaged in an unlawful business; and, being engaged in this business, and, in its pursuit, having made with the plaintiffs the contract declared on, they ought not now to be heard to say they had no power to do so."⁵ But the authority of this decision seems to have been destroyed by a later one to the effect that the defendant was not estopped from pleading ultra vires in an action brought to recover for injuries received while the plaintiff was traveling on a stagecoach for which the defendant had sold him a ticket.⁶

In three subsequent cases the availability of that plea in an action brought against a railway company in respect to goods lost after it had delivered them to a connecting carrier to be transported to the place stipulated in its contract

was alluded to, but not determined.⁷ In another case, decided about the same time, which proceeded upon the ground that a subscription to the stock of another company was void, the court did not specifically refer to the fact that the defendant had enjoyed the benefits of the contract,—an omission which indicates that no definite significance was ascribed to it.⁸ That the plea of ultra vires might, under some circumstances, be excluded by the operation of an estoppel, was distinctly recognized in a still later case which involved an action upon the indorsement of a note for accommodation.⁹ The language of the court shows that the description of estoppel which it had in mind was merely that which is inferred where one person was led by the statements or conduct of another to believe that a certain state of facts existed when the transaction in question was consummated, and not that which is predicated from a receipt of the benefits of the transaction. But the position that an estoppel might be predicated on this ground was a significant departure from the stricter theory which, in at least a portion of the earlier cases, had been affirmed or

⁵ Fuller v. Naugatuck R. Co. (1852) 21 Conn. 557, 2 Am. Neg. Cas. 266. It will be observed that the doctrine thus applied, although it was not identical with that which was subsequently elaborated by Comstock, Ch. J., in the New York case cited in note 2, supra, involved similar consequences so far as the remedial rights of the complainants were concerned.

⁶ Hood v. New York & N. H. R. Co. (1853) 22 Conn. 502, 9 Am. Neg. Cas. 149. The court said: "It is found that the defendants had no power to enter into the undertaking in question, and therefore, as a ground of claim, it must be agreed the undertaking merely is of no avail, for the reason that the directors, having no authority, did not, in legal estimation, make the contract for the company. The question is, Are the defendants estopped setting up this in their defense? The statement of the case carries on its very fact conviction to the mind that it cannot be so. The defendants estopped from denying that they have done what they never could have done! It is a question of power under the charter; and however individuals may be liable and estopped, who untruly hold themselves out as clothed with power, the defendants cannot be estopped on any such principle of law known to the court." On the first appeal, reported in (1852) 22 Conn. 1, a new trial had been ordered upon another point. The court referred to, but did not express any definite opinion with regard to, the application of the principle of estoppel under the given circumstances.

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Subsequently (see (1855) 23 Conn. 609), an equity suit was brought to restrain the defendant from further prosecuting his motion for a new trial after a verdict had been rendered on the second trial. Relief was refused on the ground that the plaintiff could have adequate protection at law against the defense of ultra vires, if he was entitled to it anywhere. See § 27, note 2, supra.

⁷ Naugatuck R. Co. v. Waterbury Button Co. (1856) 24 Conn. 468 (majority of court thought that a contract for delivery beyond the terminus of the company's lines was ultra vires); Elmore v. Naugatuck R. Co. (1860) 23 Conn. 457, 63 Am. Dec. 143; Converse v. Norwich & N. Y. Transp. Co. (1865) 33 Conn. 166 (court was asked to overrule the Hood Case, but declined to express a definite opinion as to its correctness, because no contract to carry the goods beyond the terminus had been proved by the evidence, and the question raised was consequently not a material one).

⁸ Mechanics' & W. Mut. Sav. Bank & Bldg. Assn. v. Meriden Agency Co. (1855) 24 Conn. 150.

⁹ Etna Nat. Bank v. Charter Oak Ins. Co. (1882) 50 Conn. 167. One of the grounds upon which the action was held not to be maintainable was thus stated: "Neither is there anything in this case to permit the application of the doctrine of estoppel. The plaintiff was in nowise misled; it had full knowledge; it has parted with nothing."

assumed with respect to the absolutely void quality of ultra vires transactions.

That the plea of ultra vires could not be interposed as a bar to an action against a company on its acceptance of certain bills for the accommodation of a third person was held soon afterward. But the doctrine upon which this decision was based was simply that, although the defendant had power by its charter to deal only in mercantile paper necessary to its business, yet, as it had that power, it would be bound by the acceptances in question, except against a party who took the paper with notice of its character.¹⁰ Such a ruling manifestly throws no light upon the views which at the date when it was made were entertained with regard to the operation of the principle of an estoppel in cases where the special rights of the bona fide purchasers of negotiable instruments were not involved. That principle, however, was definitely adopted two years afterward in a case in which the action was brought upon a contract made by the defendant corporation to sell certain

goods for the plaintiffs at a price to be fixed by them. The goods having been sold for less than the price fixed, it was held that the amount representing the difference between that price and the sum actually received and paid over to the plaintiffs could be recovered, irrespective of whether the contract was ultra vires or not.¹¹

77. Florida.

The doctrine that a corporation is estopped by the receipt of the benefits of a contract from pleading ultra vires in an action brought upon the contract itself prevails in this state.¹

78. Georgia.

In the earliest of the reported cases which bear upon the subject of the present monograph, the court used the following language: "The general rule would seem to be that if a corporation, in the exercise of a franchise not granted to it by the legislature, makes a contract or does an act, they may plead their want of authority on the ground that

¹⁰ Credit Co. v. Howe Mach. Co. (1887) 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472.

¹¹ Union Hardware Co. v. Plume & A. Mfg. Co. (1889) 58 Conn. 219, 20 Atl. 455.

The court said: "The defendant's undertaking under it was not one prohibited by law. It was at most only in excess of corporate powers. In pursuance of the agreement the defendant has received from the plaintiff its goods and sold them. Having thus received the benefit of the agreement, the law will not allow it to set up its own wrong to enable it to escape responsibility. Having received the property of the plaintiff in pursuance of the agreement, it will not be suffered to appropriate it, and under the plea of ultra vires defeat recovery therefor." This language is on its face susceptible of a construction which would commit the court merely to an assertion of a claimant's right to obtain relief independently of the contract. But the authorities cited evince distinctly an intention to affirm the applicability of the principle of estoppel in respect to an action founded on the contract itself. The Hood Case, reviewed in note 6, supra, was relied upon by counsel, but, curiously enough, ignored altogether by the court.

Florida.

¹ In McQuaig v. Gulf Naval Stores Co. (1908) 56 Fla. 505, 131 Am. St. Rep. 160, 47 So. 2, the fourth syllabus written by the court contains the following general statement of principles: "While those dealing with a private corporation are charged with some degree of care to ascertain the powers of the corporation with reference to the transaction, yet, if the transaction has L.R.A.1917A.

some fair relation to the matters within the corporate authority, the defense of ultra vires will not in general be available to afford injustice or imposition." This statement is somewhat wanting in precision, as it seems to waver between a definition of the circumstances under which a transaction will be deemed intra vires, and affirmation of the rule that the defense of ultra vires will not be entertained if the effect of allowing it to prevail will be the perpetration of injustice. But the actual position of the court is indicated by the fifth syllabus, which shows the precise purport of its decision: "When a corporation has authority to do a general commission and mercantile business, to own, lease, and operate turpentine farms, to lease and sublet and buy and sell timber for turpentine and milling purposes, and to buy and hold such real estate as may be necessary for or incidental to the authorized business, and an action is brought against the corporation for commissions for finding a purchaser for lands, and, to a plea of ultra vires that the corporation did not have authority to make the contract, and was not at any time seized and possessed of the lands to which the contract of sale relates, and had no interest directly or indirectly in the lands, a demurrer was filed, and a replication to the plea alleges that the defendant corporation claimed and represented itself to be the owner of the lands, employed plaintiffs, and received the benefit thereof, and sold or caused to be sold the identical lands through another for a greater profit, which replication is demurred to, the defense of ultra vires cannot avail the defendant."

the courts will not interfere to grant redress between two persons engaged in an illegal enterprise. But if the contract be within the scope of the franchise, but fail to conform to the regulations prescribed by the charter for the guidance of its officers and the protection of the rights of the members as to each other, the corporation may be held liable, under the general rules of law as to agents, estoppel, waiver, etc."¹ The generality of the language used in the former of these sentences, and the fact that cases of the class to which it refers are contrasted with those which involve mere irregularities in the conduct of the corporate business, may apparently be regarded as indicating that the court considered the plea of ultra vires to be available irrespective of whether the contract sued upon had or had not been performed by the claimant.

In a subsequent case, in which the doctrine that a corporation may estop itself from repudiating a contract the invalidity of which arises from merely formal defects was again recognized, the fact was adverted to that, according to some decisions, "any act of the officers of a corporation which is ultra vires is void, and that no consent and acquiescence or ratification by the stockholders will make it valid, or estop them from asserting its illegality, whenever it may be their interest so to do." But it was asserted that the decisions to a contrary effect were more numerous. The court then went on to say that there is "another class of ultra vires acts to which no ratification, even unanimously, by the shareholders, nor any amount of performance or other thing done by the corporation, can give life or legality. They are those by which the contract of the corporation with the public is violated,—as where a new franchise is usurped, where the power is attempted to be exercised by undertaking a new enterprise clearly outside of that authorized by the charter; for instance, where the legislature has authorized a railway to be constructed and worked, and the company undertakes to establish a bank

or make an harbor. In such cases, nothing short of legislative assistance can give legal force to what may have been done."² The remarks here made with respect to the second of the two classes of contracts which are distinguished clearly import that the court had no intention of rejecting the doctrine that the performance of a contract which is ultra vires in the sense in which that expression is more appropriately used does not estop the corporation from pleading its invalidity.

To what extent that doctrine is still accepted by the court is rendered somewhat doubtful by two cases decided about twenty years afterwards. In one of these, where the action was brought by a stockholder to have the contract set aside, we find the following statement: "Where a corporation, with the permission and acquiescence of the stockholders, holds itself out as competent to contract and carry on its business under color of law, and procures credit and induces creditors to part with their money on the faith of its contract to secure and pay the same, these contracts will be binding in a court of equity not only on the corporation, but on the stockholders. No application of the doctrine of ultra vires will allow a corporation to get value received and then refuse to pay, whether the refusal be at its own instance, or at the instance of its stockholders or a portion of the same."³ It is not altogether clear from the language here used whether the defense of ultra vires would have been treated as inadmissible, if the action had been brought against the corporation and the acquiescence of the stockholders had not been an element in the case. Manifestly, however, a court which regards that element as one which imparts validity to an ultra vires contract is evincing, to say the least, a very strong tendency toward the adoption of the principle of an estoppel as predicated from the fact of performance by the claimant. In the second of the cases referred to, a decision holding the defendant to be liable on a note given for the price of an

Georgia.

¹ *City F. Ins. Co. v. Carrugi* (1871) 41 Ga. 660. The actual point decided was that recovery might be had on a policy issued by a foreign corporation, although the instrument did not comply with a formal requirement prescribed by the corporate charter. It was held that notice of such a provision was not imputable to the claimant.

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² *Cozart v. Georgia R. & Bkg. Co.* (1875) 54 Ga. 379 (stockholders' suit to restrain payment of interest on bonds).

³ *Johnson v. Mercantile Trust & D. Co.* (1894) 94 Ga. 324, 21 S. E. 576 (stockholder's suit to have bonds declared invalid).

article which it had no power to buy was founded "upon the broad and just principle that, where a private corporation exceeds its powers and purchases property, takes possession of it, uses and keeps it, the corporation cannot set up the defense of ultra vires to avoid paying for it."⁴ It will be observed that in neither of these cases was the contract in question made by the corporation with relation to a "new enterprise clearly outside of that authorized by the charter" (see passage quoted in the preceding paragraph). In the second one, indeed, the court expressly relied upon the consideration that "the contract in question was not strictly an illegal contract; it was not prohibited by the charter. The charter authorized the corporation to make and issue commercial paper, and there was no evidence of illegality on the face of the note." It might well be argued, therefore, that, in spite of the unqualified tenor of the language in these two cases, they are not necessarily to be construed as showing that the views previously entertained by the court in respect to the absolutely void character of contracts made with relation to a business or undertaking entirely outside the scope of the corporate charter have undergone a change. They may by possibility be regarded as merely affirming the applicability of the principle of estoppel to cases involving that particular class of ultra vires contracts which have reference to a business or under-

taking authorized by the charter. That they go at least to this extent is perfectly clear. For this reason it seems to be difficult, if not impossible, to reconcile them with a subsequent ruling of the court of appeals to the effect that the circumstance of a bank's having received the benefit of a contract for the loan of a sum of money exceeding the amount which it was permitted to lend to one person did not estop it from setting up the defense of ultra vires in an action for damages caused by a breach of the contract.⁵ It seems reasonably clear that, in order to harmonize this decision with those of the supreme court which are reviewed in the preceding paragraph, the doctrine enunciated by that court as to the inadmissibility of the defense of ultra vires must be understood as applying only to those cases in which the contract has reference to the business which the corporation is authorized to carry on, and thus constitutes merely an abuse of its powers, as contrasted with a total departure therefrom. See § 43, supra.

In a still later case, the defense of ultra vires was held by the court of appeals to be available in an action on the indorsement of a note executed for the accommodation of a third party, because "the consent of all the stockholders will not estop the corporation from challenging the legality of an act which is wholly beyond the scope of its charter powers."⁶

In the syllabus prepared by the su-

⁴ Towers Excelsior & Ginnery Co. v. Inman (1895) 96 Ga. 506, 23 S. E. 418.

⁵ Swindell v. Bainbridge State Bank (1907) 3 Ga. App. 364, 60 S. E. 13 (on demurrer). There the court, after referring to the section of the Civil Code which affected the plaintiffs with notice that the agreement as made was illegal, continued thus: "This law is for the benefit of the public as well as for the stockholders, and the power to ratify an agreement which a corporation has no power to make cannot exist; nor can the stockholders of a corporation or the directors of a corporation, by acquiescence or express agreement, ratify any contract made by an officer or by the corporation itself, which the law expressly forbids; nor can a contract made by the corporation or by any officer of the corporation, against a statute expressly forbidding such contract, become valid and effective through an estoppel. A corporation may be estopped from asserting that a contract is ultra vires where it has received a benefit under the contract, only where the making of such contract was within the scope of the corporate franchise, and not repugnant to the general law, and such contract is sought to be avoided because there was a failure to comply with some regula-

tion, or the corporate power was improperly exercised. We are aware of no case which goes to the extent of holding that there can be no estoppel where the contract could not lawfully be made by the corporation."

⁶ Savannah Ice Co. v. Canal-Louisiana Bank & T. Co. (1913) 12 Ga. App. 818, 79 S. E. 45. The court said: "The statute expressly commands that the corporation shall make no contracts except such as are necessary in legitimately carrying into effect the objects and purposes of the organization, or for securing a debt due to the company. Any contract, therefore, which comes within this statutory prohibition, is void, and no consent or ratification can make an act valid which is absolutely void ab initio. We do not mean to say that a corporation can never be estopped, for there are instances where it is; such as where a bona fide purchaser acquires an obligation of a corporation which on its face appears to have been within the corporate power. But with this exception, and possibly one or two others, a corporation as such can never be estopped to plead the illegality of an act of its officers or agents wholly beyond the scope of the corporate business."

preme court for the latest case which bears upon the subject, we find the following passage: "The term 'ultra vires,' whether with perfect accuracy or not, as to the acts of a corporation, or acts purporting to be done by it, has been used in more than one sense. An act is ultra vires in the strictest sense when it is beyond the scope of the powers granted by law to the corporation, so that it is not in the power of the corporation to perform it under any circumstances. Sometimes an act is said to be ultra vires with reference to the rights of certain persons when the corporation cannot legally perform such act without their consent. Sometimes an act is said to be ultra vires with reference to some specific purpose when the corporation cannot perform it for that purpose. If an act be done which is ultra vires in the sense first mentioned, it is wholly void, and the corporation may avail itself of that fact as a defense. If an act is ultra vires in either of the last two senses, the right of the corporation to

avail itself of the defense will depend upon the circumstances of the case."⁷ As this statement is supported by the authority of two cases in which the Federal Supreme Court rejected the doctrine of estoppel in respect to ultra vires contracts,⁸ it would seem that Georgia must be reckoned among those in which that doctrine is no longer approved.

79. Idaho.

In one case involving somewhat peculiar circumstances, the court proceeded upon the broad ground that the doctrine of ultra vires "should not be applied when it would defeat the ends of justice or work a legal wrong."¹ The consideration commonly adverted to as affording a foundation for an estoppel, viz., that the contract in question had been performed by the claimant and that the corporation had reaped the benefits of it, was not specifically mentioned.²

But the doctrine of an estoppel as predicated upon that consideration was categorically adopted in two later cases.³

⁷ Georgia Granite R. Co. v. Miller (1916) 144 Ga. 665, 87 S. E. 897, in which the actual question involved was the effect of certain irregularities in the issuance of bonds.

⁸ Central Transp. Co. v. Pullman's Palace Car Co. (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; Louisville, N. A. & C. R. Co. v. Louisville Trust Co. (1899) 174 U. S. 552, 43 L. ed. 1082, 19 Sup. Ct. Rep. 817.

Idaho.

¹ For a general discussion of the criterion thus invoked by the court, see § 61, supra.

² Burke Land & Livestock Co. v. Wells, F. & Co. (1900) 7 Idaho, 42, 60 Pac. 87, citing Ohio & M. R. Co. v. McCarthy (1877) 96 U. S. 258, 24 L. ed. 693. The effect of the case is thus stated in the syllabus prepared by the court: "The respondent corporation purchased from appellants all of the property then belonging to the appellant (the B. L. & C. Co.), and agreed to pay therefor \$74,048.68, that being the sum then due from the last-named corporation to appellant, Wells, Fargo & Company, and agreed that said purchase price was secured by two certain mortgages executed by appellant Burke Land and Cattle Company, to Wells, Fargo, & Company, on said property, and accompanied by possession of such property. Held, that, although said mortgages were not originally given to secure all of said purchase price, the respondent is estopped from denying the validity of said mortgages as to any part of said purchase price." The following language was used in the opinion: "We think under the facts of this case, the Illinois corporation cannot complain because the Utah corporation agreed to pay the private debts of its L.R.A.1917A.

creator and owner, who, without consideration, gave its property the value of which greatly exceeded the amount of said debts, and out of which the private creditors of Burke might have made their claims. . . . It appears that the Utah corporation was organized for the sole purpose of enabling William Burke to do business in the name of a corporation. It was simply William Burke doing business in the name of the Utah corporation. It was organized by him. Its entire capital stock was issued to him, except four shares, which were issued to persons to qualify them as directors. From Burke it got all of its property without any consideration. He managed its affairs. It assumed to pay the indebtedness of Burke, which it had a right to do as against any objection here raised by the Illinois corporation, who is endeavoring to get possession of said property without paying what it agreed to pay for it."

³ In Darknell v. Cœur D'Alene St. J. Transp. Co. (1910) 18 Idaho, 61, 108 Pac. 536, where the claimant had for several years continued in the performance of a contract which provided that he was to be employed by the defendant corporation as long as he held stock in it, it was held that the measure of recovery was a proportionate amount of the stipulated compensation, and not merely the value of the services rendered.

In First Nat. Bank v. Callahan Min. Co. (1916) 28 Idaho, 627, 155 Pac. 673, where the object of the action was to compel the defendant mining company to deliver the residue of certain shares of treasury stock which the defendant had sold to Riley and Robbers, under a contract which embraced clauses to the effect that the defendant

In this state the doctrine of estoppel has been applied in respect of a public corporation.⁴

30. Illinois.

In the earliest case which calls for notice, an action of assumpsit was held to be maintainable against a national bank to recover certain money received by it on account of sales made on commission in pursuance of a contract made with the plaintiff, the owner of the property sold, who was indebted to the bank. The ratio decidendi was that the defendant, even if not authorized by its charter to enter into such a contract, was in any event liable if it had received money belonging to the plaintiff, whatever might be the source from which the money was derived.¹ The precise doctrinal position of the court is not clearly indicated by the language used in

should permit the vendees to designate the person to be elected as its treasurer and secretary, and that the net profits of its business should be distributed upon a certain specified footing. It was argued by counsel that these stipulations were ultra vires, and consequently that the contract of sale, being entire and indivisible, could not be enforced. The court, however, was of opinion that, whatever might be the character of the stipulations, they were separable from the rest of the contract, and that Riley and Robbers might waive them and insist upon the delivery of the stock. In this point of view it is clear that the availability of the defense of ultra vires ceased to be a material element in the case, and that there was no occasion to consider it; but the court went on to say: "It is a well-settled rule that the doctrine of ultra vires, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. *Ohio & M. R. Co. v. McCarthy* (1877) 96 U. S. 258, 24 L. ed. 693; *Burke Land & Livestock Co. v. Wells, F. & Co.* (1900) 7 Idaho, 42, 60 Pac. 87. It is also well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party and the corporation has had the full benefit of the performance of the contract. *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504. . . . In the case at bar, the principles of equity and common honesty will not permit the mining company to obtain all of the benefits it was to receive under the provisions of said contract and then avoid the legal provisions of said contract by pleading ultra vires as to certain provisions of the contract which were clearly made for the benefit of Riley and Robbers."

⁴ *Fremont County v. Warner* (1900) 7 Idaho, 367, 63 Pac. 106. L.R.A.1917A.

its opinion. Upon the facts stated, it would seem that the right of the plaintiff to recover the money could not be established without relying on the contract. If so, the decision is apparently one which requires for its support the doctrine that a corporation is estopped from pleading ultra vires when sued upon a contract of which it has received the benefits.

In the following year that doctrine was explicitly adopted, and assigned as a sufficient reason for refusing to enjoin the prosecution of a pending action upon a note given by a company in which the plaintiff was a stockholder, and to cancel other notes.² But the passage quoted in the footnote from the opinion of the court indicates that, under the circumstances, the doctrine was unnecessarily, if not improperly, invoked. The loan contract itself was in-

Illinois.

¹ *First Nat. Bank v. Priest* (1869) 50 Ill. 321.

In *Racine & M. R. Co. v. Farmers' Loan & T. Co.* (1869) 49 Ill. 331, 95 Am. Dec. 595, it was laid down that the defendant railroad company could not be permitted to set up as a defense to a bill of foreclosure, that it had no title to the property which it had itself mortgaged. But the court proceeded upon the general rule concerning the subject, and did not consider whether it was subject to modification in cases where the alleged defect of title arises from a want of corporate power. The doctrine of estoppel which, under the later decisions, would presumably have been treated as controlling within a certain period of the evolution of the law in Illinois, was not adverted to, although it had been recognized in New York several years previously.

² *Bradley v. Ballard* (1870) 55 Ill. 417, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563. After making some general remarks with regard to the principle of estoppel, the court continued thus: "If the complainant in this case had, as a stockholder, asked a court of chancery to enjoin this corporation from mining in Colorado, it would have examined the charter, and if it had arrived at the conclusion that such mining was beyond the powers derived from filing the certificate in question, under our statute, would have issued the injunction. But this he did not do. On the contrary, he has participated in the work, and so long as there was hope of gain, he was willing the money should be borrowed by which the work was to be carried forward. The borrowing of the money was not in itself an act ultra vires, nor was the giving of the notes. The money was not borrowed to be used for an illegal or immoral purpose. The lenders have been guilty of no violation of law, nor wrong of any kind. The corporation has received their money and used it for a pur-

tra vires, and the lender, not being an actual participant in the unlawful use which the company had made of the money borrowed, could not be prejudiced by the purpose to which it had actually been applied. See § 13, *supra*. It would seem, moreover, that, so far as the plaintiff himself was concerned, he was precluded by his own conduct from seeking the relief asked.

The principle underlying two cases decided soon afterward was thus enunciated in one of them: "Corporations will not be permitted to exercise powers that might be hurtful to the public interests beyond those expressly conferred by their charters; but where a corporation has exercised powers germane and incidental to those conferred, and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any definite power given, it will be estopped from denying it had authority to make such contract. Good faith to third parties who deal with such corporations, and

who may have no accurate knowledge of the extent of their powers under their charters, demands the adoption of this salutary rule."⁸ From this statement, as well as from the passages quoted in the footnote, it is apparent that the court was here proceeding upon a theory essentially diverse from the principle under which an estoppel is predicated from the fact that the particular ultra vires contract under discussion had been executed by the company. But the two cases have sometimes been relied upon as authorities for that principle.^{9a} In the same year, however, in which the more recent one was decided, the court again affirmed what it regarded as the "settled doctrine," viz., "that a private corporation cannot avail of the defense of ultra vires where the contract has been in good faith fully performed by the other party, and the corporation has had the benefit of the contract and the performance."⁴ For a considerable period this doctrine was adhered to.⁵

But a marked change in the position

pose which, whether ultra vires or not, was unquestionably the sole purpose for which the incorporators associated themselves together, and for which this complainant became a stockholder. Justice requires the corporation to repay the money it has thus borrowed and expended."

⁸ *West v. Madison County Agri. Board* (1876) 82 Ill. 205 (suit for foreclosure of trust deed).

The doctrine thus laid down was regarded as being the purport of *Chicago Bldg. Soc. v. Crowell* (1872) 65 Ill. 453, where the action was brought for the recovery of damages in respect to a building society's contract to insure a building on land covered by a deed of trust which had previously been executed to secure a loan made by the society to the plaintiff. The court remarked: "It is said that there is nothing in the act of the legislature authorizing such incorporations, or in the articles of association that would authorize appellant to engage in the insurance business. It may be conceded that appellant has no such power, but that is not this case. Appellant did not undertake to insure the property of appellee, but only to obtain insurance for him in some responsible company, as it had previously done. This is a very different undertaking, and rests wholly on different principles. Common honesty requires that when a corporation has conducted, through a series of years, a business incidental to and advantageous to the objects and purposes for which the corporation was created, although not within the express terms of their charter, they should be estopped to deny that they had rightful authority to make contracts in that regard, and should be held liable for the damages that may accrue in the breach. The liability for the *L.R.A.1917A*.

damages arising on the breach, results as a corollary from the right to contract."

^{9a} See, for example, *Peoria & S. R. Co. v. Thompson* (1882) 103 Ill. 187.

⁴ *Darst v. Gale* (1876) 83 Ill. 136 (party who had lent money to pay debts of company was held to be entitled to an injunction restraining Darst from taking possession of land sold under a trust deed given by the company).

⁵ In *Ward v. Johnson* (1880) 95 Ill. 215, where a savings bank issued "investment certificates" for money borrowed by it, the court laid it down that "the contract having been in good faith performed by the certificate holders, and the bank having had the full benefit of the contract, it is not allowed to interpose the defense of ultra vires." But from the remarks made in the previous part of the opinion, it is clear that this is another case in which the decision might have been based upon the ground that the contract in question was intra vires.

In *East St. Louis v. East St. Louis Gas-light & Coke Co.* (1881) 98 Ill. 415, 38 Am. Rep. 97, the right to sue a municipal corporation for gas furnished was affirmed on the analogy of cases in which the principle of estoppel had been applied in respect to private corporations.

In *Peoria & S. R. Co. v. Thompson* (1882) 103 Ill. 187, an action upon bonds the proceeds of which had been used to build a railroad, the court did "not at all question the general principle contended for by appellant's counsel, that negotiable securities issued without authority of law, or in express violation of a statute, are inoperative and void in the hands of even innocent

of the supreme court is apparent by some of the decisions rendered toward the close of the nineteenth century. In one of them it was observed that the cases in which a corporation is estopped from asserting that a contract is ultra vires when it has received a benefit under the contract are those in which the making of the contract is within the scope of the franchise, and it is sought to avoid the contract because there was a failure to comply with some regulation, or the power was improperly exercised.⁶ This statement was clearly incorrect, for even before it was made numerous American cases had been decided on the theory of an estoppel as applicable to contracts which were not "within the scope of the franchise." See § 42, *supra*. For the purposes of the

present summary the significant circumstance is the assumption of the court that the principle of estoppel was not operative in respect to contracts which were ultra vires in the proper sense of that expression. That assumption was also entertained in another case decided soon afterward, in which a national bank was declared not to be liable for the rent which had accrued under an unauthorized lease, after it had abandoned the leased premises.⁷ Since the conception of an estoppel, as based upon the performance of the contract, has never been carried to the extent of holding that the effect of a partial performance is to render the corporation responsible in respect to the unperformed residue, the decision is, upon the actual facts, somewhat inconclusive for the purpose

holders." But the case was considered to be controlled by the rule as to estoppel. The cases cited were *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 663; *Chicago Bldg. Soc. v. Crowell* (1872) 65 Ill. 453. *East St. Louis v. East St. Louis Gaslight & Coke Co.* (Ill.) *supra*; *Darst v. Gale* (1876) 83 Ill. 140. But the second of these seems to be scarcely a precedent in point. See 3, *supra*.

In *Heims Brewing Co. v. Flannery* (1891) 137 Ill. 309, 27 N. E. 286 (action for rent), the court remarked: "Even admitting that entering into said contract was in excess of the defendant's corporate powers, yet, having entered into said contract and enjoyed its benefits, it should be estopped to appeal to the limitations imposed by its charter, for the purpose of escaping payment of the stipulated consideration." In *Best Brewing Co. v. Klassen* (1900) 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20, decided *after* the change of doctrine adverted to in the text, the court undertook to minimize the significance of this case as an authority for the principle of an estoppel by pointing out that the lease in question was *intra vires*. But, having regard to the specific statement quoted above, this explanation is unsatisfactory not to say disingenuous. The doctrinal position of the court is quite clear.

In *People ex rel. Jackson v. Suburban R. Co.* (1899) 178 Ill. 504, 49 L.R.A. 650, 53 N. E. 349, it was held that a suburban street railway company which had received the right to use the streets of a village on the condition that the fare charged from the village to the city should not exceed that charged from another town was estopped from setting up, in mandamus proceedings instituted to compel it to perform its undertakings, the defense that those undertakings were ultra vires in respect both to the municipality and to the company.

See also *Bloomington Mut. Ben. Asso. v. Blue* (1887) 120 Ill. 128, 60 Am. Rep. 558, 11 N. E. 331 (action to recover money claimed to be due on a life benefit certificate L.R.A.1917A.

after the death of the holder, who had duly performed the contract on his part); *Millard v. St. Francis Xavier Female Academy* (1880) 8 Ill. App. 341 (borrowing of money); *People's Gaslight & Coke Co. v. Chicago Gaslight & Coke Co.* (1886) 20 Ill. App. 473 (contract in restraint of trade); *Watertown F. Ins. Co. v. Rust* (1890) 40 Ill. App. 119, affirmed in (1892) 141 Ill. 85, 30 N. E. 772, adopting the opinion of the lower court (foreign insurance company, when sued on a policy, estopped to plead that it had not complied with statutory prerequisites to the conduct of business); *Kadish v. Garden City Equitable Loan & Bldg. Asso.* (1894) 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236 (action to foreclose deed of trust given for a loan); *McNulta v. Corn Belt Bank* (1896) 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954 (rule recognized *arguendo*, but relief was denied, because the object of the suit was to recover the amount claimed to be due in respect to unexecuted part of the contract).

For other cases in which the same doctrine was applied by the court of appeals, see *First Nat. Bank v. Brooks* (1887) 22 Ill. App. 238 (deposit of money); *Northwestern Brewing Co. v. Manion* (1892) 44 Ill. App. 424 (lease); *National Brewing Co. v. Ahlgren* (1896) 63 Ill. App. 475 (lease); *Keeley Brewing Co. v. Emrick* (1896) 64 Ill. App. 247 (lease); *Standard Brewery v. Kelly* (1896) 66 Ill. App. 267 (guaranty of rent); *Lake Street Elev. R. Co. v. Carmichael* (1898) 82 Ill. App. 344 (guaranty). The last mentioned of these decisions, it will be observed, was rendered after the *McCormick Case* (see note 7, *infra*), but apparently it was not brought to the attention of the court.

⁶ *Durkee v. People* (1895) 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626.

⁷ *McCormick v. Market Nat. Bank* (1896) 162 Ill. 100, 44 N. E. 381, affirming (1895) 61 Ill. App. 33 (this decision was affirmed in (1896) 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433; see § 70, *supra*).

of the present summary. But certain remarks made in the course of the opinion indicate the nature of the alteration which the views of the court had undergone since the earlier decisions had been rendered.⁸ That alteration is still more distinctly apparent in another case of a somewhat later date, in which the contention that defendant "was estopped to raise the question of ultra vires, because it had received the benefit of the contract by the conveyance of the property to it," was explicitly rejected.⁹ But it seems to be scarcely possible to accept as accurate the statement made in the opinion that the earlier Illinois cases in which the corporation had been held to be estopped "have been where the act complained of was within the general scope of the corporate powers," and that the decisions in those cases were refer-

able to the universally accepted rule that a corporate contract may be valid as to third persons, where it is unlawful merely in the sense that it was beyond the authority of the agent who made it, or that certain formalities prescribed by the law were disregarded in making it, or that it constituted an improper use of one of the enumerated powers of the corporation. It is submitted that the language used, and the decisions rendered, in at least a portion of those cases, cannot be reconciled with the theory thus propounded as to their rationale.¹⁰

The doctrine that no estoppel can be predicated on the ground of the contract's having been performed by the party suing the corporation has been frequently applied by the supreme court in later cases.¹¹

⁸ "Where benefits have been received under an ultra vires agreement, relief granted is not upon the basis that a valid or merely voidable contract has been entered into, but, the act not being *malum in se*, the parties will, as near as they well can, be restored to their original condition." The court cited *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1885) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Thomas v. West Jersey R. Co.* (1879) 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co. v. Oregonian R. Co.* (1888) 130 U. S. 18, 32 L. ed. 830; 9 Sup. Ct. Rep. 409.

⁹ *National Home Bldg. & L. Assn. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619. The contract involved was one by which the defendant became the grantee of a city lot, and stipulated to assume the encumbrances thereon. The position taken is clearly shown by the following passage in the opinion: "In this case the transaction was beyond the corporate powers and ultra vires in the strict and legitimate sense, and against public policy. It could not be ratified or become valid by acquiescence, since there was no power to make it. *Flora D. Bishopp*, who dealt with the corporation, was chargeable with notice of its powers and their limitations, and its inability to enter into the contract. She could not make the void contract valid by acting under it. No action can be maintained upon the unlawful contract, and in such cases, if the courts can afford any remedy, it cannot be done by affirming or enforcing the contract, but in some other manner." The rule laid down in *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, was avowedly followed.

In *Brewer & H. Brewing Co. v. Boddie* (1899) 181 Ill. 622, 55 N. E. 49, affirming (1899) 80 Ill. App. 353, in which the defense of ultra vires was relied upon as a bar to an action for rent, the ratio decidendi L.R.A.1917A.

was that the defendant "had the power to rent the premises for its legitimate business, and could not avoid its contract by using the premises for other business not authorized by its charter." The above case was not referred to.

¹⁰ Only a few of the earlier authorities were reviewed, and these were declared to be in harmony with doctrine laid down. To effect such a reconciliation upon the facts merely was doubtless possible; but this method of analysis could not overcome the significance of the consideration that, in the cases cited, as well as in others not referred to, the doctrine of estoppel was enunciated without any qualification. The present writer ventures to express his agreement with the assertion of *Carter, J.*, in his dissenting opinion, that it has "been the settled doctrine of this court that, where the contract has been wholly executed and the corporation has received the benefit of it, it will be estopped from setting up in defense of payment its own lack of power, under its charter, to enter into the contract, where the contract is not one either *malum in se* or *malum prohibitum*."

¹¹ *Best Brewing Co. v. Klassen* (1900) 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20 (brewing company not liable on an appeal bond executed by a third person in a suit to recover possession of a house); *Farson v. Fogg* (1903) 205 Ill. 326, 68 N. E. 755, reversing (1903) 105 Ill. App. 572 (contract to pave street); *Wood v. Supreme Ruling, F. M. C.* (1904) 212 Ill. 532, 72 N. E. 783 (recognizing, in a suit on a certificate of a benefit society, the distinction that the defense of estoppel is not available where the contract of which the corporation has received the benefits is outside its charter powers, but only where there has been an improper or irregular exercise of these powers); *Steele v. Fraternal Tribunes* (1905) 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121 (same distinction again recognized in a similar suit);

Some of the decisions rendered by the court of appeals since the supreme court repudiated the principle of estoppel reflect this change of views.¹² But the

authority of the higher tribunal has in several instances been strangely disregarded.¹³

The following remarks were made in

Stacy v. Glen Ellyn Hotel & Springs Co. (1906) 223 Ill. 546, 8 L.R.A.(N.S.) 966, 79 N. E. 133, same distinction recognized with respect to a stipulation introduced into deed of real property by company which had no power to engage in the business of selling such property; *Converse v. Emerson, T. & Co.* (1909) 242 Ill. 619, 90 N. E. 269, affirming (1909) 148 Ill. App. 604 (purchase of stock of another corporation).

In *Fritze v. Equitable Bldg. & L. Soc.* (1900) 186 Ill. 183, 57 N. E. 873, affirming (1899) 83 Ill. App. 18 (assumpsit to recover for services), the contention that, even though the contract in question might be regarded as one which was ultra vires, yet a corporation could not avail itself of the defense of ultra vires when the contract had been in good faith performed by the other party, and the corporation has had the full benefit of such performance, was thus disposed of: "In support of this claim various decisions heretofore rendered by this court are referred to and relied upon. *Bradley v. Ballard* (1870) 55 Ill. 413, 3 Am. Rep. 656, 3 Mor. Min. Rep. 563; *Darat v. Gale* (1876) 83 Ill. 136; *Bloomington Mut. Ben. Asso. v. Blue* (1887) 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Kadish v. Garden City Equitable Loan & Bldg. Asso.* (1894) 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; *McNulta v. Corn Belt Bank* (1896) 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954. A new construction has recently been given to these decisions, which is materially variant from that heretofore put upon them (*National Home Bldg. & L. Asso. v. Home Sav. Bank* (1899) 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619), but which must be regarded as the construction now held by this court (*Best Brewing Co. v. Klassen* (1900) 185 Ill. 37, 50 L.R.A. 765, 76 Am. St. Rep. 26, 57 N. E. 20)."

In *Wheeler v. Home Sav. & State Bank* (1900) 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598, reversing (1899) 85 Ill. App. 28, the corporation received no benefits from the transaction in question, but the court also remarked that "its mere acquiescence in the unauthorized acts of its officers in a matter outside of its corporate powers cannot give rise to an estoppel."

In *Brennan v. Gallagher* (1902) 199 Ill. 207, 65 N. E. 227, reversing (1901) 99 Ill. App. 81, affirming the right of a depositor to recover his deposit in a building union, *National Home Bldg. & L. Asso. v. Home Sav. Bank*, note 9, supra, was relied upon as an authority adverse to the enforcement of the claim. But the court said that, "even if the doctrine of estoppel could not be invoked under the authority of that case, it is clear that it was not intended by anything there said to exempt corporations from all liability for benefits received by them under contracts void because ultra vires only." In this passage the court was, as the rest of

its opinion shows, affirming merely the right of the plaintiff to such relief as could be granted independently of its contract. See § 11 of note to *Crowder State Bank v. Aetna Powder Co.*, post, 1037.

¹² *Kelley, M. & Co. v. O'Brien Varnish Co.* (1900) 90 Ill. App. 287 (appeal bond); *Myers v. Equitable Bldg. & L. Asso.* (1900) 92 Ill. App. 27 (service); *Chicago Pneumatic Tool Co. v. H. W. Jones Mfg. Co.* (1899) 91 Ill. App. 547 (sale); *Bailey v. Farmers' Nat. Bank* (1901) 97 Ill. App. 66 (replevin bond); *McCartney v. Supreme Tent, K. M.* (1907) 132 Ill. App. 20 (insurance policy); *Society of St. Stephen v. Sikorski* (1908) 141 Ill. App. 1 (insurance policy); *Smith v. Bankers' Union* (1908) 144 Ill. App. 384 (certificate issued by mutual benefit society); *Luce Furniture Co. v. Almini Co.* (1915) 192 Ill. App. 386 (purchase of goods).

In *Western Teleph. Mfg. Co. v. Foley* (1909) 150 Ill. App. 343, the court thus disposed of the argument based upon the hypothesis that appellant was without authority to buy the note in question: "The legal holder of this note was a party to this suit from the beginning by the name of the unknown owner of said \$600 note, and, as such unknown owner, had a right to redeem from the tax sale. We do not think it equitable that those who may have been benefited by the redemption from the tax sale shall be relieved from the duty of contributing to defray that expense by this plea of ultra vires so interposed, if such duty would otherwise equitably rest upon them. Being a defendant in equity, even by the name of unknown owner, if the holder of this note has paid taxes which resulted beneficially to other parties, equity requires that those who have been benefited should not escape paying their equitable proportion of that which has resulted in their benefit, by such a plea as that here interposed, if the other facts entitled the holder to reimbursement." There is obviously no inconsistency between this ruling and the doctrine of the supreme court. It is merely an illustration of the general principle, He who seeks equity must do equity.

¹³ In *Chicago & S. S. Rapid Transit R. Co. v. Northern Trust Co.* (1900) 90 Ill. App. 460, the enforceability of the bonds in question was affirmed partly on the principle of an estoppel predicated from the execution of the contract, and partly on the ground that it had been entered into with the full knowledge and consent of all parties interested at the time. The attention of the court was apparently not directed to *National Home Bldg. & L. Asso.'s Case* (note 9, supra). In the affirming judgment the latter only of the two grounds mentioned above was relied upon. *Wells v. Northern Trust Co.* (1902) 195 Ill. 288, 63 N. E. 136.

a recent opinion of the supreme court: "It has sometimes been said that where the contract has been in good faith fully performed by one party, the other party, who has had the benefit of the performance of the contract, will be estopped to plead its invalidity."¹⁴ Although this was said in cases where the contract was not ultra vires in the proper sense, and the language was not, perhaps, strictly accurate, it was intended to declare the sound and wholesome doctrine that a party cannot retain the benefits, money, or property received under a contract which is void merely for want of power to enter into it, without making compensation therefor."¹⁵ This statement, when considered with reference to the language used in the cases which illustrate the altered doctrine of the court, is somewhat ambiguous. But that it imports in any degree a reversion to the older doctrine seems to be an impossible supposition. If any such reversion had been intended, the change of views would undoubtedly have been announced more definitely. The principle of an estoppel has, moreover, been categorically rejected in some cases of later date, in which the corporation was the moving party. See § 30 of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —. The key to the actual position of the court is probably to be found in its observation that this principle had been enunciated in cases where the contract was "not ultra vires in the proper sense."

In *Peoria Star Co. v. Cutright* (1904) 115 Ill. App. 492, the principle of an estoppel was applied in an action on promissory notes, one of the authorities relied upon being *Peoria & S. R. Co. v. Thompson* (1882) 103 Ill. 187, a decision rendered before the supreme court had repudiated that principle,—a change which apparently the court of appeals did not appreciate, although the leading case upon the point was cited in another part of the opinion.

The same principle was also applied in *Gibson v. O'Gara Coal Co.* (1909) 151 Ill. App. 424 (assumpsit for services), on the authority of decisions anterior to the change of doctrine. Some of these older decisions were also relied upon in *Roush v. Illinois Oil Co.* (1913) 180 Ill. App. 346 (action for repurchase price of property).

In *Jahp v. Elite Livery*. (1915) 192 Ill. App. 249, it was held, according to the headnote (no opinion is reported), that a corporation guarantying the notes of another corporation, in consideration of the compromise of bankruptcy proceedings and the retention of property by the former claimed to have been transferred to it by the latter in violation of the Bankruptcy L.R.A.1917A.

This assertion should apparently be construed as a recognition of the theory that the principle of estoppel is applicable only to contracts which amount to an abuse of the corporate powers conferred, and not to contracts which are entirely outside those powers. If regard be had merely to the facts involved, most of the Illinois decisions, early and late, might be reconciled by the aid of the distinction thus predicated, but it cannot be harmonized with the general language used in the more recent cases.

81. Indiana.

In a case in which it was held that a street railway company which had agreed to make a subscription to the fairs of the state board of agriculture could not, after having received the benefits of the contract, interpose the defense of ultra vires in an action brought to recover the stipulated subscription, the position of the supreme court was thus stated: The company "has received the profits resulting from the compliance of the plaintiff with the contract. These profits, we are at liberty to presume, have gone to swell the dividends of the stockholders in that corporation. It would be unjust for their company now to escape performance of the contract by which these profits have been realized."¹

In the following year in a suit brought by a stockholder to have a contract set aside, it was urged that, "if the

Act, cannot invoke the doctrine of ultra vires as a defense in an action on the notes.

¹⁴ [Citing] *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 658, 3 Mor. Min. Rep. 563; *Darst v. Gale* (1876) 83 Ill. 136; *Kadish v. Garden City Equitable Loan & Bldg. Asso.* (1894) 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236.

¹⁵ *United States Brewing Co. v. Doles & S. Co.* (1913) 259 Ill. 274, 47 L.R.A.(N.S.) 898, 102 N. E. 753 (lease).

Indiana.

¹ *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702. The authority mainly relied upon was the passage in *Sedgwick on Statutory & Constitutional Law*, 2d ed. p. 73, which is discussed in § 41, supra. This seems to be the earliest Indiana decision which has a definite bearing upon the principle of estoppel. But as the previous case *Smead v. Indianapolis, P. & C. R. Co.* (1858) 11 Ind. 104, has occasionally been cited in this connection, some reference to it will be proper. The facts were briefly these: The Indianapolis & Bellefontaine Railroad Company agreed to accept certain bills of exchange to be drawn upon it by the Greenville and

contract was originally ultra vires the corporation, the parties complaining of it have acquiesced in its terms such a length of time, received benefits under it, and confirmed it by so many acts, that they are now estopped from questioning its validity." But the court said: "A contract ultra vires the charter is void, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make, they cannot confirm. A void act can never become valid, merely because it remains unquestioned."² The objection that the decision rendered was in conflict with the earlier decisions already reviewed was thus answered: "In these cases, the want of power was pleaded in favor of the corporation to defeat the payment of the consideration for benefits which it had received and enjoyed. In this class of cases, the courts will go as far as is consistent with the fixed rules of law to reach the justice, equity, and good conscience of the case. In the case under the consideration, the want of power was pleaded against the corporation to prevent the perpetration of an alleged wrong. In such cases the courts will hold corporations to the strictest rules of law. There is a wide difference between the two

lines of cases. The right, which justice seeks and law endeavors to uphold, lies in each line in opposite directions, and must be sought by different ways. In one, the decisions protect right, and in the other they prevent wrong, and thus they are made consistent. In both, they are based on the fundamental principle in jurisprudence, that no one shall take advantage of his own wrong." This attempt to harmonize the decisions can scarcely be regarded as satisfactory. The court has entirely failed to meet the difficulty created by the consideration that the general theory enounced by it, viz., that an ultra vires contract is "void," is essentially inconsistent with the notion that it may be sued upon after the benefits accruing from it have been received by the corporation. So long as we are dealing with the question of the enforceability of the contract itself, the elements of justice or injustice are, it is submitted, wholly irrelevant.

Some years afterward it was declared that the plaintiff in an action on an insurance policy was "in no condition to claim" that the insurance company was "estopped by the acts and conduct of either its principal officers or its subordinate agents, from asserting and showing that the policy in suit was void."³ The decision proceeded upon the broad

Miami Railroad Company, in consideration that the latter company would adopt and maintain the gauge of the former road, for the purpose of operating the roads interchangeably and forming a continuous line, the roads having authority to thus unite and form a running connection. The bills were drawn and accepted, and the gauge adopted as agreed. In an action brought upon the bills by Smead as the holder, the former pleaded its want of power to make the acceptances. A demurrer to a replication averring that the defendant had power to make the contract was sustained. Held to be error, for the reason that such power was conferred by a valid amendment to the defendant's charter. Such a ruling clearly did not reflect any particular theory as to the consequences of the performance of an ultra vires contract. But the following remark made by the court, arguendo, seems to indicate that, if the bills had been found to be ultra vires in point of fact, the plaintiff would not have been allowed to recover: "No express power to execute bills and notes was given [to the I. & B. R. Co.], and hence the only power possessed to execute such paper was that which arose as incidental to the main undertaking; viz., the giving of such paper when necessary or proper in the carrying through that undertaking. It might give such paper to evidence indebtedness contracted in constructing the railroad, and pro-

viding for its connection with the Ohio road mentioned in its charter. It had no power, therefore, to execute merely accommodation paper, or paper to aid an undertaking not contemplated by its charter, and such paper executed by it would be void. It would be ultra vires. Such paper, it would seem, must be void in the hands of any assignee, because its issue would be outside of the power of the corporation. Would a note by an infant be valid in the hands of a bona fide holder? A bill or note executed within the power of the corporation, but by an abuse of the power in the particular instance, would, if governed by the law merchant, be valid in the hands of a bona fide holder; but when executed entirely without the corporate power, it would not, if, indeed, there could be a bona fide holder of such a bill."

² *Tippecanoe County v. Lafayette, M. & B. R. Co.* (1875) 50 Ind. 85.

³ *Leonard v. American Ins. Co.* (1884) 97 Ind. 299. The court said: "The laws of Illinois constituting the appellee's charter were made a part of appellant's policy of insurance. In § 2 of such charter it was provided that every person who should become interested in such company by insuring therein should be deemed and taken to be a member thereof, for and during the term specified in his policy, and no longer, and shall at all times be concluded and bound by the provisions of this act." By

ground that "where the parties to a transaction have equal knowledge, or means of knowledge, of all the facts, there can be no valid estoppel." The theory thus enunciated constitutes, as has already been shown, one of the grounds which have been relied upon for the purpose of demonstrating the unsoundness of the notion that an estoppel may be based upon the fact of the performance of the contract (see § 34, supra). Obviously, therefore, it is inconsistent both with the conclusion arrived at, and with the remarks made, in the first of the cases reviewed in this section.

In the next case that bears upon the subject, the right of certain stockholders to maintain an action for the avoidance of a mortgage securing an ultra vires loan was held to be conditional upon their offering to do equity by returning the money which had been received. Such a decision, it is obvious, did not necessarily imply an acceptance of the doctrine that, in a case where the corporation is the defendant, the fact of its having received the benefits of the contract precludes it from setting up the defense of ultra vires. But the following passage of the opinion shows

that that doctrine was approved by the court: "If, . . . it were conceded that the borrowing of the money was a transaction beyond the chartered power of the corporation, the authorities fully justify the conclusion that it would not be heard to assert the invalidity of the transaction while it retained its fruits. The rule is now too thoroughly established to be longer open to question, that, where a contract has been executed and fully performed on the part of the corporation, or of the party with whom it contracted, neither will be permitted to insist that the contract was not within the power of the corporation."⁴ That doctrine was also recognized in another case decided not long afterward.⁵ In neither of those cases was any reference made to the earlier ones in which the absolutely void quality of ultra vires contracts had been affirmed.

More recently the expression of a definite opinion upon the soundness of the principle of estoppel, as predicated from the receipt of benefits, was deliberately evaded, the judgment being based upon another ground.⁶

From the foregoing summary it would appear that the decisions and dicta of the supreme court, while not by any

accepting his policy of insurance, therefore, the appellant became and was a member of the appellee company, and as such was 'concluded and bound by the provisions' of its charter. As such member the appellant knew, or had the means of knowing, and therefore was bound to know, that his policy of insurance was void for want of corporate power in the appellee to issue such a policy." It should be observed that the decision was based partly upon the independent ground, that, "whenever the charter of an insurance company requires that any act shall be done, and prescribes the mode in which such act shall be done, and declares that, if the act be not done in the manner prescribed, the contract or policy of insurance shall be void, the company cannot waive the performance of such act in the prescribed mode, for performance of any condition of the contract, fixed by law, cannot be waived."

⁴ Wright v. Hughes (1889) 119 Ind. 331, 12 Am. St. Rep. 412, 21 N. E. 907.

⁵ Louisville, N. A. & C. R. Co. v. Flanagan (1887) 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370, arguendo, the contract in question being held to be intra vires. The case in 97 Indiana was not referred to.

⁶ Franklin Nat. Bank v. Whitehead (1897) 149 Ind. 500, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N. E. 592. There two creditors of the Greenfield Iron & Nail Company, an insolvent corporation for which a receiver had been appointed, filed their separate intervening petitions, claiming that, by virtue of L.R.A.1917A.

certain receipts purporting to be public warehouse receipts, issued by said corporation, they had liens upon a large portion of the property of said corporation, and were entitled to have the same set apart and applied to the payment of their claims. The court made a special finding of facts, upon which conclusions of law were stated against the national bank and the creditors represented by it, and judgment against them was rendered accordingly. Two contentions were advanced by the appellants, the creditors. In the first place, it was urged that the nail company was estopped from denying that it was a warehouseman, and that it held as such the nails mentioned in the receipts subject to their order. But the court said: "If the nail company could be estopped, as insisted by appellants, it would only be, if at all, when appellants had no notice or knowledge that the nail company was not a warehouseman, and was not engaged in such business, and had no power to engage in such business or issue warehouse receipts, but believed in good faith that it was engaged in such business, and had the power to do so and issue warehouse receipts, and that, relying upon such facts, they accepted the receipts and made the loan on the faith thereof. . . . Besides, they were bound to know that, under our statutes, a corporation organized under the law for the incorporation of manufacturing and mining companies had no power to carry on either a public or private warehouse, or issue warehouse receipts; and that

means harmonious, are on the whole indicative of an adoption of the doctrine that an action may be maintained against a corporation on an ultra vires contract by a party who has performed it on his side.

In all the cases in which the subject has been considered by the court of appeals, it has been taken for granted that that doctrine is settled law in this state.⁷

32. Iowa.

An early decision to the effect that the assenting stockholders of the corporation in question could not maintain an action to prevent it from paying notes executed by it for a debt proceeded partly upon the theory that the rule as to ultra vires "prevails in full force only where the contracts of corporations of this character [i. e., private] remain wholly executory."¹ Having regard to

the circumstances involved and the authorities cited, it is apparent that this somewhat vague statement is to be understood as importing an acceptance of the doctrine of estoppel, and the decision has been occasionally treated in later Iowa cases as a precedent for that doctrine.

Subsequently, the doctrine was enunciated that, "where an ultra vires contract is made, and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate wrong and injustice."² If the word "account" is to be construed here as importing merely that either party to an ultra vires contract is entitled to maintain an equitable suit for an account-

a public warehouseman had no authority to issue warehouse receipts on his own property in his public warehouse, as a security for his own debts or the debts of others." In the second place, it was argued that, if the nail company was not authorized to be a public warehouseman, and had no right to issue public warehouse receipts on its own property to secure its own debts, its acts in doing so were merely ultra vires, and that, as such contracts had been performed by appellants in loaning the money, the company could not, after having received the benefits of the contract, avoid such warehouse receipts on the ground that it had exceeded its corporate powers in issuing them. But the court, instead of stating whether it agreed with or dissented from the doctrine thus urged, merely adverted to the conflict of judicial opinion with respect to it, and observed that what had already been said in regard to the nail company being estopped to deny that it was a warehouseman and had the power to issue said receipts and hold said nails for appellants was a sufficient answer to this contention of appellants. The court added: "As we have shown, a public warehouseman, whether a corporation or an individual, cannot issue a public warehouse receipt on his own property in such warehouse, as security for his own debts or the debts of others, and such receipt, if issued, creates no lien on such property. The rule urged cannot therefore apply to this case, even if it were conceded that the nail company was authorized by law to engage in the business of public warehouseman, and was actually engaged in such business. Besides, the doctrine urged does not apply to contracts where the same are forbidden by statute or are contrary to public policy. *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 411, 17 Am. Rep. 702." This, it was pointed out, was the character of the contract in question.

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⁷ In *Bedford Belt R. Co. v. McDonald* (1896) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022, an action to recover for medical services rendered to an injured servant, the court said: "The general rule is that, where a private corporation has entered into a contract not immoral in itself and not forbidden by any statute, and it has been in good faith fully performed by the other party, the corporation will not be heard on a plea of ultra vires."

See also *Flint & W. Mfg. Co. v. Kerr-Murray Mfg. Co.* (1899) 24 Ind. App. 356, 56 N. E. 858 (arguendo); *Wittmer Lumber Co. v. Rice* (1900) 23 Ind. App. 586, 55 N. E. 868 (guaranty); *Chicago, I. & L. R. Co. v. Southern Indiana R. Co.* (1904) 38 Ind. App. 234, 70 N. E. 843 (doctrine recognized, but its applicability denied, for the reason that the contract in question was illegal, and not merely ultra vires); *Breinig v. Sparrow* (1907) 39 Ind. App. 455, 80 N. E. 37 (where it was laid down with regard to a contract of partnership that, "if a corporation makes a contract which is merely ultra vires, and not illegal, and others have thereby been induced to expend money, the corporation will be bound by its contract"); *State L. Ins. Co. v. Nelson* (1910) 46 Ind. App. 137, 92 N. E. 2 (arguendo); *Huntington Brewing Co. v. McGrew* (1916) — Ind. App. —, 112 N. E. 534 (subscription to fund raised for the purpose of inducing factories to locate their business in a town).

Iowa.

¹ *Thompson v. Lambert* (1876) 44 Iowa, 239.

² *Twiss v. Guaranty Life Asso.* (1893) 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8 (action on insurance policy). This statement was quoted in the recent case, *Marshalltown Stone Co. v. Des Moines Brick Mfg. Co.* (1910) 149 Iowa, 141, 126 N. W. 190 (suit on restrictive covenant).

ing, it is clear that this statement would, as a description of the remedial rights of each party, be appropriate even with respect to jurisdictions in which, although no action can be brought upon the contract itself, a claimant may obtain such relief as may be open to him independently of the contract. But the language used in other cases shows that the theory actually adopted in this state is that the effect of performance by one of the parties is to invest him with the right to bring an action upon the contract itself.

When affirmed with relation to the liability of the corporation, this theory has sometimes been enunciated in a form sufficiently general to be expressive of the conception that it is applicable both to cases in which the object of the action is to enable the corporation to relieve itself from the obligations of the contract, and to cases in which the other

party is seeking to enforce those obligations.³ In other instances the language employed distinctly embodies the narrower conception of an estoppel predicable in an action in which the corporation is the party defendant.⁴ But as both types of statement reflect precisely the same view with regard to the effect of performance by the party contracting with the corporation, it is manifest that, so far as regards the footing upon which his remedial rights are determined, it is for practical purposes immaterial whether, for the purposes of a given decision, the controlling theory is assumed to be that which is defined by the former type, or that which is defined by the latter.⁵

In one case, where the action was brought on a contract for the payment of a specified sum to the plaintiff in the event of his being permanently disabled, the special ground upon which recovery

³ "A corporation cannot retain benefits derived from an ultra vires contract, and at the same time treat the contract as entirely void, unless, perhaps, in cases where the other party has assisted wilfully in putting it beyond the power of the corporation to return what is received on such contract." *Lucas v. White Line Transfer Co.* (1886) 70 Iowa, 541, 59 Am. Rep. 449, 30 N. W. 771 (arguendo).

The corporation, while retaining the benefits of its contract, cannot escape the obligations thus assumed by pleading its own offense against the law. *Field v. Eastern Bldg. & L. Asso.* (1902) 117 Iowa, 185, 90 N. W. 717 (action held to be maintainable for amount payable on certificate of stock which contravened a prohibitory statute).

"A corporation cannot rely upon the doctrine of ultra vires to relieve itself from the consequences of a contract made by it which is fully executed by the other party, and which is not expressly prohibited or contrary to public policy." *Fidelity Ins. Co. v. German Sav. Bank* (1905) 127 Iowa, 591, 103 N. W. 958.

"A corporation cannot insist on its own want of authority to enter into a contract which has been fully executed and carried out by the other party thereto." *Garrison Canning Co. v. Stanley* (1907) 133 Iowa, 57, 110 N. W. 171 (principle of estoppel applied in suit based on theory that the company was entitled to repudiate a loan contract). This statement was quoted in *Vermont Farm Machinery Co. v. De Sota Co-op. Creamery Co.* (1909) 145 Iowa, 491, 122 N. W. 930 (action to recover price of articles sold).

⁴ "Where the consideration for its agreement has been received, a corporation is estopped to allege its want of power to contract." *Field v. Eastern Bldg. & L. Asso.* (1902) 117 Iowa, 185, 90 N. W. 717.

"Our rule is that the plea is only available where the contract is executory, and that, where the consideration for the agreement has been received, the corporation is estopped to allege its want of power to contract." *Vermont Farm Machinery Co. v. De Sota Co-op. Creamery Co.* (Iowa) *supra* (action for price of goods sold).

⁵ That the corporation is precluded from relying upon the ultra vires character of a contract, after it has been executed by the other party, was explicitly laid down or taken for granted in the following cases, besides those already cited: *Weber v. Scott County Agri. Soc.* (1876) 44 Iowa, 239 (action by stockholder to prevent payment of notes and mortgage); *Humphrey v. Patrons' Mercantile Asso.* (1879) 50 Iowa, 607 (borrowing money in excess of authorized amount); *Keokuk v. Ft. Wayne Electric Co.* (1894) 90 Iowa, 67, 57 N. W. 689 (no estoppel predicable under the given circumstances); *Church v. Johnson Bros.* (1895) 93 Iowa, 544, 61 N. W. 916 (action for commissions on sale of real property made by request of bank); *White v. G. W. Marquardt & Sons* (1898) 105 Iowa, 145, 74 N. W. 930 (purchase of stock of another corporation); *Beach v. Wakefield* (1899) 107 Iowa, 567, 76 N. W. 688, 78 N. W. 197 (involving priority of mortgage relatively to mechanics' lien); *Cathcart v. Equitable Mut. Life Asso.* (1900) 111 Iowa, 471, 82 N. W. 964 (member of benevolent society, the obligations of which had been taken over by the defendant under a consolidation agreement, held entitled to assert his rights under the agreement, though it was ultra vires); *Watts v. Equitable Mut. Life Asso.* (1900) 111 Iowa, 90, 82 N. W. 441 (equitable suit brought on certificate of life insurance against consolidated company); *Garner v. Mutual F. Ins. Co.* (1901) — Iowa, —, 86 N. W. 289 (action on insurance policy covering property of an unauthorized character); *Schrimplin v. Farmers' Life Asso.* (1904) 123

was allowed was that the defendant had incorporated in the contract an article of its charter which on its face purported to confer the power to make such a payment, and that by so doing it had estopped itself from setting up the defense of ultra vires, irrespectively of whether its officers had, in respect to the contents of the article, made a mistake or been guilty of fraud.⁶

The rule that the principle of estoppel is not applicable in cases where the contract upon which suit is brought belongs to the expressly prohibited category was affirmed in the case cited below.⁷

Iowa, 102, 98 N. W. 613 (action to recover commissions of agent under contract made with insurance company whose business defendant had purchased); *Traer v. Lucas Prospecting Co.* (1904) 124 Iowa, 107, 99 N. W. 290 (principle of estoppel applied in stockholders' suit to have mortgages declared void, so far as the amount secured exceeded the authorized limits of indebtedness); *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* (1904) 127 Iowa, 350, 69 L.R.A. 968, 109 Am. St. Rep. 387, 101 N. W. 742 (action on agreement to repurchase company's own stock); *St. John v. Iowa Business Men's Bldg. & L. Asso.* (1907) 136 Iowa, 448, 15 L.R.A.(N.S.) 503, 113 N. W. 863 (guaranty that payments requisite for the maturity of stock should not exceed a specific number); *Bobzin v. Gould Balance Valve Co.* (1908) 140 Iowa, 744, 118 N. W. 40 (arguendo).

In *Marshall Field Co. v. Oren Ruffcorn Co.* (1902) 117 Iowa, 157, 90 N. W. 618, where the action was brought upon promissory notes, the defendant pleaded that its indebtedness at the time they were executed exceeded that permitted by its articles of incorporation. But the answer also showed that this indebtedness was incurred for goods which the defendant had received. Held, that it was estopped from entering the plea of ultra vires, and that the argument that recovery must be had on the original consideration rather than the new contract or obligation executed for its payment must be rejected in view of previous decisions of the court.

In *Keokuk v. Ft. Wayne Electric Co.* (1894) 90 Iowa, 67, 57 N. W. 689, the court quoted, arguendo, the statement in *Sedgwick on Statutory and Constitutional Law*, p. 90, that "a party who has had the benefit of the agreement cannot be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract the fruits of which he retains."

In *Matt v. Roman Catholic Mut. Protective Soc.* (1886) 70 Iowa, 455, 30 N. W. 799 (action on a beneficiary certificate), the contention that no recovery could be had because the contract was void was put forth. L.R.A.1917A.

83. Kansas.

The doctrine accepted in this state has been thus stated: "While an executory contract made by a corporation without authority cannot be enforced, yet, where the contract has been executed and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned."¹ A circumstance which renders this apparent conflict of views the more singular is that the suit was brought on a negotiable instrument of which the plaintiff was a bona fide purchaser, and that the right to recover in such a suit has been rec-

ward by counsel, but the court deemed it unnecessary, under the circumstances of the case, to discuss the point.

In *Garrett v. Burlington Plow Co.* (1886) 70 Iowa, 697, 59 Am. Rep. 461, 29 N. W. 395, and *Warfield, H. & Co. v. Marshall County Canning Co.* (1887) 72 Iowa, 666, 2 Am. St. Rep. 263, 34 N. W. 467, the ratio decidendi was that a mortgage given to secure the loan of an amount which exceeded that authorized by the defendant's charter was not void.

In *Peatman v. Centerville Light, Heat & P. Co.* (1896) 100 Iowa, 245, 69 N. W. 541, following *Heuer v. Carmichael* (1891) 82 Iowa, 290, 47 N. W. 1034, the effect of the decision was that a debt exceeding the authorized amount was valid to the extent of the consideration received.

⁶ *Binder v. National Masonic Acci. Asso.* (1905) 127 Iowa, 25, 102 N. W. 190.

⁷ *Mutual Guaranty F. Ins. Co. v. Barker* (1899) 107 Iowa, 143, 70 Am. St. Rep. 149, 77 N. W. 868 (action against assignee of insurance company).

Kansas.

¹ *Sherman Center Town Co. v. Morris* (1890) 43 Kan. 282, 19 Am. St. Rep. 134, 23 Pac. 569 (purchase of merchandise creating an indebtedness exceeding the authorized amount).

For other cases in which this doctrine has been recognized, see *Sherman Center Town Co. v. Russell* (1891) 46 Kan. 382, 26 Pac. 715 (contract involving creation of an unauthorized amount of debt); *Sherman Center Town Co. v. Fletcher* (1891) 46 Kan. 524, 26 Pac. 951 (action for money promised in consideration of the plaintiff's removing his business to a new town laid out by defendant); *Alexandria, A. & F. S. R. Co. v. Johnson* (1897) 58 Kan. 183, 48 Pac. 847 (agreement to pay costs of survey of railroad); *Hanna v. Chicago, R. I. & P. R. Co.* (1913) 89 Kan. 503, 132 Pac. 154 (action for damages caused by delay in forwarding telegram); *Arkansas Valley Town & Land Co. v. Lincoln* (1895) 56 Kan. 145, 42 Pac. 706 (guaranty); *Bankers' Union v. Crawford* (1903) 67 Kan. 449, 100 Am. St. Rep. 465, 73 Pac. 79 (consolidation of fraternal associations; applicability of doctrine denied under the circumstances).

ognized even by some of the courts which reject the principle of estoppel with regard to other kinds of transactions.

83a. *Kentucky.*

In an early case in which the defendant, a corporation prohibited from issuing bills, notes, or checks as currency, or exercising any of the powers of a bank, was held liable for the amount claimed by the plaintiff for work performed in engraving their bank bills, the ratio decidendi was that, even if their object was to use these bills illegally, and in the illegal exercise of banking powers, they should be held "responsible in damages for a breach of their assumpsit to strangers who may be presumed to be ignorant of their powers, by which they engaged their services and induced them to expend their labor, time, and means at their instance and for their benefit."¹ As the contract here performed was entirely dissociated from the ultra vires acts of the bank, this decision would doubtless be approved by every court, whatever may be its general views with regard to the effect of performance upon the remedial rights of the claimant. But the statement concerning the plaintiff's presumptive ignorance of the corporate powers is plainly inconsistent with the modern

theory upon that subject. See § 2, *supra*.

In what seems to be the next relevant case, it was apparently assumed that a corporation which has been benefited by the performance of a contract is, as a general rule, precluded from availing itself of the plea of ultra vires. But, in an action by a railway company to recover upon an agreement entered into by a literary society to make a subscription in aid of the construction of a railway, the facts that the railroad company had, at great expense, complied with its part of the contract, and that the property of the society had been enhanced in value by the building of the road, were held not to estop the society from pleading ultra vires, because the benefits received were not peculiar to the society, but were shared in common with the whole community.² It seems doubtful whether the rather refined distinction here taken would meet with general approval.

In a later case, where the actual point involved was whether priority as against ordinary creditors should be accorded to a claim against an insolvent bank in respect to a secured loan of an amount exceeding that which was permitted by the articles of incorporation, the court thus stated its views: "Were this ques-

In *Blue Rapids Opera House Co. v. Mercantile Bldg. & L. Asso.* (1898) 59 Kan. 778, 53 Pac. 761, the Opera House Company, in order to obtain a loan for the purpose of erecting an opera house, became a shareholder in a building and loan association, and executed a bond and mortgage. In a suit to foreclose the mortgage, the mortgagor contended that its officers were without power to effect the loan by taking stock in the building and loan association, but the court said: "Whatever may have been the powers of the officers of the opera house company in this respect, the defense of ultra vires is not available to the company. The contract has been in good faith fully performed by the other party, the money has been paid, and the opera house company has had the full benefit of the payment and the performance of the contract. The law now interposes an estoppel, and will not permit the validity of the loan contract to be questioned."

In *Cooper v. First Nat. Bank* (1888) 40 Kan. 5, 18 Pac. 937, an action to recover the value of goods surrendered to the defendant, the mortgagee thereof, the ground upon which the court rejected the contention that, because the defendant was a national bank, it had no right to take this property and agree to turn back the proceeds to plaintiff, was thus stated: "The bank took the property to secure its own

claim; it was all personal property, and was not of more than twice the value of the claim to be secured; it received the property, secured its own claim, and then refused to account for the balance. We think, if it had the power to take the property and secure its own claim, it ought to have the power to pay back the balance to plaintiff. It would be a very strange proposition of law for the bank to receive property upon a chattel mortgage or an agreement to secure its own claim, and not be compelled to account for any balance remaining after its own claim was satisfied." This case, it will be observed, was decided two years before the earliest of those in which the principle of estoppel was formally propounded. The facts seem to have been such as to bring it within the scope of that principle.

Kentucky.

¹ *Underwood v. Newport Lyceum* (1844) 5 B. Mon. 129, 41 Am. Dec. 260. This case has sometimes been cited as an authority for the doctrine of estoppel. See, for example, *Union Gold Min. Co. v. Rocky Mountain Nat. Bank* (1873) 2 Colo. 248. But this is manifestly an erroneous view as to its purport. In fact, it was decided before that doctrine had been propounded by any court.

² *Louisville & N. R. Co. v. Literary Soc.* (1890) 11 Ky. L. Rep. 861 (abstract).

tion between the corporation and the bank, there would be little difficulty. In this case it appears that the money was actually received by the company and used in its business, and the company would be estopped from refusing to make restitution of that whereof it had received the benefit."³ The affirmation of the doctrine thus enounced had reference to proceedings of an equitable nature. But in later cases the principle of estoppel has been recognized with respect to actions at law also.⁴

In a very recent case, in which the actual point involved was the effect of the assent of all the stockholders of the defendant corporation to the execution of the notes and mortgage upon which

suit was brought, the court laid it down that, "where a contract is ultra vires, and does not conflict with any interest of the state, and is not against any principle of public policy, and where only the interests of the stockholders are involved, the corporation cannot rely upon this defense, nor can it be made to do so by the stockholders when all of them consented for the contract to be made."⁵

84. Louisiana.

An acceptance of the principle of an estoppel, as based upon the receipt of the benefits of a contract, is distinctly indicated by the language used in the three cases cited below.¹

In a case of later date than any of

³ Bell & C. Co. v. Kentucky Glass Works Co. (1899) 106 Ky. 7, 50 S. W. 2. The court quoted 4 Thomp. Corp. § 5705. The decision, which was adverse to the mortgagee bank, was founded upon the consideration that it knew that the legal limits of the mortgagor's indebtedness were being exceeded, while the other creditors had no such knowledge, and that this put them in an entirely different position. "What we held is that neither of the participants in a contract forbidden by law is in as good a position as third person not so participating." The court approved an earlier case which involved somewhat similar facts (First Nat. Bank v. D. Kiefer Mill. Co. (1893) 95 Ky. 97, 23 S. W. 675), where the claim of an assignee for the benefit of creditors was held to be prior in respect to that portion of a creditor's claim which represented the amount by which his loan exceeded the sum which the insolvent corporation was authorized to borrow. See also Citizens' Bank v. Bank of Waddy (1907) 126 Ky. 169, 11 L.R.A.(N.S.) 598, 128 Am. St. Rep. 282, 103 S. W. 249.

⁴ In Greene v. Middlesborough Town & Lands Co. (1905) 121 Ky. 355, 89 S. W. 228, 11 Ann. Cas. 888, it was observed with regard to a guaranty: "If the guarantying company received a valuable consideration for the ultra vires act, it would have to surrender what it had thus unlawfully obtained; but this record shows by the undenied allegations of appellant's petition that the Investment Company's stock was never of any value, and the evidence shows that these worthless shares have long since been returned to the corporation which issued them, so that, as a matter of fact, the Middlesborough Town Company has never received, and is not now retaining, anything of value belonging to the Investment Company of Middlesborough."

See also Albin Co. v. Com. (1908) 128 Ky. 295, 108 S. W. 299, where it was held that the defense of ultra vires was not available to a company sued on notes given for the purchase price of a business and the contracts appertaining thereto, with the understanding that they were to be collected and

paid over to plaintiff in discharge of a debt owed by the seller to the plaintiff.

⁵ Lincoln Court Realty Co. v. Kentucky Title Sav. Bank & T. Co. (1916) 169 Ky. 840, 185 S. W. 156.

Louisiana.

¹ In Canal & C. R. Co. v. St. Charles Street R. Co. (1892) 44 La. Ann. 1069, 11 So. 702, where the action was brought to recover the amount stipulated to be paid for running the defendant's cars over the tracks of the plaintiff, the court observed: "In the actual undisturbed possession of the right conveyed by the contract,—exercising it everyday,—it is difficult to see how the defendant can plead that the contract was ultra vires."

In Atkins v. Shreveport & R. River Valley R. Co. (1902) 106 La. 568, 31 So. 166, where the action was one brought by taxpayers to procure a declaration that a special tax voted in aid of the defendant company had been forfeited by reason of its nonperformance of one of the conditions of the grant, the court held that the undertaking in question was within the charter powers of the defendant, but added: "If this stipulation of the contract was not intra vires, it does not lie in the mouth of defendant company to set this up as defense. A railway company accepting a county subscription as made by the county accepts it as tendered by the county, with all of its terms and conditions, and is estopped from contending that such terms and conditions are void and unreasonable."

In Lyon Bros. & Co. v. Stern, Kenney & Boze (1903) 110 La. 473, 34 So. 641, the syllabus prepared by the court is as follows: "Where a corporation executes and records a bond as auctioneer, and solicits business as such, and receives goods as such to be sold and proceeds accounted for, in a suit against the corporation and the surety on the bond for the price of the goods, the defendants will not be permitted to urge that the corporation could not be an auctioneer under the law, and was not such in fact. They are estopped from setting up the defense."

these, where an action on a guaranty was held not to be maintainable,² the authority relied on was a general statement of the Federal Supreme Court concerning the nonenforceability of ultra vires contracts.³ But as no allusion was made to the circumstance that in the case cited the principle of estoppel was distinctly repudiated, it would scarcely be justifiable, in view of the earlier decisions already mentioned, to infer that the approval of the court extended to that repudiation also. On the facts, the case is in harmony with several others in which various courts have refused to allow recovery upon a guaranty or similar contract, unless it is shown that some specific benefit was received, or specific detriment incurred, by the guarantor. See § 46, *supra*.

85. *Maine.*

In the earliest case which bears upon the subject of this monograph, it was held that an action could not be maintained upon an insurance policy of a description not authorized by the defendant's charter.¹ For the purposes of this decision the court evidently assumed, without expressly declaring, that the defense of ultra vires was available, irrespective of whether the contract had or had not been performed by the plaintiff.

A somewhat later case in which a railroad company was declared to be liable for the nonperformance of a special contract for the delivery of goods beyond its own line was based upon the ground that the contract was intra vires, and not upon the ground that it had been executed by the consignor.² But a recognition of the principle of an estoppel seems to be indicated by the remark that, "though the company might

have had no special authority by their charter to make such contracts, and could perhaps have been enjoined or restrained from doing it by proper proceedings, they could not plead such want of authority against persons so contracting with them."

In another case the argument that recovery should be allowed on the ground that, "when a contract has been executed, in whole or in part, and the corporation has thereby received a benefit, a recovery may be had by the other contracting party to the extent of the benefit thus conferred, notwithstanding the contract was ultra vires," was declared to be sufficiently answered by the fact that the defendant had not received any benefit.³ But, as the conclusions of the court with regard to this aspect of the case were summed up in the statement that there was "absolutely nothing on which a quantum meruit or a quantum valebat claim could be sustained," it must have considered itself to be discussing simply the question whether there was any basis upon which relief could be granted independently of the contract. In this point of view the case may not unreasonably be regarded as showing by implication that the principle of an estoppel was assumed to be inapplicable under the given circumstances. On any other supposition it is difficult, if not impossible, to account for the omission both of court and counsel to advert to a phase of the case which was directly suggested by the evidence.

That the fact of the claimant's having executed the contract is not deemed in this state to operate so as to preclude the corporation from pleading ultra vires in an action on the contract is also indicated by some observations made, *arguendo*, in a subsequent case,⁴ and

² Robert Gair Co. v. Columbia Rice Packing Co. (1909) 124 La. 193, 50 So. 8.

³ Central Transp. Co. v. Pullman's Palace Car Co. (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

Maine.

¹ Andrews v. Union Mut. F. Ins. Co. (1854) 37 Me. 256.

² Perkins v. Portland, S. & P. R. Co. (1859) 47 Me. 573, 74 Am. Dec. 507. The court disapproved Hood v. New York & N. H. R. Co. (1853) 22 Conn. 502, 9 Am. Neg. Cas. 149, where a similar contract had been treated as ultra vires. See § 76, *supra*.

³ Franklin Co. v. Lewiston Inst. for Savings (1877) 68 Me. 43, 28 Am. Rep. 9.

⁴ Perkins v. Boothby (1880) 71 Me. 97, where the actual point involved was the extent of the authority of an agent of the L.R.A.1917A.

corporation in question. After referring to the doctrine under which money paid in pursuance of an illegal contract may be recovered, the court said: "It has received a wide and uniform recognition in the leading authorities. . . . There seems to be no substantial reason whatever for not extending the principle here involved to all analogous cases. If liable in one case, why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or, if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an ultra vires arrangement is one thing. To say that it may retain the proceeds thereof, which have come into its possession, without making any compensation whatever to the person from whom it has obtained

also from the general rule laid down soon afterward with respect to an executed contract, that, "in cases where there is an entire want of power to make a particular contract under any circumstances, or for any purpose, . . . all [the cases] concur in declaring the doctrine of ultra vires a valid defense, even by regular business corporations. And such contracts cannot be made valid by ratification."⁵

The doctrine laid down in the latest case in which the court has had occasion to express an opinion concerning the effect of a receipt of the benefits of the contract was that "a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid." The fact that possession had been taken and retained under the lease upon which the claim was based was declared to be immaterial.⁶

86. Maryland.

In the earliest case which bears upon the subject of the present monograph,

them, is something very different, and savors very much of an inducement to fraud' Green's Brice's Ultra Vires, 618." It should be observed that the list of cases which were cited includes some in which the right of recovery on the contract itself was affirmed; e. g., Bissell v. Michigan S. & N. I. R. Co. (1860) 22 N. Y. 258, and State Bd. of Agri. v. Citizens' Street R. Co. (1874) 47 Ind. 407, 17 Am. Rep. 702. The irrelevancy of such cases as precedents for the doctrine laid down is manifest; but the actual scope of that doctrine is sufficiently clear.

⁵ Bailey v. Methodist Episcopal Church (1880) 71 Me. 472 (action for price of materials furnished).

⁶ Brunswick Gas Light Co. v. United Gas, Fuel & Light Co. (1893) 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525 (where the defense of ultra vires was raised in an action by a corporation).

Maryland.

¹ Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge (1836) 8 Gill & J. 248, 29 Am. Dec. 543.

² In Albert v. Savings Bank (1849) 1 Md. Ch. 407 (hypothecation of stock to secure loan), the defendant bank had lent money to Jones, one of its directors, in consideration of a transfer of certain stock which he held as trustee of the plaintiff. In a suit brought for the annulment of the transfer, Johnson, C., thus commented on the Dandridge Case: "The doctrines announced by the court at pages 318, 319, and 320 render it too clear for controversy, that even the corporation itself may avail itself of the want of authority to make the L.R.A.1917A.

the nonliability of a corporation for damages resulting from its negligence in performing a contract of towage was affirmed upon the broad ground that the contract was ultra vires. The contention that the fact of its having entered into the contract estopped it from pleading ultra vires was rejected. "If," said the court, "the corporation is estopped from denying its power, the estoppel operates with like effect upon those who contract with them, and the result would be that no matter how limited the design and powers of a corporation may appear in its charter, practically it is a corporation without limitation to its powers."¹ The phraseology of this statement indicates, it is apprehended, that the court merely intended to declare that the making of a contract is not an act which will of itself create an estoppel, and not to condemn the theory that an estoppel is predicable from the circumstance of the execution of the contract by the claimant. In subsequent cases, it is true, the ruling seems to have been treated as being one which was specifically adverse to that theory.² But such a conception of

contract sought to be enforced against it, though it has received and enjoyed the consideration upon which it was made. If, then, a suit had been brought by the bank against Jones, or by Jones against the bank, upon this contract, it would in my judgment have been competent to either of the defendants under such circumstances to deny the validity of the contract, as forbidden by the charter." But it was held that the plaintiff could hold the bank liable for the value of the stock. The judgment was affirmed in (1852) 2 Md. 159, the ratio decidendi being indicated by the following remarks of the supreme court: "It is urged that, conceding the bank had no power under its charter to make the loans to Samuel Jones, and to receive as security for the same an hypothecation of the stock, yet, inasmuch as the contract has been executed, it is now too late to object. To this reasoning we cannot assent. It is true Jones might be estopped from denying the legality of the transaction, but it does not therefore follow that the rights of his cestui que trust are also concluded by what has been done. If what the bank did was illegal, no valid defense can be deduced from it against the party who has been injured by its acts. . . . What Jones did was a wrong on the rights of the appellants, and if the bank, in contempt of the limitation imposed upon it by its charter, aided him in the perpetration of the fraud, there is no reason, either of public policy or in law, which should exempt it from responsibility for the injury occasioned by its co-operation. . . . We hold that a corporation has no power to do what it is inhibited by its

its purport seems to be warrantable to this extent only, that, having regard to the evidence under review, the decision was essentially inconsistent with the theory. The nature of that inconsistency will be more clearly realized if we observe that the facts in evidence were, in so far as the claim was founded on a contract, similar to those discussed in the leading New York case in which an action for injuries received by a passenger was held to be maintainable, although the train upon which he was traveling was being operated in a state in which the defendant had no power to do business.⁵ In this point of view, it is submitted, the two decisions must be regarded as reflecting doctrines which are essentially antagonistic. However this may be, it is at least clear that the doctrine under which an estoppel cannot

be predicated from the mere fact of performance by the plaintiff was applied until a comparatively recent date.⁴

A change in the position of the court is indicated by a case in which it was laid down, with reference to an action brought by a bank on a promissory note, that the defendant could not be "heard to dispute its right to recover on the ground that it exceeded its charter rights in discounting the note." The doctrine was enunciated that "it is inequitable to permit one who has received the proceeds and benefit of the contract to repudiate it on the ground that the corporation from which he has obtained the benefit had no power to make the contract."⁶ This decision has been treated as a controlling precedent in several subsequent cases.⁶ The opinion delivered in one of the two latest of

charter from doing, and if, in violation of it, injury should be done to the property of a third party, it is liable."

In *Abbott v. Baltimore & R. Steam Packet Co.* (1850) 1 Md. Ch. 542, the earlier case was again cited by the chancellor as an authority for the doctrine laid down previously by him.

In *Boyce v. Towsontown M. E. Church* (1876) 46 Md. 359, an action of assumpsit against a religious corporation, the certificate of incorporation was defective and insufficient to show that the defendant was a corporation. The actual point determined was that the fact of the defendant's having held itself out as a corporation, and treated with the plaintiff as such, did not estop it from denying its liability as a corporation. But it will be advisable to quote that part of the opinion in which the court reasoned from the analogy of the *Dandridge Case*: "Whilst denying its capacity upon any principle of estoppel to make contracts ultra vires, to bind itself, it would not be consistent with that theory to recognize its existence ad libitum, according to the conduct of the parties concerned. Such a principle would seem to affix no other limit to the existence of the corporation de facto, or the extent of its power, than the dealings of the parties, through the recognition of the courts, might, upon the doctrine of estoppel, prescribe. It would be more reasonable to hold corporations to their contracts, though ultra vires, of which they have received the benefit, or to prevent parties who have contracted with them and received the benefit therefrom, from defeating their liability on the ground of want of power in the corporation, as is held in quarters of high authority (see note and references in 2 Kent, Com. 351), than to hold that corporations should be deemed to have existence, because they had so held themselves out."

⁵ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258. See § 95, *infra*. L.R.A.1917A.

⁴ The decision in *Lazear v. National Union Bank* (1879) 52 Md. 78, 36 Am. Rep. 355, that a bank could not sue on a note the purchase of which was ultra vires is clearly inconsistent on the facts with the principle of estoppel.

⁵ *United German Bank v. Katz* (1881) 57 Md. 128. The court said: "It does not follow . . . because the appellant exceeded its legitimate powers in procuring this note by discounting the same, that recovery cannot be had. If he received the plaintiff's money, or was the knowing instrument of someone else doing so, he ought not to escape liability to pay on that ground. . . . Whether he received the money personally or not is immaterial, if, by his procurement, someone else did get the money upon the faith of what he did. It was all one transaction." No reference was made to the *Dandridge Case*, note 1, *supra*, or to the doctrine for which it has been regarded as an authority. The court quoted the statement in *Sedgwick on Statutory & Constitutional Law*, p. 73, that a party who has had the benefit of a contract transcending the charter powers of a corporation "cannot be permitted to question its validity," and the statement in 2 *Potter's Law of Corporations*, 663, that executed contracts, "by the plainest rules of good faith, should be permitted to stand." The following comment was made upon this case in *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (1905) 102 Md. 307, 2 L.R.A.(N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351: "The form of recovery, and not the substantial right of recovery, was the thing in question there. This is the only case in Maryland to which we have been referred in which a recovery directly upon the void contract has been allowed at law."

⁶ In *General German Aged People's Home v. Hammerbaecker* (1885) 64 Md. 595, 54 Am. Rep. 782, 3 Atl. 678 (suit for specific performance), the decision proceeded upon

those cases which belong to this group leaves some uncertainty with regard to the precise extent to which an action on the contract was regarded as being maintainable.⁷ But, as the other proceeded avowedly upon the ground that ultra vires and illegal contracts belong to distinct categories in this respect, that the former are sometimes, and the latter

never, enforceable, and as this differentiation was justified by the authority of some New York decisions which embody the doctrine of an estoppel as predicated from the enjoyment of the benefits of the contract by the party against whom the claim is made, it may be assumed for the present that Maryland is now to be counted among the jurisdictions

the ground that, even though the corporation in question had no power to receive a donation of land from a certain decedent, the fact that the ultra vires contract had been executed by the corporation rendered it unassailable by anyone who, like the defendant, claimed the property through the donor.

In *Heironimus v. Sweeney* (1896) 83 Md. 146, 33 L.R.A. 99, 55 Am. St. Rep. 333, 34 Atl. 823, the point actually decided in proceedings for the distribution of the assets of a corporation was that the shareholders, having enjoyed the benefits of certain money lent by special depositors, were estopped from alleging that the contracts of deposit were ultra vires.

In *Black v. First Nat. Bank* (1903) 96 Md. 399, 54 Atl. 88, where the action was brought upon a promissory note which, as the plaintiff bank alleged, had been discounted by it, the court declared that, "being an executed contract, the transaction was one upon which recovery might be had, even if it were a sale, and not a discount." In *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (Md.) supra, it was pointed out that the declaration in this case "contained the common counts, as well as a special count on the note, and the recovery by the bank might be properly attributed to those counts, even if the note had been held to be purchased instead of discounted, as it was held to be." But this method of explaining the decision does not get rid of the fact that the earlier case cited in the preceding note was relied upon without any qualification as an authority.

⁷In *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (Md.) supra, the actual point determined was that the defendant, a railroad company which, in excess of its powers, guaranteed a certain amount of dividends on the stock of a hotel company, and also the interest on bonds issued by it, could not be held liable in an action to recover for a year's deficit. The ratio decidendi was that there was only a single count in the declaration, viz., one upon the void contract, and that "the railroad company never received from the hotel company, either directly or indirectly, any money or property whatever under this contract. . . . The hotel company has paid nothing, and parted with nothing under this contract, and is therefore under all the authorities without any right of action." This statement is apparently susceptible of the construction that, in the opinion of the court, an action might have been maintained upon the contract itself,

if the railroad company had in point of fact received some specific benefit from the transaction. But the tenor of its argument and the authorities upon which it relied would seem rather to indicate that its actual position was that the relief to which the plaintiff might in its view have been entitled, if the situation had been different in respect to the particular element adverted to, would have been obtainable only in a proceeding based upon a claim of such a character that it could be enforced independently of the contract. Among the cases cited were *Thomas v. West Jersey R. Co.* (1879) 101 U. S. 71, 25 L. ed. 950, and *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, which are certainly adverse to the theory that an action is maintainable upon the contract. The court also quoted the following statement of Judge Thompson in 10 Cyc. 1156: "The great mass of judicial authority seems to be to the effect that where a private corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make the contract." But the court explained this passage as meaning that the fruits or benefits of the contract must have been received from the other contracting party, and not from outside parties, and, in confirmation of its construction, refers to the language of the same writer on page 1155 of Cyc., where he announces the general rule that, "where money has been paid or property transferred to a corporation under a contract which is not *malum in se*, the party receiving may be made to refund to the party from whom it has received the value of that which it has actually received, and to this end he may maintain against the corporation the equitable common-law action for money had and received." But an examination of these two passages shows that they do not relate to the same situations. In the first, the learned author is stating the doctrine held by a large number of courts, that a party to an ultra vires contract who has executed it may enforce the corresponding obligation by which the other party is bound under the terms of the contract itself. The source from which the benefits must be received is in nowise involved in a statement of this rule, and he does not advert to this point at all. In the second passage, he is referring to the wholly distinct doctrine, accepted by nearly all courts, which declares that a

in which that doctrine prevails, and that it is regarded as being applicable whether the action is brought by or against the corporation.⁸ In some cases in which the defense of ultra vires has been relied upon, the right of recovery was discussed and determined with reference to the rule that a party to an invalid contract may, generally speaking, disaffirm it and recover back any money which may have been paid in pursuance of it.⁹ As there is no inconsistency between the rule thus applied and the doctrine under which the execution of a contract by the other party does not operate so as to estop the corporation from pleading the defense of ultra vires (see § 11 of the note to *Crowder State Bank v. Ætna Powder Co.* post, 1037), these cases do not of themselves supply any definite information regarding the position of the court in respect to that doctrine.

87. *Massachusetts.*

In the earliest case which calls for notice, the liability of a church for the repayment of a loan obtained by the rector and wardens in pursuance of a vote of the proprietors was predicated upon the ground that, "if the debt of

party to an invalid contract is entitled to recover money paid under it.

⁸ In *Maryland Trust Co. v. National Mechanics' Bank* (1906) 102 Md. 608, 63 Atl. 70, the ground upon which the trust company resisted a claim made by the bank for insolvency proceedings was that the contract in question, which provided for the purchase of the company's own stock under an arrangement which contemplated a "rigging of the market," was both illegal and ultra vires. The court said: "If the contract we are dealing with in this case is open to the objection of being both ultra vires and illegal, the discussion will be greatly abbreviated by omitting all reference to the ultra vires feature as a distinct ground of invalidity, and by confining ourselves to a consideration of the alleged illegality. The discussion will be shortened by putting aside the mere ultra vires character of the contract, because a contract simply ultra vires is not necessarily unenforceable; it may be enforced under certain conditions, and hence, before it can be stricken down on that ground alone, all the conditions under which it may be upheld must be eliminated, and to exclude them all would involve a prolonged examination and analysis of numerous facts and a minute application of many legal principles, none of which need be alluded to at all, if the contract is void by reason of its illegality."

⁹ *Maryland Hospital v. Foreman* (1868) 29 Md. 524; *Lester v. Howard Bank* (1870) 33 Md. 558, 3 Am. Rep. 211. L.R.A.1917A.

which the note is evidence was incurred for the benefit of the corporation, which was made by the statute to represent the church or the proprietors, and the money procured actually went to their use, they knowing the circumstances under which it was procured, an action must certainly lie to recover that money; otherwise, manifest wrong and injustice would be done."¹ This case has sometimes been cited as an authority for the doctrine that a corporation is estopped from pleading ultra vires as against a claimant who has performed the contract sued on.² But it is submitted that this view is erroneous.³

In a subsequent case the right to recover against a bank upon a special contract which provided that certain money should remain on deposit for a specified time was denied on the ground that the contract violated a provision of the defendant's charter which expressly forbade it to make contracts for the "payment of money at a future day certain."⁴ That this case, although sometimes cited as an authority for the principle of estoppel,⁵ has no real bearing upon that principle, seems quite clear. It is simply one of those cases which were decided during a period

Massachusetts.

¹ *Episcopal Charitable Soc. v. Episcopal Church* (1823) 1 Pick. 372.

² See, for example, 2 *Thomp. Corp.* 2d ed. § 2787, note 17.

³ The court distinctly declared that "the church or proprietors were only a voluntary religious society," and, after the passage of the regulating statute, "could make contracts only through the organs appointed by the statute; viz., the rector, wardens, and vestry; so that the note given by the rector and wardens only, under a vote of the proprietors, would bind the proprietors only as joint contractors associated together as partners, and not as a corporation." The contract, therefore, was treated as one the invalidity of which consisted in the fact that it had not been entered into by the defendant in the manner prescribed by the statute. The case does not afford any indication as to what the position of the court would have been if the question presented had been the effect of the ultra vires quality of a corporate contract entered into by the proper agent, and not one defective by reason of some informality.

⁴ *White v. Franklin Bank* (1839) 22 Pick. 181. For the other phase of this case, see the note to *Crowder State Bank v. Ætna Powder Co.* post, 1026.

⁵ See, for example, 2 *Thomp. Corp.* 2d ed. § 2787, note 17.

when all ultra vires contracts were treated as being nonenforceable, when no distinction in this respect was drawn between executory and executed contracts, and when the category connoted by the expression "ultra vires" was universally regarded as comprehending both expressly and impliedly prohibited contracts.

In a still later case, in which the action was brought under a special statute for the recovery of damages caused by the construction of certain unauthorized works on a railway line, the railway company was held to be estopped from pleading ultra vires.⁶ This decision has been cited by an eminent judge as a precedent for the general doctrine that the plea of ultra vires is not available in an action brought upon a contract which the plaintiff has performed on his side.⁷ But it manifestly has no bearing upon the contractual liability of a corporation.

In a subsequent case the judgment in favor of a corporation which had petitioned for the avoidance of insolvency proceedings previously instituted against itself and an individual, as parties, was based upon the ground that the partnership was ultra vires.⁸ The court laid it down that "those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the partnership." The enunciation of this doctrine indicates that, if the ultra vires character of the contract had been interposed as a plea in the insolvency proceeding, the fact of its having been executed by the moving party would not have been regarded as raising an estoppel against the corporation.

In the following year it was held, in an action brought against the defendant as a common carrier to recover damages for goods destroyed by fire on a line which it had leased from another corporation, that, as it was in the actual possession and use of the line, without

obstruction from the lessor or the commonwealth, and had received the plaintiff's property under an agreement that it should be safely kept and transported to its destination, it was no answer to a breach of that agreement, to deny the validity of its own contract for the use of the road. "An innkeeper might as well resist the claim of a guest for compensation for the loss of his luggage, by suggesting doubts as to the validity of his landlord's title to the inn which he hired."⁹ The extent to which this decision goes is merely that, where a corporation makes a contract with a stranger in relation to the disposition of property of which it is in control by virtue of an ultra vires contract previously entered into with another person, it cannot escape liability for a breach of the later contract by pleading the illegality of the anterior one. Manifestly, therefore, the general question whether an estoppel may be created by the execution of an ultra vires contract was not involved. A few years later the court declined to express any opinion with regard to that question in a case where it was argued that the defendant was not estopped to plead ultra vires as a defense to an action to recover commission for certain services.¹⁰

In a subsequent case it was held that the note of a manufacturing corporation in the hands of a holder in good faith, for value, who took it before maturity and without any knowledge that the maker had not received full consideration, could be enforced against the corporation, although it was made as an accommodation note.¹¹ The ratio decidendi was that, as a manufacturing corporation had the power to make a negotiable promissory note, the liability of the defendant was governed by the principle that "when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to

⁶ Parker v. Boston & M. R. Co. (1849) 3 Cush. 107, 50 Am. Dec. 709.

⁷ Comstock, Ch. J., in Bissell v. Michigan S. & N. I. R. Cos. (1860) 22 N. Y. 258. See § 95, infra.

⁸ Whittenton, Mills v. Upton (1858) 10 Gray, 582, 71 Am. Dec. 681.

⁹ McCluer v. Manchester & L. R. Co. (1859) 13 Gray, 124, 74 Am. Dec. 624.

¹⁰ Brown v. Winnisimmet Co. (1865) 11 Allen, 326. The court remarked, however, that "the later English authorities seem to sanction the doctrine that such a ground of defense, although it may be 'unbecoming and ungracious,' or, in the stronger L.R.A.1917A.

language of Lord St. Leonards, 'indecent,' is nevertheless legal and valid, if it be made to appear, either by the express provisions of an act of incorporation or by necessary and reasonable implication therefrom, that a contract which is sought to be enforced in an action at law against a corporation is beyond the scope of the powers granted by its charter; or, in other words, that the legislature did not intend that the body created by them should enter into contracts of a character like that which a plaintiff makes the foundation of a claim against it.

¹¹ Monument Nat. Bank v. Globe Works (1860) 101 Mass. 57, 3 Am. Rep. 322.

the other contracting party, the doctrine of ultra vires does not apply." The case, therefore, does not throw any light upon the views of the court with regard to the principle of an estoppel in respect to contracts that are ultra vires in the proper sense of that expression.

But that principle is clearly inconsistent with several cases decided during the ensuing period. In one of these, where the assignee of the lessee of a street railway sued the lessor for half of the money which the plaintiff had expended on repairs, the decision proceeded upon the ground that the lease and the stipulations therein, including the one upon which the plaintiff relied, were ultra vires, and that, as the plaintiff's claim could not be established without relying on the contract, he had no remedy either at law or in equity.¹² In another it was held that an ultra vires guaranty of the expenses of a public entertainment could not be enforced by a person who had, in reliance upon the

guaranty, paid out money in connection with the entertainment.¹³ In another it was laid down that the plaintiff could not enforce against the defendant bank certain agreements providing that money deposited with it should be invested in stocks and bonds.¹⁴ In another it was held that a demurrer should have been sustained to a declaration which alleged the plaintiff's performance of an ultra vires contract and a breach by the defendant.¹⁵ In view of the facts involved in these cases, it is clear that they may be regarded as embodying the doctrine that the circumstance of a claimant's having performed the contract on his side does not render it enforceable; or at all events that they cannot be reconciled with the theory that this circumstance operates so as to estop the corporation from pleading ultra vires. In two other cases belonging to this period, the principle of estoppel was adverted to, but no definite opinion was expressed with regard to its soundness.¹⁶

¹² *Middlesex R. Co. v. Boston & C. R. Co.* (1874) 115 Mass. 347.

¹³ *Davis v. Old Colony R. Co.* (1881) 131 Mass. 258, 41 Am. Rep. 221. The court referred to the following statement in an earlier case: "No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the incorporators." *Salem Mill Dam Corp. v. Ropes* (1827) 6 Pick. 32.

¹⁴ *L'Herbette v. Pittsfield Nat. Bank* (1894) 162 Mass. 137, 44 Am. St. Rep. 354, 38 N. E. 368.

¹⁵ *Dresser v. Traders' Nat. Bank* (1895) 165 Mass. 120, 42 N. E. 567 (agreement to procure customers).

¹⁶ In *Nims v. Mt. Hermon Boys' School* (1893) 160 Mass. 177, 22 L.R.A. 364, 39 Am. St. Rep. 467, 35 N. E. 776, where the actual point determined was that an educational corporation engaged in operating a public ferry, carrying passengers for hire, could not escape liability for negligence in the management of the ferry on the ground that the business was ultra vires, the court proceeded upon the general rule, "that corporations are liable for their torts, as natural persons are," and that "it is no defense to an action for a tort to show that the corporation is not authorized by its charter to do wrong." It was observed that "the only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferryboat is that the contract to carry the plaintiff was ultra vires, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void." This argument was disapproved, but L.R.A.1917A.

in the course of its opinion the court made the following remarks: "Courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract and inducing a change of condition by another party, attempts to avoid the contract by a plea of ultra vires. It is said that such a plea will not avail, when to allow it would work injustice and accomplish legal wrong. *Leslie v. Lorillard* (1888) 110 N. Y. 519, 1 L.R.A. 456, 18 N. E. 363; *Linkauf v. Lombard* (1893) 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a contract might retain them and leave the other party without remedy, as he might do in a supposable case where another had put himself at a disadvantage on the faith of a contract with him to commit a crime." The court reviewed the leading New York case, *Bissell v. Michigan S. & N. J. R. Cos.* (1860) 22 N. Y. 258 (see § 95, *infra*), but did not express any preference for either of the conflicting views advocated in the opinions of *Comstock*, *Ch. J.*, and *Selden*, *J.*

In *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (1896) 164 Mass. 222, 49 Am. St. Rep. 454, 41 N. E. 268, the court declined, in a suit for an accounting under a traffic contract between two railway companies, to discuss the contention of the defendant that the contract was ultra vires. This refusal presumably did not import anything more than that the court was of opinion that in

From the foregoing summary it would seem to be a warrantable conclusion that, although no formal doctrine was enunciated in any of the cases with regard to the principle of estoppel, and the expression of a definite opinion was avoided in some instances in which the facts were such as to suggest an explicit statement upon the subject, the views of the supreme court up to the end of the last century were distinctly adverse to the acceptance of this principle.

Apparently its views in this regard remain unaltered, for, although the language used in the latest case which bears upon the subject is somewhat ambiguous, nothing seems to have been said which can be regarded with certainty as betokening a change of position. One of the reasons there urged for the avoidance of a contract limiting the sale of machinery by the defendant corporation to a certain class of customers, viz., that it was *ultra vires*, was thus disposed of: "While created for the purpose of engaging in a particular kind of business, there was no prohibition upon the form of contracts it might adopt to effect a sale of its product, and it should not be permitted to repudiate, as being in excess of its corporate powers, a transaction which is otherwise valid, and under which it received and has retained the consideration, when such a course must result in positive injury to the plaintiff."¹⁷ Apparently this statement might be construed as importing that the court had in mind the distinction taken in many jurisdictions, between contracts which are especially prohibited and those which are merely unauthorized (see §§ 17 and 18, *supra*), and was expressing its approval of the doctrine that the principle of estoppel is applicable only

where contracts of the latter description are involved. But the conclusion that this is not the meaning of the passage is strongly indicated by two considerations. In the first place, the contract under discussion was, in another part of the opinion, expressly declared to be valid, for the reason that it was "neither immoral, nor void for want of corporate authority." Any reference to the operation of the principle of estoppel with respect to a contract deemed to be valid would clearly be out of place, or at most a mere *obiter dictum*. In the next place, none of the earlier decisions adverse to that principle were adverted to. It is almost inconceivable that so careful a court, if it had really intended to take a position inconsistent with its former rulings, would have ignored them entirely. From the cases actually cited it would seem that the court had in view simply the doctrine as to the sole and exclusive right of the state to raise the question of *ultra vires*. See § 5, *supra*. Those cases are, at all events, not precedents for the principle of an estoppel, as predicated from the fact of the defendants having received the benefits of the contract.¹⁸

88. *Michigan*.

In the earliest case which involved the right to sue upon a contract of which the defendant had received the benefits, the action was brought by a corporation upon a bill of exchange which it had discounted. In discussing the law with reference to a new trial, the court laid it down that, if the bank had taken a higher rate of interest than then allowed by its charter, the bill would be absolutely void, and the action consequently

such a suit the remedial rights of the claimant are not founded upon the contract itself.

¹⁷ *New York Bank Note Co. v. Kidder Press Mfg. Co.* (1906) 102 Mass. 391, 78 N. E. 463.

¹⁸ In *Slater Woollen Co. v. Lamb* (1887) 143 Mass. 420, 9 N. E. 823, the primary ground upon which the right of recovery was predicated was that, in an action brought by a corporation upon a contract which it had performed on its side, the question whether that contract was *ultra vires* could not be raised at all by the defendant, since only the state could take advantage of its invalidity. A decision based upon this theory is plainly not an authority for the principle of estoppel. As shown in § 38 of the note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —, the remarks of the court with regard to the L.R.A.1917A.

other aspects of the decision, which presumably are those adverted to in the case under review, are of uncertain import in respect to the footing upon which the plaintiff was deemed to be entitled to maintain the action.

In *Prescott Nat. Bank v. Butler* (1893) 157 Mass. 548, 32 N. E. 909, the plaintiff was a national bank, and the Federal decisions as to the remedial rights of such corporations were avowedly followed as being absolutely controlling in a state court.

In *Nims v. Mt. Hermon Boys' School* (1893) 160 Mass. 177, 35 N. E. 776, 22 L.R.A. 364, 39 Am. St. Rep. 467, 35 N. E. 776, the question whether an *ultra vires* contract becomes enforceable after the other party has performed it was not involved at all. In fact, the court explicitly declined to consider that question. See note 16, *supra*.

not maintainable.¹ Such an expression of opinion with respect to the supposed state of facts obviously imports that the circumstance of the corporations having received the benefits of the contract was regarded as not creating any estoppel against pleading *ultra vires*.

A case decided about thirty years afterward turned upon the doctrine that the contract under review, being beyond the powers of the public corporation against which the action was brought, could not be ratified by it.² This decision is not, strictly speaking, relevant to the present discussion, but the language used by the court is significant as indicating that its earlier views with regard to the quality and incidents of an *ultra vires* contract had undergone no modification.

A definite change of position is evinced by a somewhat later case in which the right of the plaintiff to recover the value of a commodity sold to a corporation was affirmed. Three distinct points were determined by the court; viz., (1) that, as the defendant had exceeded its powers in purchasing the commodity for purposes of specula-

tion, and not of manufacture, the plaintiff was at no time bound by the contract, and that, in so far as the defendant had actually received the commodity, it was liable for its value; (2) that the mere fact of the plaintiff's having entered into a contract which he knew to be in excess of the defendant's powers did not estop him from alleging its invalidity; (3) that the evidence was not of such a character as to justify the application of the doctrine that "parties may . . . be estopped, in some cases, from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice."³ In the next case the right to recover upon promissory notes given for money borrowed by an elevator company for the purpose of erecting an elevator and carrying on the business of buying and selling grain was affirmed on the ground that the question whether the company was authorized to buy and sell grain under its charter and by virtue of the act under which it was incorporated was immaterial, because its articles of association, signed by all the stockholders,

Michigan.

¹ *Orr v. Lacey* (1846) 2 Dougl. (Mich.) 230.

² *Highway Comrs. v. Van Dusan* (1879) 40 Mich. 429. The court said: "This rule that a corporation cannot vitalize and substantiate something it has no original power to do, and which if done, as matter of fact, is absolutely void in point of law, has no bearing on those cases where property or money obtained beyond power is required to be disgorged, or to cases where the fault in question is the want of formalities or the neglect of methods, and the irregularity is not such as to render the proceeding positively void. The recovery of money or property obtained and held through transgression of power does not affirm the power. It denies it. The ground of reclamation is the denial of the adverse title, and wherever the act in controversy might have been so done originally as to bind, there is no principle in the way of a subsequent binding ratification or assumption, so far as respects the immediate parties."

³ *Day v. Spiral Springs Buggy Co.* (1885) 57 Mich. 146, 58 Am. Rep. 352, 23 N. W. 628. The authority cited with regard to the second of these grounds was *Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge* (1836) 8 Gill & J. (Md.) 319, 29 Am. Dec. 543. See § 86, *supra*. In support of the third point the court quoted the statement of Comstock, Ch. J., in *Parish v. Wheeler* (1860) 22 N. Y. 508, that "the executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so

require," and continued thus: "But this is not such a case. The contract has only been performed in part. The defendant has received a portion of the property bargained for, and we may justly assume that what has been received has passed into the hands of Hulz and been paid for, so that the defendant will lose nothing but the anticipated profits on the remainder, if the contract is not enforced in its favor. Those profits it had no right at any time to count upon; and, in contemplation of law, there can be no injustice in depriving it of profits which the law would not permit it to bargain for. No valid ground for estoppel is therefore found to exist in the case. The defendant, then, if the plaintiff has established a valid demand, is not entitled to recoup damages for refusal to make complete performance, because to allow recoupment would be indirectly to enforce the contract." With respect to the remaining question, viz., whether the plaintiff was entitled to recover for the goods delivered, and not paid for, the court observed: "The defendant has had the goods, and there is no want of equity in requiring it to make payment. They were delivered under a contract which bound neither party, and though the plaintiff is the party who now refuses to go on with it, the defendant was at liberty to do the same, and we cannot know that it would not have done so if the change in market value had been such as to make it for its interest. But, however that may be, if the defendant pays for the property received, the parties will have justice meted out to them as nearly as is now possible."

distinctly set out its purpose to be to engage in the buying and selling of grain and other commodities, as well as in the storing of them, and their knowledge of this purpose was consequently imputable to the corporation itself. Having this knowledge, and "having voluntarily engaged in the business, and borrowed this money and used it as well in the building of the elevator as in its other business, the defendant will not be permitted to plead that it had no authority under the law to do exactly what its articles of association stated to all the world was its object and purpose to do under and by virtue of its incorporation."⁴ It will be observed that the estoppel here predicated is not, as in the great majority of the cases, based upon the conception that the contract had been performed by the adverse party, but upon the conception that the corporation and the corporators had done certain acts which operated so as to preclude both it and them from alleging that it had exceeded its powers.

All the later cases have proceeded explicitly upon the doctrine that a corporation is estopped from pleading *ultra vires* as against a claimant who has completely executed the contract on his part.⁵ In one of them the right of recovery was referred not only to the fact of full performance of the contract by the plaintiff, but also to the consideration that the clause in the statute under which the defendant had been organized, providing that the articles of association should state "the purpose or purposes

for which the corporation is formed, and it shall not be lawful for said corporation to divert its operations or appropriate its funds to any other purpose, except as hereinafter provided," was not intended as a criterion of the validity of the contracts of the corporation, but was simply designed for the protection of the public.⁶ The court also relied upon the circumstance that the contract had been entered into with the full assent of all the stockholders of both the corporations concerned.

89. Minnesota.

The earliest cases which have a bearing upon the attitude of the supreme court with regard to the principle of estoppel had reference to actions by corporations. See note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —.

The first case in which the liability of the corporation was considered proceeded upon the doctrine that, "where a private corporation has authority to issue negotiable securities, such instruments, when issued, possess the legal character ordinarily attaching to negotiable paper, and the holder in good faith before maturity, and for value, may recover, even though in the particular case the power of the corporation was irregularly exercised, or was exceeded.¹ As the doctrine thus laid down predicates an estoppel only in respect to a certain class of contracts, and for the benefit of a certain class of persons (see § 11, *supra*), and it has been adopted in some jurisdictions in which the general

⁴ *Carson City Sav. Bank v. Carson City Elevator Co.* (1892) 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641.

⁵ *Dewey v. Toledo, A. A. & N. M. R. Co.* (1892) 91 Mich. 351, 51 N. W. 1063 (action on note given for purchase price of certain stock held by claimant in another company); *Clement, B. & Co. v. Michigan Clothing Co.* (1896) 110 Mich. 458, 68 N. W. 224 (assumpsit for purchase price of assigned judgment); *Peterson v. People's Bldg. Loan & Sav. Asso.* (1900) 124 Mich. 573, 83 N. W. 606 (doctrine affirmed in case where defendant was not shown to have exceeded its powers); *Rehberg v. Tontine Surety Co.* (1902) 131 Mich. 135, 91 N. W. 132 (assumpsit on contract for sale of personalty on instalment plan); *Edwards v. Michigan Tontine Invest. Co.* (1902) 132 Mich. 1, 92 N. W. 491 (bill for an accounting with respect to a similar contract); *Citizens' Sav. Bank v. Globe Brass Works* (1908) 155 Mich. 9, 118 N. W. 507 (action on note given in payment of debt of stockholder); *Timm v. Grand Rapids Brewing Co.* (1910) 160 Mich. 371, 27 L.R.A.(N.S.) 186, 125 N. W. 357 (assumpsit on bond of indemnity L.R.A.1917A.

to secure sureties); *Blackwood v. Lansing Chamber of Commerce* (1914) 178 Mich. 321, 144 N. W. 823 (action on contract to hold a public meeting).

In *Woodcock v. First Nat. Bank* (1897) 113 Mich. 236, 71 N. W. 477, where it was held that the rights of a bona fide purchaser of a promissory note could not be defeated by the fact that the transaction in pursuance of the instrument executed was *ultra vires*, the decision evidently reflects the difference between the positions of such a claimant and of one whose remedial rights are not regulated by the special rules relating to negotiable instruments.

In *Coit v. Grand Rapids* (1898) 115 Mich. 493, 73 N. W. 811, the doctrine that a corporation "cannot retain the benefits of an executed contract and deny its authority" was applied with reference to a municipality.

⁶ *Butterworth v. Kritzer Mill Co.* (1897) 115 Mich. 1, 72 N. W. 990 (suit to foreclose mortgage given to secure guaranty).

Minnesota.

¹ *Auerbach v. Le Sueur Mill Co.* (1881) 28 Minn. 291, 41 Am. Rep. 285, 9 N. W. 799.

rule prevails that the fact of performance on the part of the claimant does not of itself preclude the corporation from pleading ultra vires, a decision of this purport does not afford any precise information concerning the views of the court with regard to that rule. But a disapproval of the rule is perhaps inferable from the following passage in the opinion: "Whether the plea of ultra vires should be allowed as a defense to assumed obligations should not be determined without regard to the character and objects of the incorporation, the nature of the powers conferred or withheld, the particular character of the obligations assumed or contract entered into, the relations of the contracting parties, and the bona fides of him against whom the doctrine of ultra vires is asserted."

In the next case in which the court had occasion to express an opinion upon the point, its position with regard to the principle of an estoppel was definitely stated in these terms: "There are few rules better settled, or more strongly supported by authorities, with fewer exceptions, in this country, than that when a contract by a private corporation, which is otherwise unobjectionable, has been performed on one side, the party which has received and retained the benefits of such performance shall not

be permitted to evade performance on the ground that the contract was in excess of the purpose for which the corporation was created."³ In a somewhat later case the grounds upon which it was held that no action could be maintained upon a note given for a loan exceeding the amount of indebtedness which the defendant was authorized to incur were thus stated: "The society has received none of the benefits of the loan, and the transaction was one which in and of itself assumed to create an indebtedness on the part of the society in excess of the limit fixed by its articles. The plaintiff was chargeable with notice of this latter fact, for it is settled rule that a person who deals with a corporation must, at his peril, take notice of its charter or articles of association."⁴ As the absence of benefit to the corporation constituted, under the broad rule previously enounced, a conclusive bar to recovery, it would seem that the reference to the element of absence of notice was in this instance superfluous.

In later cases the principle of an estoppel was applied in favor of claimants who were clearly chargeable with notice of the illegality of their contracts; but this circumstance was not explicitly adverted to.⁴

In a case of later date than any of

³ *Seymour v. Chicago Guaranty Fund Life Soc.* (1890) 54 Minn. 147, 55 N. W. 907 (action held to be maintainable which was founded on an insurance policy of which the alleged invalidity consisted in its having been issued to a person who had passed the age up to which the defendant was authorized to insure applicants).

⁴ *Kraniger v. People's Bldg. Soc.* (1895) 60 Minn. 94, 61 N. W. 904. There the defendant's secretary, upon receiving the money from plaintiff, embezzled it, and then absconded. The court said: "If the society had received the money and enjoyed the benefits of it, there is no doubt, under the authorities, but that the plaintiff could recover the money paid, if not upon the note, at least because of the money received and the benefit enjoyed by the defendant. Or, again, if the loan had been within the limit fixed by the articles of association, say, for \$1,000, and hence the transaction had been on its face within the powers of the corporation as well as the authority of its agent, there would be no doubt, under the authorities, that the defendant would have been liable notwithstanding that the agent, after receiving the money, misappropriated it, or that, because of extrinsic facts not known to the plaintiff, this loan increased the indebtedness of the society beyond the limit fixed in its articles of association."

⁴ *Erb v. Yoerg* (1896) 64 Minn. 468, 67 L.R.A.1917A.

N. W. 355 (replevin to recover goods purchased unlawfully by corporation); *Gruber v. Grand Lodge, A. O. U. W.* (1900) 79 Minn. 59, 81 N. W. 743 (action on benefit certificate).

The effect of *Hunt v. Hauser Malting Co.* (1903) 90 Minn. 282, 96 N. W. 85, is thus stated in the syllabus prepared by the court: "Where a corporation of this state, organized for the manufacture of malt, as well as to buy and sell grain and brewing implements, purchased bank stock and held the same a number of years as an investment for profit, its acts in this respect were unlawful and beyond the authority of the power conferred upon it by its articles of incorporation. . . . But, after having received dividends for a number of years upon its stock investment with the knowledge of all the stockholders, the malting company is estopped from asserting its ultra vires acts in purchasing the stock, in a suit to recover a stockholder's liability under Laws 1899, chap. 272, brought by the receiver of a bank which had become insolvent." In the lower court a demurrer to the complaint had been sustained on the authority of *California Nat. Bank v. Kennedy* (1896) 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831 (see § 70, note 5, supra). But the supreme court refused to follow this decision, for the reason that, "while a state court is bound by the deci-

those so far cited, we find the following remarks: "A contract ultra vires, in the general and primary sense that it is wholly outside the power of the corporation to make under any circumstances, is ordinarily void in toto; but whether a contract strictly within the scope of the corporation's powers, but ultra vires in the restricted or secondary sense that the power has been irregularly exercised, or that it was beyond the power of the corporation 'in some particular or through some undisclosed circumstances,' is wholly void or not, depends upon the circumstances of the particular case."⁵ The statement at the beginning of this passage, and the footing upon which the two classes of ultra vires contracts are differentiated, would seem to import, with respect to the juristic quality of contracts which are ultra vires in the proper sense of that expression, an abandonment of the former views of the court. If such contracts are assumed to be "void in toto," the principle of an estoppel clearly cannot be logically applied for the purpose of rendering them enforceable. But as the contract under review was merely ultra vires in the secondary sense, a determination of the question whether that principle is applicable to contracts which are ultra vires in the stricter sense was not necessary for the purposes of the decision. Under such circumstances, it would manifestly be unwarrantable to infer from the language quoted above that that question will be answered in the negative, when the court is next called upon to consider it.

90. Mississippi.

The judgment in an early case in which it was held that the transferee of an insurance company's note was not entitled to maintain an equity suit to

enforce the contract proceeded upon the broad ground that the defendant had no power to contract debts or borrow money.¹ Upon the facts, this decision clearly requires for its support the doctrine that the defense of ultra vires is available to a corporation irrespective of whether the contract in question has or has not been performed by the claimant on his side. But the remedial rights of the parties were not discussed with reference to the element of performance,—an omission readily accounted for by the fact that at the time when the decision was rendered that element and its incidents had been very little considered by the courts.

About twenty years later, in a suit to enforce a vendor's lien upon land sold to a municipal corporation, it was held that, as the proceeding was "in rem, seeking nothing but the subjection of the land conveyed, . . . the vendee cannot, without offering to surrender the land, escape payment of the purchase money on the ground that it had no authority to enter into the contract."² The emphasis here laid upon the nature of the proceeding seems to warrant the conclusion that the court was not yet prepared to indorse the general principle of estoppel, the applicability of which was clearly suggested by the facts. If this inference is correct, the citation of the case as an authority for that principle is not warranted.³

A similar conclusion is indicated by the language used in a later case in which the actual decision was that, after having received the benefit of certain contracts, the corporators "would not be permitted to allege the invalidity of their charter in defense of an action to compel them to pay for the benefit thus received."⁴ The passage quoted in the footnote from the opinion shows

sions of the United States Supreme Court as to the powers of national banks, the application of such decisions to a state bank in a case brought in the state courts is to be determined by state decisions." On the second appeal of the case, in (1905) 95 Minn. 206, 96 N. W. 85, the law as stated on the first appeal was reaffirmed.

⁵ Jaggard, J., in *Bell v. Kirkland* (1907) 102 Minn. 213, 13 L.R.A.(N.S.) 793, 120 Am. St. Rep. 621, 113 N. W. 271.

Mississippi.

¹ *Bacon v. Mississippi Ins. Co.* (1856) 31 Miss. 116.

² *Natchez v. Mallery* (1877) 54 Miss. 499.

³ For an instance of such a citation, see *Bond v. Terrell Cotton & Woolen Mfg. Co.* (1891) 82 Tex. 309, 18 S. W. 691.

⁴ *Prairie Lodge v. Smith* (1892) 58 Miss. L.R.A.1917A.

301 (action to subject property to mechanics' lien). Discussing the contention that the contracts sued on were ultra vires the corporation, the court said: "It is insisted that, though the power to make these contracts may be within the terms of the charter, yet the provisions of that instrument authorizing these contracts are themselves illegal, since they provide for the erection of a building not for charitable purposes, but for pecuniary gain to the members of the corporation. If this were true, it could not avail the defendants here. They procured the charter with the provision contained in it giving the power to make the contracts sued on. Every member of the corporation became such under this charter, and they assented to the exercise by the corporation of the power to

that the court did not treat the case as one which involved an ordinary suit to enforce an ultra vires contract, and that, although the principle of estoppel was referred to obiter without any explicit disapproval, it was not actually indorsed.⁵ If it had been so indorsed the case would have been in conflict with another decided soon afterward, in which the position was taken that any relief to which the claimant may be entitled must be sought independently of the contract.⁶ This case is in harmony with a subsequent one which determined the analogous point that a foreign corporation which had entered into a contract without having complied with certain statutory provisions defining the conditions under which it might legally carry on business in Mississippi could not "repudiate the contract and retain the consideration received by it, especially when the other party was innocent and igno-

rant of the fact that the law has been violated."⁷ The nature of the position taken is indicated by the following remark of the court: "If the contracts were invalid, and conferred no right of action on the banks, they gave no right to the company to hold the money, and, repudiating the contracts, the company, *ex æquo et bono*, was liable to repay the money it had received,—liable not under or by virtue of the contracts, but by reason of the fact that, there being no valid contract, it had received money which in good conscience it could not retain."

But the court seems to have now definitely adopted the doctrine that, as against a claimant who has executed a contract on his side, the corporation is estopped from pleading ultra vires, even where the action is founded upon the contract itself.⁸

make the contracts. . . . The question presented is different from that which would be presented if the contract were made by the managers without the consent of the corporators, and also without the powers specified in the charter. In that case the stockholders, as principals, might possibly be allowed to aver the want of power in their agents, the managers, to bind them, and that they had been thus compelled to enter into a business outside of the scope of their agreement. Yet in that case it has been held that, if the stockholders receive the benefit of the contract, they cannot refuse to pay the price of what they have appropriated. Here, however, the complaint is not that the managers have exceeded their granted powers as contained in the charter, but that the stockholders have included in their charter powers not, it is true, *per se* illegal and improper, but only objectionable because the law does not allow them to be exercised by a corporation formed as this was. If this argument should prevail, it would show only that the stockholders were private partners, and liable individually instead of as members of a corporation, for the powers in the charter are such as individuals and partners may legally exercise."

⁵ For this reason the case seems to have been improperly cited as an authority for that principle in 3 Thompson on Corporations, 2d ed. § 2787, note 17.

⁶ *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.* (1893) 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879. There the court discussing an unauthorized consolidation agreement, said: "There are some decisions which proceed on the apparent postulate that an ultra vires agreement executed fully by one of the corporations, or so far executed that the status quo cannot be restored, may be made the basis of an action. But in many

of these cases it will be found that the measure of recovery would be the same whether the injury done to the plaintiff by the failure of the defendant to perform, or the benefit received by the defendant under the agreement, is taken as the standard. Cases of this sort may therefore be well assigned to that other and far more numerous class, in which the right of recovery is not rested upon the invalid agreement, but is recognized to exist notwithstanding the agreement, upon the principle that the defendant may not repudiate the contract and yet retain the benefit which has been derived under it. The decided weight of authority in England and America is that no action lies upon the invalid contract, that no decree can be made by a court of equity for its specific performance, nor a recovery had at law for its breach; but that, by proceeding in the proper court, the plaintiff may recover to the extent of the benefit received by the defendant from the execution of the agreement by the plaintiff." The court cited *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Davis v. Smith American Organ Co.* (1881) 131 Mass. 258; *Pearce v. Madison & I. R. Co.* 21 How. (U. S.) 441, 16 L. ed. 184; *Ashbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304; *Re Cork & Y. R. Co.* (1869) L. R. 4 Ch. (Eng.) 748, 39 L. J. Ch. N. S. 277, 21 L. T. N. S. 735, 18 Week. Rep. 26. The court had apparently no adequate knowledge of the number of American precedents that are antagonistic to its views.

⁷ *Williams v. Bank of Commerce* (1894) 71 Miss. 858, 42 Am. St. Rep. 503, 16 So. 238 (creditor's bill to cancel deed of trust).

⁸ In *Watts Mercantile Co. v. Buchanan* (1908) 92 Miss. 540, 46 So. 66 (action on

91. *Missouri.*

Two of the earlier decisions of the supreme court of this state may be regarded as indicating, though by no means distinctly, an acceptance of the doctrine that the plea of ultra vires constitutes a valid defense to an action on a corporate contract, irrespective of whether it has been executed or not on the part of the claimant.¹ Twelve years later we find the doctrine laid down that a company could not maintain a suit for the avoidance of an issue of stock without offering to return the price paid for it, and that a stockholder was equally precluded from asking for such relief as long as the company itself retained this money.² As a decision of this purport might, without any inconsistency, be rendered by a court which rejects the principle

note given by defendant to an individual for shares in another corporation), the court, after adverting to the fact that the penalty specified in the Mississippi statute which forbids one corporation to purchase the capital stock of another, or to acquire the franchise, plant, or equipment of any other corporation, was denounced against the purchasing corporation, and that it would have to be stretched to cover a case as against an individual seller, said: We "prefer to plant ourselves, in the particular case before us, on the decisions of various courts, notably, New York, Massachusetts, and Wisconsin, and on the language of the New York court that 'that kind of plunder which holds onto the property, but pleads the doctrine of ultra vires against the obligation to pay for it, has no recognition or support in the laws of this state.' We refer to 2 Cook on Corporations, p. 1608, and notes. We subscribe to that doctrine in the particular case we have in hand, and, if it be true that the Federal courts would hold differently, we respectfully decline to follow them; but we do not think it would be so held in the Federal courts on the facts of the case at bar." The court was evidently not aware that the doctrine prevailing in Massachusetts is different from that accepted in New York and Wisconsin, but apparently intended to follow the decisions in the two latter states.

In *National Surety Co. v. Hall-Miller Decorating Co.* (1913) 104 Miss. 626, 46 L.R.A.(N.S.) 325, 61 So. 700, an action on the bond of a surety for a contractor employed by the trustees of a hospital was held to be maintainable on the ground that "an advantage was obtained by the trustees, and an extra credit was given to the contractors; and, it being the duty of the trustees to erect a building with as little delay as possible, and to do so upon the best terms obtainable, we are of the opinion that the plea of ultra vires, if upheld, 'would defeat the ends of justice,' and to L.R.A.1917A.

of estoppel (see § 21, ante), it is not a distinct authority for that principle.

In a subsequent case the court relied upon the general rule under which an estoppel is predicated where one person wilfully causes the other to believe in the existence of a certain state of things.³ The estoppel which is referred to the element of a receipt of benefits was not adverted to. But it is clear that a recognition of this species of estoppel cannot logically be evaded by a court which affirms the applicability of the general rule just mentioned to a case involving an ultra vires transaction.

About thirty years afterwards it was laid down in unqualified terms that the principle of estoppel "cannot be applied to validate a contract which the corporation had no power to make."⁴ But, as the actual point determined was merely

deny the plea will only require the contractors and their surety to carry out their obligations advisedly assumed." The authority cited was *Ohio & M. R. Co. v. McCarthy* (1877) 96 U. S. 258, 24 L. ed. 693.

Missouri.

¹ In *Hoagland v. Hannibal & St. J. R. Co.* (1867) 39 Mo. 451, and *St. Joseph ex rel. Hannibal & St. J. R. Co. v. Saville* (1867) 39 Mo. 460, the court cited with approval *Pearce v. Madison & I. R. Co.* (1858) 21 How. (U. S.) 441, 16 L. ed. 184. But both those cases related to the enforcement of executory contracts, and there is nothing in them to show that the approval thus expressed extended to that part of the Federal decision which bears upon the question of an estoppel (see § 68, supra), unless it is the general remark in the second one, that "all the world dealing with the corporation is bound to take notice of its charter and the extent of its powers."

² *Buford v. Keokuk Northern Line Packet Co.* (1879) 69 Mo. 611.

³ *St. Louis v. St. Louis Gaslight Co.* (1877) 70 Mo. 69 (contract for the supply of gas to a city).

⁴ *State ex rel. St. Louis Underground Service Co. v. Murphy* (1896) 134 Mo. 548, 34 L.R.A. 369, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132. There it was unsuccessfully contended, in support of a petition for a mandamus to require the commissioner of streets to grant a permit to the St. Louis Underground Service Company, relator, to construct conduits for electric wires, that, inasmuch as relator and its assignors had gone to large expense, with the knowledge of the city, in constructing subways in some of the streets, and had paid to the city semiannually, in advance, the sum of \$500 for the rights and franchises granted it, as required by an ordinance, the city should now be estopped to deny the validity of the ordinance. The court quoted the statement in *Bigelow* on

that the principle could not be invoked for the purpose of charging the city with liability in respect to the unperformed part of the contract in question, it is apparent that, in spite of the generality of the language used by the court, this case did not settle either the question whether a corporation is entitled to plead ultra vires in respect to that part of a contract which the claimant has performed, or the question whether that plea is available as a defense to an action by one who has performed the whole contract on his side.

The foregoing summary of the decisions indicates that, so far as the decisions of the supreme court were concerned, one of the Federal courts of appeals was apparently justified in making the following statement in 1904: "We think the correct view of the decisions of that court—giving effect to each according to the particular case then under consideration—is that they establish a rule which is essentially the same as that recognized in the Su-

preme Court of the United States; viz, that, where the contract which is ultra vires has been fully performed on both sides, . . . what has been done will not be undone at the suit of either party; . . . but where any part of the contract remains executory, its invalidity may be effectively asserted, notwithstanding its partial performance, because the power to enter into the contract or to make it obligatory at all has been withheld by the authority which created the corporation and defined its powers."⁵ That learned tribunal, however, failed to advert to the fact that before the date of its statement the principle of estoppel had been distinctly recognized in several decisions of the Missouri court of appeals.⁶

But a change in the views of the state supreme court is betokened by the language used and the rulings made in more recent cases.⁷ Its present position is that which is defined in the following statement: "The doctrine that a party under a mere ultra vires contract may

Estoppel, 5th ed. pp. 466, 467, that "if the act undertaken was in and of itself ultra vires of the corporation, no act of the body can have the effect to estop it to allege its want of power to do what was undertaken." It was observed that "as the city had no power to authorize the use of its streets for private purposes by ordinance, it certainly cannot do so by estoppel." Reliance was also placed upon the following statement in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 317, 30 L. ed. 94, 6 Sup. Ct. Rep. 1094: "We know of no well-considered case where a corporation which is party to a continuing contract which it had no power to make, seeks to retract, and refuses to proceed further, can be compelled to do so."

⁵ *Anglo-American Land, Mortg. & Agency Co. v. Lombard* (1904) 68 C. C. A. 89, 132 Fed. 721.

⁶ No reference was made by the Federal court to the case cited in note 9, *infra*, or to the earlier of those collected in note 10.

⁷ In *First Nat. Bank v. Guardian Trust Co.* (1904) 187 Mo. 494, 70 L.R.A. 79, 86 S. W. 109 (action on a note executed by the Kansas City, etc., Railroad Company, and indorsed by the defendant), the grounds upon which the plaintiff was held to be entitled to recover were thus stated: "The contract in this case was fully executed on the part of the plaintiff, and its money was parted with by reason of the execution of the note by the defendant. This being true, the question confronts us, Should the defense of ultra vires as interposed by the defendant be availing under the facts as disclosed by the record? We have reached the conclusion that it should not be. It may be conceded that under the powers L.R.A.1917A.

conferred upon the defendant by the statutes under which it was organized, it would not be authorized to simply engage in the business of becoming a purely accommodation maker or indorser of promissory notes. Upon the facts in this case this legal principle is not applicable to the questions herein presented. . . . We repeat in this case that the defendant had adopted a business policy in respect to the Belt Railroad Company, that of undertaking to finance the company to the end that it might be successfully operated. The plaintiff in this case, in furnishing the money upon the execution of this note by the Belt Railroad Company and the defendant, was rendering a benefit and aid to the defendant in carrying out a business policy it had so long pursued, and it would be grossly inequitable to permit the defendant, after fully receiving the assistance of the plaintiff in carrying out this undertaking to finance the Belt Railroad Company, and relieve it of a pressing indebtedness, to now say that it had exceeded its corporate powers, and interpose such want of power as a defense to this action."

In *Cass County v. Mercantile Town Mut. Ins. Co.* (1904) 188 Mo. 1, 86 S. W. 237 (action on policy of insurance), the court said: "It is well settled in this state that the defense of ultra vires is not open to a corporation when the contract has been fully executed on the part of the other contracting party, and it is not expressly prohibited by law."

See also *Kansas City ex rel. Diamond Brick & Tile Co. v. Schroeder* (1906) 196 Mo. 281, 93 S. W. 405, where the principle of estoppel was affirmed with respect to a municipal corporation.

not get and retain benefits thereunder, and turn about and repudiate the contract, is well grounded in principle."⁸

In the earliest case in which the court of appeals had occasion to consider the question of ultra vires as a defense to an action founded on an executed contract, the judgment, affirming the right of the claimant to recover the amount of a coupon of a bond issued by a railway company, was based partly on the ground of his being the bona fide holder of a negotiable instrument, and partly on the principle of an estoppel against raising that defense under the given circumstances.⁹ That principle has also been recognized in many later cases.¹⁰

⁸ *St. Louis v. St. Louis, I. M. & S. R. Co.* (1913) 248 Mo. 10, 154 S. W. 55 (action of ejectment).

In *Richard Hanlon Millinery Co. v. Mississippi Valley Trust Co.* (1913) 251 Mo. 553, 158 S. W. 359, it was remarked with reference to one of the counts in the complaint that it was "not really a suit upon the contract, although the contract is mentioned therein," but "a suit at law to recover back the money paid under the contract." The court, however, said: "If the contract were only executed upon one side, then the plea of ultra vires would be unavailing, because a corporation cannot receive money to do a thing and fail to do that thing, and after keeping the money, excuse itself from liability by a plea of ultra vires."

⁹ *Singer v. St. Louis, K. C. & N. R. Co.* (1879) 6 Mo. App. 427. There the bonds stated upon their face that the payment of the interest was secured by a lease of the railroad of the maker to the defendant, which was to pay the interest by paying the coupons. The court reasoned thus: "Though the lease was not here in evidence, facts were in evidence sufficient to show that defendant was estopped from urging as a defense that it had no power to make the arrangement which it did make with the St. Louis, Council Bluffs, & Omaha Railroad Company, and from denying the authority of its officers to make the indorsement upon the back of the bonds. It is clear, both upon principle and authority, that it was not open to the defendant, a business corporation, to urge as against the plaintiff the defense of ultra vires, or of nonratification by its stockholders, under the circumstances of this case."

¹⁰ In *Lysaght v. St. Louis Operative Stonemasons' Asso.* (1893) 55 Mo. App. 538 (application for mandamus), the court said: "The law is that, for acts merely in excess of charter authority, corporations cannot set up the defense of ultra vires, where the consideration has been received, and the transaction executed by the other party."

In *Winscott v. Guarantee Invest. Co.* (1895) 63 Mo. App. 367 (action on contract with regard to the issue of certain pre-L.R.A.1917A.

In some instances the conception that to allow this defense to prevail where the claimant has performed his part of the contract would not advance justice, but accomplish a wrong, has been relied upon as the sole or as one ground of the decision.¹¹

In other instances the inadmissibility of the defense has been predicated on the general ground that, except in cases where the provisions of the corporate charter operate, either expressly or by implication, to invalidate transactions outside the scope of that charter, the question of ultra vires is one which can be raised only by the state.¹² It would seem that in any jurisdiction in

ferred stock), the court said: "The defense of ultra vires is not admissible where the contract has been fully executed on one side, unless it is a contract expressly prohibited by law."

In *Williams v. Verity* (1903) 98 Mo. App. 654, 73 S. W. 732 (suit for cancellation of deed of trust), it was declared to be quite well settled in Missouri "that the defense of ultra vires is not open to a corporation when the contract has been fully executed on the part of the other contracting party, and it is not expressly prohibited by law."

For other cases in which the doctrine thus laid down has been approved, see *Grohmann v. Brown* (1897) 68 Mo. App. 630 (enforceability of creditor's claim in receivership proceedings); *Goodland v. Bank of Darlington* (1896) 74 Mo. App. 365 (suit to enforce personal liability of defendant as stockholder in another bank); *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 185 (see note 12, *infra*); *York v. Farmers' Bank* (1904) 105 Mo. App. 127, 79 S. W. 96 (action to enforce liability resulting from arrangement with bank for paying an overdraft); *Adams v. Farmers' Mut. F. Ins. Co.* (1905) 115 Mo. App. 21, 90 S. W. 747 (action on policy of insurance); *Ellett-Kendall Shoe Co. v. Western Stores Co.* (1908) 132 Mo. App. 513, 112 S. W. 4 (rule recognized, *arguendo*); *Osmers v. Lemay-Wegmann Brokerage Co.* (1911) 155 Mo. App. 211, 134 S. W. 65 (action on notes given by vendee of patent rights); *William R. Bush Constr. Co. v. Bambrick-Bates Constr. Co.* (1913) 176 Mo. App. 608, 159 S. W. 738 (contract as to leasing and surrendering lease was held *intra vires*, but rule as to effect of appropriation of benefits was affirmed, *arguendo*); *Hough v. St. Louis Car Co.* (1914) 182 Mo. App. 718, 165 S. W. 1161 (action for personal injuries).

¹¹ *Relfe v. Columbia L. Ins. Co.* (1881) 10 Mo. App. 150; *Hough v. St. Louis Car Co.* *supra*.

¹² In *Cass County v. Mercantile Town Mut. Ins. Co.* (1904) 188 Mo. 1, 86 S. W. 237 (action on policy of insurance), the court approved the following statements in *Goodland v. Bank of Darlington* (1896) 74

which a doctrine of this comprehensive scope is regarded as being one of general application, the principle of an estoppel is superfluous as a means of working out the remedial rights of the parties. See § 5, *supra*. But this aspect of the matter was not adverted to in any of the cases cited.

In a case in which an action brought to enforce the statutory liability of a trust company as a shareholder in a bank in which it had purchased a controlling interest was held not to be maintainable, the court, referring to the rules regarding estoppel and the sole right of the state to complain, remarked that it knew of no Missouri case in which these rules "had been applied where the corporation had become a party to a contract void for the reason that it was wrong in itself and a violation of some public policy and good morals."¹³ From this statement and the decision rendered, it may be inferred that, in the opinion of the court, the descriptions of ultra vires transactions which belong to the same category as the one under discussion do not fall within the scope of the principle of estoppel. The facts with relation to which the statement was made indicate that the excepted category was deemed to embrace transactions which involve the conduct of a business

different in kind from that specified in the corporate charter. Whether it was regarded as including any other classes of transactions, there is nothing in the opinion to show.

In one case where the action was brought on a guaranty given by a national bank, the ruling of the court that the defendant was not estopped to plead ultra vires was based upon the ground that the Federal decisions were of paramount authority.¹⁴ See §§ 68 and 70, *supra*.

92. Nebraska.

The position of the supreme court with respect to one particular description of contract is indicated by the following statement in a syllabus prepared by it: Where an incorporated bank becomes surety in such an undertaking, no estoppel to assert want of power to incur the obligation arises solely upon the ground that other parties have been misled and acted in reliance thereon to their disadvantage, since the obligation was so clearly ultra vires that the parties must have known it and taken their chances of the corporation carrying it out. In such cases, the corporation will be held estopped only where it has acquired money or property by means of the contract in excess of its powers, and, having retained the same or the

Mo. App. 365 (suit to enforce personal liability of defendant as stockholder in another bank): "It has been repeatedly decided by the appellate courts of this state that a violation of a charter cannot be taken advantage of collaterally or incidentally, but only on a direct proceeding instituted for that purpose. . . . It has further been declared by the same courts that in a collateral proceeding to declare the ultra vires acts of a trading corporation void, it must be shown to be the intention of the charter, as gathered from its terms, not only to restrict the business of the corporation to certain things, but in addition to declare that, when it exceeds these restrictions, the act should be void. If such intention does not exist in the charter, the state alone can question such acts as ultra vires, except when the contract is against public policy or good morals."

For other cases in which the doctrine stated in the text is recognized, see *Osmer v. Lemay-Wegmann Brokerage Co.* (1911) 155 Mo. App. 211, 134 S. W. 65, and *Hough v. St. Louis Car Co.* (1914) 182 Mo. App. 718, 165 S. W. 1161 (where *St. Louis Drug Co. v. Robinson* (1883) 81 Mo. 26, was referred to as an authority for the doctrine "that the question of ultra vires, as depending upon the ownership of the stock in one corporation by another, cannot be raised collaterally"). L.R.A.1917A.

In *Welsh v. Ferd Heim Brewing Co.* (1892) 47 Mo. App. 608, the doctrine applied in the above cases was the basis of a judgment in favor of the plaintiff in an action for rent which had accrued under a lease after the defendant had repudiated it. It would seem that such a claim, being founded upon the unperformed, and therefore executory, part of the contract, should have been disallowed under the general rule explained in § 3, *supra*. But the decision and the remarks made with regard to the doctrine referred to in the text were approved in *Glass v. Ferd Heim Brewing Co.* (1891) 47 Mo. App. 639.

A similar criticism is suggested by *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 185, where the doctrine was invoked as one of the grounds of a decision holding that a servant to whom the defendant had promised to give permanent employment was entitled to recover damages in respect to a breach of the contract after it had been acted upon for fifteen years. But the decision was approved in *First Nat. Bank v. Guardian Trust Co.* (1905) 187 Mo. 494, 70 L.R.A. 79, 86 S. W. 109.

¹³ *State ex rel. Hadley v. Bankers' Trust Co.* (1911) 157 Mo. App. 557, 188 S. W. 669.

¹⁴ *First Nat. Bank v. American Nat. Bank* (1902) 173 Mo. 153, 72 S. W. 1069 (promise to pay certain drafts).

proceeds thereof, sets up want of power against the party seeking to enforce it.¹ From this statement it is clear that Nebraska is one of the states in which the applicability of the principle of estoppel under appropriate circumstances is recognized.

In a later case where an action for money due on account of goods sold and delivered was held not to be maintainable, the actual ground upon which the decision proceeded was that the agent who made the contract in question had in so doing exceeded his authority.² The added declaration of the court that the contract was ultra vires of the corporation itself might seem to import that the claim was regarded as being non-enforceable for this reason also. Having regard to the circumstances involved, such a position would be inconsistent with the principle of estoppel, and consequently with the earlier case reviewed above. But this apparent conflict between the two cases scarcely affords a sufficient basis for inferring a change in the views of the court.

93. *New Hampshire.*

The ground upon which it was held in one case that the defendant was not liable for the price of certain articles sold to it in pursuance of a contract made by its president was that "the powers of the agents of corporations to enter into contracts in their behalf are limited, by the nature of things, to such contracts as the corporations are by their charters authorized to make."¹ The effect of the execution of the contract by the claimant was not specifically adverted to; but it is clear that, when

viewed with relation to the circumstances involved, the decision may be regarded as being by implication an authority for the doctrine that a corporation is not estopped by such execution from pleading ultra vires.

In another case, decided about ten years afterwards, the doctrine was approved that, "if a corporation is authorized to give notes for any purpose, a bona fide indorsee of the note of such corporation has a right to presume that it was issued for an authorized purpose, and it is no defense against him to show that the note was given for a purpose not authorized by the charter."² As the restricted doctrine thus recognized has been adopted even in jurisdictions in which the mere fact of the corporation's having accepted the benefits of a contract does not create an estoppel against alleging it to be ultra vires, this expression of opinion cannot be said to afford any definite information concerning the views entertained by the court with respect to the significance of that fact in actions that are not founded on negotiable instruments.

Three years later the court observed that "the argument of justice was in favor of holding that a corporation, equally with an individual, after having received the benefit of such [i. e., ultra vires] contracts, shall not be permitted to repudiate them upon the ground that it has violated some statute provision in contracting them."³ But the actual ratio decidendi is to be found in the passage of the opinion in which the court, after having conceded that everyone then dealing with the corporation, must be presumed to know the limitation

Nebraska.

¹ *Sturdevant Bros. & Co. v. Farmers' & M. Bank* (1901) 62 Neb. 472, 87 N. W. 156, affirmed on rehearing in (1903) 69 Neb. 220, 95 N. W. 819.

² *Farmers' Co-op. Shipping Asso. v. George A. Adams Grain Co.* (1909) 84 Neb. 752, 122 N. W. 55.

New Hampshire.

¹ *Downing v. Mt. Washington Road Co.* (1860) 40 N. H. 230.

² *Rich v. Errol* (1871) 51 N. H. 350, citing *Monument Nat. Bank v. Globe Works* (1869) 101 Mass. 57, 3 Am. Rep. 322, and the opinion of Selden, J., in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 289. The applicability of the doctrine was denied for the reason that the persons who assumed to pledge the credit of the defendant, a town, had no authority to do so, and that the note upon which the action was brought was consequently "not made or issued" by it.

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³ *Ossipee Hosiery & Woolen Mfg. Co. v. Canney* (1874) 54 N. H. 295. There the corporation sued in assumpsit for an assessment made on a stockholder to pay a corporate debt. The essential point involved, therefore, was whether the corporation itself was liable on the contract from which the debt resulted. The contention of the defendant stockholder was that, as it had been provided by Gen. Stat. chap. 135, § 4, that "no corporation, banks and insurance companies excepted, shall contract debts or incur liabilities exceeding one half of its capital stock then actually paid in and unimpaired, and of its other property and assets," the contract was ultra vires as to any debt contracted beyond the amount so limited; that a creditor dealing with an agent of a corporation must see for himself that the agent acts within the scope of his authority; and that an act ultra vires cannot be ratified.

imposed upon its power to contract debts, continued thus: "But, at the same time, it is equally clear that the contracting of these debts beyond the limit fixed by statute was not the exercise of a power not conferred on the corporation, but was the abuse of a general power in these particular instances, of which abuse the other contracting parties (the creditors) cannot ordinarily be presumed to have known."

In a case decided six years afterward one of the grounds upon which a bill was held to be maintainable against the stockholders of a company whose notes, executed for a loan in excess of its powers, had been signed by them as comakers, was that "the statutory prohibition of the contraction of debt did not authorize the company to keep, without repayment, the money it was forbidden to hire,"—or, in other words, that the defendant, having "hired the plaintiff's money, was liable to repay it, whether the hiring was authorized or

not."⁴ From the language thus used it is not quite clear whether the court intended to rely upon the doctrine of estoppel, or simply upon the implied obligation of a corporation to return money or property which it has received in pursuance of an ultra vires contract. See § 11, of the note to *Crowder State Bank v. Aetna Powder Co.* post, 1037. The other consideration relied on was that "the plaintiffs could not be presumed to have known that the company was exceeding its powers." See § 12, *supra*.

In other cases, also, we find it formally laid down that, "when the corporation has received the consideration or enjoyed the benefit of a contract which it repudiates, but which has been executed on the part of any person, and has paid no equivalent on its part, he may recover back the consideration received and enjoyed;"⁵ or, in other words, that "a corporation cannot retain the benefits and repudiate the burdens of ultra vires contracts."⁶ But, owing to the general

⁴ *Connecticut River Sav. Bank v. Fiske* (1880) 60 N. H. 363, citing *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, note 3, *supra*.

⁵ *Hall v. Paris* (1879) 59 N. H. 71 (settlement of claims against an insolvent bank).

⁶ *Latulippe v. New England Invest. Co.* (1913) 77 N. H. 31, 86 Atl. 361 (purchase of its own stock by company).

In *Cogswell v. Rockingham Ten Cents Sav. Bank* (1879) 59 N. H. 43, it was contended that the claims of two persons who had kept in an insolvent bank special deposits, to be paid out on call, were not entitled to a preference as against the general creditors, because the receiving of such deposits on such terms was not within the authorized business of the bank. But the court said: "Admitting this to be so, the bank, having received the money and converted it to its use as a part of the general fund, must be held to account for it, and the claims of Davis and Fernald are debts to be paid in full."

In *Greeley v. Nashua Sav. Bank* (1884) 63 N. H. 145, an action of assumpsit for certain securities delivered for safe-keeping to the clerk of defendant's treasurer, the grounds upon which recovery was denied were thus stated: "Whether the contract was made with French with or without the knowledge or assent of the treasurer, it was a contract which neither could make on behalf of the bank, for it was a contract which the defendants were not empowered by their charter to make. It was no part of the business of the bank to receive valuables or securities for safe-keeping. Their charter does not authorize them to act as mere depositaries. None of the evidence tends to show that the bonds came into the possession of the bank, or that the bank

ever received any benefit from them, or any of their proceeds. On the contrary, the evidence is that the bank never received the bonds or their avails."

In *Manchester & L. R. Co. v. Concord R. Corp.* (1889) 66 N. H. 100, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383, an equity suit was brought for a discovery and an accounting of the defendants' dealings with the plaintiffs' railroad properties during a period of about thirty years, under various contracts and leases; for the delivery of certain books, records, and papers alleged to belong to the plaintiffs; for the return to them of rolling stock and equipments of the appraised value of \$147,592, which went into the defendants' possession at the time they took the plaintiffs' road, and which they still retained; and for the determination and adjustment of the respective rights of the parties in and to certain lands, depots, and tracks. One of the special pleas filed by the defendants averred that the contracts between the parties, under which the defendants went into and retained the possession and management of the plaintiffs' road for more than thirty years, "were wholly beyond the corporate power" of either party to make or to ratify, and that therefore the defendants should be hence dismissed with their costs and charges. The plaintiffs' demurrer to this plea was sustained on grounds thus stated: "The defense set up is so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that in equity, at least, neither party to a transaction ultra vires simply is heard to allege its invalidity while retaining its fruits. However the contractual power of the defendants may be limited under their charter,

terms in which this principle has been enunciated, and the fact that nearly all the cases in which it has been distinctly recognized involve either equitable suits or proceedings in which the rights and liabilities of the parties were determinable on the same footing as in such suits, they cannot be said to have definitely committed the court to an adoption of the doctrine that the performance of the contract is a circumstance which precludes the corporation from interposing the defense of ultra vires in actions of law which are founded upon the contract itself. In fact, the rejection of that doctrine is clearly indicated by a case decided during the same period, in which it was expressly laid down that no recovery could be had under a declaration which counted merely upon the contract itself.⁷ As this ruling is a direct authority upon the point, its significance is not seriously diminished by the fact that, in another case of somewhat later date, in which it was held that the defendant was not liable, both court and counsel apparently took it for granted that the principle of estoppel would have been controlling if the evidence had been

such as to warrant its application.⁸

The language used, and authorities cited, in the most recent case that bears upon the doctrinal position of the court, would seem to evince an acceptance of the doctrine of estoppel.⁹ But it is to be observed that here, also, the proceedings were of an equitable nature, and that the court was not called upon to determine the question whether that doctrine may be applied for the purpose of enabling a claimant to enforce an ultra vires contract in an action at law.

94. New Jersey.

Having regard to the facts involved, the earlier cases seem by implication to require for their support the doctrine that the fact of the other party having performed the contract on his side does not preclude the corporation from pleading ultra vires.¹

The doctrine established by the more recent decisions is that the corporation is estopped to raise that defense in all cases where the contract has been executed on both sides, and that, where "the party seeking relief has performed on his part, the plea of ultra vires by

there is no limitation of their power to make restitution to the other party whose money or property they have obtained through an unauthorized contract; nor, as a corporation, are they exempted from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial."

⁷ Norton v. Derry Nat. Bank (1882) 61 N. H. 589, 60 Am. Rep. 335 (action on guaranty).

⁸ Greeley v. Nashua Sav. Bank (1884) 63 N. H. 145. See note 6, supra.

⁹ In International Trust Co. v. Davis & F. Mfg. Co. (1900) 70 N. H. 118, 46 Atl. 1054 (bill to restrain levy of execution against property of company which had issued bonds secured by a mortgage to the plaintiff trust company), the court argued thus: "The defense that the mortgage to secure the last issue of bonds was ultra vires, because the amount of the issue was more than one half the cost of the light company's property, is also set up. The company could not avail itself of this defense, for it has received and now retains the proceeds of the contract. . . . These creditors cannot invoke the aid of this doctrine, for it is applied only at the instance of the state, the corporation, or its stockholders, or of a third person whose rights are infringed by the illegal agreement. Green's Brice, Ultra Vires, pt. 4, chap. 2. Assuming that the execution of this mortgage was beyond the powers granted to the company, and that these creditors so far stand in the position of innocent purchasers as to have the right to attack it (Com. v. Smith (1869) 10 Allen L.R.A.1917A.

(Mass.) 459, 87 Am. Dec. 672), the defense is not available here. The claim that a contract is void because beyond the charter powers of a corporation is seldom recognized as a defense to an agreement otherwise unobjectionable, and never except as a shield against wrong. Whitney Arms Co. v. Barlow (1875) 63 N. Y. 69, 20 Am. Rep. 504; Lewis v. American Sav. & L. Asso. (1898) 98 Wis. 203, 30 L.R.A. 559, 73 N. W. 793." It was held that the plaintiffs were entitled to an equitable lien upon the property to the extent of \$14,100 as against the Davis & Farnum Company, and \$19,100 as against Kendall, the other defendant.

New Jersey.

¹ In Morris & E. R. Co. v. Sussex R. Co. (1869; Err. & App.) 20 N. J. Eq. 542, it was held that one railway company could not compel another to account for a certain stipulated percentage of the money received for the transportation of passengers and freight over certain lines the building of which had not been authorized when the contract was entered into.

In National Trust Co. v. Miller (1880) 33 N. J. Eq. 155 (suit to foreclose a mortgage), the court adopted the doctrine laid down in Thomas v. West Jersey R. Co. (1879) 101 U. S. 71, 25 L. ed. 950, following Ashbury R. Carriage & Iron Co. v. Riche (1875) L. R. 7 H. L. 653, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, 2 Eng. Rul. Cas. 304, that a contract not within the scope of the powers conferred on a corporation cannot, by any partial performance, become the foundation of a right of action.

the corporation which has acquiesced in it is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status."² The second branch of this doctrine has been reaffirmed in several later cases.³ But it has also been stated in a broader form, expressive of the theory that the inability of the corporation to raise the plea of ultra vires is predicable regardless of the question whether it is or is not feasible to restore the claimant to his former status.⁴

In one of the cases decided with reference to the doctrine, language was used which indicated that it was regarded as being applicable only in cases where the acquiescence of all the stockholders is

proved, and there is nothing to show that the interests of creditors will be injuriously affected by the enforcement of the contract.⁵

95. New York.

In § 44 of the monograph appended to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —, it is stated that the earliest New York case which has a bearing upon the effect of the performance of an ultra vires contract by the moving party is one in which Chancellor Kent intimated, without explicitly deciding, that, where that party is the corporation itself, the question of its want of power can be raised only by the government of the state by which the corporate charter has been granted.¹ The principle thus adverted to seems to be the rationale of another early case

² *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* (1886; Err. & App.) 48 N. J. L. 530, 7 Atl. 523 (action of debt to recover rent).

³ *Chapman v. Iron Clad Rheostat Co.* (1898) 62 N. J. L. 497, 41 Atl. 690 (contract to employ plaintiff); *Perkins v. Trinity Realty Co.* (1905) 69 N. J. Eq. 723, 61 Atl. 167 (see note 5, infra); *Bettle v. Republic Sav. & L. Asso.* (1906) 71 N. J. Eq. 613, 64 Atl. 176 (action to recover money borrowed on certificate by building and loan association); *Earle v. American Sugar Ref. Co.* (1908) 74 N. J. Eq. 751, 71 Atl. 391 (suit for accounting in respect to loan made by purchase of commercial paper).

In *State ex rel. Rutherford v. Hudson River Traction Co.* (1906; Sup. Ct.) 73 N. J. L. 235, 63 Atl. 84, the court, in dealing with an application for mandamus to compel defendant to macadamize the street on which its tracks were laid, said: "In our view it is not open to the traction company to raise the question that the grant of its local privileges and franchises was ultra vires the municipal corporation, while at the same time the company retains and uses and enjoys those privileges and franchises. The plea of ultra vires is not admitted in such circumstances except where it is practicable to restore the status quo ante, and we therefore think the present respondent is estopped from setting up that plea."

⁴ In *Whitehead v. American Lamp & Brass Co.* (1905) 70 N. J. Eq. 581, 62 Atl. 554 (appeal from receiver's order disallowing a claim based on a guaranty of payment for materials sold), the court thus stated its conclusions: "If the act was in excess of its [guarantying company's] authority, it having induced the claimant to part with its property relying upon the promised 'ultimate payment,' and being benefited by having the material manufactured for its account, it would be unconscionable to now permit it to interpose L.R.A.1917A.

the plea it offers. The weight of modern judicial authority favors the rule that, where a private corporation enters into a contract in excess of its granted powers, but not expressly prohibited, and has received the benefits contracted for, it will be estopped from pleading a want of power to make the agreement for the purpose of escaping performance on its part." But some doubt as to whether the general language here used is anything more than an accident is suggested by the fact that the court also approved the passage quoted in the text in which the qualifying clause as to the impossibility of complete restitution is inserted.

⁵ In *Perkins v. Trinity Realty Co.* (1905) 69 N. J. Eq. 730, 61 Atl. 167 (suit to foreclose mortgage executed for accommodation of a third party), *Garrison, V. C.* said: "It is clear that the notes, to secure which this mortgage was given, were not for any purpose of the defendant company, and were not given in the due course of its business, and were given as an accommodation to a third party. I think, therefore, it is obvious that the mortgage could not be sustained if attacked by any creditor of the corporation or by any stockholder who did not assent to it. But since it is not shown that there are any creditors, and no question of public policy intervenes, and every stockholder assented to this disposition of the company's property, I find that this mortgage, given for a valuable consideration, should not be declared invalid at the instance of this defendant. . . . In cases where stockholders have all assented to corporate action, and no rights of the state or creditors intervene, the doctrine of estoppel is fully applicable, and the plea of ultra vires is unavailing."

New York.

¹ *Silver Lake Bank v. North* (1820) 4 Johns. Ch. 370 (action by Pennsylvania corporation).

also, in which, as the action was bought by a creditor of a corporation to enforce the individual liability of a stockholder, the liability of the corporation itself was primarily involved.³ But the precise position of the court is not shown by its very brief opinion.

In the same monograph it is shown that, in several cases in which the courts held that no action could be maintained by a corporation upon a contract which violated the Restraining Act or a similar statute, the element of the defendant's acceptance of the benefits accruing to him from the plaintiff's performance thereof was not discussed at all. In harmony with these decisions is

a case in which, toward the close of this period it was held that a corporation could not be sued upon an ultra vires contract, and in which, although the contract had in point of fact been performed by the plaintiff, no reference was made to this aspect of the evidence.³ During the ensuing period the significance of the fact of performance was considered in some cases; but they are not consistent. In one the doctrine was applied that, as against a person who has performed the contract on his side, a corporation is estopped from pleading ultra vires.⁴ In another that doctrine was explicitly repudiated.⁵ In another it constituted the ground upon which a

³ *Spear v. Crawford* (1835) 14 Wend. 20, 28 Am. Dec. 513. It was laid down that whether it was lawful or not for the Harlaem Canal Company to divide the excess of lands purchased by them among the stockholders, a stockholder, when sued by a creditor, could not allege that or any other illegality in the acts of the company in bar of a recovery against himself. Such illegal acts did not per se work a forfeiture.

⁴ *Safford v. Wyckoff* (1841) 1 Hill, 11. There the defendant was sued as president of a bank organized under the general law of 1838, upon a bill of exchange or draft drawn by the bank upon the North American Trust & Banking Company in favor of one Dodge, and indorsed to the plaintiff. Held, by Cowen, J., that, as the bank had no authority to issue drafts on time, the action could not be maintained. The ground upon which the decision proceeded was simply that the issue of the instrument was an infraction of the general Restraining Law of 1837. This was one of the cases relied upon by Selden, J., in the opinion which he delivered in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258. See note 11, *infra*. The decision was reversed in (1842) 4 Hill, 442, on the ground that, although the draft had been improperly issued, it was valid in the hands of a bona fide holder, because it was not on its face illegal or unauthorized. To this ruling Selden, J., did not advert, possibly because the special ground upon which it was based was such as to render it unimportant in a general discussion of the extent of the right to sue on an ultra vires contract. It should be observed that New York is one of the states in which ultra vires and expressly prohibited contracts are now assigned to different categories, so far as regards the right to sue upon them after they have been executed. See §§ 17, 18, and 44, *supra*.

The theory of the reversing decision was presumably taken for granted in *Stoney v. American L. Ins. Co.* (1845) 11 Paige, 635, where the obligation of a Maryland company to pay its certificates to the holders thereof, in spite of their having been issued in New York in violation of the Restraining Act, was affirmed on the special L.R.A.1917A.

ground that the holders were bona fide purchasers who had no notice of the illegality of the instruments.

⁵ *Indiana v. Woram* (1843) 6 Hill, 33, 40 Am. Dec. 378. There the object of the action was to enforce the individual liability of the stockholders of a corporation which had exceeded its power by purchasing certain bonds. The judgment affirming the right of action was put upon the ground that the previous decision in *Moss v. Rossie Lead Min. Co.* (1843) 5 Hill, 137, where the corporation itself was the defendant, had established the broad principle that "a corporation cannot avoid its obligation on the ground that it was given for property which the corporation was not authorized to purchase." It is submitted that this is not a correct statement of the purport of a case which, as the opinion shows, proceeded simply upon the special ground that the defendant company was "authorized by statute to exercise a general agency, to which a large discretion was necessarily incident," and consequently that "acts done by such a company which bear an equivocal appearance, because they may be within or without the corporate power or the capital employed, must be tested by such rules as we apply to the acts of a general agent. The man who deals with such an agent is not bound to know that the transaction is within the scope of his authority." But for the purposes of the present review of the decisions the significant fact is that the broader principle was assumed in the later case to have been established by the earlier one.

⁶ *Hodge v. Buffalo* (1846) 2 Denio, 110. There it was held that a man who had, in pursuance of an agreement with the common council of Buffalo, furnished a public entertainment on Independence Day, could not recover from the municipality the money which had been expended. The court said: "The plaintiff's counsel, failing to find express authority to make expenditures for this purpose, insists that the claim can be sustained on the ground that, the plaintiff having furnished this entertainment, the corporation has received the consideration and is bound to pay, although

bank was held to be liable upon an accommodation indorsement.⁶ This decision was cited not long afterward by an eminent judge in support of his theory that the doctrine of estoppel is one of general application.⁷ But it is submitted that the passages quoted in the footnote from the opinion shows that the court did not intend to go any further than to affirm the applicability of the doctrine of estoppel in respect to one particular class of cases; viz., those in which the indorser is a corporation empowered to negotiate commercial paper in the course of its business, and the action upon the indorsement is

brought by a bona fide purchaser for value.⁸

About the same time as the last-mentioned case was decided, the right of recovery on executed ultra vires contracts was much discussed with reference to the question whether, relatively to the corporation, the other contracting party was in *pari delicto*.⁹ In so far as they turn upon that question, they are reviewed in § 14, of the note to *Crowder State Bank v. Aetna Powder Co.* post, 1045. For the purpose of the present summary, it will be sufficient to state that in one of them the decision proceeded partly upon the principle of an estop-

the engagement was made without legal authority. It is said to be analogous to a subsequent ratification by a corporation of the unauthorized act of its agent. I cannot concur in this view of the case. The doctrine referred to assumes that the principal has power to confer the requisite authority in the first instance. It cannot be maintained that a corporation can by a subsequent ratification make good an act of its agent which it could not have directly empowered him to do. The power attempted to be conferred by the common council upon this committee was unauthorized, and the acts of the committee were void so far they assumed to bind the corporation." The defendant in this instance was a municipal corporation, but the reasoning of the court is quite general, and is manifestly intended to be applicable to all corporations, whether public or private.

⁶ *Bank of Genesee v. Patchin Bank* (1855) 13 N. Y. 309. The court said: "It is quite clear that the officers of a banking association or other corporation have no power to engage the institution, as the surety for another, in a business in which it has no interest. Such a transaction is without the scope of the business of the company. . . . I entertain no doubt but that a bank may lawfully indorse the commercial paper which it holds, with a view to raise money upon it by way of discount, or for any other lawful purpose. . . . But the officers of the bank have no right to indorse on its behalf the paper of other persons in which it has no interest, or to make the bank a party to paper for the accommodation of anyone. Such contracts are void upon the same principle that an indorsement by a partner, of the firm name, without the consent of his copartners, for the accommodation of a third person, would be inoperative against the firm. . . . The evidence in this case tended to show, and perhaps it established, that the bill in question was drawn, accepted, and indorsed for the accommodation of the railroad corporation, and to enable that corporation to borrow money. The indorsement of the defendant was therefore void in the hands
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of every person having notice of the facts. But if the proper officers of the defendant have negotiated it to the plaintiff, representing it to be a bill belonging to their bank, and upon the faith of that representation the plaintiff has, in the usual course of its business, discounted it, advancing to the defendant the proceeds, the defendant is precluded, upon the principle just referred to [defining the rights of innocent holders], from setting up that it was indorsed without authority." The court then referred to certain cases in which it had been held that, "if a note made for the purpose of raising money is negotiated to an indorsee upon a discount greater than the legal rate of interest, by means of a representation by the indorser that it is business paper in his hands, that the indorser cannot set up the defense of usury against the indorsee," and continued as follows: "This is carrying the principle of estoppel to the length of protecting a transaction prohibited by a positive law founded upon considerations of public policy. It is not necessary to affirm that doctrine in this case, for the objection here is not that the transaction itself was unlawful, but only that it was unauthorized in this particular case. I see no objection to applying to it the principle that where a party has, by his declaration or conduct, induced another to act in a particular manner, he will not afterwards be permitted to deny the truth of his admission, if the consequence would be to work an injury to such other person."

⁷ See the opinion of Comstock, Ch. J., in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258, note 11, *infra*.

⁸ Compare *Monument Nat. Bank v. Globe Works* (1869) 101 Mass. 57, 3 Am. Rep. 322, reviewed in § 11, *supra*.

⁹ *Tracy v. Talmage* (1856) 14 N. Y. 160, 67 Am. Dec. 132; *Curtis v. Leavitt* (1857) 15 N. Y. 9; *Sacketts Harbor Bank v. Codd* (1858) 18 N. Y. 240; *De Groff v. American Linen Thread Co.* (1860) 21 N. Y. 124, reversing (1855) 24 Barb. 375, but not on this point; *Oneida Bank v. Ontario Bank* (1860) 21 N. Y. 490.

pel based upon the receipt of benefits from the other contracting party. "If it be conceded," said the court, "that the defendants had no power to enter into the contract of sale in this case and bind the company to perform the obligations assumed, viewed as a mere question of corporate power, yet, having undertaken to do so, and having received the full consideration agreed to be paid by the plaintiff, and he having fulfilled his entire contract, they cannot now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon them."¹⁰

From the foregoing resumé of the decisions, it is apparent that, toward the close of the period during which they were rendered, the trend of judicial opinion was distinctly in the direction of the doctrine under which corporations are deemed to be estopped from plead-

ing ultra vires as a bar to an action upon a contract, after it has been performed by the other party. That doctrine was still more firmly established by a noteworthy case which came before the court of appeals in 1860. The action was brought for the recovery of damages for injuries caused by the negligence of the servants of two corporations who were jointly operating a train on which the person injured was a passenger, through a state to which the charter of neither of the defendants extended.¹¹ Elaborate and very able opinions were delivered both by Comstock, Ch. J., and by Selden, J. Their arguments, so far as relevant to the general discussion of the subject of estoppel, are reviewed in subtitles VII. and VIII, supra. Here it will be sufficient to state that the position taken by the former judge was that the action was maintainable on the contract, and

¹⁰ *De Groff v. American Linen Thread Co.* (1860) 21 N. Y. 124. The following passage may also be quoted: "It is very clear that if the plaintiff in this suit had been prosecuted upon one of the notes given by him upon the purchase, he could not, having accepted and retaining the goods, have set up as a defense want of power in the defendants to enter into the contract. The same rule of right and the same measure of justice will be exacted in this suit. This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability when contracting with a corporation, and in the case of a corporation when seeking to escape responsibility on the plea of ultra vires for act deliberately done with all usual and needful formalities; and where they have received the entire benefit they contracted for, such a defense should no longer be tolerated in our courts. In principle it is condemned by the decision in *Tracy v. Talmage* (1856) 14 N. Y. 162, 67 Am. Dec. 132, although I admit this precise question is not presented in that case. Where the question is merely as to the capacity to contract, a party who has had the benefit of the contract should not be permitted, especially where there is no unlawful intent charged upon the other party, and he is in no sense in *pari delicto*, to question its validity. To deny relief to a plaintiff thus situated would be substantially to secure to the party deliberately violating one of the laws of its existence, and where no guilty complicity can be charged upon the other party, the fruits of an illegal transaction, and operate as a premium upon repudiation and fraud."

Having regard to the language used in this case, it is noteworthy that in *Cary v. Cleveland & T. R. Co.* (1859) 29 Barb. 35, the supreme court seems to have been unacquainted with the notion of an estoppel

as predicated from a receipt of the benefits of the contract; for, in discussing the right of a railway passenger to recover for the loss of his baggage on a line connected with the system of the defendant, it remarked that there were no facts upon which an estoppel could be based, because "no fraud had been practised upon the plaintiff." Such language clearly would not have been used if the court had had in mind the estoppel which results simply from the receipt of benefits. For this reason the citation of the case as a precedent for the doctrine as to such an estoppel is plainly unwarrantable. See, for example, *Bradley v. Ballard* (1870) 55 Ill. 413, 8 Am. Rep. 666, 3 Mor. Min. Rep. 563.

¹¹ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258. The position taken by Comstock, Ch. J., whose views have been adopted by the court of appeals in all the subsequent cases, is shown by the following extracts from his opinion: "Can, then, two railroad corporations having connecting lines thus unite their business, for the purpose of promoting their common interest; charter another connecting road in furtherance of the same policy; hold themselves out to the public as carriers over the whole route; enter into contracts according; receive the benefit of those contracts; and then, when liabilities arise, interpose the violation of their own charters to shield them from responsibility? Such a defense is shocking to the moral sense, and, although it appears to have some support in judicial opinions, I think it has no foundation in the law. . . . I have no hesitation in affirming the judgment of the court below, upon the principles of contract and of duty resulting therefrom. That the entire course of business in which the defendants were engaged could not be justified by their charters, I am not prepared to deny. Each of them

that if the defendants could not be held under their contract, they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract called for. The view of Selden, J., was that the claim could not be enforced upon this basis, but that the defendant might be held liable as for a breach of a duty to use reasonable care with respect to a person who was lawfully traveling on its cars. Clarke, J., agreed with Selden, J., and all but one of the other judges concurred in a decision for the plaintiff, without stating the ground on which they

thought the decision should be placed.

In the same year the principle of estoppel was again recognized in a case in which it was held that a claim for money paid at the request of a railway company to one who had advanced the price of a steamboat purchased for it could not be resisted on the ground that the purchase was ultra vires, although the plaintiff, when he paid the money, knew all the facts.¹³ Comstock, Ch. J., who delivered the opinion of the court, laid down the broad doctrine that, "when a sale of a chattel made to a corporation is executed and complete in all

was chartered to build a railroad, the termini of which were specified. They built the roads, and then consolidated their business." He conceded that they had no rightful authority to consolidate the business of the two lines which they had separately built, or to construct or lease another road in continuation of theirs. "But these things were actually done, and they were done openly and publicly. If these acts were an abuse of power, the shareholders had ample opportunity to prevent or arrest the abuse. But no complaint from them has ever been heard, and their acquiescence must be presumed. If state sovereignties were wronged by the course of dealing pursued, no interference or complaint has come from that quarter. Conceding, then, that the defendants might change the attitude in which they stood toward the public, and return at any time to the sphere of legitimate duty, they could not revoke past contracts, the consideration of which they had received, and upon the performance of which they had entered. They were bound to pay their servants and laborers, and they were liable for the careful transportation of freight committed to their charge. They could not invite a traveler into their cars, and, after injuring him by their negligence, reject the responsibilities of their contract. A traveler from New York to the Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations." The following authorities were relied upon as sustaining his views; *Steam Nav. Co. v. Weed* (1853) 17 Barb. 378; *Silver Lake Bank v. North* (1820) 4 Johns. Ch. 370; *Chester Glass Co. v. Dewey* (1819) 16 Mass. 102, 8 Am. Dec. 128; *Bank of Genesee v. Patchin Bank* (1855) 13 N. Y. 309; *Bulkley v. Derby Fishing Co.* (1817) 2 Conn. 255, 7 Am. Dec. 271; *Parker v. Boston & M. R. Co.* (1849) 3 Cush. (Mass.) 108, 50 Am. Dec. 709; *Allegheny City v. McClurkan* (1850) 14 Pa. 82. But an examination of these cases will show that only the first and last can fairly be regarded as precedents in point. Those in 4 Johns. Ch. and 16 Mass. proceeded upon the theory that, where a corporation is seeking to enforce a contract, the question of its want

of power is one which only the state can raise. The fourth case embodies a rule of limited application rather than the broad doctrine of an estoppel predicable in respect to every description of contract. See note 6, supra. The passage quoted by the learned chief justice from the Connecticut case would sustain his views, if construed literally and without reference to the question actually involved. But the context shows that the court had in mind not contracts that are ultra vires in the proper sense of that expression, but those which are invalid merely by reason of the failure of the corporate agents to comply with formal requirements. See § 8, supra. The Massachusetts case in 3 Cush. involved an action for damages to property, and was decided with reference to the language of a special statute (see § 87, supra). It was therefore irrelevant as an authority in a general discussion. It is somewhat remarkable that no reference was made to *Indiana v. Woram* (1843) 6 Hill, 33 (note 4, supra), and *De Groff v. American Linen Thread Co.* (1860) 21 N. Y. 124 (note 10, supra), both of which were favorable precedents.

In *Buffett v. Troy & B. R. Co.* (1869) 40 N. Y. 168, affirming (1862) 36 Barb. 421, an action to recover for injuries caused by the overturning of a sleigh used by the defendant company to convey intending passengers from a village to a station, the *Bissell Case* (1860) 22 N. Y. 258, was cited as a controlling authority. The contention that the company was not liable, because the contracts were for transportation on or over territory not lying between its terminal points, was rejected.

¹³ *Parish v. Wheeler* (1860) 22 N. Y. 494. There it appeared that this railroad corporation, of which the defendant was receiver, had, in excess of the powers conferred by its charter, purchased and paid for a steamboat and several canal boats; that, being in the possession and use of the property in connection with its regular business, it mortgaged the same property to its creditor, the plaintiff, taking back charter parties for a limited period, and also a stipulation for a reconveyance if the debt should be paid at the time agreed on; that the plaintiff, taking the usual

things, except the performance of its own promise to pay the price, a plea that it ought not to have made the purchase is not to be entertained, especially so long as it retains, and insists upon retaining, all the benefit of the contract.

Corporations themselves, like individuals, in dealing with other parties, must live up to the rules of common honesty." The learned judge also said: "I am constrained to reject all the arguments on both sides of this case founded on the alleged illegality of any of the transactions involved. Contracts with corporations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their

previous situation, I am willing to agree, should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and therefore a breach of private trust. But the executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require." Since these two cases were decided, it has always been regarded as settled law in this state "that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract." ¹⁴ "The law which obtains in

course in such cases, caused a part of the property to be sold after a default had occurred, and received the proceeds of that sale, which nearly or quite satisfied the debt.

¹⁴ *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504, a case in which the doctrine was referred to as being the counterpart of the rule which holds a converse; viz., that "if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation."

Vought v. Eastern Bldg. & L. Asso. (1902) 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496 (contract to pay maturity value of shares of stock).

For other cases in which the doctrine enunciated in the text has been applied or recognized, see *Hurd v. Kelly* (1879) 78 N. Y. 588, 34 Am. Rep. 567, affirming *Hurd v. Green* (1879) 17 Hun, 327 (bond guarantying obligations of bank); *Alexander v. Cauldwell* (1881) 83 N. Y. 480, 5 Mor. Min. Rep. 650, (applicability of doctrine was denied because evidence failed to show receipt of benefits); *Woodruff v. Erie R. Co.* (1883) 93 N. Y. 609 (action for amount due under lease); *Jemison v. Citizens' Sav. Bank* (1890) 122 N. Y. 135, 9 L.R.A. 708, 25 N. E. 284 (doctrine recognized, but held inapplicable on the given facts); *Starin v. Edson* (1889) 112 N. Y. 206, 19 N. E. 670 (affirming, arguendo, the right to recover rent already accrued under a lease); *Bath Gaslight Co. v. Claffy* (1896) 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390 (arguendo in a case where the claimant was the corporation); *Linkauf v. Lombard* (1893) 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472 (charter of vessel); *Moss v. Cohen* (1899) 158 N. Y. 249, 58 N. E. 8 (arguendo); *Hamilton Trust Co. v. Clemes* (1900) 163 N. Y. 423, 57 N. E. 614, affirming (1897) 17 App. Div. 162, 45 N. Y. Supp. 141 (mortgage); *Bushnell v. Chautauqua County Nat. Bank* (1877) 10 Hun, 378, judgment modified in (1878) 74 N. Y. 290 (plaintiff entered into a contract with

Shaw, a third person, on the faith of the defendant's promise that he should be compensated out of money deposited with the defendant for any damage he might sustain from the third person's failure to perform the contract); *Jourdan v. Long Island R. Co.* (1886; Sup. Ct. Gen. Term) 6 N. Y. S. R. 89 (contract for interchangeable use of railway lines); *Potter v. New York Infant Asylum* (1887) 44 Hun, 367, affirmed in (1890) 118 N. Y. 684, 23 N. E. 1147 (employment of counsel); *Palmer v. Cypress Hill Cemetery* (1888; Sup. Ct. Gen. Term) 14 N. Y. S. R. 591 (sale of real property); *Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co.* (1888; Sup. Ct. Gen. Term) 16 N. Y. S. R. 208, reversed in (1890) 123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499, but not on grounds touching the validity of the agreement; *Cunningham v. Massena Springs & Ft. C. R. Co.* (1892) 63 Hun, 439, 18 N. Y. Supp. 600, affirmed in (1893) 138 N. Y. 614, 33 N. E. 1082 (action for work performed); *Milborne v. Royal Ben. Soc.* (1897) 14 App. Div. 406, 43 N. Y. Supp. 1026 (action on certificate of benefit society); *Usher v. New York C. & H. R. Co.* (1902) 76 App. Div. 422, 78 N. Y. Supp. 508, affirmed in (1904) 179 N. Y. 544, 71 N. E. 1141 (contract in settlement of claim for damages); *Ellis v. Howe Mach. Co.* (1880) 9 Daly, 78 (action for services); *Holm v. Claus Lipsius Brewing Co.* (1897) 21 App. Div. 204, 47 N. Y. Supp. 518 (guaranty was held valid, but principle of estoppel was recognized); *Noll v. Archer-Pancoat Co.* (1901) 60 App. Div. 414, 69 N. Y. Supp. 1007 (contract for burial of employee); *Curtis v. Natalie Anthracite Coal Co.* (1903) 89 App. Div. 61, 85 N. Y. Supp. 413, affirming (1903) 39 Misc. 586, 80 N. Y. Supp. 603, decision of supreme court affirmed without opinion in (1906) 181 N. Y. 543, 73 N. E. 1122 (assumption of indebtedness of another company); *Ring v. Long Island Real Estate Exch. & Invest. Co.* (1904) 93 App. Div. 442, 87 N. Y. Supp. 682, affirmed in *Ring v. Howell* (1906) 184 N. Y. 553, 76 N. E. 1107 (action to recover money delivered to secretary of corporation); *Schurr v. New*

this state and in several other jurisdictions is that, where one party has received the full benefit of an ultra vires contract, it cannot plead the invalidity of the contract to defeat an action upon it by the other party. . . . A contrary rule obtains in the Supreme Court of the United States."¹⁵

In one of the cases already mentioned, the general statement as to the operation of the principle of estoppel was followed by the qualification that, "if an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail."¹⁶ The precise force of these words is not altogether clear. On their face they would seem to be susceptible of a construction which would virtually assimilate the doctrine in this state to that which is applied by the courts which hold that the fact of a contract's having been executed by the party who is suing the corporation does not estop it from relying upon the defense of ultra vires, but which at the same

time concede that the claimant is entitled to any description of relief which may be obtainable after the contract has been disaffirmed. Having regard, however, to the various explicit declarations of the New York courts which show that they consider the execution of the contract as a circumstance which operates so to exclude the defense of ultra vires in an action based upon the contract itself, the words in question should possibly be construed as importing merely that a claimant may resort to such secondary remedies as may be available, if an action on the contract is, under the given circumstances, no longer open to him.

New York is one of the states in which contracts that are ultra vires and contracts that are prohibited and unlawful are deemed to be distinguishable in this respect, that no estoppel is created by the execution of a contract of the latter description.¹⁷ As to this distinction, see generally §§ 17, 18, and 44, *supra*.

York & B. Suburban Invest. Co. (1892; C. P.) 45 N. Y. S. R. 645, 18 N. Y. Supp. 454 (employment of services of agent).

In *Veeder v. Mudgett* (1884) 95 N. Y. 295, where the action was brought to enforce the individual liability of a stockholder, the court, after referring to certain similar cases in which an estoppel against pleading ultra vires had been predicated upon the fact of the defendants' having received dividends, proceeded thus: "The answer made to them is that an act absolutely and wholly void, because under the law incapable of being performed, cannot be made valid by estoppel. This is true where under the law there is an entire lack of power to do the act which is brought in question." Having regard to the fact that the invalidity of the contract in question arose from a mere informality (see § 8, *supra*), it would seem that this statement impliedly committed the court to the doctrine that no estoppel against pleading the invalidity of a contract could be created where it was ultra vires in the proper sense of the term. Such a doctrine, it is clear, was inconsistent with the decisions rendered in this state since the recognition of the principle of estoppel.

In *Gause v. Commonwealth Trust Co.* (1907) 196 N. Y. 134, 24 L.R.A.(N.S.) 967, 89 N. E. 476, the decision of the court of appeals that the defendant could not be held liable upon its guaranty was referred to the consideration that no advantage had been obtained by it from the agreement. The judgment affirmed that of the supreme court in (1908) 124 App. Div. 438, 108 N. Y. Supp. 1080, where the doctrine of estoppel was recognized *arguendo*, and the decision of the court of first instance was L.R.A.1917A.

reversed. See (1907) 55 Misc. 110, 106 N. Y. Supp. 288. For earlier proceedings in this case, see *Gause v. Commonwealth Trust Co.* (1904) 44 Misc. 46, 89 N. Y. Supp. 723, reversed in (1905) 100 App. Div. 427, 91 N. Y. Supp. 847. But the principle of estoppel was not alluded to by the supreme court.

It would seem that the doctrine stated in the text might have been invoked in *Davis Sewing Mach. Co. v. Best* (1883) 30 Hun, 638, where it was held, in an action against the receiver of a trust company, that a security which had, in violation of an implied prohibition in the company's charter, been taken for a loan made by it, could be enforced for the benefit of the depositors of the company, notwithstanding the prohibition. But the actual ratio decidendi was that, under the true construction of the charter, it was not intended by the legislature that "the taking of a class of securities prohibited should be regarded as void." The authority cited was *Union Nat. Bank v. Matthews* (1878) 98 N. S. 621, 25 L. ed. 188. See § 17 of note to *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A. 1917B, —.

In *Taylor v. Empire State Sav. Bank* (1893) 66 Hun, 538, 21 N. Y. Supp. 643, the ratio decidendi was that the statutory provision in question was not intended to render the contract void.

¹⁵ *Appleton v. Citizens' Cent. Nat. Bank* (1908) 190 N. Y. 417, 32 L.R.A.(N.S.) 543, 83 N. E. 470.

¹⁶ *Whitney Arms Co. v. Barlow* (1876) 63 N. Y. 62, 20 Am. Rep. 504.

¹⁷ *Madison Ave. Baptist Church v. Baptist Church* (1878) 73 N. Y. 82; *Woodruff v. Erie R. Co.* (1883) 93 N. Y. 609.

96. North Carolina.

The principle that the plea of ultra vires is not available to a corporation as against a claimant who has performed the contract on his side has been adopted in this state.¹

In one case the court rejected the contention that this principle was not controlling "where the contract in question was made with a municipal corporation in direct violation of a constitutional restriction or in violation of the law of public policy."² The only phase of the situation thus predicated which was considered by the court was the applicability of the principle of estoppel in respect to municipal corporations. For the doctrine adopted there is adequate authority. See § 48, *supra*. But by the theory that the defense of ultra vires is excluded even where the contract is "in direct violation of a constitutional restriction," the doctrine of estoppel seems to be given a wider extension than has so far been recognized in other jurisdictions. So far as the present writer has been able to ascertain, all other courts which apply the principle of estoppel except from its operation transactions that are contrary to public policy, and the great majority of those courts take the position that expressly

prohibited transactions also are excepted.

97. North Dakota.

In one of the syllabi prepared by the supreme court, we find the following statement: "A contract of a corporation that is ultra vires not because prohibited by positive law or inherently vicious, and not because the corporation could not, under any circumstances, make the contract, but solely because of the existing circumstances and conditions under which it was made, is never void, and the plea of ultra vires will not avail either party to such contract when the contract has been fully executed by the other party."¹ This doctrine was formulated in a case in which the corporation was the plaintiff, but the terms in which it is expressed show that it was regarded as being equally applicable to cases in which the action is brought against the corporation. Among the authorities relied upon was the case cited in the footnote, which, however, seems to be very remotely, if at all, a precedent for a doctrine the effect of which is to create an essential distinction between the two descriptions of ultra vires contracts which are specified.²

North Carolina.

¹ *Hutchins v. Planters' Nat. Bank* (1901) 128 N. C. 72, 38 S. E. 252 (action on guaranty given by bank).

The facts in *Herring v. Cumberland Lumber Co.* (1913) 159 N. C. 382, 42 L.R.A. (N.S.) 64, 74 S. E. 1011, were apparently such that the principle might have been applied; but the right of recovery was predicated on a ground independent of the contract.

² *Charlotte Twp. v. Piedmont Realty Co.* (1903) 134 N. C. 41, 46 S. E. 723, holding that a demurrer had been properly overruled in an action on a contract by which a land company had stipulated to pay part of the cost of a bridge advantageous to its property.

North Dakota.

¹ *Tourtlot v. Whited* (1900) 9 N. D. 467, 84 N. W. 8.

² *Anderson v. First Nat. Bank* (1896) 5 N. D. 451, 67 N. W. 821 (two former appeals are reported in (1894) 4 N. D. 182, 59 N. W. 1029, and (1895) 5 N. D. 80, 64 N. W. 114). There it was held that, while a national bank has no power to act as an agent for the sale of negotiable instruments, yet, if it does assume to act as such, it must account for the proceeds of the sale. The rationale of the decision was that the retention of the proceeds amounted to a conversion thereof. But the court also laid down the broad rule that the violation L.R.A.1917A.

of the law which the bank had committed by exercising powers not conferred upon it could be taken advantage of only by the sovereign authority which created it,—a doctrine which is manifestly much wider in scope than the principle of estoppel, but which, so far as regards the liability of the corporation, is productive of the same consequences as that principle in any case to which both the doctrine and the principle are applicable. See § 5, *supra*. On a subsequent appeal reported in (1897) 6 N. D. 497, 72 N. W. 916, the court merely stated that, so far as the question of ultra vires was concerned, it had nothing to add to what had been said in the previous opinion. A judgment in favor of Anderson having been affirmed, a writ of error to the Federal Supreme Court to revise it was allowed. The principal argument upon which defendant in error relied in support of his motion to dismiss the writ was that the judgment rested on two grounds, one of which, broad enough in itself to sustain the judgment, involved no Federal question. But the court said: "This contention is so far justified as to give color to the motion, although, under our decision in *Logan County Nat. Bank v. Townsend* (1891) 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 406, we must decline to sustain it, while, at the same time, that case affords sufficient authority, if authority were needed, for an affirmance of the judgment. . . .

98. *Ohio.*

In a case decided during the first half of the nineteenth century, the court used language which seems to embody the principle of an estoppel, as predicated from the fact of the defendants' having enjoyed the benefits of the contract. If the statement is to be construed in this sense, it is the earliest reported recognition of that principle.¹

In a much later case, where the defense interposed to a foreclosure suit was that the defendant had no power to borrow and give its notes and a mortgage to evidence its obligation, the court referred to the general rule, which it regarded as being well established; viz., "that, where a contract has been executed and fully performed on the part either of the corporation or of the other contracting party, neither will be permitted to insist that the contract and such performance by one party were not within the corporate power of the company."² But a doctrine of narrower scope than the rule thus formulated is enounced in the following extract from the opinion, which states the specific conclusions arrived at by the court with regard to the particular facts under review: "Where the corporation, in the exercise of apparent power to borrow, secures from another a loan of money on the faith that the power exists, it would be a miscarriage of justice to permit the company to escape liability

on the ground that, in the act of borrowing, it transcended the limits of the power granted by its charter; especially would this be so where there is nothing on the face of the paper by which the debt is evidenced, showing the company to have overstepped the boundary line of corporate privilege in the act of borrowing, and where there is no notice of a want of power or capacity to borrow, and the money is loaned and the security taken on the faith of its existence." It will be observed that the propositions of which these statements are expressive are not identical. The general rule as laid down is in nowise inconsistent with the theory that notice of the actual extent of the powers of a corporation is imputed to everyone who deals with it. It simply imports a denial that this theory is a decisive factor where the contract in question has been executed by one of the parties. On the other hand, the assumption underlying the doctrine actually applied is that the notice contemplated by the theory is not necessarily and under all circumstances imputable.

The general rule, and not the qualified doctrine, was relied upon in a later case where, in an action against the guarantor of a corporate note, the defense that the agreement with respect to the loan evidenced by the instrument provided for the payment of interest at a rate exceeding that which the maker

Here the bank was found to have itself purchased notes which the owner had authorized it to sell to a third party, and, on general principles of law, it was held liable for their value as for a conversion, even though it was not within its powers to sell them as the owner's agent. We are of opinion that the supreme court of North Dakota committed no error in the disposition of any Federal question." It is apparent that the decision of the state court was affirmed merely in so far as it rested upon the theory of a conversion. Its general remarks regarding the doctrine of ultra vires were in nowise indorsed.

As illustrating the effect ascribed to the receipt of the benefits of an ultra vires contract, the case of *Minneapolis, St. P. & S. Ste. M. R. Co. v. Oppgaard* (1908) 18 N. D. 1, 118 N. W. 830, may also be referred to, though it does not actually involve such a contract. The purport of the decision is thus stated in the syllabus written by the court: The fact that a railway company is not shown to have a separate franchise or authority to do a telegraph business for compensation is immaterial, where the railway company is shown to have assumed such franchise or authority fully, and is therefore estopped to show, as L.R.A.1917A.

against the state, that it has no franchise, as a defense to the collection of a tax levied by the state on a franchise and other property used in the telegraph business.

Ohio.

¹ *Bank of Chillicothe v. Chillicothe* (1836) 7 Ohio, pt. 2. p. 31, 30 Am. Dec. 185. There the actual ground upon which the defendant municipality was held to be liable was that it had not exceeded its powers in borrowing the money for which it was sued; but the court made the following remarks: "The language of the defendants to the plaintiffs is in substance this: True, you loaned to us this money, you did it at our earnest solicitation, we have used it for our own benefit; but we have no power to borrow, we violated our charter in so doing, and we will take advantage of this our own wrongful act, to protect ourselves from the payment of that which is your honest due. No rule of decision which will lead to such manifest injustice ought to be adopted without careful examination and much deliberation."

² *Hays v. Galion Gaslight & Coal Co.* (1876) 29 Ohio St. 330 (borrowing of money).

of the note was authorized to pay was held to be untenable, for the reason that "the tendency of the courts, based upon the strongest principles of justice, is to enforce contracts against corporations, although in entering into them they may have transcended their chartered powers, when they have received the consideration and the benefit of the contract."³ The same position has been taken in a very recent case.⁴

In a case where a foreign insurance company unsuccessfully contended in an action on a policy, that the effect of a statute declaring it to be unlawful for a person to act on behalf of such a company until it had complied with certain requirements was to render the policy void, the ratio decidendi was that that statute should not be construed as being intended to invalidate its policies.⁵ Having regard to the later decisions of the court, it may be surmised that in a case of this sort the principle of estoppel would now be relied on, and treated as controlling, unless the court should defer to the authority of those cases which declare that the principle cannot be invoked where the action is brought on an expressly prohibited contract.

³ *Larwell v. Hanover Sav. Fund Soc.* (1883) 40 Ohio St. 274, relying upon the case cited in the preceding note.

⁴ In *Siders v. Gem City Concrete Co.* (1910) 33 Ohio C. C. 552, which was affirmed without any opinion in (1913) 87 Ohio St. 579, 102 N. E. 1124, it was laid down in the syllabus written by the court, that a corporation which has purchased its own stock and given a note in payment, and thereafter sells the stock, is estopped from setting up the defense of want of power to make such a purchase.

⁵ *Union Mut. L. Ins. Co. v. McMillen* (1873) 24 Ohio St. 79.

Oklahoma.

¹ *Shawnee Nat. Bank v. Purcell Wholesale Grocery Co.* (1912) 34 Okla. 34, 41 L.R.A.(N.S.) 494, 124 Pac. 603 (action for price of goods purchased by the bank in carrying out a construction contract).

² In *Crowder State Bank v. Aetna Powder Co.* (Okla.) post, 1021, (action for price of articles purchased) the second of the syllabi prepared by the court runs as follows: "It may be considered as settled law in this state to-day that, when a corporation goes outside of its legitimate business and makes a contract, and that contract is executed, and the corporation has received the benefits of the contract, the courts will not listen to a plea of ultra vires."

In *Rounds & P. Lumber Co. v. Thompson* (1915) — Okla. —, 153 Pac. 648, where L.R.A.1917A.

99. Oklahoma.

In a case where the essential question presented by the evidence was whether a bank which, for the purpose of collecting a debt owed to it, had undertaken to perform a contract into which the debtor had entered, but which was ultra vires as to the bank, could repudiate a debt incurred to a third party as an incident of its undertaking, after it had received the consideration of that debt, the court expressed the opinion that the preferable ground upon which to place a recovery under such circumstances is "that the corporation, having received money or property by virtue of a contract not immoral or illegal of itself, is estopped to deny liability."¹ The principle thus enunciated has also been affirmed in three later cases.²

100. Oregon.

The supreme court has recently stated its position in the following terms: "We think that both reason and the weight of authority are to the effect that, where a corporation has entered into a contract in excess of its granted powers, and has received the fruits or benefits of the contract, and an action is brought

an action for the foreclosure of a mechanics' lien was brought by a corporation which had become surety on a contractor's bond for the purpose of inducing a property owner to award to him a contract for the erection of a building, one of the points determined was that shown by the following passage in the opinion: "Under the circumstances of this case, even if it appeared that plaintiff was not specifically empowered to execute said bond as surety, it should not be permitted to take advantage of such assumed want of power to bind itself as it purported to do by the bond. After obtaining the substantial benefits accruing to it by the sale of its material to the contractor, it is estopped to invoke the doctrine of ultra vires, and thus escape liability on its bond."

The effect of *Western & S. Fire Ins. Co. v. Murphy* (1916) — Okla. —, 156 Pac. 885, is thus stated in a syllabus written by the court: "Where a corporation purchased stock from its president and released him from certain stock subscriptions in consideration of his resignation, in an action on its promissory notes given in payment therefor it is estopped to defend on the ground that the contract was ultra vires, after having received and retained the benefits of the transaction, and voluntarily placed itself in a position where it could not put the plaintiff in statu quo."

See also *American Nat. Bank v. E. W. Adams & Co.* (1914) 44 Okla. 129, L.R.A. 1915B, 542, 143 Pac. 508, the effect of which is stated in § 7, note 3, supra.

against it to enforce the contract, it is estopped to set up the defense that it had no power to make it."¹

101. *Pennsylvania.*

In the earliest case which bears upon the principle of estoppel, the defendant was a municipal corporation, and liability on certain scrip notes was imputed to it for reasons thus stated: "It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is power to contract, undoubtedly, and if a series of contracts has been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted. A bank which has long been in the habit of doing business of a particular description would not be exonerated from liability because such business was not expressly authorized in its charter. The object of all law is to promote justice and honest dealing, when that can be done without violating principle. I cannot perceive that any principle is violated by holding a corporation liable for the contracts of its accredited agents, even not expressly authorized, when these contracts, for a series of times, were entered into publicly, and in such a manner as, by necessary and irresistible implication, to be within the knowledge of the corporators. It was the acquiescence of the corporators, and the habit and custom of business of the corporation, which induced the public to give credit to the scrip or notes, which was evidence of contract. But when to this circumstance we add that the corporators themselves received the value of these notes or contracts in the erection of improvements in the city, and enjoyed and still enjoy the value of them, the conclusion is irresistible that the corporators ought to pay them by the assessment of taxes on the corporators, if they have no other available means. The debt is due by positive engagement, it is due *ex æquo et bono*,—in the forum of conscience and the forum of law. One rule of law is often met

and counterchecked by another of equal force, so that, although the corporators are in general protected from unauthorized acts of their agents, yet, at the same time, a rule of equal force requires that they should not deceive the public, or lead them to trust and confide in unauthorized acts of their agents. If they receive the avails and value of those acts, it is implicit evidence that they consented to and authorized them. They adopt the act, and are responsible to those who on the faith of such acquiescence and approbation trusted their agents."¹ From this extract it is apparent that the judgment of the court was referred to two distinct conceptions; viz., (1) The presumed acquiescence of the corporators in the making and performing of the contracts in question and (2) the impropriety of allowing the corporation to repudiate contracts the benefits of which it had received and enjoyed. It will be observed, moreover, that the latter of these conceptions is viewed under a double aspect; that is to say both as an element tending to show the acquiescence of the corporators, and as an element pointing to the conclusion that it would be inequitable to sustain the defense of *ultra vires* under the given circumstances. The early date of this case renders it specially important for the purposes of a summary of the evolution of the principle of estoppel, and it has always been treated as a leading authority by the courts which have adopted that principle.² The obvious defect in the argument of the court is that it entirely ignores the element which constitutes one of the foundations of the doctrine under which the principle of estoppel is repudiated; viz., that persons dealing with a corporation are chargeable with knowledge of the extent of its powers.

Subsequently, we find the court using language which would seem to commit it to the doctrine that a corporation whose managing agents, with the consent of the directors or stockholders, engage in a business outside the scope of its charter powers, is bound by all the contracts which they may make in

Oregon.

¹ *Roane v. Union Pacific L. Ins. Co.* (1913) 67 Or. 264, 135 Pac. 892 (action on note delivered in pursuance of a compromise settlement, by a foreign insurance company which had not complied with the statutory prerequisites to the transaction of business in Oregon).
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Pennsylvania.

¹ *Allegheny City v. McClurkan* (1860) 14 Pa. 81 (action of debt).

² It was one of the precedents relied upon by Comstock, Ch. J., in the well-known opinion which he delivered in *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 279.

conducting that business.³ Such a doctrine is clearly opposed to the authorities as a whole. Nor can it be reconciled with the majority of the decisions reviewed below, unless we assume that as stated in this instance, it was intended to apply only to executed contracts,—a limitation which is certainly not indicated by any of its remarks.

The next two cases in which the right to maintain an action upon an ultra vires contract was considered seem to be, upon the facts, inconsistent with the theory that the defense of invalidity cannot be set up by a corporation which has accepted the benefits of the contract. The rights and liabilities of the parties were defined by certain statutes which authorized the plaintiff county to subscribe to the stock of a railroad company, to issue bonds with interest coupons attached, and to deliver them to the company in payment of stock, and which empowered the company to receive these bonds on the terms of paying interest to the county, or its creditors holding the bonds, equal to the interest falling due from time to time on the bonds. The first case proceeded upon the ground that, "without express authority, or beyond the limits of authority conferred, . . . the company had no power to bind its stockholders, who constituted the company, to pay interest to the county of Allegheny for a period of thirty years, or any other period."⁴ These words were quoted with approval in the second case.⁵ But the fact was also adverted to "that the county has no such peculiar equities as would evoke the doctrine of estoppel in its favor, even were we in a position to

apply it. The county received the same compensation for its subscription that others did. It can stand on no higher level and can ask for no greater consideration than its fellow shareholders." The position of the court in another point of view is indicated by the further remark: "It is not to be doubted but that not merely a corporation, but also any natural person, may repudiate a contract executed by an agent without authority. In the case in hand, the directors of the Pittsburgh & Steubenville Railroad Company, in executing the contract with the county, acted ultra vires in that they agreed that the county shares of stock should bear interest, and, having so acted, the company may well repudiate that contract." From this statement of the purport of the cases it is apparent that the circumstance that the defendants had enjoyed the benefits accruing to them from the subscription was not an element in the decisions, as rendered. In view of the controlling force ascribed to that circumstance in the case first noticed in the present section, the omission of the court to discuss it is difficult to explain; if the same effect had been attributed to it as in that case, both decisions must seemingly have been in favor of the claimant. But the earlier case was not referred to at all in either of the opinions.

All the more recent decisions proceed upon or are consistent with the principle that, "where a corporation has entered into a contract which has been fully executed on one part, and nothing remains but for it to pay the consideration money, it will not be allowed to set up that the contract is ultra vires."⁶

³ In *Hagerstown Bank v. Loudon Savings Fund Soc.* (1861) 3 Grant, Cas. 135, previous appeal (1860) 36 Pa. 498, 78 Am. Dec. 390, the court observed, arguendo: "If a bank should engage in building a railroad, for instance, it would violate the law of its existence, but the acts of the cashier in pursuit of the unauthorized purpose would bind the bank. As between the bank and those who contracted with it, the new enterprise would become a part of its usual and appropriate business, in the conduct of which it would be liable for the acts of its agents. But if its agents departed from that new enterprise and attempted to involve the bank in other unlawful pursuits without the express sanction of the directors or stockholders, there would be no legal ground of liability." This is certainly very sweeping language, and it would seem that the doctrine which it embodies was not necessary for the support of the decision rendered in the case under review; viz., that, where a corporation is author-

ized to receive deposits of money in the ordinary course of its business, a demand for the repayment of a particular deposit cannot be resisted by it on the ground that it really received the money with a view to relending it at a higher rate of interest than that paid to the depositor. Under such circumstances, it is submitted (1) that there was involved merely an abuse of corporate powers rather than a departure from them, and (2) that, even if such a departure was involved, it was so dissociated from the deposit that the rights of the depositor could not be affected by it.

⁴ *Pittsburg & C. R. Co. v. Allegheny County* (1869) 63 Pa. 126, where it was held that, having regard to the provisions of the Enabling Act, the county was entitled to recover interest on the railroad bonds "until the completion of the road," and no longer.

⁵ *Pittsburg & S. R. Co. v. Allegheny County* (1875) 79 Pa. 211.

⁶ *Wright v. Pipe Line Co.* (1882) 101 Pa.

In other words, "a corporation may not avail itself even of ultra vires as a defense, where a contract has been entered into and executed in good faith by the other party and the corporation has received the benefit of the performance."⁷ This doctrine, however, is apparently regarded as being inoperative except in cases where some positive advantage has accrued to the corporation. That prejudice was suffered by the other party does not entail the same

consequences as benefits actually received seems to be the virtual effect of a decision that no action could be sustained on a guaranty executed by a national bank for accommodation merely.⁸

It has been expressly held that the principle of estoppel has no application to cases in which the contracts are declared by a statute to be unlawful and void.⁹

204, 47 Am. Rep. 701 (action by a person who purchased, with notice of the circumstances, a promissory note given by one company for the price of stock of another company). The court observed that this was the doctrine applied in *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* (1876) 83 Pa. 160, 2 Mor. Min. Rep. 421 (agreement by railway company to pay a certain sum per barrel on all oil transported by it, in consideration that the pipe line company would deliver all the oil under its control for transportation). The court also asserted that its decision was "but declaratory of the law as ruled in a number of earlier cases." In all the cases cited, however, the actual theory upon which recovery was allowed was that the plaintiff could establish his case without the aid of the illegal contract,—a theory from which the deduction was drawn that, "where the plaintiff has made out his case without calling the illegal transaction to his aid, the defendant, who had enjoyed its benefits, cannot set up the defense of ultra vires." The court continued thus: "When the plaintiffs offered the note in evidence, they had a perfect prima facie case, and did not need the aid of any illegal transaction to entitle them to a verdict. They required no aid from the contract for the sale of the stock. That, as before observed, had been fully executed, and was a matter with which the plaintiffs had nothing whatever to do. After the plaintiffs had made out their case, the defendants set up their want of corporate power to buy the stock, by way of defense. This with the stock transferred to them and unpaid for. The effect of this defense, if successful, would be to punish innocent parties who had no connection with the illegal transaction, for the wrongful act of the defendant corporations." In this latter part of its opinion the court has obviously shifted its position to some extent from that which is indicated by the general language quoted in the text. But as the case of *Oil Creek & A. River R. Co. v. Pennsylvania Transp. Co.* supra, undoubtedly embodies the broad doctrine thus formulated, the later case may justifiably be regarded as an authority for that doctrine, as well as the more restricted one to which the decision was finally referred.

⁷ *Presbyterian Board v. Gilbee* (1905) 212 Pa. 310, 61 Atl. 925 (arguendo in a case in which a mere informality was involved), cited in *Pannebaker v. Tuscarora Valley R. L.R.A.* 1917A.

Co. (1907) 219 Pa. 60, 67 Atl. 923 (arguendo in a case turning on authority of president), and in *Ramble v. Pennsylvania Coal Co.* (1911) 47 Pa. Super. Ct. 28 (action to recover balance of 10 per cent retained under a contract to cut and haul lumber).

For other cases in which the principle of estoppel was recognized, see *Boyd v. American Carbon Black Co.* (1897) 182 Pa. 206, 37 Atl. 937, reversing (1897) 6 Pa. Dist. R. 209 (demurrer based on ground of ultra vires held to have been improperly sustained to a bill for an accounting in respect to partnership transactions); *Union Trust Co. v. Mercantile Library Hall Co.* (1899) 189 Pa. 263, 42 Atl. 129 (foreclosure of mortgage given to secure bonds which exceeded the defendant's borrowing power); *Doylestown & D. Turnp. Road Co. v. Philadelphia & E. Electric R. Co.* (1912) 49 Pa. Super. Ct. 381 (action to recover stipulated rent).

In *Pittsburg, J. E. & E. R. Co. v. Altoona & B. C. R. Co.* (1900) 196 Pa. 452, 46 Atl. 431, where the suit was brought to forfeit an ultra vires lease, and there was a cross bill praying that the lessor should be restrained from collecting the rent by distress and from terminating the lease, the court observed: "The cry of ultra vires is made by a party to the contract,—to the executed agreement from which it has already derived some benefit. If it is ultra vires now, it was ultra vires then, when the contract was solemnly entered into by this appellee, with the full knowledge that there was no connecting line, and equity will turn a deaf ear for relief from a compact intelligently and deliberately made when prayed for by a party to it whose conscience has become quickened only when hopes are disappointed and expectations not realized."

⁸ *National Bank v. Sixth Nat. Bank* (1905) 212 Pa. 238, 61 Atl. 889. The only question discussed, however, was whether the guaranty was ultra vires, and this question was answered in the affirmative on the authority of the rulings of the Federal Supreme Court. It is somewhat curious that the court did not refer either to its own decisions with respect to the principle of estoppel, or to the Federal decisions which reject that principle. This case was followed in *Bank of Barnwell v. Sixth Nat. Bank* (1905) 28 Pa. Super. Ct. 415.

⁹ *Weed v. Cumming* (1901) 198 Pa. 442, 48 Atl. 409, affirming (1900) 12 Pa. Super. Ct. 412.

102. Rhode Island.

In a case where the plaintiff was held to be entitled to reclaim money advanced to a corporation under its ultra vires agreement to repay the loan in preferred stock, the recovery was said to be not under the contract, but in disaffirmance of it.¹ The position thus taken may presumably be regarded as indicating that in the view of the court the fact of the contract's having been performed on the side of the claimant would not have precluded the defendant from relying on the defense of ultra vires, if the action had been brought upon the contract itself.

103. South Carolina.

The doctrine that a corporation which has received the benefits of a contract is estopped from pleading ultra vires in an action founded upon it has been adopted in this state.¹

Rhode Island.

¹ *Anthony v. Household Sewing Mach. Co.* (1889) 16 R. L. 571, 5 L.R.A. 575, 18 Atl. 176.

South Carolina.

¹ *Williamson v. Eastern Bldg. & L. Asso.* (1898) 54 S. C. 582, 71 Am. St. Rep. 822, 32 S. E. 765 (decision with regard to a motion to dissolve an attachment), (1901) 62 S. C. 390, 38 S. E. 616 (action held to be maintainable for the face value of shares in the defendant corporation). The court said: "If the agreement was ultra vires, and the association entered into it knowing it could not perform its part thereof, and thereby induced the plaintiff to part with his money in the purchase of stock, then it was a tort, and the defendant would be liable therefor. Furthermore, even if the agreement was ultra vires and the defendant could interpose this plea, it would not be allowed to retain the benefits which it derived therefrom, and this would give the plaintiff a cause of action." The second of these two judgments was affirmed in *Eastern Bldg. & L. Asso. v. Williamson* (1902) 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. Rep. 527. See § 68, *supra*.

For a later case in which the doctrine stated in the text was applied, see *Kammer v. Supreme Lodge, K. P.* (1912) 91 S. C. 574, 75 S. E. 177 (action on benefit certificate).

² *Lancaster County v. Cheraw & C. R. Co.* (1887) 28 S. C. 134, 5 S. E. 338.

South Dakota.

¹ *Dorsett v. Black Hills Traction Co.* (1912) 30 S. D. 420, 138 N. W. 808, Ann. Cas. 1916A, 846 (action on contract by traction company to furnish water for irrigation purposes), referring to Judge Thompson's monograph in 10 Cyc. 1157, and his treatise on Corporations, §§ 8318-8321. L.R.A.1917A.

This is one of the states in which the doctrine has been held to be applicable to public corporations.²

104. South Dakota.

The following statement of an eminent text writer has been approved: "The great mass of judicial authority seems to be to the effect that, when a private corporation has entered into a contract in excess of its granted powers, and has received the fruit or benefits of the contract, and an action is brought against it to enforce the obligation on its part, it is estopped from setting up the defense that it had no power to make it."¹

105. Tennessee.

In the earliest relevant case, the ground upon which relief was granted in an equitable suit for an accounting in respect to transactions under an ultra vires contract was that the plaintiff was not in *pari delicto* with the defendant.¹

The only South Dakota case cited was *Sweeney v. United Underwriters Co.* (1912) 29 S. D. 576, 137 N. W. 379, the effect of which is thus stated in the syllabus written by the court: "Civil Code, §§ 425, 436, which authorize a corporation to hold its own stock on certain conditions, and which prohibit withdrawal of any part of the capital stock, etc., are designed solely for the protection of creditors and stockholders; and if an agreement by a corporation in selling stock, to repurchase it at the buyer's option, is ultra vires under those sections, the corporation cannot repudiate such option and yet retain the purchase money."

Tennessee.

¹ *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.* (1850) 11 Humph. 1, 53 Am. Dec. 742. There the agent of the complainant, an Ohio corporation, who resided in New York, and the agent of the defendant, a Tennessee corporation, who resided in Philadelphia, entered into an arrangement under which the complainant opened an account in favor of the defendant to be drawn upon, and to be made good by the latter. In pursuance of this transaction a debt of several hundred thousand dollars was created in favor of the former against the latter. The agent of the complainant company was not acquainted with the restrictions of the charter of the defendant company, which, while allowing the drawing of the drafts for specific purposes, prohibited banking; nor had he been informed of the purposes of the various drafts drawn by the latter on him. Held, that the complainant was entitled to recover of the defendant the balance of account in its favor, to subject to the satisfaction of its claim the capital stock of the defendant company, and to hold the individual stockholders liable therefor.

It was explicitly stated that the relief granted was "against the contract, and not upon the contract." But the court added the significant statement "that, in the nature of things, the law cannot enforce an illegal contract, although the parties be not in *pari delicto*. But it is consistent with itself that the law shall annul such contract, and place the parties in all respects in *statu quo*." These general remarks may warrantably be construed as indicating that, in the opinion of the court, an *ultra vires* contract was incapable of enforcement, irrespective of whether it had or had not been performed by the plaintiff on his side.

About twenty years afterward the principle of an estoppel, as based upon the receipt of money and its use for corporate purposes, was recognized in a case involving somewhat peculiar circumstances.² The position thus taken, in so far as it may be regarded as evincing the adoption of a general doctrine,

and not as being referable to the special facts in evidence, was clearly inconsistent with the views expressed in the earlier case, which, however, was not adverted to by the court.

Subsequently, the contention that, as the contract had been executed on the part of the claimant, "it would be inequitable and unjust to rely upon the doctrine of *ultra vires*," was explicitly rejected.³ That position was adhered to in the most recent case in which the subject has been considered.⁴

The position of the court with regard to the absolutely void quality of an *ultra vires* contract is also illustrated by a later case which proceeded upon the ground that, "where a corporation has authorized its agent to make a contract beyond its charter power, or *ultra vires*, and such contract is made by the agent, he incurs no personal liability."⁵ The court laid it down such a contract is not susceptible of ratification.

In a very recent case, one which in-

² *Mobile & O. R. Co. v. Wisdom* (1871) 5 Heisk. 125. This was a proceeding by mandamus to compel the defendant company to receive, in payment for freight or passage on the road, certain tax receipts given by the tax collector of a county. The facts which were relied upon as a ground for the application of the principle were these: The legislature had authorized the people of counties to subscribe for stock, and to pay the subscriptions by imposing taxes on themselves. In order to secure subscribers the defendant company not only agreed that the counties so furnishing aid should be represented in the company, but that every individual who should buy up \$100 of the tax receipts should become a stockholder, and in addition to this, that every holder of the tax receipts, who preferred to invest his tax receipts in freight or passage on the road, should have the right to do so. The court thus stated its conclusions: "The acceptance of the assistance from the county of Madison imposed all of these obligations on the united corporation represented by its officers. Each of these obligations is equally binding on the corporation, and after having accepted the taxes, and used them for the common benefit in building the road, they cannot now repudiate any one of the obligations thus assumed."

³ *Miller v. American Mut. Acci. Ins. Co.* (1893) 92 Tenn. 167, 20 L.R.A. 765, 21 S. W. 39 (action on insurance policy). The decisions of the English courts, and those rendered by the Supreme Court of the United States, and in Massachusetts and Alabama, were approved. The general remarks in the opinion with regard to the conflict of judicial views are referred to elsewhere.

This decision was to some extent fore-
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shadowed by one rendered a few years before, to the effect that a bill to enforce an *ultra vires* guaranty of a special dividend on stock could not be maintained. *Memphis Grain Elevator Co. v. Memphis & C. R. Co.* (1887) 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. 52. But the essential element of a receipt of the benefits of the contract was not so distinctly present in this transaction as to render the case a perfect precedent for the doctrine enunciated in the later one.

Another earlier case, *Mallory v. Hanaur Oil Works* (1888) 86 Tenn. 598, 8 S. W. 396, proceeded upon the ground that an action in respect to the unperformed residue of a continuing *ultra vires* contract was not maintainable. See § 3, *supra*.

⁴ *Tennessee Ice Co. v. Raine* (1901) 107 Tenn. 151, 64 S. W. 29, where a decision holding that the lower court had improperly sustained a demurrer to a petition in insolvency proceedings for the allowance of a claim in respect to beer sold to an ice company was put upon the ground that, "while the petitioner may not recover upon the contract, as in affirmance of the same, it has the right to disaffirm such contract and sue for the proceeds of its property, which the ice company, under the guise of a contract, has received, and which it seeks to repudiate without accounting for the benefits received. . . . The petition is in the alternative that a recovery be had in affirmance of a sale, but if this cannot be done over the objection of the ice company, then that petitioner be allowed to disaffirm the contract and sue for the proceeds of the goods sold and not paid for, on the idea of a *quantum valebat*, or of money had and received, or consideration retained upon a void sale."

⁵ *Hermitage Hotel Co. v. Dyer* (1911) 125

volved the disposition of the assets of an insolvent corporation, the reason assigned for holding that no liability could be established against the assets in question was that a certain bank had exceeded its power when it purchased a controlling interest in another bank.⁶

106. Texas.

The doctrine of estoppel was recognized in the earliest cases in which the supreme court had occasion to express an opinion upon the subject.¹ In a somewhat later case the point involved was the enforceability of certain mortgage bonds which had neither been authorized nor ratified by vote of the holders of two thirds of the corporate stock, as the statute required. It was laid down that, "when the contract is executed and the corporation has received the benefit, the weight of authority seems to be that the corporation should be held estopped to deny its authority to make it."² Having regard to the actual facts here involved and the specific grounds upon which the decision was placed, the judgment itself goes no further than to affirm the principle of an estoppel in relation to cases in which a contract falling within the scope of the corporate powers is not executed in the manner prescribed by statute. See § 8, *supra*. But the statement above quoted and the authorities cited with approval show clearly that that principle was regarded as extending also to cases in which the contract is *ultra vires* in the proper sense of the expression.

The next decision involved the right

of recovery upon bonds jointly executed by two corporations in excess of their powers. Under the peculiar circumstances in evidence, the transaction was treated as invalid for the reason that it was substantially one in which the two corporations agreed that a sum of money to be divided between them should be borrowed, on the security of bond, and that each should become the surety for the other for the amount received by such other. It was held that, as neither of the corporations could bind itself by accommodation paper executed for the benefit of the other, the only ground upon which one of them could be held liable for more than its proportionate amount of the debt incurred was that it had power to aid in the prosecution of the other's business. The court was of opinion that it had no such power. The actual ratio decidendi was that, as the corporations had bound themselves jointly and severally, each should be held liable for so much of the indebtedness as it could legally have bound itself to pay.³

A subsequent case in which the innocent purchaser of a promissory note guaranteed by the defendant was held to be entitled to enforce the guaranty turned upon the theory that the guaranty was merely "a misuse of granted power."⁴ This expression is somewhat ambiguous, since it may be construed either as showing that the transaction was deemed to be one of the kind discussed in §§ 9 et seq., *supra*, and consequently entirely outside the *ultra vires* category, or as reflecting an acceptance of the distinction recognized by some

Tenn. 302, 142 S. W. 1117 (action against president of corporation for balance of subscription to stock).

⁶ Wood v. Green (1914) 131 Tenn. 583, 175 S. W. 1139.

Texas.

¹ In *Indianola v. Gulf, W. T. & P. R. Co.* (1882) 56 Tex. 594, where an action brought to enforce the provisions of a contract by which the defendant had been granted a right of way was held to be maintainable, the court said: "This defense of the company, that its directors had no authority to make the contract when the desired right of way had been secured by it, and the company had been for years and was still in the enjoyment of the same, to say the least of it, is an exceedingly narrow defense, shorn of all equity, and is entitled to no favorable consideration."

In *Texas & St. L. R. Co. v. Robards* (1883) 60 Tex. 545, 48 Am. Rep. 268, the contract in question was held to be *intra vires*, but the court referred with approval L.R.A.1917A.

to the statement in *Waterman on Specific Performance*, § 220, concerning the effect of performance. See § 41, *supra*.

² *Texas Western R. Co. v. Gentry* (1888) 69 Tex. 625, 8 S. W. 98.

³ *Northside R. Co. v. Worthington* (1895) 88 Tex. 562, 5 Am. St. Rep. 778, 30 S. W. 1055.

⁴ *Gaston v. J. I. Campbell Co.* (1911) 104 Tex. 576, 140 S. W. 770, modified in (1911) 104 Tex. 585, 141 S. W. 515, reversing (1910) — Tex. Civ. App. —, 130 S. W. 222. The court distinguished the cases relied upon by the defendant in error, on the ground that in them all "it appeared either that the corporation executing the guaranty was without legal authority to execute the contract sued on at all, or that the note sued on, by its terms, gave notice of its vice and infirmity, that it was obtained without payment of what in law is termed 'valuable consideration,' or that the purchaser, when he received the note thereafter sued on, had notice that the indorsement was without consideration."

judges between contracts ultra vires in the sense that corporation is not authorized to make them under any circumstances, and contracts ultra vires in the sense that they involve a wrongful exercise of a power conferred by the charter. See § 43, supra. But as the broad theory of the Federal Supreme Court, that the principle of estoppel cannot be invoked for the purpose of affecting a corporation with liability in respect of an ultra vires contract,⁵ was approved, the former of these alternative explanations is apparently the correct one. If so, the decision would indicate a withdrawal from the position taken in the first of the cases cited in this section.

That position, however, was resumed in a somewhat later case in which the

defense interposed was that the contract in question was invalid as having reference to an unauthorized business.⁶ The ground upon which the right of recovery was affirmed was "that an action for damages for breach of contract will not be avoided by the plea of ultra vires when the corporation has received benefits under the alleged illegal contract. In such a case, and under such circumstances, the corporation is estopped from denying its power to make the contract."

Nearly all the decisions of the court of appeals are in full accord with the doctrine that a corporation is estopped from setting up the plea of ultra vires in an action founded upon a contract of which it has received the benefits.⁷ But a portion of its rulings seem to be

⁵ The case cited was *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 50, 35 L. ed. 55, 65, 11 Sup. Ct. Rep. 478.

⁶ *Kincheloe Irrigating Co. v. Hahn Bros.* (1912) 105 Tex. 231, 146 S. W. 1187, affirming (1910) — Tex. Civ. App. —, 132 S. W. 78 (agreement by irrigation company to furnish land as well as water).

⁷ In *Galveston & W. R. Co. v. Galveston* (1896) — Tex. Civ. App. —, 37 S. W. 27, the defendant having failed to extend its road across Galveston bay in pursuance of the terms of the contract by which it acquired, upon condition of its building such an extension, the right to use the streets of Galveston, the city brought suit to have the license forfeited. The railroad charter did not authorize it to build a railroad across the bay, nor had it received permission from the Federal authorities to construct a bridge across the bay. The contention of its counsel was that, as it had no authority to extend its road or build a bridge across the bay, its agreement with the city to do so was ultra vires, and consequently that the condition was void. But the court said: "By entering into the agreement the appellant acquired a valuable right which it has ever since enjoyed. It will not be permitted to retain and enjoy the right, and refuse to perform the condition, and defeat the forfeiture on the ground of its want of authority to make the contract by which the right was secured. It is estopped to set up any such defense." This decision was reversed in (1897) 90 Tex. 398, 36 L.R.A. 33, 30 S. W. 96. But the principle of estoppel was not referred to.

In *Lottman Bros. Mfg. Co. v. Houston Waterworks Co.* (1896) — Tex. Civ. App. —, 38 S. W. 357, the right of the plaintiff to recover damages for the failure of the defendant to furnish water as stipulated was affirmed on the ground that, if the defendant received the agreed consideration, it could not, while holding the money, say L.R.A.1917A.

that it had not authority to make the contract.

In *Sabine Tram Co. v. Bancroft* (1897) 16 Tex. Civ. App. 170, 40 S. W. 837, the executed part of an unauthorized contract of partnership was held to be enforceable.

In *Gross v. Brewster* (1900) — Tex. Civ. App. —, 55 S. W. 590, the ratio decidendi was that an ultra vires guaranty was not binding by way of estoppel unless the corporation had received benefits therefrom.

In *First Nat. Bank v. Greenville Oil & Cotton Co.* (1901) 24 Tex. Civ. App. 645, 60 S. W. 828, the defendant national bank, after having taken a mortgage on cattle belonging to a person to whom it had lent money, agreed that, if the plaintiff would sell and deliver certain feed stuffs to that person, it would pay for them. In pursuance of this agreement the plaintiff supplied the feed stuffs. Held, in an action on the agreement, that, as the bank was interested in the improvement of the cattle, and they were improved by the feed supplied, and could not have been placed on the market if it had not been supplied, the bank could not defeat a recovery on the ground that the agreement was ultra vires.

In *Continental F. Asso. v. Masonic Temple Co.* (1901) 26 Tex. Civ. App. 139, 62 S. W. 930, the liability of a Texas insurance company upon a policy issued in Ontario was affirmed against the objection that the policy was ultra vires and void as being in violation of the corporate charter and of the laws of Texas and of the laws of the Dominion of Canada. The doctrine applied was "that, where the contract is executed and the corporation has received the benefits of it, it cannot invoke its want of power as a defense." The court also adverted to the considerations, that the party insured, being a resident in a foreign county, could not be expected to know the provisions of the defendant's charter, and that, as its members were presumably cognizant of the fact that it was doing business outside the state, and

more or less inconsistent with those of the supreme court.⁸

107. *Vermont.*

An early decision holding the defendant railway company to be liable in an action of assumpsit founded upon its failure to transport a chattel with reasonable despatch to a place beyond the limits of its line was based upon the

ground that, "if the corporators acquiesce in the extension of the business of the company, even beyond the strict limits of its charter upon the most literal interpretation, and strangers are thereby induced to contract upon the faith of the authority of the agents of such companies, the companies are not at liberty to repudiate the authority of such agents, when their transactions

that in so doing it was acting beyond its powers, it was more just that the loss should fall upon them than that the insured should fail to receive his insurance money. But under the circumstances a reference to these elements seems to have been superfluous.

In *Whaley v. Bankers' Union* (1905) 39 Tex. Civ. App. 385, 88 S. W. 259, where it was held that a claim under a benefit certificate was not enforceable on the ground of an equitable estoppel, the ground of the decision was that the claimant had paid nothing to the defendant company, and that it had not received anything of value belonging to him, nor made any promise or agreement based upon any consideration moving from him.

In *Deaton Grocery Co. v. International Harvester Co.* (1907) 47 Tex. Civ. App. 267, 105 S. W. 556, the principle of estoppel, which had been invoked as the ground upon which the plaintiff was entitled to enforce an ultra vires guaranty, was held to be inapplicable, for the reason that the guarantor company "received nothing from the plaintiff or anyone else as a consideration for making the contract, and therefore was not withholding from the plaintiff or anyone else anything received by it upon the contract."

In *W. C. Bowman Lumber Co. v. Pierson* (1911) — Tex. Civ. App. —, 139 S. W. 618, the court proceeded on the theory that, as the signing of the guaranty which it was sought to enforce was a "pure gratuity," there was no question of estoppel involved.

In *San Antonio Hardware Co. v. Sanger* (1912) — Tex. Civ. App. —, 151 S. W. 1104, an action on notes given by the defendant for the price of shares of its own stock was held to be maintainable, as coming within the scope of the rule that, "when a contract with a corporation is merely ultra vires, not being prohibited by law, and not contrary to public policy, and the party contracted with the corporation has performed his part of the contract, his action cannot be defeated by a plea of ultra vires on the part of the corporation."

In *Phoenix Land Co. v. Exall* (1913) — Tex. Civ. App. —, 159 S. W. 474 (action of trespass to try title and for the recovery of rent), an attorney, after having recovered land under a contract for the payment of a contingent fee by his clients, conveyed the interest thus acquired to the defendant company, which held the legal title for them. The object of the convey-

ance was to enable the grantee to defend a suit more effectively. Held, that, as the company received the full benefit of the performance of the contract entered into between it and the grantor, the ends of justice would be defeated, and a legal wrong done, by permitting the company to defeat the enforcement of the contract on its part by its plea of ultra vires.

In *Waller v. Gorman Mercantile Co.* (1911) — Tex. Civ. App. —, 141 S. W. 833, where the defendant was sued upon its indorsement of three notes, the right of action was affirmed on two grounds; viz., (1) that, as the indorsement was not for accommodation merely, as was claimed, the doctrine of ultra vires was wholly inapplicable; and (2) that, if it were in any sense applicable, the case would fall within the rule which prohibits a corporation from receiving and retaining the benefits of an ultra vires contract and repudiating its obligations thereunder.

In *Taylor Feed Pen Co. v. Taylor Nat. Bank* (1915) — Tex. Civ. App. —, 181 S. W. 534 (former opinion as reported in (1915) — Tex. Civ. App. —, 177 S. W. 176, was withdrawn), the suit was brought to cancel a note and deed of trust executed by the Taylor Feed Pen Company to secure a loan which it used for the purpose of guarantying the debt of another company in which it had no interest. One of the reasons assigned for affirming the judgment of the lower court was that "appellant, having received a valuable consideration for the execution of the note and mortgage, and not having tendered back the same, is estopped to plead ultra vires." In the opinion a distinction was taken between contracts which a corporation "has no capacity to make under any circumstances" and those which merely constitute an "abuse of its power," and the doctrine of estoppel was declared to be applicable only in respect of the latter class.

In *Coppard v. Farmers' & M. State Bank* (1916) — Tex. Civ. App. —, 184 S. W. 551, Coppard, the trustee in bankruptcy of the Bain Mercantile Company brought suit against the defendant for conversion of the assets of the bankrupt estate, including a certain note executed by the president of the bankrupt as security for a loan. The defense raised was that the defendant was entitled to hold the note as collateral until the balance of the debt was paid. The right to interpose such a defense obviously depended upon whether the transaction created an obligation enforceable

prove disastrous."¹ Having regard to the facts under review, it is clear that this decision was in harmony with the principle of an estoppel as based upon the execution of the contract by the claimant. But at the date when the decision was rendered that principle had as yet been very little discussed, and apparently the attention of the court was not directed to it. The theory adopted, viz., that a corporation may, as a result of the acquiescence of the corporation in its transaction of a kind of business which lies outside its charter powers, render itself liable for the breach of a contract made with reference to such business, is essentially inconsistent with the conception of an ultra vires agreement which, as is shown *infra*, was subsequently adopted.

In a later case where trover was brought for bonds which had been deposited in a national bank and stolen, the

against the company. The theory of the plaintiff was that the effect of the transaction was to render the company a mere surety for a personal debt of its president. But the court ruled in favor of the defendant, on the ground that the note made and the loan obtained were found by the jury to have been for the benefit of the corporation; that "it is not every ultra vires act of a corporation that is void" (*Steger v. Davis* (1894) 8 Tex. Civ. App. 28, 27 S. W. 1068); that the contract in question, not being void, was subject to ratification; and that such ratification might be inferred from the fact that for several months all the stockholders had been aware of what had been done on behalf of the company.

In *Planters' Cotton Oil Co. v. Guaranty State Bank* (1916) — Tex. Civ. App. —, 188 S. W. 38, where the object of a cross bill was to recover a balance alleged to be due from the plaintiff company on account of money borrowed by its manager for the purpose of speculating in cotton, the applicability of the principle of estoppel was denied for the reason that the company had not received any benefits from the transaction.

See also *Canadian Long Distance Teleph. Co. v. Seiber* (1913) — Tex. Civ. App. —, 159 S. W. 897, where the statement of the law in *Kincheloe Irrigating Co. v. Hahn Bros.* (note 6, *supra*) was approved.

²In *Fidelity & D. Co. v. National Bank* (1908) 48 Tex. Civ. App. 301, 106 S. W. 782, it was held, on the authority of certain decisions of the Federal Supreme Court, that the performance of an ultra vires contract of suretyship by the claimant did not render it enforceable against a national bank. So far as the actual decision is concerned, this case is upon the facts consistent with the position which, in other states where the doctrine of estoppel prevails, is L.R.A.1917A.

court, treating the action as being one which, though in form *ex delicto*, was, in so far as it rested upon contract, governed by the same rules as though *ex contractu*, held that the defendant was not liable for the reason that "the taking such special deposits to keep merely for the accommodation of the depositor was not within the authorized business of such banks, and that their cashiers had no power to bind them to any liability on any express contract accompanying, or any implied contract arising out of, such taking."³ A decision to this effect seems to require for its support the assumption that a corporation is entitled to avail itself of the plea of ultra vires even as against a claimant who has performed the contract on his side. But this aspect of the matter was not adverted to either by court or counsel.

Subsequently, the position was explicitly taken that the fact of the con-

taken with regard to contracts of this nature from which no direct benefit accrues to the guarantor corporation. See § 46, *supra*. But the fact that the rulings of a court which rejects that doctrine were cited as precedents indicates the adoption of a doctrinal standpoint different from that of the Texas supreme court.

This decision was cited as a controlling precedent in *Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.* (1916) — Tex. Civ. App. —, 184 S. W. 238, where the right to maintain an action on an indemnity bond was denied on grounds thus stated: "The appellant cites many cases where the defense of estoppel has been invoked, but we think in those cases the facts were different from those in this case, and the equities therein were so strong as not to be disregarded; while in this case, the two corporations having similar charters under the laws of Texas, they should have known, if they did not, that the powers granted to them by their charters and their contracts were not within the scope of their authority and void; hence the plea of estoppel cannot prevail in order to enforce said contract and give appellant relief." It is somewhat remarkable that the court failed to apprehend that the theory reflected in this statement, viz., the fact of the plaintiff's knowledge of the extent of defendant's powers was not a presumption *juris et de jure*, was the very opposite of that entertained in the Federal cases upon which it relied. See § 68, *supra*.

Vermont.

¹*Noyes v. Rutland & B. R. Co.* (1854) 27 Vt. 110.

²*Wiley v. First Nat. Bank* (1875) 47 Vt. 546, 19 Am. Rep. 122. See *Whitney v. First Nat. Bank* (1877) 60 Vt. 388, 28 Am. Rep. 503.

tract's having been performed by the claimant does not in any wise preclude the corporation from alleging that it was unauthorized. The court said: "With regard to contracts which are ultra vires in the strict sense, the sound doctrine is that they are wholly void, and not merely voidable; that the corporation is under a perpetual disability to make them; that, therefore, there can be no ratification by the corporation, and that a corporation cannot be estopped from making the defense of ultra vires when it is sued for nonperformance on its part. The denial of corporate existence, and the claim that a corporation has not proceeded in the way or through the officers designated by law, are defenses that stand on a different and much narrower ground than the defense of ultra vires in its full and proper sense."³

In a recent case the court, relying on the authority of the English cases reviewed in §§ 22 and 23, *supra*, proceeded upon the theory that doctrine laid down above was not controlling in respect of the claim of a person who had lent money to an insolvent corporation for the purpose of enabling it to pay its employees.⁴

³ *Metropolitan Stock Exch. v. Lydonville Nat. Bank* (1904) 76 Vt. 303, 57 Atl. 101 (plea of ultra vires held good on demurrer to declaration alleging breach of certain contracts).

⁴ *Roberts v. W. H. Hughes Co.* (1912) 86 Vt. 76, 83 Atl. 807. As to this case, see further under § 28, *supra*.

Virginia.

¹ *Newa-Register Co. v. Rockingham Pub. Co.* (1915) 118 Va. 140, 86 S. E. 874. On the faith of this contract the separate properties of the two corporations were united for the joint business, and the contemplated arrangements were carried out in such a manner as to render a restoration of the status quo no longer possible. There the plaintiff and defendant publishing companies, after having effected, under the sanction of the state authorities, the necessary amendments in their charters, formed a partnership for the purpose of publishing a newspaper. Held, that the plaintiff was entitled to an injunction restraining the defendant from acts which would have placed it in absolute control of the business and given it exclusive possession of the assets of the partnership. The court also took the position that, if it was conceded that the amendments to the charters of both contracting parties were beyond the scope of the powers of the Corporation Commission, "the fact that both parties applied for the amendments and dealt with each other thereunder operates to estop either of them from questioning the power of the other."

L.R.A.1917A.

108. Virginia.

In a very recent case the law was laid down as follows: "We are of opinion that, where the rights of the public are not involved, a purely private corporation entering into a contract in excess of its powers, and receiving benefits thereunder, is estopped from setting up the defense that it was without power to make it, so far as such estoppel is necessary to do justice between the parties. This is true as well in case of a contract partly performed as in case of one completely executed, and is, both by reason and authority, especially true where the corporation concerned has sought and obtained an express grant of the power (even though not validly conferred) in its charter."¹

109. Washington.

The doctrine that the plea of ultra vires cannot be interposed by a corporation for the purpose of defeating the claim of a person who has performed the contract on his side has always been accepted in this state.¹

109a. West Virginia.

In one case it was held in a suit

Washington.

¹ In *Tootle v. First Nat. Bank* (1893) 6 Wash. 181, 33 Pac. 345, the court observed: "It is not necessary to decide whether or not the contract was ultra vires, for it was not immoral; it was fully performed by the other party, and the bank received and retained the benefits, and in such a case the plea of ultra vires is unavailing."

For other cases in which the doctrine was approved, see *Spokane v. Amsterdamsch Trustees Kantoor* (1900) 22 Wash. 172, 60 Pac. 141 (arguendo); *Krisch v. Inter-State Fisheries Co.* (1905) 39 Wash. 381, 81 Pac. 855 (company which had received benefits of sale of its own stock held not to be entitled to plead ultra vires in defense of an action for damages for inducing the purchaser to take it); *CREDITORS' CLAIM & ADJUSTMENT Co. v. NORTHWEST LOAN & T. Co.* ante, 737 (action on guaranty).

In *Wheeler v. Everett Land Co.* (1896) 14 Wash. 630, 45 Pac. 316, suit to foreclose a lien on materials sold by appellant to a contractor for use in a hotel owned by the land company, the respondent land company set up, as an affirmative defense and counterclaim, that appellant was surety upon a bond given by Grant to secure the erection of the building, and that by reason thereof the appellant was not entitled to a lien upon the building, and was also liable to the respondent for money expended for material by it to finish the building, the contractor having failed to complete it. The appellant resisted the matters thus set up on three grounds, one of which was

brought to enforce a corporate mortgage, that the defendant was precluded from interposing the defense that a statutory provision declaring such a contract to be invalid unless it was sanctioned by the written assent of two thirds of the stockholders had not been complied with.¹ This decision turned upon the effect of a mere informality in respect of an intra vires contract; but the language used in the opinion indicates that the court regarded the principle of an estoppel as being applicable also to cases in which the contract under review is entirely beyond the powers of the corporation.

110. Wisconsin.

The doctrine that the fact of a plaintiff's having performed on his side the ultra vires contract upon which he brings suit does not estop the corporation from raising the defense of ultra vires seems to be required for the support of a case in which it was held that no recovery could be had upon a policy of fire insurance issued in violation of an enactment which prohibited companies from insuring property of the character in question without a majority vote of the members.¹ The fact that the company had received the benefits of the contract as a result of the payment of premiums was not adverted to, nor was there any discussion of the question whether the principle of an estoppel, as based upon

this element, operated so as to enlarge the remedial rights of the plaintiff. But the court declared that "the doctrine of consent and waiver is not applicable to such a case, because the law makes the restriction of power, and not a mere regulation of the company,"—a position which, logically at all events, was inconsistent with that principle. As it was explicitly laid down that the prohibited policy was ultra vires, the decision cannot be explained as being one of those which illustrate the theory that the principle of estoppel is applicable to ultra vires, but not to expressly prohibited, transactions. But the principle of estoppel has been applied in the more recent cases.

"It is well settled that a corporation cannot avail itself of the defense of ultra vires when the contract in question has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. Much less will the claim that the transaction was ultra vires be allowed as a ground for rescinding the contract and restoring to the complaining party, on that ground, the property or funds with which he has parted, after he has had the benefit of full performance of the contract by the other party; and, in general, the plea of ultra vires will not be allowed to prevail whether interposed for or against

that it had no authority to become a surety. But the court said: "As appellant, in consequence of going upon the bond, obtained direct and substantial benefits by reason of the sale of a large amount of material, and as the bond was accepted and relied upon in good faith by the respondent, appellant should not be allowed to invoke the doctrine of ultra vires, and so escape liability." This decision was distinguished in *Washington Mill Co. v. Sprague Lumber Co.* (1898) 19 Wash. 165, 62 Pac. 1067, on the ground that the defendant in the case under review had received no benefit from the transaction.

In *Miller v. Washington Southern R. Co.* (1895) 11 Wash. 414, 39 Pac. 673, a corporation executed notes for the purchase price of some of its own stock, and afterwards conveyed its entire property to the defendant, which assumed all the debts of the grantor. The ground upon which it was held that the defendant was estopped from raising the objection that the purchase of its own stock by the grantor was ultra vires was that the grantor had never questioned the validity of the transaction, but in effect ratified the same by the sale of its property to the defendant.

In *Blair v. Metropolitan Sav. Bank* (1902) 27 Wash. 192, 67 Pac. 609, where the want of corporate power to lend money was re-

lied on as a defense to an action brought to recover on a note, and to foreclose the mortgage securing it, the decision turned upon grounds thus stated: "It was clearly within the corporate powers of the appellant to make a contract of this character after the amendment of its articles of incorporation, even if it was not so before. By taking to itself the property, assuming the payment of the debt, and giving its own obligation therefor, it bound itself to pay the debt, and cannot now be heard in a court of equity to plead its former incapacity as a defense to a suit upon that obligation." In relying upon the fact of the augmentation of the corporate powers, the court has referred its ruling to a consideration which rendered it unnecessary to discuss the question whether recovery could have been had upon the ground of an estoppel. But apparently the defendant might, upon the facts in evidence, have been held liable even if the corporate powers had not been enlarged.

West Virginia.

¹ *Boyce v. Montauk Gas Coal Co.* (1892) 37 W. Va. 73, 16 S. E. 501 (construing a New York statute).

Wisconsin.

¹ *Luthe v. Farmers' Mut. F. Ins. Co.* (1882) 55 Wis. 543, 13 N. W. 490.

a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong."²

"When a contract made by a corporation has been so far executed that to allow the corporation to repudiate it would work injustice to the other party thereto, who has in good faith relied thereon, the doctrine of estoppel applies and prevents such repudiation regardless of whether the corporation had a right to make it or not, unless its act in that regard was in violation of some written law of the state or sound public policy; that in such circumstances, if the corporation exceeds its power, it commits a punishable offense against the sovereignty of the people, but cannot itself invoke the doctrine of ultra vires to avoid its act, at the same time inflicting a grievous wrong upon the one who has in good faith relied upon the assumption that it possessed in fact the power which it pretended to have authority to exercise."³

Cases in which the corporation has received the benefit of an ultra vires contract have also been regarded as being within the scope of the general doctrine that, "when a corporation violates its

organic act, it commits an offense against the sovereignty of the state, which only the state can punish by proceedings to forfeit its charter, in the absence of some other method provided by statute."⁴

In one case the court declined to apply the principle of estoppel for the purpose of enabling the claimant to recover on a contract which was illegal, as being unduly discriminatory.⁵

XII. Doctrine prevailing in Canada.

110a. Upper Canada and Ontario.

An early case in which the power of a railway company to lend money to a similar company was under discussion really turned upon the consideration that the loan, though originally ultra vires, had been validated by the legislature. But language was used by the court which might apparently be construed as indicating that, even in the absence of such validation, the question of want of power could not have been raised, if one of the contentions advanced, viz., that the lender had got the benefit of the money lent, had been supported by the facts.¹

² *Lewis v. American Sav. & L. Asso.* (1898) 98 Wis. 203, 39 L.R.A. 559, 73 N. W. 793 (arguendo, in case where contract was held valid). A writ of error was dismissed. See *Hale v. Lewis* (1900) 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677.

³ *Wuerfler v. Grand Grove, O. D.* (1902) 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

For other cases in which the principle of estoppel was recognized, see *Witter v. Grand Rapids Flouring Mill Co.* (1891) 78 Wis. 543, 47 N. W. 729 (suit to foreclose mortgage); *McElroy v. Minnesota Percheron Horse Co.* (1897) 96 Wis. 317, 71 N. W. 652 (rule laid in case where contract was held to be intra vires); *Bigelow v. Chicago, B. & N. R. Co.* (1899) 104 Wis. 109, 80 N. W. 95 (action on contract of carriage); *Bullen v. Milwaukee Trading Co.* (1901) 109 Wis. 41, 85 N. W. 115 (suit on note); *Ledebuhr v. Wisconsin Trust Co.* (1902) 112 Wis. 657, 88 N. W. 607 (action on benefit certificate).

In *North Hudson Mut. Bldg. & L. Asso. v. First Nat. Bank* (1891) 79 Wis. 31, 11 L.R.A. 845, 47 N. W. 300 (action of replevin which turned upon the validity of a loan to the plaintiff corporation), one of the grounds upon which the decision proceeded was thus stated: "The corporation has received the money loaned, and applied it to the legitimate purposes of the company in paying off the first series of stockholders. So far as this payment was justly due to such stockholders, all the other stockholders are benefited by it, and they cannot retain the benefit of the application L.R.A.1917A.

of the money loaned by the bank, and refuse to pay the loan. The plaintiff is estopped, by the receipt and application of the money to a legitimate purpose of the corporation, from setting up a want of power in the corporation to make the loan. The corporation cannot reap the benefit of the money loaned, and then allege a want of power to make it."

⁴ *Ledebuhr v. Wisconsin Trust Co.* (1902) 112 Wis. 657, 88 N. W. 607. See also *Bullen v. Milwaukee Trading Co.* (1901) 109 Wis. 41, 85 N. W. 115 (suit on note).

In *Eastman v. Parkinson* (1907) 133 Wis. 375, 13 L.R.A.(N.S.) 921, 113 N. W. 649, it was observed: "This court and most courts hold that an ultra vires contract, one not within the scope of the corporate authority to make under any circumstances, which is no longer executory, and is not tainted by fraud, or clearly prohibited by statute, or condemned by sound public policy, cannot be impeached by the corporation or anyone representing it; that the only remedy is one on behalf of the state to punish the corporation for violating the law."

⁵ *Kilbourn City v. Southern Wisconsin Power Co.* (1912) 149 Wis. 168, 135 N. W. 499.

Canada.

¹ *Great Western R. Co. v. Commercial Bank* (1864) 2 U. C. Err. & App. 319, affirmed in (1865) 6 Moore, P. C. C. N. S. 295, 16 Eng. Reprint, 112, where this point was not referred to.

In a later case it was laid down that "a corporation ought not to be allowed to avail itself of the doctrine of ultra vires as against a party seeking to enforce the contract, which has been performed by him, and has resulted in a corresponding benefit to the shareholders."² The authority upon which most reliance was placed was an Indiana decision.³ That decision was a clear authority for the doctrine enunciated. See § 81, *supra*. But the English precedents relied upon were certainly not in point.⁴

In a later case where it was held that money received on deposit by a company acting in excess of its powers must be restored, the court seems to have assumed that an action on the contract itself was maintainable.⁵ If so, the decision was clearly inconsistent with the English cases.⁶

But all these earlier decisions, in so

far as they may be regarded as precedents for the doctrine of estoppel, have now been overruled by a very recent case in which, strange to say, they were not mentioned at all, even for the purpose of disapproving them.⁷

111. Quebec.

That the principle of estoppel is not accepted in this province is to some extent indicated by a case in which it was held that no recovery could be had on an ultra vires guaranty.¹ But, as the direct benefits arising from the contract accrued only to the person in whose favor the guaranty was executed, the decision is one of ambiguous import.

112. British Columbia.

In two cases decisions have been rendered which upon the facts are inconsistent with the doctrine of estoppel; but it was not specifically adverted to.¹

² *Clarke v. Sarnia Street R. Co.* (1877) 42 U. C. Q. B. 39.

³ *State Bd. of Agri. v. Citizens' Street R. Co.* (1874) 47 Ind. 407, 17 Am. Rep. 702. *Whitney Arms Co. v. Barlow* (1875) 63 N. Y. 62, 20 Am. Rep. 504, was also cited.

⁴ One of them was *Ex parte Chippendale* (1853) 4 De G. M. & G. 19, 43 Eng. Reprint, 415, 18 Jur. 710, 2 Week. Rep. 543. The actual rationale of this case is explained in §§ 22, 23, *supra*. Another was *Bank of Australasian v. Breillat* (1846) 6 Moore, P. C. C. 152, 13 Eng. Reprint, 642, 12 Jur. 189. This decision (so far as relevant in the present connection) was based upon the ground that the obligation of the company of which the defendant was chairman, to repay the loan in question, was not discharged by the fact that the contract which contained the stipulation as to repayment was accompanied by other stipulations which were ultra vires of the directors. See § 7, *supra*. Even if those stipulations had been ultra vires of the company itself, the decision would clearly afford no support to the doctrine enunciated by the court.

The court also cited *McDonald v. Upper Can. Min. Co.* (1869) 15 Grant, Ch. (U. C.) 179. There the ratio decidendi apparently was that the contract sued upon, one for the remuneration of the plaintiff, was intra vires. But it must be admitted that the doctrinal position of the court is not as clearly defined as it might be.

⁵ *Walmsley v. Rent Guarantee Co.* (1881) 29 Grant, Ch. (U. C.) 484. L.R.A.1917A.

⁶ *Proudfoot, V. C.*, relied on the *Chippendale Case*. But see note 1, *supra*.

⁷ *Union Bank v. McKillip & Sons* (1913; App. Div.) 30 Ont. L. Rep. 87, 16 D. L. R. 701, affirming (1913) — Ont. —, 11 D. L. R. 449. *Hodgins, J. A.*, after laying it down that the liability of a corporation on an ultra vires guaranty cannot be predicated either on the receipt of benefits or a change of position by the party advancing the money, proceeded thus: "There is no estoppel by an act which is beyond the corporate powers; and where recovery has been had of property or money received by a company upon a contract afterwards found to be ultra vires, the principle is based upon rescission and restoration of the parties to the status quo ante, and even that remedy is confined to cases where the consideration has been received from the other contracting party, and not from outside parties."

¹ *Johansen v. Chaplin* (1889) *Montreal L. Rep.* 6 Q. B. 111.

¹ *Carter Dewar Crowe Co. v. Columbia Bitulithic Co.* (1914) 20 B. C. 37, 18 D. L. R. 50 (no action maintainable on a promissory note executed by the defendant as guarantor of the purchase price of articles supplied to another company); *Columbia Bitulithic Co. v. Vancouver Lumber Co.* (1915) — B. C. —, 21 D. L. R. 91 (chattel mortgage given for money lent by a company which had no power to make a loan was held not to be enforceable).

C. B. L.

COLORADO SUPREME COURT.

DENVER DRY GOODS COMPANY, Plff.
in Err.,
v.
M. H. JESTER.

(60 Colo. 290, 152 Pac. 903.)

Husband and wife — necessities — effect of right to divorce.

A man is not liable for necessities furnished his wife, who is living apart from him because of her violation of marital duties and obligations, for which he is entitled to a divorce.

For other cases, see Husband and Wife, I. a, 2, in Dig. 1-52 N. S.

(November 1, 1915.)

ERROR to the County Court for the City and County of Denver to review a judgment in defendant's favor in an action brought to recover the value of certain goods sold by plaintiff to defendant's wife, without his knowledge or consent, while they were living apart. Affirmed.

The facts are stated in the opinion.

Messrs. Everett Owens and George B. Struby, for plaintiff in error:

When the husband and wife live apart by common consent, he is liable for necessities furnished her.

Bishop, Marr. Div. § 1235; Lockwood v. Thomas, 12 Johns. 248; Fredd v. Eves, 4 Harr. (Del.) 385; Allen v. Aldrich, 29 N. H. 63; 2 Kent, Com. 124; Horwood v. Heffer, 3 Taunt, 421, 128 Eng. Reprint, 167; Houliston v. Smyth, 3 Bing. 127, 130 Eng. Reprint, 462, 10 J. B. Moore, 482, 2 Car. & P. 22, 3 L. J. C. P. 200, 28 Revised Rep. 609; Montague v. Espinasse, 1 Car. & P. 502; Pidgin v. Cram, 8 N. H. 350; Ross v. Ross, 69 Ill. 569; Evans v. Fisher, 10 Ill. 569; Mayhew v. Thayer, 8 Gray, 172; Smith, Contr. 289; Emmett v. Norton, 8 Car. & P. 506; Dixon v. Hurrell, 8 Car. & P. 717; Rumney v. Keyes, 7 N. H. 571; Wanamaker v. Weaver, 98 Am. St. Rep. 647, note.

That the defendant did not authorize the tradesmen to give credit will not relieve him of his liability; indeed, he may expressly forbid the credit and still be liable.

Pierpont v. Wilson, 49 Conn. 450; McGrath v. Donnelly, 131 Pa. 549, 20 Atl. 382; Black v. Bryan, 18 Tex. 453; Bergh v. Warner, 47 Minn. 250, 28 Am. St. Rep. 302, 50 N. W. 77; Daubney v. Hughes, 60 N. Y. 187; Barr v. Armstrong, 56 Mo. 577; Watkins v. De Armond, 89 Ind. 553.

Note. — As to liability of husband for necessities furnished wife while living apart from him, see annotation following this case, post, 958.
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Messrs. McKnight & Henry and C. A. Ferguson, for defendant in error:

Defendant and his wife were not living apart by agreement, but on account of her fault, so that he was not liable for her necessities.

21 Cyc. 1223, 1224; Cooper v. Lloyd, 6 C. B. N. S. 619, 141 Eng. Reprint, 559; Sawyer v. Richards, 65 N. H. 185, 23 Atl. 150; Gilman v. Matthews, 20 Colo. App. 170, 77 Pac. 366.

White, J., delivered the opinion of the court:

The question involved in this action is whether the Denver Dry Goods Company, plaintiff in error, may recover of M. H. Jester, the defendant in error, the value of certain goods which it sold to his wife without his knowledge or consent, and while the jesters were living separate and apart. Plaintiff in error claims that when the goods were sold the Jesters were living apart by mutual consent, and that such goods were necessities within the meaning of the law, and that the husband had failed to supply his wife with the same or make any provisions for her support. The defendant in error contends that the goods were not necessities, and that the living apart was not by mutual consent, but because the wife was guilty of violation of her marital duties and obligations, entitling the husband to a divorce and for which he was, at the time the goods were sold, prosecuting a cause of action which subsequently resulted in a decree in his favor.

As the Jesters were not living together as a family in fact, at the time the goods were sold, it is conceded that the statute (Rev. Stat. 1908, § 3021) relative to family expenses has no application. Gilman v. Matthews, 20 Colo. App. 170, 179, 77 Pac. 366. This is also true as to the statute on the subject of alimony, etc., and the power of the courts in that regard. The controversy is therefore controlled by the principles of the common law. The cause was tried to the court without a jury, and judgment entered in favor of defendant in error. Neither special findings of fact nor declarations of law were made, and an examination of the evidence fails to show that the court had an erroneous conception of the law or that the judgment is wrong. On the contrary, there is a fair quantum of proper evidence to warrant the conclusion that Mrs. Jester was guilty of offenses against the marital relation that entitled her husband to a divorce, and that this was the effective cause of their living apart when the goods in question were purchased. The duties of the wife, as wife, form the consideration for the husband's liability for her maintenance.

If she is guilty of offenses against the marital relation that entitle her husband to a divorce, and by reason thereof they do not live together, her contracts for necessities will not bind the unoffending husband. *Sawyer v. Richards*, 65 N. H. 185, 23 Atl. 150; *Cromwell v. Benjamin*, 41 Barb. 558;

Brown v. Mudgett, 40 Vt. 68; 21 Cyc. p. 1223.

The burden is upon plaintiff in error to show reversible error, and, having failed in that regard, the judgment is affirmed.

Gabbert, Ch. J., and Bailey, J., concur.

Annotation—Liability of husband for necessities furnished wife while living apart from him.

- I. Separation through fault or misconduct of husband, 958.*
- II. Separation through fault or misconduct of wife, 963.*
- III. Separation by mutual consent or agreement, 965.*
- IV. Liability for necessities furnished pending suit for divorce, 966.*
- V. Effect of wife having means of her own, 967.*
- VI. Duty of tradesmen to make inquiry as to husband's liability, 968.*
- VII. Necessity for and effect of notice not to give wife credit, 968.*
- VIII. Burden of proving liability, 969.*
- IX. Effect of agreement by husband to pay, 970.*

This note is confined to the question of the husband's liability for necessities furnished to wife while living apart from him, but not under decree of divorce or separation.

As to liability of husband for necessities furnished wife while living with him, see note to *Wanamaker v. Weaver*, 65 L.R.A. 529, and to *James McCreery & Co. v. Martin*, 47 L.R.A.(N.S.) 279.

As to liability of husband on wife's contract for attorneys' fees in divorce proceedings, see notes to *Wolcott v. Paterson*, 24 L.R.A. 629; *Zent v. Sullivan*, 13 L.R.A.(N.S.) 244; and *Meaher v. Mitchell*, L.R.A.1915C, 467.

Generally as to liability of husband for necessities, see Index to L.R.A. Notes, "Husband and Wife," §§ 7 and 8.

I. Separation through fault or misconduct of husband.

If the cause of a husband and wife living apart from each other is the fault or wrong of the husband, either because he has deserted her, or because he has turned her away, or treated her with such cruelty that she is obliged to leave him, the general rule is that he will be responsible to one who furnishes her with necessities.

And so, under such circumstances, a

husband has been held liable for necessities furnished a wife in: *Zeigler v. David* (1853) 23 Ala. 127; *Fredd v. Eves* (1846) 4 Harr. (Del.) 385; *Kemp v. Downham* (1853) 5 Harr. (Del.) 417; *Biddle v. Frazier* (1866) 3 Houst. (Del.) 258; *Mitchell v. Treanor* (1852) 11 Ga. 324, 56 Am. Dec. 421; *Wilson v. Bishop* (1882) 10 Ill. App. 588; *Seybold v. Morgan* (1892) 43 Ill. App. 39; *Hoobler v. Heenan* (1899) 81 Ill. App. 422; *Peck v. Gibeson* (1899) 83 Ill. App. 92; *Arnold v. Brandt* (1896) 16 Ind. App. 169, 44 N. E. 936; *Scott v. Carothers* (1897) 17 Ind. App. 673, 47 N. E. 389; *Rariden v. Mason* (1902) 30 Ind. App. 425, 65 N. E. 554; *Watkins v. De Armond* (1883) 89 Ind. 553; *Beaudette v. Martin* (1915) 113 Me. 310, 93 Atl. 758; *Hancock v. Merrick* (1852) 10 Cush. (Mass.) 41; *Reynolds v. Sweetser* (1860) 15 Gray (Mass.) 78; *Cartwright v. Bate* (1861) 1 Allen (Mass.) 514, 79 Am. Dec. 759; *Kirk v. Chinstrand* (1901) 85 Minn. 108, 56 L.R.A. 333, 88 N. W. 422; *East v. King* (1900) 77 Miss. 738, 27 So. 608; *Snover v. Blair* (1855) 25 N. J. L. 94; *Clothier v. Sigle* (1906) 73 N. J. L. 419, 63 Atl. 865; *Minck v. Martin* (1886) 22 Jones & S. (N. Y.) 136; *W. & J. Sloane v. Boyer* (1905) 95 N. Y. Supp. 531; *Sultan v. Misrahi* (1905) 47 Misc. 655, 94 N. Y. Supp. 519; *Walker v. Loughton* (1855) 31 N. H. 111; *Llewellyn v. Levy* (1894) 163 Pa. 647, 30 Atl. 292; *Clement v. Mattison* (1846) 3 Rich. L. (S. C.) 93; *Hughes v. Rees* (1884) 10 Ont. Pr. Rep. 301; *Griffith v. Paterson* (1873) 20 Grant, Ch. (N. C.) 615; *Archibald v. Flynn* (1872) 30 U. C. Q. B. 523; *Forriatall v. Lawson* (1876) 34 L. T. N. S. (Eng.) 903.

Where the husband expels the wife from his house without her fault, or compels her to leave his house by cruelty to her, and without the means of support, he thereby gives her credit for her reasonable expenses. This liability does not in such case rest upon an implied agency, but is an obligation imposed by the law from necessity, and is founded on the marital relations and the duty of

the husband to maintain the wife. If the husband who, in violation of his marital obligation, drives his wife from his house without the means to procure the necessities of life, could also deny the credit to supply them, she would be liable to suffer or perish from want. The law, therefore, from necessity, authorizes anyone to supply her necessary wants under such circumstances, and to look to the husband for compensation. *Litson v. Brown* (1866) 26 Ind. 490.

And in *Rariden v. Mason* (1902) 30 Ind. App. 425, 65 N. E. 554, the court said that the husband cannot by his wrongful conduct relieve himself of the legal obligation to support his wife; that the law treats her in such case as having authority to contract for such necessities upon his credit; that it is necessary for her to do so in order to obtain the benefit of his obligation to support her which the law so confers; and she, for the practical purposes of an action to enforce his liability, may be treated as an agent in the contracting of the indebtedness.

Under a Code provision that "neither husband nor wife can remove the other nor the children from the homestead without the consent of the other," a husband who drives his wife from the homestead impliedly obligates himself to pay for her support, regardless of the cause of the expulsion. *Baker v. Oughton* (1906) 130 Iowa, 35, 106 N. W. 272. In holding that the husband could not justify his conduct, the court said that "if he had abandoned her, leaving her in possession of the homestead, then the question of his liability might depend on whether his abandonment was justifiable; but we do not think that it can have been the intention of the legislature, in expressly prohibiting the husband from expelling the wife from the home, that she should nevertheless be left without any legal provision for her support, and that those who furnish her necessities should do so subject to a determination of the question whether there was justification for the husband's act, no justification being recognized as sufficient by the statute. The argument in favor of this view is strengthened by the consideration that where the husband seeks a divorce from his wife, whether originally or by cross bill, he may properly be compelled to furnish her temporary support and to pay her attorneys' fees; the reason evidently being that she should not be deprived of the means of making defense, and that

the court ought not to be compelled in advance to determine whether she has a good ground of defense. Certainly there is no greater reason for allowing the wife temporary alimony and attorneys' fees when the husband is seeking to procure a divorce from her on a ground that is sufficient on the face of it than there is for allowing her the necessities of life after he has driven her from home, and while she is endeavoring to secure a determination of the question whether his action was without justification."

The husband is liable, where the separation is due to his fault or wrong, though the necessities were furnished without his personal request, and though the person furnishing them knew at the time that the husband and wife were living separate and apart from each other. *Rariden v. Mason* (1902) 30 Ind. App. 425, 65 N. E. 554.

Nor is actual proof of an express demand that the husband support his wife, and of his refusal, essential to recovery by one who has furnished the wife with necessities after abandonment of her by the husband, especially where, from the attitude assumed by the husband, a demand would have been wholly useless. *Hardy v. Eagle* (1898) 25 Misc. 471; 54 N. Y. Supp. 1045.

Nor is the liability of the husband to one furnishing necessities to the wife, who has with good cause left him, affected by the fact that the one so furnishing the necessities and the wife conspired to abduct a minor child of the husband and wife, who was in the custody of the husband. *Burlem v. Shannon* (1860) 14 Gray (Mass.) 433.

A husband who abandons his wife without fault on her part, leaving her wholly without means of support, is liable, without express request or express promise to pay, to her son for necessities furnished her. *Eiler v. Crull* (1885) 99 Ind. 375.

And where the separation was due to the fault of the husband, his estate will be liable for necessities furnished her by a son. *Todtleben v. Rudowski* (1913) 181 Ill. App. 318.

A husband who has deserted his wife is liable to a township for necessities furnished her as a pauper. *Springfield v. Demott* (1844) 13 Ohio, 105.

Also, a township may recover from a husband who is abundantly able to support her, for necessities furnished his wife, where she was forced to leave him because of his cruelty. *Howard v. Whetstone Twp.* (1841) 10 Ohio, 365.

A husband who turns out of doors his wife, who is in ill health, without providing for her, is liable for medical attendance after she is so turned out. *Harrison v. Grady* (1866) 12 Jur. N. S. (Eng.) 140, 13 L. T. N. S. 369, 14 Week. Rep. 130.

And a husband is liable for the funeral expenses of his wife, living apart from him without fault on her part. *Bradshaw v. Beard* (1863) 12 C. B. N. S. 344, 142 Eng. Reprint, 1175, 31 L. J. C. P. N. S. 273, 8 Jur. N. S. 1228, 6 L. T. N. S. 458; *Cunningham v. Reardon* (1868) 98 Mass. 538, 96 Am. Dec. 670.

And this even though he had no notice of her death. *Cunningham v. Reardon* (Mass.) supra. The court stated that the origin of the responsibility "is not merely and strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequences would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an authority to do for him what law and duty require him to do, which he neglects or refuses to do for himself; and is applicable as well to supplies furnished to the wife where she is sick, insensible, or insane, and to the care of her lifeless remains, as to contracts expressly made by her. Nor is any notice to him requisite in order to charge him for her funeral expenses any more than for necessities to sustain life. The burden is on the plaintiff in either case to prove the existence of a necessity and that the husband has failed to make provision for it. But when this is established, nothing more is needed to create the liability; and it would seem to be an idle ceremony to give notice of his wife's death to a man who had refused her the means of sustaining life. The responsibility for funeral expenses is not a new and distinct cause of action, differing in kind or in the rules by which it is created, but an incident to the obligation to furnish bodily support."

A pregnant wife leaving her husband's home is justifiable so as to make her husband liable for necessities furnished, where she leaves on the eve of confinement, through well-grounded fears that the child will not be safely delivered there, because of the husband's previous suggestion that he prevent the child from being born alive. *Kent v. Brinkerhoff* (1887) 8 N. Y. S. R. 794.

So, also, where a husband deserts his wife and causes it to be reported that he is dead, and, relying upon such report, the wife marries again, such second mar-

riage or a conviction of bigamy therefor will be no defense to an action for necessities subsequently furnished. *Cartwright v. Bate* (1861) 1 Allen (Mass.) 514, 79 Am. Dec. 759.

But commencement of proceedings for divorce by a husband against his wife on the ground of her cruelty towards him will not, of itself alone, justify her in leaving his house, and enable her to carry his credit with her, if he is willing to provide proper support for her there. *Sturbridge v. Franklin* (1893) 160 Mass. 149, 35 N. E. 669. The court added, however, that the commencement of such a suit under other circumstances might furnish a complete justification for the wife leaving him.

And a husband's threat to confine his wife in a lunatic asylum was held, in *Biffin v. Bignell* (1862) 7 Hurlst. & N. (Eng.) 877, 8 Jur. N. S. 647, 31 L. J. Exch. N. S. 189, 6 L. T. N. S. 248, 10 Week. Rep. 322, not to constitute sufficient cause for her to leave him so as to make him liable for necessities furnished her while living apart.

Where a husband by his adultery compels his wife to leave him, it is equivalent to turning her out of doors, and he gives her credit with the whole community, although it be expressly forbidden by him. *Sykes v. Halstead* (1848) 1 Sandf. (N. Y.) 483.

So, also, adultery of wife with connivance of husband is not justification for his turning her out of doors without maintenance, and so he is liable for necessities furnished. *Wilson v. Glossop* (1888) L. R. 20 Q. B. Div. (Eng.) 354, 52 J. P. 246, 57 L. J. Q. B. N. S. 161, 58 L. T. N. S. 707, 36 Week. Rep. 296.

And a husband's duty to support his wife living apart from him did not cease where she committed adultery in pursuance of his expressed written license, given with deliberation and without solicitation, upon condition that she should not look to him for support, *Ferren v. Moore* (1879) 59 N. H. 106. The court said that what he consented to he cannot complain of in this suit. The execution of his agreement that she should violate their marriage contract was not a justification of his violating that contract by turning her out of doors and refusing to support her. He can no more enforce the condition of his license than he could maintain an action upon her promise, or the promise of any other person to pay him for the license a sum equal in value to a release of his obligation to support. That obligation, whatever it is, cannot be avoided by such illegal bargains.

Marital rights and duties are established by law. The marriage contract may be broken by either party, with or without the consent of the other; but it cannot be rescinded or modified by them. The plaintiff is in no way connected with the lawless transaction. The case does not raise the question of whether the husband's duty of supporting his wife when she is able to support herself is, under any circumstances, in any degree, affected by modern legislation, or the question whether the obligation of support is mutual.

But, although a wife be justified by her husband's abuse in leaving him, she would forfeit her claim upon him by a subsequent act of adultery. *Cooper v. Lloyd* (1859) 6 C. B. N. S. 519, 141 Eng. Reprint, 559.

And it has been held that a husband who turned his wife out of doors is not liable for board and lodging furnished her, where she committed adultery while living separate, though he had committed adultery himself. *Govier v. Hancock* (1796) 6 T. R. (Eng.) 603, 3 Revised Rep. 271.

But in *Luka v. Poohina* (1876) 5 Haw. 695, it was held that, in order to free the husband from liability, the adultery of the wife must be notorious.

Although in *Horwood v. Heffer* (1811) 3 Taunt. 421, 128 Eng. Reprint, 167, it was held that the fact that a prostitute was placed at the head of the husband's table was not sufficient to justify the wife's departure, so as to render him liable for necessities furnished her, if she could obtain support at her husband's house, the court stating that nothing short of actual terror and violence would be sufficient, yet the better view is that taken in *Descelles v. Kadmus* (1859) 8 Iowa, 51, which held that if a husband introduces a prostitute into his house and permits her to remain there as an inmate, his wife will be justified in withdrawing from his protection, and he will be bound to provide her with necessities.

In fact, in *Houliston v. Smith* (1825) 3 Bing. 127, 130 Eng. Reprint, 462, 2 Car. & P. 22, 3 L. J. C. P. 200, 10 J. B. Moore, 482, 28 Revised Rep. 609, which held, disapproving and criticizing *Horwood v. Heffer* (Eng.) supra, that a reasonable apprehension of personal violence justified a wife in leaving her husband, so as to make him liable for necessities, the court said, speaking of the *Horwood Case*, that "the doctrine in that case cannot be law. Is a decent woman to stay under the same roof with a prostitute? To sit at the same table with her? Or to

give place and receive her meals in a separate apartment? The law can never require any woman to act contrary to decency. If a wife remains in the house with her husband and an adulteress, I doubt whether she could afterwards obtain a divorce for the adultery of her husband; her continuance in the house with her husband under such circumstances might be considered as an assent to his conduct, and prejudice her case in the spiritual court."

And the fact that the wife is insane will not lessen his liability for necessities furnished her. *Descelles v. Kadmus* (Iowa) supra.

Nor is it necessary that the one suing to recover for necessities furnished such a wife show that he was appointed her guardian (Iowa) Ibid. The court stated that "the wife was boarded and maintained by plaintiff not as her guardian; she was received into his house and protected and continued there, not because he held that relation to her, but because the husband, by his improper conduct, had rendered her departure from her home indispensable. The law requires the husband to supply his wife necessities—such as meat, drink, clothes, medicines, etc.—suitable to his degree and circumstances; and if he, by his treatment, shall render her situation unsafe or their home unfit for a modest and chaste woman to remain in, he sends her from home as effectually as if he turned her out of doors without cause; and under such circumstances he gives her a general credit for necessities, for which he will be liable to anyone furnishing them. It was in view of this obligation that plaintiff furnished the necessities to defendant's wife and sought to make him liable. Her insanity would certainly not lessen his liability in this respect. How far such situation should legitimately operate to require plaintiff to return her to the husband's care and protection, if required, or what other effect it might have under many possible circumstances, we are not now called upon to determine. We only determine that in order to enable the plaintiff to recover for necessities furnished the insane wife of the defendant when compelled to leave his home on account of either his cruel treatment, or because of his making lewd and profligate women inmates of her home, it was not necessary that he should have furnished them as her guardian, nor that he should have acted as such in taking her under his care and protection."

As to bringing another woman into the

house as cruel and inhuman treatment, see the note attached to *Craig v. Craig*, 2 L.R.A. (N.S.) 669, and also see note to *Hooker v. Hooker*, 43 L.R.A. (N.S.) 964, on bringing wife in contact with prostitute as ground for divorce; the unanimous opinion of the cases cited in such notes is that bringing a wife in contact with prostitutes, or permitting them to be in the house against the wife's wish, is ground for divorce; and so in a measure these cases sustain the decisions in the *Descelles Case* (Iowa) *supra*, and *Houliston Case* (Eng.) *supra*.

But a husband is not liable where he makes suitable provision for his wife's maintenance and support.

So, if a husband pay his wife a sufficient maintenance, he is not liable for necessities furnished her. *Le Boutillier v. Piske* (1888) 47 Hun (N. Y.) 323; *Mizen v. Pick* (1838) 1 Horn & H. (Eng.) 163, 7 L. J. Exch. N. S. 153, 3 Mees & W. 481.

And that tradesmen received no notice of such allowance is immaterial. *Mizen v. Pick* (Eng.) *supra*.

Also in *Litson v. Brown* (1866) 26 Ind. 489, where a wife who had justifiably separated from her husband was given by him money sufficient to supply her reasonable wants and necessities up to the time when she secured a decree of divorce, it was held that he was not liable for board and necessities furnished her after the receipt of the money, but that for such as were furnished prior to the receipt of such money he was liable.

And in *Crittenden v. Schermerhorn* (1878) 39 Mich. 661, 33 Am. Rep. 40, it was held that, as alimony had been allowed, and no additional allowance had been asked for on the ground of inadequacy, there was no liability.

So, the husband may employ such mechanics and storekeepers as he chooses, and can prohibit all others from giving their credit on his account. *Kimball v. Keyes* (1833) 11 Wend. (N. Y.) 33.

And where the wife, when furnished with provisions in large quantities, sells them, the husband may adopt the mode for providing for her of sending her meals to her, if the supply be abundant and of good quality. *Mott v. Comstock* (1832) 8 Wend. (N. Y.) 544.

But where the allowance the husband pays his wife is inadequate for her support, he is liable for necessities furnished her, where, by his cruelty, she has been compelled to live apart from him. *Baker v. Sampson* (1863) 14 C. B. 383, 143 Eng. Reprint, 494.

And where a wife has left her husband because of his adultery with a servant

girl, and has instituted an action for divorce, an offer to provide for her in a separate apartment in his house is no defense to an action for necessities. *Sykes v. Halstead* (1848) 1 Sandf. (N. Y.) 483.

And where a husband refuses to permit his wife to live with him, he is not relieved from liability by showing that he procured board and lodging for her with a person with whom she refused to live. *Kirk v. Chinstrand* (1901) 85 Minn. 108, 56 L.R.A. 333, 88 N. W. 422.

Also, where the wife was deserted at the house of one who furnished her with necessities, and was offered a home by her husband in an unfit place, it is not necessary to affirmatively prove that there was a refusal on the husband's part to maintain the wife elsewhere or at all. *Tibbetts v. Wadden* (1895) 94 Iowa, 173, 62 N. W. 693.

And a husband who has deserted his wife is not relieved from liability for necessities furnished her upon her rejecting his offer to furnish her support and maintenance in his own home, where there was every evidence that the offer of reconciliation lacked good faith and sincerity. *Walker v. Leighton* (1855) 31 N. H. 111.

In *Dowe v. Smith* (1865) 11 Allen (Mass.) 107, the wife left her husband because of cruelty, and later obtained a divorce, the decree granting, *inter alia*, a sum of money for expenses for support already obtained. In an action by the father of the wife to recover for necessities furnished during the pendency of the divorce proceedings, the husband was held liable despite the granting of such sum, and although the father assisted in prosecuting the libel. The court took the position that, having either directly or by implication of law authorized the wife to procure the necessities the debt was due to one furnishing them for the husband, and was not discharged by the decree awarding the sum of money; that plaintiff had no means of making that fund available; that the wife owed him nothing, and he was not a party to the decree awarding the money.

Where a husband turns his wife out without cause, liability for necessities after the wife's refusal of his offer to take her back depends upon whether the offer was bona fide, and whether the wife had well-grounded fears of further ill treatment if she should return. *Bennett v. Jones* (1859) 9 N. B. 397.

Whether a wife is justified in leaving her husband is a question for the jury. *Rea v. Durkee* (1861) 25 Ill. 503.

II. Separation through fault or misconduct of wife.

If a wife leaves her husband without his assent or without sufficient justification, or if by her misconduct she gives her husband justification for leaving her or for turning her out, the general rule is that the husband is not liable for necessities furnished her. So, that the husband under such circumstances will not be liable has been held in: *Johnson v. Coleman* (1915) 13 Ala. App. 520, 69 So. 318; *Bevier v. Galloway* (1874) 71 Ill. 517; *Schmuckle v. Bierman* (1878) 89 Ill. 454; *Hartmann v. Tegart* (1873) 12 Kan. 177; *Corry v. Lackey* (1895) 105 Mich. 363, 63 N. W. 418; *Belknap v. Stewart* (1893) 38 Neb. 304, 41 Am. St. Rep. 729, 56 N. W. 881; *Sawyer v. Richards* (1889) 65 N. H. 185, 23 Atl. 150; *Vusler v. Cox* (1891) 53 N. J. L. 516, 22 Atl. 347; *Simpson v. Dutcher* (1910) 123 N. Y. Supp. 340; *Ogle v. Dershem* (1904) 91 App. Div. 551, 86 N. Y. Supp. 1101; *Catlin v. Martin* (1877) 69 N. Y. 393; *Constable v. Rosener* (1903) 82 App. Div. 155, 81 N. Y. Supp. 376, affirmed without opinion in (1904) 178 N. Y. 587, 70 N. E. 1097; *Thorne v. Kathan* (1879) 51 Vt. 520; *Sturtevant v. Starin* (1865) 19 Wis. 268; *Morgenroth v. Spencer* (1905) 124 Wis. 564, 102 N. W. 1086; *Mainwaring v. Leslie* (1826) 2 Car. & P. (Eng.) 507; *Moody & M. 18*, 31 Revised Rep. 691; *Tempany v. Hakewill* (1858) 1 Fost. & F. (Eng.) 438, and see *DENVER DRY GOODS Co. v. JESTER*, ante, 957.

In *Hartmann v. Tegart* (1873) 12 Kan. 177, the court stated that it is not the policy of the law to encourage separation between husband and wife. It is not the policy of the law to encourage wilful breaches of the marriage laws and duties to weaken the wholesome influence which keeps those together who have solemnly pledged themselves to live together. And it never was the policy of the law to cast burdens upon individuals without some corresponding benefits. It would shock human nature to say that a husband who has done no wrong should support a wife without having the benefit of her company or society. And when a husband furnishes a good home, he is bound only to support her there, and is not bound to support her in the house of some other person, who possibly may be encouraging separation.

So, a husband who is ready, able, and willing to support his wife, who gives her no just cause or occasion to leave him, cannot be compelled to support her elsewhere than at his own home, if he has

one, by any private person or by the town or county, whether she be sane or insane. *Monroe County v. Budlong* (1868) 51 Barb. (N. Y.) 493.

Also, where a wife voluntarily leaves her husband's house, the husband will not be liable for necessities furnished her if his house is always open to her, and she is well provided for there, even though the husband himself lives elsewhere. *Anderson v. McLeod* (1876) 2 Pr. Edw. Isl. 142.

A husband has a right, as defense to an action for necessities furnished his wife while living apart from him, to show that the separation was wilful on her part and without his fault, and this right of defense is irrespective of knowledge of the separation on the part of one furnishing the necessities. *Steinfeld v. Girrard* (1907) 103 Me. 151, 68 Atl. 630; *Sturtevant v. Starin* (1865) 19 Wis. 268; *McCutchen v. McGahay* (1814) 11 Johns. (N. Y.) 281, 6 Am. Dec. 373.

But in *Vanuxen v. Rose* (1855) 7 Ind. 222, it was held that a husband will be liable for necessities furnished his wife after her elopement from him until it has become notorious that she has so left him. And so an instruction in effect that a husband will not be liable for necessities furnished his wife who has left him without cause, irrespective of whether or not the tradesmen had notice of the separation, was held erroneous. But in this case, where there was a verdict for the husband, it was held that such an instruction, while erroneous, was not prejudicial, as there was evidence that, at the time of the sale, there were enough facts within the knowledge of the tradesmen and in the circumstances under which the wife purchased to put them on inquiry, and so the verdict for the husband would not be disturbed.

A husband will not be liable to one with notice, for necessities furnished his wife, who has voluntarily left him. *Williams v. Prince* (1848) 3 Strobb. L. (S. C.) 490.

Also, a husband is not liable for board furnished his wife, where the one furnishing such board knew that the husband left his wife justifiably because of her misconduct. *Middlebrook v. Slocum* (1908) 152 Mich. 286, 116 N. W. 422.

The wife who abandons her husband solely because of his indifference and neglect cannot charge her husband for necessities. *Bostwick v. Brower* (1897). 22 Misc. 709, 49 N. Y. Supp. 1046.

And where a wife leaves her hus-

band's house to make a visit, and not from apprehension of ill treatment, although the husband had used violence towards her some months before, and she refuses to return unless his relatives, who live with him, go away, the husband is not liable for necessities furnished during the separation. *Blowers v. Sturtevant* (1847) 4 Denio (N. Y.) 46.

But the fact that a wife makes a false accusation against the husband does not make a separation the fault of the wife, so as to relieve him from liability for necessities furnished her. *Forrester v. Hurtt* (1907) 18 Haw. 215.

And in *Brown v. Patton* (1842) 3 Humph. (Tenn.) 135, it was held that although the wife had abandoned her husband without sufficient cause, yet he was properly charged with medicinal services rendered her, as, in a letter to the one to whom the wife went to live, the husband expressed a desire that her wants be supplied and that she have a comfortable support. In this case the husband offered compensation in a particular manner, which was rejected; but the court did not consider that such rejection precluded recovery, as it thought the letter could be understood as undertaking to pay for necessities, and there ought not to be a restriction to a particular mode of paying for them.

Though a wife leave home without cause, the husband will be liable for necessities furnished her after his refusal of her solicitation to be received back. *Ewers v. Hutton* (1801) 3 Esp. (Eng.) 255; *Henderson v. Stringer* (1834) 2 Dana (Ky.) 291.

So, in *Reed v. Moore* (1832) 5 Car. & P. (Eng.) 200, a husband was held liable for necessities furnished his wife where she left him after a quarrel, and he refused to take her back except upon condition that she give up some of her property, which condition he had no right to impose.

And in *McGahay v. Williams* (1814) 12 Johns (N. Y.) 293, it was held that if a wife leaves her husband, although voluntarily and without sufficient cause, his liability is revived when the application to him by a third person, on behalf of the wife, that he receive her back, is refused, but without questioning the authority of the third person, the refusal being put on some other ground, the court stating that this is tantamount to a personal application by the wife herself.

In *Manby v. Scott* (1663) 1 Mod. 124, 86 Eng. Reprint, 781, however, it was held that if a wife leaves her husband against his will, and, upon the husband's L.R.A.1917A.

refusal of her offer to reconvert, she lives apart from him, the husband is not liable for goods furnished during her separation against his express prohibition, although they are necessary and she has no separate maintenance. The views of Judge Hyde as to the rights of married women, as expressed in his opinion in this case, are interesting as an example of the fanaticism and bigotry of that time.

Where the wife abandoned the husband without cause, and he afterwards received her back, he is not liable for necessities furnished during the separation. *Oinson v. Heritage* (1873) 45 Ind. 73, 15 Am. Rep. 258; *Williams v. Prince* (1848) 3 Strobb. L. (S. C.) 490.

A wife who is turned away from the house by the husband because of her adultery does not carry with her credit upon the husband. *Hunter v. Boucher* (1825) 3 Pick. (Mass.) 289; and see also *DENVER DRY GOODS CO. v. JESTER*, ante, 957.

And where a wife is living apart from her husband by reason of her own adultery, of which offense she is under indictment, the husband will not be liable for legal services of counsel she employs to defend her, and who know of the separation, although such counsel are informed and believe she is innocent. *Peaks v. Mayhew* (1901) 94 Me. 571, 48 Atl. 172.

It is a good defense to an action against a husband for necessities furnished the wife while living apart from him that he turned her away because she had committed adultery, or that, while living apart from him, she committed adultery; and the availability of such defense, does not depend upon a knowledge by one furnishing the necessities of the fact of the adultery. *Gill v. Read* (1858) 5 R. I. 343, 73 Am. Dec. 73.

But in *Norton v. Fazan* (1798) 1 Bos. & P. 226, 126 Eng. Reprint, 873, 4 Revised Rep. 785, it was held that where a husband, because of his wife's adultery, without making any provision for her, leaves her in his house, where she continues her adulterous conduct, he is liable to tradesmen unaware of the circumstances in which she is living. The basis of the decision seems to have been that the husband voluntarily left her in his own house without making it known that the separation was the fault of the wife, so giving the appearance of desertion on his part.

If the wife elopes with an adulterer, the husband is not liable. *Collins v.*

Mitchell (1852) 5 Harr. (Del.) 369; Morris v. Martin (1725) 1 Strange, 647, 93 Eng. Reprint, 757; Swan v. Mathieson (1911) 103 L. T. N. S. (Eng.) 832, 27 Times L. R. 153.

But though a wife be guilty of an adulterous elopement, if the husband take her back and afterwards turn her out, he will be liable for necessities furnished her. Harris v. Morris (1801) 4 Esp. (Eng.) 41.

III. Separation by mutual consent or agreement.

If a wife lives apart from her husband by his consent no condition or agreement being made that she shall support herself, she not having the means of support, and no proper provision being made therefor by him she carries his credit with her for necessities. Forrester v. Hurtt (1907) 18 Haw. 215; Seybold v. Morgan (1892) 43 Ill. App. 39; Bensyl v. Hughes (1903) 109 Ill. App. 86; McClary v. Warner (1897) 69 Ill. App. 223; Mayhew v. Thayer (1857) 8 Gray (Mass.) 172; Lockwood v. Thomas (1815) 12 Johns. (N. Y.) 248; Tait v. Lindsay (1862) 12 U. C. P. 414; Burkett v. Trowbridge (1871) 61 Me. 251; Ambrose v. Kerrison (1851) 10 C. B. 776, 138 Eng. Reprint, 307, 20 L. J. C. P. N. S. 135.

So, a husband who does not give his wife a regular allowance will be liable for necessities purchased by her on his credit where it is shown that he has permitted her to do this, and has paid for goods so purchased, although it has been his custom to require goods purchased to be sent to him, and if he approved, he sent them to her and paid for them. Raymond v. Cowdrey (1896) 19 Misc. 34, 42 N. Y. Supp. 557.

And the husband is liable for funeral expenses of his wife, who is living apart from him. Ambrose v. Kerrison (1851) 10 C. B. 776, 138 Eng. Reprint, 307, 20 L. J. C. P. N. S. 135.

The fact that one furnishing necessities to a wife living apart from her husband with his consent may not have been requested by the husband to do so, or may have been notified by the husband that he would not be responsible therefor, will not relieve the husband from liability, the liability in such case resting on his marital duty. Oltman v. Yost (1895) 62 Minn. 261, 64 N. W. 564.

And a sum mutually agreed upon and paid in lieu of alimony upon a wife's obtaining divorce will not be considered as including a sum for necessities furnished.

Burkett v. Trowbridge (1871) 61 Me. 251.

A husband is liable for necessities furnished his wife where, though they separated by agreement, she offers to return, but he refuses to receive her. Cunningham v. Irvin (1821) 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458.

But in Bensyl v. Hughes (1903) 109 Ill. App. 86, where, after a slight quarrel, the husband and wife separated, the husband was held not liable for necessities furnished after a refusal to comply with his request that she return, and until she had in good faith offered to return.

Where, however, the husband has made allowance to the wife for her support, he is not liable for goods furnished. Shreve v. Dulany (1808) 1 Cranch, C. C. 490, Fed. Cas. No. 12,817; Kemp v. Downham (1853) 5 Harr. (Del.) 417; Bensyl v. Hughes (1903) 109 Ill. App. 86; Malden Hospital v. Murdock (1914) 218 Mass. 73, 105 N. E. 457; Quinlan v. Westervelt (1910) 65 Misc. 547, 120 N. Y. Supp. 879; Cary v. Patton (1831) 2 Ashm. (Pa.) 140; Carmany v. Orth (1873) 2 Pearson (Pa.) 175; Tod v. Stokes (1698) 12 Mod. 244, 88 Eng. Reprint, 1294; Willson v. Smyth (1831) 1 Barn. & Ad. 801, 109 Eng. Reprint, 984, 9 L. J. K. B. 155; Dixon v. Hurrell (1838) 8 Car. & P. (Eng.) 717; Negus v. Forster (1882) 46 L. T. N. S. (Eng.) 675, 30 Week. Rep. 671.

And where a husband and wife separate by mutual consent, and the husband contracts with a third person for her maintenance, the husband will not be liable for her support if the wife leaves such third person without justifiable cause. Pidgin v. Cram (1836) 8 N. H. 350.

But in Bertie v. Chesterfield (1722) 9 Mod. 31, 88 Eng. Reprint, 296, the husband's estate was held liable for his wife's funeral expenses, although she lived apart from him on separate maintenance.

A husband is not liable for necessities furnished his wife by a tradesman who had notice that she had a separate maintenance. Rawlyns v. Vandyke (1801) 3 Esp. (Eng.) 250.

But it is immaterial that the tradesman did not know of such separation and allowance where he had not, prior to the separation, furnished goods to the wife on the credit of her husband. Cany v. Patton (1831) 2 Ashm. (Pa.) 140.

However, it has been held that a hus-

band living separate and apart from his wife under an agreement which gave the wife an allowance for support, and which was regularly paid, is liable for medical services rendered the wife while so living apart, where the physician had no knowledge of the matter. *Lawrence v. Brown* (1894) 91 *Iowa*, 342, 59 N. W. 256. The court expressly stated, however, that, the question not being before them, they refused to determine what the effect would be if the physician had known of the separation or of the allowance agreement.

But the fact that a husband makes an allowance will not relieve him of liability if it is not sufficient for all necessities. *Pearson v. Darrington* (1858) 32 *Ala.* 227; *McKinney v. Gulman* (1889) 38 *Mo. App.* 344; *Hodgkinson v. Fletcher* (1814) 4 *Campb. (Eng.)* 70, 15 *Revised Rep.* 725.

However, where a wife is living apart from her husband, accepting a sum for her support, and agreeing to support herself, the husband cannot be held liable for necessities furnished her, although the sum given her is inadequate, where there has been no offer to return or any claim made for support. *Alley v. Winn* (1883) 134 *Mass.* 77, 45 *Am. Rep.* 297.

And where the wife makes the terms of maintenance, the husband is not liable for necessities furnished, though the income is insufficient. *Eastland v. Burchell* (1878) L. R. 3 Q. B. Div. (Eng.) 432, 47 L. J. Q. B. N. S. 500, 38 L. T. N. S. 568, 27 *Week. Rep.* 290.

But acquiescence of the wife in the amount received is insufficient. *Hodgkinson v. Fletcher* (Eng.) *supra*.

Also, a husband will be liable for necessities furnished his wife where the allowance which he has promised to make has not been paid. *Baker v. Barney* (1811) 8 *Johns (N. Y.)* 72, 5 *Am. Dec.* 326; *Nurse v. Craig* (1806) 2 *Bos. & P. N. R.* 148, 127 *Eng. Reprint*, 581; *Collier v. Brown* (1862) 3 *Fost. & F. (Eng.)* 67.

Or if he does not pay it regularly. *Fredd v. Eves* (1846) 4 *Harr. (Del.)* 385; *Beale v. Arabin* (1877) 36 L. T. N. S. (Eng.) 249.

And a husband who has not paid the stipulated allowance will be held liable for necessities furnished his wife although another tradesman has received more than the stipulated allowance for board and lodging. *Collier v. Brown* (Eng.) *supra*.

So, also, a husband who does not regularly pay an allowance is liable for neces-

sary medical attendance furnished his wife, though he directed her not to run bills. *Beale v. Arabin* (1877) 36 L. T. N. S. (Eng.) 249.

Whether or not a separation was with the consent of the husband is a question for the jury. *Evans v. Fisher* (1849) 10 *Ill.* 569.

And it is also a question for the jury whether the allowance made by the husband to the wife, who is living apart from him by mutual consent, is sufficient, taking into consideration the status of the parties and the income of the husband. *Holder v. Cope* (1846) 2 *Car. & K. (Eng.)* 437.

IV. Liability for necessities furnished pending suit for divorce.

Pendency of divorce proceedings will not relieve the husband from liability for his wife's support, who is living apart from him, where no alimony has been decreed, and he has not made any other provision for her maintenance. *Johnston v. Allen* (1869) 6 *Abb. Pr. N. S. (N. Y.)* 306, 39 *How. Pr.* 506; *Minck v. Martin* (1886) 22 *Jones & S. (N. Y.)* 136; *Cunningham v. Irwin* (1821) 7 *Serg. & R. (Pa.)* 247, 10 *Am. Dec.* 458; *Keegan v. Smith* (1826) 8 *Dowl. & R. (Eng.)* 118, 5 *Barn. & C.* 375, 108 *Eng. Reprint*, 140, 4 L. J. K. B. 189, 29 *Revised Rep.* 273.

At least, he will be liable up to the time of actual payment of alimony. *Minck v. Martin* (1886) 22 *Jones & S. (N. Y.)* 136.

And he is liable whether the marriage is lawful or not. *Johnston v. Allen* (N. Y.) *supra*.

And he will be liable though the decree, made after the debt was contracted, directed payment of alimony from a date prior to the time the necessities were furnished. *Keegan v. Smith* (1826) 8 *Dowl. & R. (Eng.)* 118, 5 *Barn. & C.* 375, 108 *Eng. Reprint*, 140, 4 L. J. K. B. 189, 29 *Revised Rep.* 273.

But where alimony has been decreed, the husband will not be liable. *Bennett v. O'Fallon* (1828) 2 *Mo.* 69, 22 *Am. Dec.* 440; *Wise Memorial Hospital Asso. v. Peyton* (1915) 99 *Neb.* 48, 154 N. W. 838; *Meyer v. Jewell* (1904) 88 N. Y. Supp. 972; *Hare v. Gibson* (1876) 32 *Ohio St.* 33, 30 *Am. Rep.* 568.

Or where he has made adequate provision for her support. *Allen v. Rieder* (1910) 41 *Pa. Super. Ct.* 534.

And he will not be liable for necessities furnished, whether or not tradesmen had notice of the separation. *Meyer v. Jewell* (1904) 88 N. Y. Supp. 972.

So, a husband who pays alimony regularly pending action for divorce is not liable for board furnished wife. *Knagge v. Pfeiffer* (1880) 5 Ohio L. J. 794. The court stated that "when an action for divorce is pending and alimony has been decreed and paid promptly, those dealing with the wife do so at their peril, and the circumstances fixing his liability must be shown by those dealing with her." The court added that the testimony showed that the one furnishing the board knew that there was an action for divorce and although she denied knowing that alimony had been granted, it was her business, after learning of the action for divorce, to inquire into the matter to see if alimony had been allowed, and paid; stating that she should have gone to the court, or to the husband's attorney, or to the husband himself to learn if the alimony had been paid, and should then have looked to that for payment, or should have declined further to board the wife.

But in *Schneider v. Rosenbaum* (1906) 52 Misc. 143, 101 N. Y. Supp. 529, the husband was held liable for services of a nurse during his wife's confinement, although, pending an action for separation, they were living separate, and he was paying her \$5 a week.

V. Effect of wife having means of her own.

Where a wife has means of her own adequate for her support, the husband will not be liable for necessities. *Fredd v. Eves* (1846) 4 Harr. (Del.) 385.

Even though the wife lives apart from her husband through no fault of her own. *Liddlow v. Wilmot* (1817) 2 Starkie (Eng.) 86, 19 Revised Rep. 684.

So, also, in *Hunt v. Hayes* (1891) 64 Vt. 89, 15 L.R.A. 661, 33 Am. St. Rep. 917, 23 Atl. 920, it was held that a wife wrongfully turned away by her husband cannot pledge his credit for necessities if she has an adequate income of her own with which she can supply herself.

And in *Hass v. Brady* (1906) 49 Misc. 235, 96 N. Y. Supp. 449, it was held that where a wife has large independent means, and there is no evidence that the husband had refused to furnish necessities, the wife, and not the husband, will be liable for goods furnished her, although she directs that the bill be sent to him.

But in *Ott v. Hentall* (1899) 70 N. H. 231, 51 L.R.A. 226, 47 Atl. 80, it was held that a wife's financial ability to

provide for herself does not deprive her of the right to pledge her husband's credit for necessities, where she is living apart from him on account of his misconduct.

Nor do statutes enabling married women to hold property to their own use, and enlarging their rights and liabilities, change the rule which gives a wife power to pledge her husband's credit for necessities. (N. H.) *Ibid*.

After reviewing the cases holding to the contrary, the court in the *Ott* Case stated that "it is sufficient to say that they seem to be inconsistent with the character of the obligation which the law imposes upon the husband as a part of the marriage relation. Marriage is founded on the idea that the parties will establish a home and rear a family. The husband is by nature, as well as by law, the leading and responsible party in the undertaking. Among other things he takes upon himself the duty of providing a home and suitably maintaining the wife and children. The wife's ability to provide herself with the necessities of life does not relieve her from the duties while they live together, and no reason is perceived why it should do so while she is living apart from him in consequence of his misconduct."

A voluntary pension to the wife from the Crown during pleasure will not relieve a husband from liability for necessities furnished the wife, where the husband drove her out without providing a separate maintenance; *Thompson v. Hervey* (1768) 4 Burr. 2178, 98 Eng. Reprint, 136.

And a husband who abandons his wife and family without good cause, in this case because of wife's complaint of his familiarity with other women, and without providing means of support, is liable for necessities furnished, though the wife has the earnings of two daughters, who live with her. *Hall v. Weir* (1861) 1 Allen (Mass.) 261.

So, also, in *Thorpe v. Shapleigh* (1877) 67 Me. 235, action for necessities furnished wife, who had left her husband for good and sufficient cause, it was held that a request to charge that "the plaintiff cannot recover for any alleged necessities furnished to the defendant's wife while she . . . was the owner of a dwelling house and land which she omitted to appropriate to the relief of her necessities" was properly refused. The court stated that "when a husband wrongfully turns his wife away he is by law liable for her support. A dwelling house would seem to be as much a neces-

sity for a wife and family to protect her from the inclemencies of the weather as food to save her from starvation. The request implies an obligation to appropriate what is, in and of itself, a necessity, to procure other necessities, which would not be more needed than the one omitted to be appropriated."

And in *Prescott v. Webster* (1900) 175 *Mass.* 316, 56 *N. E.* 577, where the husband deserted his wife without justifiable cause, making no provision for her support, it was held that the rule that where the wife has means of her own the husband will not be liable for necessities furnished her had no application where it appeared that an interest she had in real estate was not such that she could realize upon it so as to relieve her distress. The facts in this case showed that the wife had an equity of redemption of the value of \$2,000 in a house, the rents of which were applied to payment of interest on a mortgage and taxes, and were, during the separation, no more than sufficient for that purpose, and that she had no other property.

VI. Duty of tradesmen to make inquiry as to husband's liability.

One who deals with a married woman living separate from her husband is bound to make inquiries and ascertain whether, under the circumstances, her husband will be chargeable for the articles furnished. *Mullally v. Lott* (1911) 162 *Ill. App.* 533; *Bevier v. Galloway* (1874) 71 *Ill.* 517; *Johnson v. Coleman* (1915) 13 *Ala. App.* 520, 69 *So.* 318; *Bennett v. O'Fallon* (1828) 2 *Mo.* 69, 22 *Am. Dec.* 440; *Rutherford v. Cox* (1848) 11 *Mo.* 348; *Porter v. Bobb* (1857) 25 *Mo.* 36; *Reese v. Chilton* (1858) 26 *Mo.* 598; *Wise Memorial Hospital v. Peyton* (1915) 99 *Neb.* 48, 154 *N. W.* 838; *Hatch v. Leonard* (1902) 71 *App. Div.* 32, 75 *N. Y. Supp.* 726; *Brown v. Mudgett* (1868) 40 *Vt.* 68.

So, the husband will not be liable for necessities furnished the wife when the circumstances are such as to put the one furnishing them on inquiry which would result in his learning that the wife had abandoned the husband, who was ready and willing to furnish all she needed. *Wallace v. Ellis* (1873) 42 *Ind.* 582.

VII. Necessity for and effect of notice not to give wife credit.

Express authority given to the wife by the husband to charge him for necessities is not revoked by a separation of the parties, in the absence of notice. *L.R.A.* 1917A.

Anonymous (1897) 21 *Misc.* 656, 48 *N. Y. Supp.* 277.

And where, after separation, a husband pays a bill for goods purchased before separation, without dispute, and without notice that the wife is not still authorized to charge him, the husband is liable for necessities furnished after the separation. *Hartjen v. Ruebsamen* (1897) 19 *Misc.* 149, 43 *N. Y. Supp.* 466. The court held that an actual agency in the wife was to be inferred from the subsequent act of the husband in paying the previous bill without objection or qualification.

But such agency cannot be inferred from the fact that the wife, before separation, dealt with a tradesman, where there is no evidence that any bill had ever been rendered the husband, or that he had personally paid anything on account of her indebtedness, but it is shown that she always paid cash. *Bostwick v. Brower* (1897) 22 *Misc.* 709, 49 *N. Y. Supp.* 1046.

So, also, in *Wallis v. Biddick* (1873) 22 *Week. Rep. (Eng.)* 76, it was held a husband is not bound to give notice of separation to tradesman with whom he had always dealt on a cash basis.

And in *Wilson v. Thomass* (1911) 127 *N. Y. Supp.* 474, it was held that a tradesman is not entitled to notice of termination of a wife's implied agency to pledge her husband's credit by living separately, where it does not appear that he ever relied upon such agency.

In *Shillito v. Duhme* (1858) 3 *Ohio Dec. Reprint*, 336, it was held that a husband is not bound to give notice of his wife's separation; so, if a merchant sells goods to her without inquiry, he is bound by the relation of husband and wife, and if the wife voluntarily separates, the husband is not liable.

A man under a duty to supply his wife with necessities, who fails to perform it, cannot escape liability to one who does furnish her with necessities, upon the ground that he gave notice that he would not be responsible for them. To permit this would be to put it in the power of bad husbands to deprive their wives of all means of living; for, if notice terminated liability, a man had enough to beat his wife would be quick to give it. *Watkins v. De Armond* (1883) 89 *Ind.* 553.

So, a husband is liable to third persons for support, although he forbids such persons to charge him, where the wife, because of cruelty and abuse, is justified in leaving him. *Bradish v. Huse* (1796) 1 *Dane, Abr. (Mass.)* 355.

And a husband who, by his adultery, compels his wife to leave him, gives her credit with the whole community, although it is expressly forbidden by him. *Sykes v. Halstead* (1848) 1 Sandf. (N. Y.) 483.

And in *Harris v. Morris* (1801) 4 Esp. (Eng.) 41, it was held to be no defense to an action against a husband for necessities furnished his wife, whom he has turned out of doors, that he advertised her and gave notice to persons not to trust her.

Also in *Button v. Weaver* (1903) 87 App. Div. 224, 84 N. Y. Supp. 388, it was held that a husband is liable for medical services rendered his wife, who is living apart from him, where he has not made suitable provision for her, and this although he may be justified in the separation, and also although he may have notified the physician not to render her services on his account. The court stated: "A husband living separate from his wife may determine in a large measure in what way his credit is to be pledged and in what manner the marital duty of providing for his wife is to be fulfilled. If, however, he forbids one from running an account against him for necessities furnished for his wife, in order to make the prohibition effective he must otherwise supply her needs or permit her to pledge his credit elsewhere. He must perform the obligation in some fair way. In the present case he directed the plaintiff to abstain from performing services concededly necessary for his wife, but made no other provision for her for this necessity. He endeavored to be relieved wholly from the liability resting upon him. This he may not do."

And in *Rennick v. Ficklin* (1842) 3 B. Mon. (Ky.) 166, it was held that though a husband gives notice that he will not pay the debts of his wife, who is living separate from him, yet if the articles are necessities, suitable to her state and condition, he is bound to pay for them after her return upon a reconciliation.

But one who has separated from his wife and has started proceedings for divorce is not liable for necessities furnished her where he has made adequate provision for her support, and has advertised that he will not be liable for her debts. *Allen v. Rieder* (1910) 41 Pa. Super. Ct. 534.

A notice inserted in a newspaper by one, that he will not be liable for anything furnished his wife, has no effect as to a tradesman not shown to have had

notice thereof. *W. & J. Sloane v. Boyer* (1905) 95 N. Y. Supp. 531; *Walker v. Loughton* (1855) 31 N. H. 111.

But where a husband has designated certain persons to supply his wife with necessities on his account, one not designated cannot recover for goods furnished if it is shown that a notice was published forbidding credit, and that the newspaper in which such notice appears was taken by such person. *Kimball v. Keyes* (1833) 11 Wend. (N. Y.) 33.

And one who furnishes necessities to a wife who has left her husband, with knowledge that the husband has published a notice that he will not be liable for her debts, must show that the wife had good cause for the separation. *Pool v. Everton* (1858) 5 Jones, L. (N. C.) 241.

In *Benjamin v. Dockham* (1882) 132 Mass. 181, it was held that a husband will not be liable for milk furnished a wife with a child less than one year old, where furnished against the husband's express notice not to do so, in the absence of evidence that such living apart is under such circumstances as to give the wife implied authority to bind him by contract for necessities.

But, in a subsequent action in (1883) 134 Mass. 418, the proof having been adduced that the wife was living apart from her husband because of his cruelty, he was held liable although the declaration was for milk delivered at the husband's request, the court stating that she had, under the circumstances, authority to pledge the husband's credit even against his will, and her request was his request.

VIII. Burden of proving liability.

The presumption is that the husband is not liable for necessities furnished his wife, who is living separate and apart from him, and so, one furnishing necessities to her has the burden of proving that the separation took place under such circumstances as will render the husband liable. *Johnson v. Coleman* (1915) 13 Ala. App. 520, 69 So. 318; *Brinkerhoff v. Briggs* (1900) 92 Ill. App. 537; *Bonney v. Perham* (1902) 102 Ill. App. 634; *Cline v. Buddemeier* (1911) 164 Ill. App. 79; *Forrester v. Hurtt* (1907) 18 Haw. 215; *Peaks v. Mayhew* (1901) 94 Me. 571, 48 Atl. 172; *Beaudette v. Martin* (1915) 113 Me. 310, 93 Atl. 758; *Vusler v. Cox* (1891) 53 N. J. L. 516, 22 Atl. 347; *Blowers v. Sturtevant* (1847) 4 Denio (N. Y.) 46; *M'Cutchen v. McGahay* (1814) 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Robinson v. Litz* (1910) 123 N. Y. Supp. 363;

Wolf v. Schulman (1904) 45 Misc. 418, 90 N. Y. Supp. 363; Buxbaum v. Mason (1906) 48 Misc. 396, 95 N. Y. Supp. 539; Monahan v. Auman (1909) 39 Pa. Super. Ct. 150; Hultz v. Gibbs (1870) 66 Pa. 360; Morgenroth v. Spencer (1905) 124 Wis. 564, 102 N. W. 1086; Clifford v. Laton (1827) 3 Car. & P. (Eng.) 15, Moody & M. 101.

And a town which is endeavoring to charge a husband with necessities furnished his wife, living apart from him, has the burden of proving that her living apart is under such circumstances as enable her to use her husband's credit; being in this respect in no different situation than an individual who furnishes necessities. Sturbridge v. Franklin (1893) 160 Mass. 149, 35 N. E. 669.

And where by statute a husband is not liable for necessities furnished his wife when they are living apart, except where the separation is due to his fault, or where it is by agreement, and the wife is without means of her own, the tradesmen must show that the wife has no separate estate, and that the husband was not justified in leaving her; proof that he was not furnishing her with money being insufficient. Decker v. Moyer (1910) 121 N. Y. Supp. 630.

And the fact that one furnishing the articles had no knowledge that the wife was living separate from her husband will not relieve him from the burden of proof. Vusler v. Cox (1891) 53 N. J. L. 516, 22 Atl. 347.

But it has been held that where the wife resides separate from her husband, proof of her marriage with him and that the articles furnished were necessary for her support will constitute prima facie evidence of the liability of the husband and of his promise to pay, and the burden of proof rests upon the husband to show that her separation and want of means of support are through no fault on his part. Rumney v. Keyes (1835) 7 N. H. 571.

Also it has been held that the husband has the burden of showing that tradesmen had notice that the wife, living apart from him by mutual consent, had separate maintenance. Rawlyns v. Vandyke (1801) 3 Esp. (Eng.) 250.

One furnishing necessities to a wife living apart from her husband has the burden of proving that the husband disregarded or disobeyed his legal duty to furnish them. Bonney v. Perham (1902) 102 Ill. App. 634; Lee v. Mead (1881) 9 Mo. App. 597; S. E. Olson Co. v. Youngquist (1898) 72 Minn. 432, 75 N. W. 727; Robinson v. Litz (1910) 123 N. Y. Supp. 363; Farquharson v. Brokaw L.R.A.1917A.

(1910) 67 Misc. 277, 124 N. Y. Supp. 476, affirmed without opinion in (1910) 142 App. Div. 898, 126 N. Y. Supp. 1128.

And where a husband professes to provide for his wife, who lives apart from him, it is incumbent upon a party who has been expressly forbidden to give credit to her, in order to render the husband liable for subsequent supplies, to show affirmatively and clearly that the husband did not supply her with necessities suitable to her condition. Mott v. Comstock (1832) 8 Wend. (N. Y.) 544.

Where a husband and wife live apart by mutual consent, the husband making an allowance for support, the tradesmen have the burden of proving that such allowance is insufficient. Johnston v. Sumner (1858) 3 Hurlst. & N. 261, 157 Eng. Reprint, 469, 4 Jur. N. S. 462, 27 L. J. Exch. N. S. 341, 6 Week. Rep. 574; Bloomingdale v. Brinckerhoff (1892) 2 Misc. 49, 20 N. Y. Supp. 858.

Also that the goods furnished were necessary. Bloomingdale v. Brinckerhoff (N. Y.) supra.

But in Rumney v. Keyes (1835) 7 N. H. 571, and Tebbets v. Hapgood (1857) 34 N. H. 420, it was held that the marriage being proved, and that articles furnished were necessities, the husband has the burden of proving that he had made suitable provision for his wife.

IX. *Effect of agreement by husband to pay.*

A husband will be liable for necessities furnished his wife, living apart from him, where he subsequently promised to pay for them. Frost v. Willis (1841) 13 Vt. 292; Allen v. Aldrich (1854) 29 N. H. 63; Shreve v. Dulany (1808) 1 Cranch, C. C. 499, Fed. Cas. No. 12,817.

And this although he may have allowed her a separate maintenance. Shreve v. Dulany (Fed.) supra.

And the fact that the promise to pay was induced by the wife's deception will not relieve him from liability if the party furnishing the goods was not party to such deception. Allen v. Aldrich (1854) 29 N. H. 63.

And an implied ratification of a wife's debt for necessities will make the husband, who has deserted her, liable therefor. Jenner v. Hill (1858) 1 Fost. & F. (Eng.) 269.

But statements made by a husband should not be held conclusive as an assumption of liability for necessities furnished his wife, living apart without reasonable or just cause, where they were made under a mistaken belief as to liability, induced by the tradesmen. Brown v. Mudgett (1868) 40 Vt. 68. J. H. B.

MISSISSIPPI SUPREME COURT.
(In Banc.)

L. T. VENTRESS et al., Appts.,
v.

D. H. WALLACE, Receiver of Citizens'
Bank.

(— Miss. —, 71 So. 636.)

Pleading — supplemental bill — abandonment of original bill.

1. The original bill is not abandoned by the filing of a supplement which asks that it be taken as and for an amended and supplemental bill, and as part of the original bill, and that relief be granted upon this bill along with the original one.

For other cases, see *Pleading*, I. o, in *Dig.* 1-52 N. S.

Receiver — insolvent bank — right to recover assets.

2. The receiver of an insolvent bank may maintain an action to hold the directors liable for losses caused by their negligence, although the caption of the bill states that he is suing for the benefit of all creditors of the bank.

For other cases, see *Receivers*, IV. in *Dig.* 1-52 N. S.

Equity — jurisdiction — action against bank directors.

3. Equity has jurisdiction of an action by a receiver of an insolvent bank to compel its directors to account for losses caused by their negligent management of the concern.

For other cases, see *Equity*, I. a, in *Dig.* 1-52 N. S.

Descent and distribution — suit against heirs — tort of ancestor.

4. Where creditors may secure administration upon the estate of their deceased debtor, a receiver of an insolvent bank cannot maintain an action against the heirs of a deceased director to recover for losses caused by his negligent management of the affairs of the bank.

For other cases, see *Descent and Distribution*, III. in *Dig.* 1-52 N. S.

Limitation of action — action for failure to audit books of bank — when arises.

5. A cause of action against directors of a bank for losses due to defalcation of the cashier, because of their neglect, continued over a long period of years, in failing to audit the books of the bank, does not arise until their negligent conduct is discovered.

For other cases, see *Limitation of Actions*, II. f, in *Dig.* 1-52 N. S.

(February 21, 1916.)

APPEAL by defendants from a decree of the Chancery Court for Wilkinson

Note. — As to limitation of actions against directors of corporation for malfeasance or nonfeasance, see annotation following this case, post, 980.
L.R.A.1917A.

County overruling their separate demurrers to the amended and supplemental complaint filed to hold them liable as officers and directors for alleged negligence in the administration of the affairs of the insolvent bank. Affirmed in part.

The facts are stated in the opinion.

Messrs. Green & Green and Ackland H. Jones, for appellants:

The remedy at law is clear, adequate, complete, and exclusive, and equity has no jurisdiction.

Freeman v. Winchester, 10 Smedes & M. 577; 15 Enc. Pl. & Pr. 654, 655; Smith v. Brittenham, 109 Ill. 540; Kitchens v. Harrall, 54 Misc. 474; Cumberland Teleph. & Teleg. Co. v. Williamson, 101 Miss. 1, 57 So. 559; Scottish Union & Nat. Ins. Co. v. Warren-Gee Lumber Co. 103 Miss. 816, 60 So. 1010; Avery v. McClure, 94 Miss. 172, 22 L.R.A.(N.S.) 256, 47 So. 901, 19 Ann. Cas. 134; Jones v. Jones, 79 Miss. 261, 30 So. 651; 1 Cook, Corp. § 218; 3 Cook, Corp. 6th ed. § 701; 11 Am. & Eng. Enc. Law, 2d ed. 175; Mathews v. Mobile Mut. Ins. Co. 75 Ala. 85.

The bill shows no right of action in complainant, as receiver, for the use of creditors.

Freeman v. Winchester, 10 Smedes & M. 577; Kitchens v. Harrall, 54 Miss. 474; 15 Enc. Pl. & Pr. 664, 665; 1 Cook, Corp. § 218; Ellis v. H. P. Gates Mercantile Co. 103 Miss. 560, 43 L.R.A.(N.S.) 982, 60 So. 640, Ann. Cas. 1915B, 526; Kansas City, M. & B. R. Co. v. Cantrell, 70 Miss. 320, 12 So. 344; Waters v. Mobile & O. R. Co. 74 Miss. 539, 21 So. 240, 1 Am. Neg. Rep. 284; Jones v. Kansas City, M. & B. R. Co. 73 Miss. 913, 23 So. 547.

Section 147 of the Constitution does not preclude reversal on the ground of jurisdiction.

Scottish Union & Nat. Ins. Co. v. Warren-Gee Lumber Co. 103 Miss. 820, 60 So. 1010.

The bill states no cause of action: especially none in the complainant receiver.

Chicago, St. L. & N. O. R. Co. v. Scurr, 59 Miss. 461, 42 Am. Rep. 373; Mann's Mercantile Co. v. Smith, 107 Miss. 16, 64 So. 929; Avery v. McClure, 94 Miss. 172, 22 L.R.A.(N.S.) 256, 47 So. 901, 19 Ann. Cas. 134; Briggs v. Spaulding, 141 U. S. 147, 35 L. ed. 669, 11 Sup. Ct. Rep. 924; Mason v. Moore, 73 Ohio St. 275, 4 L.R.A.(N.S.) 597, 76 N. E. 932, 4 Ann. Cas. 240; Knower v. Haines, 31 Fed. 513; Kraft-Holmes Grocery Co. v. Crow, 36 Mo. App. 288; Piscataqua F. & M. Ins. Co. v. Hill, 60 Me. 182; Mitchell v. Bank of Indianola, 98 Miss. 658, 54 So. 87; Eyrich v. Capital State Bank, 67 Miss. 61, 6 So. 615; Utley v. Hill, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 35 S. W. 1691; Zinn v. Mendel,

9 W. Va. 580; *Smith v. Hurd*, 12 Met. 371, 46-Am. Dec. 690; *Howe v. Barney*, 45 Fed. 668; *Craig v. Gregg*, 83 Pa. 19; *Allen v. Curtis*, 26 Conn. 456; *Evans v. Brandon*, 53 Tex. 56; *Smith v. Poor*, 40 Me. 415, 63 Am. Dec. 672; *Fusz v. Spaunhorst*, 67 Mo. 256; *Utey v. Hill*, 155 Mo. 232, 49 L.R.A. 323, 78 Am. St. Rep. 569, 55 S. W. 1091; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448; 21 Am. & Eng. Enc. Law, 2d ed. 880-882; *Deaderick v. Bank of Commerce*, 100 Tenn. 457, 45 S. W. 786; *Force v. Age-Herald Co.* 136 Ala. 278, 33 So. 866; *Frost Mfg. Co. v. Foster*, 76 Iowa, 535, 41 N. W. 212; *Thomp. Corp.* 2d ed. § 1297; *Swentzel v. Penn. Bank*, 147 Pa. 140, 15 L.R.A. 305, 30 Am. St. Rep. 718, 23 Atl. 405; *Spering's Appeal*, 71 Pa. 11, 10 Am. Rep. 684; *Maisch v. Savings Fund*, 5 Phila. 30; *Williams v. Brady*, 221 Fed. 118; *Ellis v. H. P. Gates Mercantile Co.* 103 Miss. 560, 43 L.R.A. (N.S.) 982, 60 So. 649, Ann. Cas. 1915B, 526; *Warner v. Penoyer*, 82 Fed. 181, 44 L.R.A. 761, 33 C. C. A. 222, 61 U. S. App. 372, 91 Fed. 587; 1 Bowles, Bkg. p. 284.

Directors of a corporation are not liable for the mismanagement, frauds, or defalcations of the subordinate officers, including the cashier.

Thomp. Corp. 2d ed. § 1280; *Lewis v. Montgomery*, 145 Ill. 31, 33 N. E. 880; *Savings Bank v. Caperton*, 87 Ky. 306, 12 Am. St. Rep. 488, 8 S. W. 885; *Chick v. Fuller*, 51 C. C. A. 648, 114 Fed. 22; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; *Warner v. Penoyer*, 82 Fed. 181, 44 L.R.A. 761, 33 C. C. A. 221, 61 U. S. App. 372, 91 Fed. 587; *Movius v. Lee*, 30 Fed. 307; 1 Dolles, Bkg. 264, 265; *Rankin v. Cooper*, 149 Fed. 1010.

The allegations of the bill are vague and uncertain, and conclusions of the pleader; and no specific act or acts of wanton, wilful, and gross negligence, or any legal or equitable liability to complainant for creditors, is averred.

6 Enc. Pl. & Pr. 396; *Spears v. Cheatham*, 44 Miss. 71; *Jones v. Rogers*, 85 Miss. 839, 38 So. 742; *Perkins v. Sanders*, 56 Miss. 737; *McCerrin v. Alabama & V. R. Co.* 72 Miss. 1013, 18 So. 420; 3 Cook, Corp. 6th ed. 701; *Southern R. Co. v. Free*, 95 Miss. 739, 50 So. 442; 12 Enc. Pl. & Pr. 1033.

There can be no liability of the directors for acts prior to the extension of credit by the creditors.

Thomp. Liability of Officers, 430; *Wilson v. Stevens*, 129 Ala. 630, 87 Am. St. Rep. 86, 29 So. 678.

There is no liability for the alleged violation of § 202, Code of 1906, providing for holding of meetings and making investigations as to the affairs of the bank. L.R.A.1917A.

Mann's Mercantile Co. v. Smith, 107 Miss. 16, 64 So. 929; *Avery v. McClure*, 94 Miss. 172, 22 L.R.A. (N.S.) 256, 47 So. 901, 19 Ann. Cas. 134; *McClenden v. Whitten*, 95 Miss. 124, 48 So. 964; *Sells v. Rosedale Grocery & Commission Co.* 72 Miss. 605, 17 So. 236; *Lewis v. Montgomery*, 145 Ill. 31, 33 N. E. 880; *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher*, 26 Hun, 52, 97 N. Y. 651; *Edwards Hines Lumber Co. v. Marquardt*, — Iowa, —, 117 N. W. 666; *Knox v. Baldwin*, 80 N. Y. 610; *Union Iron Co. v. Pierce*, 4 Biss, 327, Fed. Cas. No. 14,367; *State Sav. Bank v. Johnson*, 18 Mont. 440, 33 L.R.A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *International Paper Co. v. Gazette Co.* 182 Mass. 578, 66 N. E. 636; *Mitchell v. Hotchkiss*, 48 Conn. 18, 40 Am. Rep. 146; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834; *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Lawler v. Burt*, 7 Ohio St. 340; *Larsen v. James*, 1 Colo. App. 313, 29 Pac. 183; *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Moies v. Sprague*, 9 R. I. 541; *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; *Derrickson v. Smith*, 27 N. J. L. 166; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554; *Lowry v. Inman*, 46 N. Y. 119; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376; *Knoop v. Blaffer*, 39 La. Ann. 23, 6 So. 9; *Jessee v. De Shong*, — Tex. Civ. App. —, 105 S. W. 1013; *Hogue v. Capital Nat. Bank*, 47 Neb. 929, 66 N. W. 1036; *Kleckner v. Turk*, 45 Neb. 191, 63 N. W. 469; *First Nat. Bank v. Price*, 33 Md. 487, 3 Am. Rep. 204, 13 Mor. Min. Rep. 485; *Eastman v. Clackamas County*, 32 Fed. 33; *Patterson v. Thompson*, 86 Fed. 85; *Breitung v. Lindauer*, 37 Mich. 217; *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821; *Cooley, Const. Lim.* 4th ed. p. 445, note; *Irvine v. McKeon*, 23 Cal. 472; *Davidson v. Witthaus*, 106 App. Div. 186, 94 N. Y. Supp. 428.

The Statute of Limitations applicable to penalties or forfeitures applies.

McClenden v. Whitten, 95 Miss. 124, 48 So. 964; *Knoop v. Blaffer*, 39 La. Ann. 23, 6 So. 9; *Larsen v. Jones*, 1 Colo. App. 313, 29 Pac. 183; *State Sav. Bank v. Johnson*, 18 Mont. 440, 33 L.R.A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *Patterson v. Wade*, 53 C. C. A. 1, 115 Fed. 770; *Knox v. Baldwin*, 80 N. Y. 610; *Colorado Fuel & Iron Co. v. Lenhart*, 6 Colo. App. 511, 41 Pac. 834; *Gregory v. German Bank*, 3 Colo. 332, 25 Am. Rep. 760; *Patterson v. Thompson*, 86 Fed. 85; *Sturges v. Burton*, 8 Ohio St. 215, 72 Am. Dec. 582; 2 *Thomp. Corp.* § 1360.

Messrs. *Bramlette & Bramlette* also for appellants.

Messrs. J. McC. Martin and Watkins & Watkins, for appellee:

The receiver had the right to represent the bank and to bring an action which the bank itself might have brought.

Freeman v. Winchester, 10 Smedes & M. 577; Kretchmar v. Stone, 90 Miss. 375, 43 So. 177; Bank of Gloster v. Hindman, 95 Miss. 742, 50 So. 65, Ann. Cas. 1912A, 23; Benjamin v. Staples, 93 Miss. 507, 47 So. 425; Thomp. Corp. § 1316.

A court of equity has jurisdiction of this controversy.

Thomp. Corp. § 1215; Emerson v. Gaither, 103 Md. 564, 8 L.R.A.(N.S.) 738, 64 Atl. 26, 7 Ann. Cas. 1114; Briggs v. Spaulding, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; Robinson v. Hull, 12 C. C. A. 674, 25 U. S. App. 48, 63 Fed. 222; Hodges v. New England Screw Co. 1 R. I. 312, 53 Am. Dec. 624; Citizens' Loan Assn. v. Lyon, 29 N. J. Eq. 110; Citizens' Bldg. Loan & Sav. Assn. v. Coriell, 34 N. J. Eq. 383; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; King v. Wooldridge, 78 Miss. 179, 28 So. 824; Love Mfg. Co. v. Queen City Mfg. Co. 74 Miss. 290, 21 So. 146; Wolfe v. Simmons, 75 Miss. 540, 23 So. 586; Millsaps v. Chapman, 76 Miss. 942, 71 Am. St. Rep. 547, 26 So. 369; Brent v. B. E. Brister Sawmill Co. 103 Miss. 876, 43 L.R.A.(N.S.) 720, 60 So. 1018, Ann. Cas. 1915B, 576; Ellis v. H. P. Gates Mercantile Co. 103 Miss. 560, 43 L.R.A.(N.S.) 982, 60 So. 649, Ann. Cas. 1915B, 526; Story, Eq. Jur. § 964; 28 Am. & Eng. Enc. Law, 2d ed. 58; Cook, Corp. 5th ed. § 648; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; Fidelity & D. Co. v. Wilkinson County, 106 Miss. 654, 64 So. 457, Ann. Cas. 1916B, 1248; 16 Cyc. 41, note 64; Irwin v. Lewis, 50 Miss. 363; Barnes v. Lloyd, 1 How. (Miss.) 584; Cameron v. Cameron, 82 Ala. 392, 3 So. 148; Vansyckle v. Richardson, 13 Ill. 171; Williams v. Ewing, 31 Ark. 229; Hall v. Martin, 46 N. H. 337; Cutright v. Stanford, 81 Ill. 240; Vanmeter v. Love, 33 Ill. 260; Bank of Mississippi v. Duncan, 52 Miss. 740; Georgia P. R. Co. v. Brooks, 66 Miss. 583, 6 So. 467; Eyrich v. Capital State Bank, 67 Miss. 60, 6 So. 615; Buie v. Pollock, 55 Miss. 309; Woods v. Riley, 72 Miss. 73, 18 So. 384; Atkinson v. Felder, 78 Miss. 83, 29 So. 767.

A director of a bank is required, in the performance of his duties, to use the same care which a reasonably prudent business man would bring to bear in managing his own business.

2 Thomp. Corp. 2d ed. chap. 46; 10 Cyc. 830; Bank of Mutual Redemption v. Hill, 56 Me. 385, 96 Am. Dec. 470; Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81, 12 L.R.A.1917A.

N. E. 676; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Marshall v. Farmers' & M. Sav. Bank, 85 Va. 676, 2 L.R.A. 534, 17 Am. St. Rep. 84, 8 S. E. 586; Union Nat. Bank v. Hill, 148 Mo. 380, 71 Am. St. Rep. 615, 49 S. W. 1012; Warren v. Robison, 19 Utah, 289, 75 Am. St. Rep. 742, 57 Pac. 287; Commercial Bank v. Chatfield, 121 Mich. 641, 80 N. W. 712; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; Ackerman v. Halsey, 37 N. J. Eq. 356; Vance v. Phenix Ins. Co. 4 Lea, 385.

Lack of reasonable and ordinary care on the part of a director is gross negligence for which he is liable.

Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; 21 Am. & Eng. Enc. Law, 874.

If any statute of limitations applied at all, the ten-year statute would apply to trusts of this character.

Patton v. Pinkston, 86 Miss. 651, 38 So. 500; Thomp. Corp. § 1318.

Stevens, J., delivered the opinion of the court:

Appellants appeal from a decree overruling their separate demurrers to the amended and supplemental bill of complaint exhibited against them by D. H. Wallace, duly qualified receiver of the Citizens' Bank of Wilkinson county. There was an original bill, to which was interposed a demurrer. Thereafter the amended and supplemental bill was filed, and separate demurrers were exhibited thereto, considered by the court, and overruled. The original bill avers in detail the appointment of receiver, the insolvency of the bank, and the administration of the bank's assets under the supervision of the court. The bill further charges that the directors and officers of the bank were guilty of wilful, wanton, and gross negligence in the management and supervision of the affairs and business of the bank; that they employed a cashier, and intrusted to him the work and responsibility, not only of cashier, but of book-keeper, correspondent, and general manager of the bank, with full control and possession of the funds, securities, and property of the bank; that the cashier kept all the accounts, handled all moneys, and from time to time juggled the accounts, misused and appropriated the funds of the bank, and became a pronounced defaulter; that after the discovery by mere accident that the cashier had misused and mismanaged the assets of the institution, a liquidator was selected, and an audit company was employed to examine into the affairs and true condition of the bank, and that this company made its report to the directors,

submitting, among other things, the following: "While pointing out, however, that had any examination of the books ever been made previous to the date of January, 1913, the defalcations and irregularities would most certainly have been disclosed, and probably would not have amounted to such a large figure as is now the case."

The bill further charges that during all of the nine years in which the cashier served, no examination or audit of the books and affairs was ever had or made by anyone whatever; that the directors accepted the cashier's reports and statements in reference to what the books showed, or as to the condition of the bank; that the charter and by-laws of the bank required an examination or inspection from month to month, but none was ever made or ordered by the directors; that they failed to appoint a finance or other committee to audit or examine the affairs of the bank, and accordingly no examination or audit was ever made; that the directors failed to use ordinary care in the management, failed to keep informed, and violated every duty imposed upon them by and as an incident to their office of director; that the law required the board to hold regular meetings and keep an accurate and complete record of all proceedings had at their said meetings, to make personal inspection of the bank's affairs and books in January, April, July, and October of every year, and to certify their finding to the auditor of public accounts under oath, and that none of these duties required by law was performed or regarded, but that all statements of the condition of the institution were prepared by the said faithless cashier and accepted by the directors as true and correct without verification. The bill sets out in further detail the obligations and duties of the directors and the alleged gross violation of these duties; the appropriation of the funds and securities of the bank by the cashier, false entries entered by the cashier on the books, the taking from the bank of valuable notes, which the cashier had not accounted for, and the appropriation thereof by the cashier. It is charged that A. G. Shannon, J. H. Jones, and W. P. S. Ventress were directors of the bank, along with the other living directors who are named as defendants to the bill, but that Mr. Ventress departed this life November 23, 1911, Mr. Jones, December 10, 1911, and Mr. Shannon, December 31, 1912. The executrix of Mr. Jones and the administrator of Mr. Shannon and the heirs at law of Mr. Ventress are named as defendants to the bill, no administration having been taken out on the estate of W. P. S. Ventress, deceased. Claim was made against the estates of the

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said decedents, along with the living directors, for losses of the bank occurring during their lives and while they were members of the board of directors, and against the surviving directors alone for losses occurring after the death of the directors mentioned and up to the final suspension of the bank.

The bill attempts to hold the heirs at law of Mr. Ventress liable for all losses of the bank occurring while he was a director to the extent of the value of the real and personal property left by Mr. Ventress and received by his said heirs. The bill prays for an accounting and full adjustment and prorating of the obligations of the several defendants and their estates. The amended and supplemental bill reiterates many of the averments of the original bill, and further sets out in detail the assets and liabilities of the bank and full list of the creditors. The amended bill charges that a bond in the sum of \$10,000 was given by the cashier as security for the faithful performance of his duty; that under the provisions of this bond it could be renewed and continued in force from year to year; that this bond had been lost or misplaced, and could not be found among the papers and securities of the bank; that the directors did not examine or pay any attention to the bond, and failed to see that the same was properly renewed and kept in force. It is charged, further, that the cashier was a defaulter from year to year from the time of his appointment, April, 1904, to 1913, and the annual shortage is tabulated, aggregating the total sum of \$73,302.05. The amended and supplemental bill abounds in charges of bad faith and bad management on the part of the cashier and the grossest kind of negligence on the part of the directors. The prayer is for an accounting, for personal decree against the living directors, and the personal representatives of the two deceased directors whose estates are being administered upon, and a charge against the property received by the heirs at law of Mr. Ventress from his estate. The demurrers, both general and special, submit every conceivable objection to the bill. Without setting out in detail the 20 grounds for the general demurrer and the many grounds of the special demurrer to many paragraphs of the bill, we discuss the main points of the case stressed by counsel for appellants in oral argument.

It is contended that after the filing of the amended and supplemental bill the original bill is no part of the pleadings in this cause. The amended and supplemental bill, however, is asked by the pleader "to be taken as and for an amended and supple-

mental bill of complaint, and as part of his original bill herein," and that relief be granted "upon the final hearing of this bill of complaint, along with complainant's original bill herein." Under the facts of this case, therefore, we do not take the amended bill as an abandonment of any of the averments of the original bill, but, as indicated by the language of the amended bill itself, as supplemental thereto. Both documents together constitute the bill of complaint in this case.

The right of the receiver to maintain this suit is earnestly challenged. Counsel for appellants construe and term this an action of the creditors of the bank, attempted to be prosecuted by and through the receiver. This, however, is not a creditors' suit. It is true that the caption of the bill describes the complainant as "suing herein by order of court, for benefit of all creditors of said bank." The bill as a whole shows that this is really and truly a suit in equity by the receiver for and on behalf of the defunct corporation, the affairs of which he is administering under the supervision of the court. In a sense the suit, if successful, will inure to the benefit of creditors. But the right of complaint to sue must not be limited or measured by the expression referred to. The question is not so much what the complainant calls himself as what action he in truth and in fact states. In *Morse on Banks and Banking*, vol. 1, 4th ed. § 129, it is stated that "if liability of a director once accrues . . . for . . . dishonesty, negligence, or incompetency, the claim of the bank against him becomes a part of the assets of the institution. An assignee, receiver, commissioner, or other party whomsoever, who may come into possession of the property for the purpose of collecting it and distributing it among the creditors and shareholders, is obliged to regard the rights of action against such delinquent directors as a part of the available assets."

Mr. Thompson, in his excellent work on *Corporations*, vol. 2, § 1316, says: "It is now practically everywhere conceded that the receiver succeeds to the title of the corporation, and whatever rights it may have asserted against its unfaithful directors such receiver may also enforce against them. The jurisdiction of courts of equity to compel unfaithful directors to account to the corporation for losses sustained by their negligence, frauds, and breaches of trust has long been sustained both in England and in this country. An order of court, appointing a receiver of the bank and authorizing him to take charge of and reduce to his possession all the property, rights, credits, demands, and choses in action of

every description, however arising, and belonging to the bank, and empowering him to bring and prosecute, in his own name, as such receiver, all actions necessary in the discharge of his duties, was held sufficient to authorize the receiver to maintain an action against the directors for damages for losses occasioned by their negligence in the management of the affairs of the bank."

In the case of *Ellis v. H. P. Gates Mercantile Co.* 103 Miss. 560, 43 L.R.A. (N.S.) 982, 60 So. 649, Ann. Cas. 1915B, 526, which was a suit in equity, brought by a number of depositors and stockholders against the directors of the Magee Bank, one of the grounds of the demurrer to the bill submitted was that "the right of action, if any there is, is in the bank, or its receiver, and not in complainants;" and the court, in its opinion, through Reed, J., observes that "the suit might have been brought by the bank, to which the directors, as officers or trustees, were first liable. The bank, not being a going concern, and its business being under the control and management of the receiver appointed by a court of equity for the purpose of collecting the assets and winding up its affairs, could not bring the suit; but it would be proper for the receiver, standing in the place of the bank and administering its affairs, to bring the suit."

It was shown in the *Ellis Case* that the receiver declined to bring the suit in question. The instant case is similar to the case of *Ellis v. H. P. Gates Mercantile Co.* and the liability of the directors under circumstances detailed by the bill now before us is settled and fixed beyond question by the *Ellis Case*. The right of the receiver to maintain this suit is supported by authority, by reason, and by every sense of justice. The bank, as a going corporation, was managed by its officers and directors, the very parties here sued. Its affairs are now in liquidation, and the receiver is the party primarily privileged and charged with the duty of maintaining this action.

It is earnestly contended that this is an action in tort, and that the equity court is not the proper forum. The status of directors has been well defined by text-writers and the adjudications of our own court. Mr. Thompson, vol. 2, § 1215, observes that "the rule is thoroughly embodied in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders, and are treated by courts of equity as trustees. They are regarded as agents intrusted with the management of the corporation, for the benefit of the stockholders collectively, and as occupying a fiduciary

relation in the sense that the relation is one of trust, and are held to the utmost good faith in their dealings with the corporation."

The case of *Emerson v. Gaither*, 103 Md. 564, 8 L.R.A.(N.S.) 738, 64 Atl. 26, 7 Ann. Cas. 1114, is interesting and in point. The note to this case collates many authorities sustaining the jurisdiction of equity over suits by a corporation, or its representative, against the directors, for the very kind of losses here complained of. The opinion, in discussing the case of *Cockrill v. Cooper*, 20 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 7, says: If the receiver is compelled to sue at law, numerous actions must be brought; and "very likely several separate actions would have to be brought against some of the directors, to comply strictly with the rules of procedure at law governing the joinder of parties.

... It is also fair to infer from what is stated in the bill that the excessive loans therein complained of were inaugurated by one set of directors, and either continued, renewed, or enlarged by another, so that a suit brought against any one of the directors would probably involve an inquiry into the proceedings of the board of directors, and into many of the financial transactions of the bank for the entire period during which its affairs are alleged to have been mismanaged."

The opinion in that case further says: "Not only can a multiplicity of actions be prevented by a proceeding in equity to redress the wrongs complained of, which is a matter proper to be considered, but it would seem that complete justice to all parties can be thereby better assured than by suits at law. It would be practically impossible for a jury to properly dispose of all questions raised by this bill, and when the fiduciary relation, which the directors occupy to the corporation, is remembered, there would seem to be no reason why courts of equity should not have power to determine such controversies, especially in this state, where the tendency is to extend, rather than limit, the jurisdiction of courts of equity."

In the case of *Bosworth v. Allen*, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163, an action by the receiver against directors, the court observes: "Equitable jurisdiction extends to all culpable acts and omissions of the directors by which the pecuniary interests of the corporation are or may be injured."

The holding of our own court in the case of *Brent v. B. E. Brister Sawmill Co.* 103 Miss. 876, 43 L.R.A.(N.S.) 720, 60 So. 1018, Ann. Cas. 1915B, 576, and *Ellis v. H. P. Gates Mercantile Co.* supra, is in per-

fect accord with this view. Other authorities are collated by counsel for appellees in their exhaustive brief in this case. The rights and liabilities of the parties hereto can best be inquired into and adjusted in equity. The personal representatives of Mr. Jones and Mr. Shannon are sued, and their portion of the liability, if any, must be ascertained with due regard to the beneficiaries of those estates. Losses occurring subsequent to the death of either of these directors could not, of course, be claimed against the estates. The ascertainment of all losses must be determined as of a certain time, and this involves an accounting and the searching-out facilities afforded by the chancery court.

The separate demurrer of Mrs. W. G. Ventress, Harriet Ventress, Charles G. Ventress, and Margaret Ventress should have been sustained. The bill shows that no administration has been had upon the estate of W. P. S. Ventress, deceased, and this action should be prosecuted, if at all, against the administrator. Whatever may be the rule in any particular state, and aside from a possible state of facts justifying a suit in equity by a creditor against the heirs at law without administration, the statute laws of our state afford every creditor a full, complete, and adequate remedy at law. The provisions of our Code place any creditor in position to force administration, and in case the relatives do not apply for administration, entitle any interested creditor to apply for letters of administration, or to petition the court to appoint the county administrator, or the sheriff, in case there is no county administrator. For all this court may know, other creditors of Mr. Ventress might be interested in his estate and the proper administration thereof. Our court, in dealing with a similar question in the case of *Partee v. Kortrecht*, 54 Miss. 66, held: "It cannot be affirmed that the complainants are remediless except in this suit, because the ordinary, regular method of dealing with the assets of a decedent is open to them. When a creditor has the statutory right to take the office of administrator, or to suggest that it be conferred on the county administrator, and neither the one nor the other has been done, it is plain that the ordinary and statutory method of reaching and applying the assets is open to the party."

The right of action in this case is based on the alleged negligence of Mr. Ventress in failing to discharge the duties imposed upon him as a director in his lifetime. It is not only necessary, but proper, that his personal representative should be made a party defendant, to contest with the complainant the essential question of liability.

There cannot be said to be any fixed obligation until the merits of this litigation are inquired into by the court, and not only the liability, but the amount thereof, fixed and determined.

It will profit little to discuss the other questions raised by the demurrer. The case has been well briefed and well argued, and has had our careful consideration. We are clearly of the opinion that the bill states a cause of action, that the receiver has the right to sue, and that equity is the proper forum. This presents a case where equity has proper and original jurisdiction. The action of the chancellor in overruling the demurrer of all the parties except the heirs at law of W. P. S. Ventress, deceased, was correct, and to that extent the decree of the court below is affirmed. The decree, in so far as it overrules the demurrer of the Ventress heirs, should be set aside and reversed. The demurrer as to them should be sustained, and the bill dismissed. The cause will be remanded for further proceedings in accordance with the views herein expressed.

Affirmed in part and reversed in part.

A suggestion of error having been filed, the following additional opinion was handed down May 15, 1916:

The suggestion of error, so-called, is really an application for the court to amend its opinion, either by deciding the question of the Statute of Limitations or by expressly reserving judgment on this ground of the demurrer. Special demurrers were interposed to that part of the bill seeking to recover for losses occurring more than three years prior to the filing of this suit. The bill avers that "the following table shows his (the cashier's) stealings, pilferings, and defalcations year by year from October 16, 1904, down to January 18, 1913;" and undertakes to give, in a general way, the amount of losses for each year. The chancellor granted an appeal to settle the principles of the case, and this appeal brings in review the correctness of his decree overruling these special demurrers. To determine and adjudicate whether either of the Statutes of Limitations can be availed of by the directors in this case will enable the chancellor confidently to apply the law of the case to the facts, and may save a great deal of expense or costs, as well as labor, in taking proof as to the items which counsel for appellants contend are barred by the Statute of Limitations. This point was not covered by the oral argument in the case, and for this reason, as also because this feature of the case is presented by special, instead of general, demurrers, our attention was not directed to it in the preparation of the opinion heretofore delivered. The point, however, is covered by the splendid briefs on file, and we accordingly proceed with this addition to our former opinion.

Counsel for appellants submit that the breach of duty complained of is based upon an implied promise, and that therefore § 3099, Code of 1906, would apply. They contend, further, that if this section does not apply, then that the six-year Statute of Limitations could certainly be pleaded. While the particular point now before us has occasioned much conflict in the authorities, we are persuaded that the application of certain well-recognized principles of equity will render the problem easy of solution. As stated in the opinion already delivered, the amended bill of complaint in this cause charges the directors with the grossest kind of negligence and continuing sins of omission. The gist of the action is for losses sustained by the bank as a result of many years of mismanagement, the "wilful, wanton, and gross negligence in the management of the affairs of said bank."

It is laid to the charge of these directors that they wilfully failed to investigate the books of the institution or to have the affairs of the bank audited, but on the contrary held the institution out to the trusting public as a safe and solvent banking establishment, and "quietly, negligently, and wilfully closed their eyes" to the true condition of the bank and the obligation resting upon them as managing agents of the corporation. This is a case where the entire board of directors is sued. During the period complained of they had exclusive possession and control. It was their business to make and execute all necessary corporate contracts, and to direct the policy of the institution. As a part of their duties, they alone could determine the propriety of any suit at law or equity, and were alone charged with the authority to institute such suits. The demurrer admits as true facts which convict the directors, not so much with being guilty of a single act that is wrong or actionable, such as the declaration and payment of an unlawful dividend or the misappropriation of a certain fund, but of a continuing policy of negligence that is shocking to every sense of justice and that has wrecked the institution. While the directors have had complete and exclusive control, the stockholders left in their charge and trust their several investments, and depositors and creditors have dealt with them in perfect good faith and confidence, and so it is that stockholders, depositors, and creditors generally, in the very nature of things did not know, and could not know, the true condition of the

bank at any day during the long period of time complained of, and did not know, and could not know, that any one of the officers and directors was failing to discharge the usual and ordinary duties imposed upon him by his position of director.

It is true that the stockholders have their annual or periodic meeting for the purpose of electing directors and attending to any other necessary business incident to a regular shareholder's meeting, but at these meetings they looked to the directors, their agents, for a true and correct account of their stewardship, and naturally accepted the financial statements submitted by the directors. If, therefore, the directors have continued from month to month and from year to year to neglect the duties imposed by their office and the statutory law of our state, and this continuing negligence silently but surely operates over a long period of time and is only brought to the attention of the creditors and shareholders when and not until the institution is hopelessly insolvent and a receiver inquires into the true status of affairs, how can the guilty directors be heard now to say that time has barred this action against them? If anyone had notice of the negligence complained of, it is these directors themselves, and they are charged with the responsibility of correcting the evil. If any suit is to be brought against any one or more of the directors, it is this very managing board of directors who must authorize suit in the name of the corporation and see that same is successfully prosecuted. By their reliance, therefore, upon the Statute of Limitations, they place themselves in the attitude of profiting by their own wrongdoing; and such plea, if sustained by the court, would simply "add insult to injury." They now say to the receiver in this case: "You cannot maintain this suit because the same should have been filed within three years, and certainly not exceeding six years from the time the losses complained of occurred. It is true that we should have seen to it that this suit was filed, yet the corporation, as a going concern, did not, as a matter of fact, sue us in the time allowed, and we are now discharged from all liability."

It occurs to us that a mere statement of this contention is a sufficient answer. It is a familiar principle of equity that no one should be allowed to profit by his own wrongdoing.

There is another well-recognized principle of law that should apply, and that is the doctrine of concealed fraud. How could the corporation have sued in this case except at the initiative of its directorate? The very board here complained of has either wilfully or negligently kept from the L.R.A.1917A.

beneficiaries of this estate all knowledge of the wrongs complained of, and in the very nature of things this suit could not have been filed any earlier. Under the circumstances it could not be earlier known that losses had in fact occurred. It is only after the receiver is appointed and inquires into its condition and has a correct audit of the bank's affairs made that the corporation, as such, finds that any losses have occurred, and that the interests of the directors are adverse. The conflict in the authorities on the question as to what, if any, statute of limitations is available to directors, arises from the varying views as to whether directors are trustees of an express trust. In the determination of the question as applied to the particular case now before us, it is really unnecessary for us to determine whether the directors of this bank were trustees of an express or an implied trust. Our own court in an early case (*Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74), very strongly inclined to the holding that directors are trustees, expressly holding that the unpaid subscription of stock "is a continuing, subsisting trust and confidence, to which the statute of limitations has no application." The court uses this further language which, while it may be dicta, is yet suggestive and persuasive: "Test the principle by the converse state of facts. Suppose the stock to be all paid; the bank to go on prosperously; that no dividends are declared, but the whole is permitted to accumulate until the charter is about to expire. Then that the stockholders claim their respective amounts of stock with the accrued profits; but the directors refuse to pay, and interpose the Statute of Limitations to that part which is of more than six years' standing. No one can believe that the statute would bar in such a state of the case because of the trust reposed. There is no adverse holding; the stockholders compose the corporation. The same principle must govern this case."

We approve the reasoning in the case of *National Bank v. Wade* (C. C.) 84 Fed. 15, and the decision of the supreme court of appeals, holding in that case that the Statute of Limitations did not run so long as the trust was active, and did not begin until the directors surrendered control over the bank. Judge Hanford in that case says: "The Statute of Limitations of this state provides that the right to commence an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument, is barred after three years from the time the cause of action accrued. But it must be remembered that at the time of making the loans which caused the losses

complained of the defendants were the managing officers of the bank. I hold that in cases of this nature the Statute of Limitations will not begin to run so long as the cestui que trust is under the control or influence of the trustee (2 Perry, Trusts, 3d ed. § 864, p. 512; 2 Pom. Eq. Jur. § 1089); and, as this suit was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the Statute of Limitations."

We think the ruling that the Statute of Limitations does not begin to run in favor of a director in a case of this kind until he surrenders his office is the more reasonable and supported by better authority. This view of the question was early outlined by Mr. Justice Sharswood in *Spring's Appeal*, 71 Pa. 11, 10 Am. Rep. 684,—a decision, on the whole, favorable to directors. The court in that case said that the view announced by them rendered it unnecessary to discuss the Statute of Limitations, "except in the case of the defendants Churchman and Smith," and, further: "Upon the point as made in their case, each of them having entirely ceased to be a director more than six years before the bill was originally filed, we entirely concur in the opinion of the chief justice in *Churchman's Case*."

The question is fully discussed in the case of *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530, the court emphasizing the proposition that the assets of a corporation are, in equity, a trust fund, and that the directors of a corporation are trustees. A part of the opinion is in the following language: "Ordinarily, an express trust is created by a deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist and to which the same legal principles are applicable, and such appears to be the relation established by law, between directors and the corporation . . . [citing] *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74; *Curry v. Woodward*, 53 Ala. 371. The Statute of Limitations, therefore, presented no bar to a recovery by the receiver."

It is interesting to observe that the court cited with approval the early case of *Payne v. Bullard*, supra, decided by our own court, and evidently construed the opinion as committing our court to this holding. The two more recent cases of *Greenfield Sav. Bank v. Abercrombie*, 211 Mass. 252, 39 L.R.A. (N.S.) 173, 97 N. E. 897, Ann. Cas. 1913B, 420, and *Brinckerhoff v. Roosevelt*, 74 C. C. A. 498, 143 Fed. 478, held with much confidence that the Statute of Limitations does not begin to run until after the cessation of

the trust imposed upon directors, the circuit court of appeals making the following pertinent observation: "The action is not barred by the Statute of Limitations or for laches, for the reason that the complainant did not discover the wrongful conduct, which is the foundation of the action, until a few months prior to its commencement. Directors are assumed to act for the interest of their stockholders, and the latter have a right to rely upon the assumption that they are acting honestly until the contrary appears."

Mr. Thompson, at § 1318, discusses the defense here pleaded by the directors, and announces the general rule as follows: "As to the defense of the Statute of Limitations, the rule applicable in cases of fraud applies in this class of cases; that is, the statute begins to run only from the time when the corporation or its representative acquired knowledge of the fraud or collusion. Such cases proceed upon the theory that the action does not accrue until the discovery of the facts constituting the fraud by the aggrieved party. . . . A better class of cases, it seems, regard the directors as trustees, and that no lapse of time as a bar to a direct or express trust, as between the trustee and a cestui que trust, and that the Statute of Limitations does not run against the claim of a corporation in actions against directors for breaches of trust."

It is not the purpose of this opinion to declare directors of a corporation trustees of an express trust. The application of the statute must be governed by the facts of any particular case. The case of *Cooper v. Hill*, 36 C. C. A. 402, 94 Fed. 582, relied on by counsel for appellants, was controlled by the facts of that particular case, and the court recognized the principle which should control the instant case in the following language: "If the acts of the appellants upon which this suit is founded had been parts of a continuous and persistent course of action which had wrecked this bank and robbed its creditors and stockholders; if they had been accompanied with intentional misrepresentations; if they had been purposely or negligently concealed from the other officers and employees of the bank or from its stockholders and creditors,—these facts might well induce a court of equity to permit this suit to be maintained notwithstanding the statute."

It will be observed that the court in that case says if the facts are "negligently concealed" from the stockholders and creditors, the statute should not apply. The same salutary principle is applied in the case of *Rankin v. Cooper* (C. C.) 149 Fed. 1010, the court referring to the exceptional

circumstances recognized by the opinion in *Cooper v. Hill*, *supra*. We wish to cite with approval this language of the opinion that applies with equal force to the present case: "As to the Statute of Limitations, I have come to the conclusion that it does not apply, because the case, in my opinion, falls under the exceptional circumstances referred to by Sanborn, J., in *Cooper v. Hill*, *supra*, circumstances under which a court of equity will permit a suit to be maintained, notwithstanding the statute, . . . and also because at the time of the commission of the wrongful acts in question and afterwards until the appointment of a receiver, the defendants who were concerned therein constituted the majority, if not the whole, of the board of directors, and that, in consequence of their having full control of the corporation, no suit could be brought to redress the alleged grievances until a receiver was appointed."

One of the strongest opinions relied upon by appellants is that of *Boyd v. Mutual Fire Assn.* 116 Wis. 155, 61 L.R.A. 918, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171. The reasoning of the court in that case is persuasive that directors are not trustees of an "express trust" in the sense that we generally understand that term, but the real question involved in that case was whether or not the Statute of Limitations would run from the time of the appointment of a receiver to the institution of the suit in question. The six-year statute was pleaded, and the court first held that no statute applied. On a rehearing, however, the court held that the six-year statute commenced to run from the time of the commission of the wrongs complained of. It yet remains that more than six years had run between the cessation of the trust and the time of the filing of the suit, and it was altogether unnecessary, therefore, for the court to go further than holding that, under the fact of that case, the six-year statute applied. It will be observed furthermore that the chief justice filed a dissent-

ing opinion. We reiterate our statement that whether or not directors are express trustees does not so much concern the court in the instant case, and much of the learning of the opinions along this line have no application to the particular case now confronting us. It is not the purpose of this opinion to hold that the Statute of Limitations may not be pleaded in courts of equity. It is generally held that the statute does not apply to trusts for which there is no remedy at law,—trusts cognizable alone in a court of equity and in a suit directly between trustee and cestui que trust. Concede that an action at law might have been brought by the bank in this case against the directors for any portion of the losses complained of, yet no such action could have been instituted unless the officers and directors themselves had taken the initiative, and this, as a matter of fact, would have placed them in an attitude of suing themselves. When it is remembered that the losses complained of were accruing from time to time over a period of nine years, that the personnel of the board changed, two of the directors being deceased, and that an accounting is necessary, it is difficult to perceive how a jury could well dispose of all questions raised by the bill, and how the remedy at law was full, adequate, and complete. At any rate, the receiver has acted promptly after his appointment, and, under the circumstances, this action could not have been instituted earlier. All parties in interest are now before the court. Even applying the three-year Statute of Limitations from the time of the death of Mr. Ventress and Mr. Jones, the action has been instituted in reasonable time.

The application for this additional opinion being now disposed of, let the case be affirmed and remanded, to be proceeded with in accordance with the opinion heretofore delivered and the additional views herein expressed:

Annotation—Limitation of actions against directors of corporation for malfeasance or nonfeasance.

Application of statute, generally; trust relation.

The great majority of the cases, as hereafter appears, hold that directors are not trustees of an express trust, and therefore may take advantage of the Statute of Limitations.

Thus, it is held that the relation of directors to the corporation and its stockholders is not such as to prevent their taking the benefit of the Statute of Limitations. 1917A.

tations in an action to hold them liable for misfeasance or malfeasance in office. *Boyd v. Mutual Fire Assn.* (1902) 116 Wis. 155, 61 L.R.A. 918, 96 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171; *Cullen v. Coal Creek Min. & Mfg. Co.* (1897) —Tenn.—, 42 S. W. 693.

Bank directors are not express trustees, but at most are implied trustees, in whose favor the Statute of Limitations runs against an equitable action by a

shareholder and creditor, charging them with inattention, negligence, and mismanagement, resulting in the bank's insolvency. *Wallace v. Lincoln Sav. Bank* (1891) 89 *Tenn.* 630, 24 *Am. St. Rep.* 625, 15 *S. W.* 448.

The Statute of Limitations is applicable to an action by the holder of bank notes against directors of the bank, whose mismanagement has caused its failure. *Hinsdale v. Larned* (1819) 16 *Mass.* 64.

In *Lexington & O. R. Co. v. Bridges* (1847) 7 *B. Mon. (Ky.)* 556, 46 *Am. Dec.* 528, an equitable action by a creditor to hold directors personally liable because of their declaration of dividends in the absence of profits, it was held, against the contention that they were trustees holding the funds misapplied for the benefit of creditors, and that therefore they could not rely upon the Statute of Limitations, that such rule did not apply where the trust, as in the case in question, was limited in its duration, or where the party seeking redress had a legal remedy and a court of law concurrent jurisdiction.

Directors hold the property of the corporation for the benefit of creditors under an implied or constructive trust, and not under a direct trust, and therefore may plead the Statute of Limitations against a creditors' bill charging them with wrongfully converting corporate funds to their own use. *Baxter v. Moses* (1885) 77 *Me.* 465, 52 *Am. Rep.* 783, 1 *Atl.* 350.

A director can set up the Statute of Limitations against an action by the company to recover money paid to him by a debtor of the company, to induce him to use his influence to obtain a compromise of the claim. *Metropolitan Bank v. Heiron* (1880) *L. R.* 5 *Exch. Div. (Eng.)* 319, 43 *L. T. N. S.* 676, 29 *Week. Rep.* 370.

Directors not sued within the statutory period from the time they have ceased to be such are not precluded, by reason of their former relation to the corporation, from relying on the statute as a bar to an action by the corporation or its representative or a stockholder, for negligence or misconduct in the discharge of their duties, either at law or in equity. *Emerson v. Gaither* (1906) 103 *Md.* 564, 8 *L.R.A. (N.S.)* 738, 64 *Atl.* 26, 7 *Ann. Cas.* 1114.

The limitation applicable to an action at law by a corporation against directors for malfeasance, misfeasance or negligence in office whereby loss or damage has resulted, is equally applicable to a

similar action in equity by a stockholder or creditor. *Wallace v. Lincoln Sav. Bank (Tenn.) supra.*

The holdings of the cases of *Cooper v. Hill* (1899) 36 *C. C. A.* 402, 94 *Fed.* 582, and *Rankin v. Cooper* (1907) 149 *Fed.* 1010, upon the question of the application of the Statute of Limitations to actions against directors, are sufficiently set out in *VENTRESS v. WALLACE, ante*, 971.

But in *VENTRESS v. WALLACE*, a suit in equity by the receiver against the entire directorate of a corporation for gross and long-continued negligence in its management, fraudulently concealed from the stockholders and creditors, it was held that the particular circumstances of the case prevented the application of the statute, the court stating that it was unnecessary to determine whether the defendants were trustees of an express or an implied trust, since the receiver acted promptly after his appointment, and the action could not have been instituted earlier.

The Statute of Limitations is no bar to a bill by the receiver against the managers of a savings bank for losses sustained through their alleged negligence and misfeasance in its management, because their relation to the depositors and creditors represented by the receiver is that of trustees under a direct trust which is cognizable only in a court of equity, and the proceeding is between the trustees and the representative of the cestuis que trustent. *Williams v. McKay* (1885) 40 *N. J. Eq.* 189, 53 *Am. Rep.* 775.

But it was held in *Lippitt v. Ashley* (1915) 89 *Conn.* 451, 94 *Atl.* 995, that the failure of savings bank directors to exercise reasonable care in the supervision of the conduct of a dishonest treasurer, of whose dishonesty they had no notice, was not a breach of an express or direct trust, and that therefore the statute would run against an action by the receiver to recover losses caused by such negligence, distinguishing the preceding case upon the ground that the defendants in that case participated in a positive violation of the express terms of the charter and by-laws, and of statutes, while in the case at bar there was no such violation, but merely passive negligence in the performance of a common-law duty.

The Statute of Limitations cannot apply to an action by the official liquidator of a company to compel directors to refund the amount of dividends improperly paid out of capital for the

reason that they stand in the position of trustees as to the company's funds. *Re Exchange Bkg. Co.* [1882] L. R. 21 Ch. Div. (Eng.) 519, 52 L. J. Ch. N. S. 217, 48 L. T. N. S. 86, 3 Week. Rep. 174, *Re Sharpe* [1892] 1 Ch. (Eng.) 154, 61 L. J. Ch. N. S. 193, 65 L. T. N. S. 806, 40 Week. Rep. 241.

But subsequently to the commencement of the two preceding cases an act took effect which gave trustees, whether their trust arose by construction or implication of law, or was an express trust, the benefit of the Statute of Limitations, and thereafter it was held that directors were trustees within the meaning of such trustee act, and therefore might plead the statute in answer to a charge of misapplication of the company's funds. *Re Lands Allotment Co.* [1894] 1 Ch. (Eng.) 616, 63 L. J. Ch. N. S. 291, 70 L. T. N. S. 286, 42 Week. Rep. 404, 7 Reports, 115, 7 Eng. Rul. Cas. 613; *Whitwam v. Watkin* (1898) 78 L. T. N. S. (Eng.) 188, 14 Times L. R. 288; *Re National Bank of Wales* [1899] 2 Ch. Div. (Eng.) 629, affirmed without discussion of this point in [1901] A. C. 477.

Under the rule that no lapse of time is a bar to a direct or express trust, as between the trustee and the cestui que trust, it was held in *Ellis v. Ward* (1890) 137 Ill. 509, 25 N. E. 530, that the Statute of Limitations presented no bar to an action by a receiver against directors for misappropriation or misapplication of corporate funds, upon the ground that the trust assumed by directors in respect of the corporate property was a direct trust as contra-distinguished from simply an implied trust.

Commencement of running of statute — in general.

As a general rule, the Statute of Limitations begins to run against an action against directors of a corporation for their malfeasance or nonfeasance from the time of the perpetration of the wrongs complained of, except in the case of their fraudulent concealment, in which case the statute does not commence to run until their discovery, or until the time, prior thereto, when the exercise of reasonable vigilance would have disclosed them. There is another exception to the rule, based upon the trust relation of the directors to the corporation, which is discussed in *VENTRESS v. WALLACE*, ante, 971, where the offending directors are in control of the corporation and charged with the duty of instituting an action against them-

selves in the name of the corporation, in which case the statute does not begin to run against an action against them by the receiver or other representative of the corporation until they cease to be directors.

Thus, the statute begins to run against an action by the trustee in bankruptcy of a corporation against its directors, to recover a sum alleged to have been unlawfully withdrawn from the capital stock, from the date of the wrongful depletion of the capital stock complained of. *Thomas v. Richter* (1915) 88 Wash. 451, 153 Pac. 333. In this case, which was founded upon a statute making directors individually liable for the withdrawal of any part of the capital stock, it was contended that the statute was intended to prevent frauds upon the creditors, of corporations, and that the statute commenced to run from the discovery of the act; but the court held that the action was not based on fraud, but on the violation of the statute, the motive of the directors being immaterial; and said that if the gist of the action were relief on the ground of fraud, there were strong grounds for the contention that the statute began to run from the adjudication of insolvency; or at least from the time prior to that date that the creditor learned of the wrongful diversion of the capital stock.

The cause of action alleged in a bill in equity by a creditor of a corporation against its directors to account for money of the company alleged to have been wrongly paid to its president, pursuant to an unlawful resolution of the directors, arose upon the passage of the resolution, and the Statute of Limitations therefore began to run from such time, and not from the date of the payment of the money. *Link v. McLeod* (1900) 194 Pa. 566, 45 Atl. 340. The further contention of the creditor that the statute only began to run from his discovery of the facts was decided adversely to him upon the ground that his ignorance, in the absence of fraudulent concealment by the directors, did not toll the statute.

An action by the receiver of an insolvent corporation to compel a director to account for corporate funds fraudulently misapplied was held not to be solely cognizable by the court of chancery within the meaning of a Statute of Limitations providing that the cause of action in a case so cognizable should not be deemed to have accrued until the discovery by the aggrieved party of the

facts constituting the fraud. *Mason v. Henry* (1897) 152 N. Y. 529, 46 N. E. 837.

In an action by stockholders against directors of a bank for losses resulting from their negligence, fraud, and mismanagement, it was held that the statute began to run from the date of the acts complained of, against the contention that it did not commence to run until the expiration of the charter of the bank. *Percy v. White* (1844) 7 Rob. (La.) 513.

The statute commences to run against an action against the directors of a bank for fraudulently diverting its funds for their own benefit when the diversion is complete, there being no concealment, no secrecy, and no deceit, and the salient facts of the transaction being spread upon the books of the bank. In such case the running of the statute is not postponed until the discovery of the facts constituting the fraud. *Cooper v. Hill* (1899) 36 C. C. A. 402, 94 Fed. 582.

In an action by stockholders of an insolvent national bank against its directors for damages sustained by the loss of their stock investment and an assessment thereon, resulting from the negligent and wrongful acts of the defendants, the court rejected the contention of the plaintiffs that they had no right of action against the defendants until the refusal of the receiver to sue, and that the statute did not commence running until that time, holding that their right of action accrued and was complete upon the perpetration of the wrongs by the defendants, and that the statute ran from that time. It was also held that the further contention that the statute was not set running until the assessment against the plaintiffs was made and paid was untenable, for the reason that the wrongful acts complained of constituted the cause of action, and not the effect it produced nor the damage it occasioned; and the statute runs from the accruing of the cause of action. *Brinkerhoff v. Bostwick* (1884) 34 Hun., (N. Y.) 352. This case was reversed upon another point in (1885) 99 N. Y. 185.

But in an action by a stockholder against the directors of a corporation in which the complaint alleged that, pursuant to a fraudulent conspiracy to defraud plaintiff of his stock, defendants levied an assessment on the stock without any necessity therefor, and sold his stock on nonpayment of the assessment, and at such sale bought it themselves for a nominal sum, and alleged that subsequently defendants

fraudulently appropriated the property of the corporation, to plaintiff's damage, it was held that the sale of his stock in pursuance of the alleged conspiracy, and his consequent exclusion from the corporation and the profits thereof, was the gravamen of the action, and that the Statute of Limitations ran from the date of the discovery of the fraudulent purpose of such sale. *Marks v. Evans* (1900) 6 Cal. (Unrep.) 505, 62 Pac. 76.

Against an action by a company to recover from a former director the amount received by him from a debtor of the company as a bribe to use his influence as a director to procure a settlement of the claim, the statute commences to run from the time of the discovery by the company of the alleged fraud. *Metro-politan Bank v. Heiron* [1880] L. R. 5 Exch. Div. (Eng.) 319, 43 L. T. N. S. 676, 29 Week. Rep. 370.

And against an action by the receiver of a life insurance company against a director to recover securities alleged to have been received by him in consideration of his advocating and voting for the reinsurance of his company's policies in another company, the statute does not begin to run until the discovery of the secret fraud. *Bent v. Priest* (1885) 86 Mo. 475.

In *Thomson v. Clanmorris* [1900] 1 Ch. (Eng.) 718, 69 L. J. Ch. N. S. 337, 48 Week. Rep. 488, 82 L. T. N. S. 277, 16 Times L. R. 296, an action by a shareholder against the directors of a company to recover compensation for loss sustained by him by reason of untrue statements in the prospectus of the company, on the faith of which he subscribed for his shares, under a director's liability act making them liable for such loss, it is stated, but not decided, that the statute begins to run against such an action from the date when the shares were subscribed for.

In an action by a creditor against directors, charging them with having illegally declared dividends, where it appeared that they acted under the mistaken belief, that there were profits to distribute, it was held, contrary to the plaintiff's contention that the statute did not begin to run until his discovery of the facts, that the statute began to run from the time when he could have discovered them by the exercise of proper vigilance. *Lexington & O. R. Co. v. Bridges* (1847) 7 B. Mon. (Ky.) 556, 46 Am. Dec. 528.

In *Brinkerhoff v. Roosevelt* (1906) 74 C. C. A. 498, 143 Fed. 478, an action to compel a director and officer to ac-

count for money lost through his negligence and mismanagement, the court stated that the action was not barred for the reason that the complainant did not discover the wrongful conduct, which was the foundation of the action, until a few months prior to its commencement.

Spring's Appeal (1872) 71 Pa. 11, 10 Am. Rep. 684, is sufficiently discussed in *VENTRESS v. WALLACE*, ante, 971, upon the question as to when the commencement of the running of the statute is postponed until the termination of the defendant's directorship.

—in case of improper loans.

The statute does not begin to run against the liability of a bank director for losses caused by the making of illegal loans until the losses actually occur. *Emerson v. Gaither* (1906) 103 Md. 564, 8 L.R.A.(N.S.) 738, 64 Atl. 26, 7 Ann. Cas. 1114.

And it does not begin to run against the liability of trustees of a savings bank for money lost through loans made by them in contravention of statute and the rules of the institution, until the facts are learned by the institution. *Greenfield Sav. Bank v. Abercrombie* (1912) 211 Mass. 252, 39 L.R.A.(N.S.) 173, 97 N. E. 897, Ann. Cas. 1913B, 420.

The statute does not commence to run against an action by a national bank against directors who are its managing officers, to recover losses sustained in consequence of illegal loans, until they have given up control of the bank to their successors. *National Bank v. Wade* (1897) 84 Fed. 10.

Nor does it begin to run against a stockholder's representative action to compel the executors of a director to pay back to the corporation money illegally borrowed therefrom by him, until he ceases to be a director. *Murray v. Smith* (1915) 166 App. Div. 528, 152 N. Y. Supp. 102.

—with reference to the time when debt to plaintiff was contracted or matured.

The cause of action given to a creditor by a statute making directors who declare and pay dividends when the corporation is insolvent liable for its debts accrues upon the maturity of the creditor's debt and the statute begins to run from that time. *Patterson v. Wade* (1902) 53 C. C. A. 1, 115 Fed. 770; *Patterson v. Thompson* (1898) 86 Fed. 85.

From the same time the statute commences to run against a creditor's action to enforce the personal liability of di-

rectors under a statute making them so liable for failure to file required certificates. *Sullivan v. Sullivan Mfg. Co.* (1883) 20 S. C. 79.

The statute commences to run against an action by a creditor of a corporation under a statute making the directors liable for debts contracted in violation of the charter, from the time when the debt to him was contracted. *Bassett v. St. Albans Hotel Co.* (1875) 47 Vt. 313.

Against a suit by creditors against directors assenting to the illegal creation of an indebtedness by a corporation exceeding the amount of its capital stock, to enforce their individual liability for such excess, the statute does not commence to run until the maturity of the debt sought to be recovered. *Woolverton v. Taylor* (1890) 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007.

The statute begins to run against an action by existing creditors to enforce the individual liability of directors for excessive debts from the time the indebtedness in excess of the legal limit was incurred, and not from the time of a subsequent further increase; but against such an action by one becoming a creditor after such an illegal increase of indebtedness, the statute does not commence to run until the creation of his debt. *Swan v. Burham* (1900) 70 N. H. 580, 49 Atl. 93.

It was held in *Nimmons v. Tappan* (1870) 2 Sweeny (N. Y.) 652, that the statute began to run against an action by a creditor to enforce the statutory liability of directors by reason of default in filing an annual report from the time of such default, and, in case of a number of successive defaults, from the last default.

But in later cases it was held that the statute commenced to run against such an action from the maturity of the plaintiff's debt, and not from the time of default in making the report, and that the occurrence of succeeding defaults did not change the time from which the statute ran. *Jones v. Barlow* (1875) 62 N. Y. 202; *Trinity Church v. Vanderbilt* (1885) 98 N. Y. 170; *Chapman v. Lynch* (1898) 156 N. Y. 551, 51 N. E. 275; *Morgan v. Hedstrom* (1900) 164 N. Y. 224, 58 N. E. 26; *Cornell v. Roach* (1881) 9 Abb. N. C. (N. Y.) 275; *Chapman v. Comstock* (1890) 58 Hun, 325, 34 N. Y. S. R. 517, 11 N. Y. Supp. 920, appeal dismissed in (1892) 134 N. Y. 509, 47 N. Y. S. R. 650, 31 N. E. 876; *Blake v. Clausen* (1896) 16 Misc. 400, 73 N. Y. S. R. 604, 25 N. Y. Civ. Proc. Rep. 310, 33 N. Y. Supp. 514, af-

firmed upon another point in (1896) 10 App. Div. 223, 75 N. Y. S. R. 1168, 41 N. Y. Supp. 772, which is affirmed in (1899) 158 N. Y. 727, 53 N. E. 1123.

In *Nimmons v. Tappan* (N. Y.) *supra*, and in the preceding cases, the plaintiff's debt became due after the default; but in the following cases, in which it was held that the statute started to run from the time of the default, the plaintiff's debt matured before the default: *Lossee v. Bullard* (1880) 79 N. Y. 404, 54 How. Pr. 319; *Knox v. Baldwin* (1880) 80 N. Y. 610; *Duckworth v. Roach* (1880) 81 N. Y. 49; *Staten Island Midland R. Co. v. Hinchliffe* (1902) 170 N. Y. 473, 63 N. E. 545; *State Sav. Bank v. Johnson* (1896) 18 Mont. 440, 33 L.R.A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; *Davis v. Mills* (1903) 58 C. C. A. 123, 121 Fed. 703, sent to the Supreme Court upon another point (1903) 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692.

So that the correct rule in New York and Montana, whose statutes make the directors liable for all the debts of the company existing at the time of the default, and for all contracted before the report shall be made, seems to require the concurrence of both events, viz., the occurring of the default and the maturity of the debt, to start the Statute of Limitations running, and therefore the statute commences to run in those states from the maturity of the debt when that follows the default, and from the default when that follows the maturity of the debt.

But in Colorado, where the statute makes the directors liable for all the debts of the corporation contracted during the year next preceding the time when the report should have been filed, and until such a report shall be made, it is held that the Statute of Limitations begins to run from the time of the default, irrespective of the relative time of the contracting or maturity of the debt. *Dart v. Hughes* (1910) 49 Colo. 465, 109 Pac. 952; *Nolds v. Hendrie & B. Mfg. Co.* (1913) 56 Colo. 322, 138 Pac. 22; *Hazelton v. Porter* (1901) 17 Colo. App. 1, 67 Pac. 170; *Clough v. Rocky Mountain Oil Co.* (1898) 25 Colo. 520, 55 Pac. 809.

Two early Colorado cases, *Larsen v. James* (1892) 1 Colo. App. 313, 29 Pac. 183, and *Colorado Fuel & Iron Co. v. Lenhart* (1895) 6 Colo. App. 511, 41 Pac. 834, held that as to debts subsequent to a default, the statute commenced to run from the time of the contracting of the debt, or from the date when a cause of action accrued thereon L.R.A.1917A.

against the company; but these cases are overruled by *Dart v. Hughes* (Colo.) *supra*.

Period of limitation—in general.

An action by a railroad company charging a director with mismanagement with the view of bringing about the sale of the road, and with a breach of trust in purchasing the road at the resulting sale, and praying that the road be surrendered to it, is not an action for the recovery of real property, nor one for relief on the ground of fraud, but a suit to declare and enforce an implied or constructive trust, which is barred in five years. *Covington & L. R. Co. v. Bowler* (1872) 9 Bush. (Ky.) 468.

A bill in equity by a shareholder and creditor of a bank, against its directors, for losses caused by their neglect and mismanagement of its affairs, is not barred by the three-year limitation of actions for injury to or conversion of personal property, but is barred by the six-year limitation of actions on contracts not otherwise provided for, because the relation of a director to a corporation implies a contract that he will use ordinary diligence in the discharge of the duties he undertakes by accepting the office. *Wallace v. Lincoln Sav. Bank* (1891) 89 Tenn. 630, 24 Am. St. Rep. 625, 15 S. W. 448.

And a suit in equity by stockholders to compel directors to account for sums alleged to have been wrongfully and fraudulently diverted by them from the company's treasury to their individual profit was held barred in six years by apparently the same statute. *Cullen v. Coal Creek Min. & Mfg. Co.* (1897) — Tenn. —, 42 S. W. 693.

A representative action by a stockholder under the common law for alleged misconduct and negligence of bank directors was held not barred in three years under a statute barring in that time an action against a director of a moneyed corporation to recover a penalty imposed, or to enforce a liability created by law, upon the ground that such statute referred to a liability created by statute, but it was held that such action was barred in ten years under a statute requiring an action, the limitation of which was not specially prescribed, to be commenced in that time. *Brinkerhoff v. Bostwick* (1885) 99 N. Y. 185, 1 N. E. 663.

And in *Murray v. Smith* (1915) 166 App. Div. 523, 152 N. Y. Supp. 102, the same ten-year statute was held applicable to a stockholders' action to compel the executors of a director to restore to

the corporation money illegally borrowed therefrom by him.

An action by the receiver of an insolvent corporation against a director to compel an accounting for property and assets of the corporation misapplied by him was held to fall under a statute prescribing a limitation of six years for an action upon a contract, obligation, or liability, express or implied. *Mason v. Henry* (1897) 152 N. Y. 529, 46 N. E. 837.

In *Great Western Min. & Mfg. Co. v. Harris* (1901) 111 Fed. 38, it was held that in Vermont the six-year Statute of Limitation was applicable to a suit by the receiver of a corporation, founded upon the common-law liability of the defendant for misfeasance and negligence in the performance of his duties as a director, to charge him with a specified sum wrongfully withdrawn from the corporation while insolvent, and paid over to him and the other stockholders, and for other losses of the corporation alleged to have been caused by mismanagement and negligence of the directors.

An action by the receiver of a corporation to compel de facto directors to give an account of their alleged fraudulent mismanagement and diversion of its trust funds or securities, and to respond for the damage occasioned thereby, is one in equity, and not at law, and hence the six-year, and not the ten-year, Statute of Limitations applies. *Pierson v. Morgan* (1887) 20 Abb. N. C. (N. Y.) 428.

The ten-year, and not the three-year, Statute of Limitations, is applicable to an equitable action by a stockholder to recover from the directors of a bank for the loss of the value of his stock, occasioned by their negligence and misconduct in allowing its funds to be loaned to irresponsible parties. *Hanna v. People's Nat. Bank* (1901) 35 Misc. 517, 71 N. Y. Supp. 1076. This case was reversed in (1902) 76 App. Div. 224, 78 N. Y. Supp. 516, and the judgment of the appellate division was modified in (1904) 179 N. Y. 107, 71 N. E. 778, upon another point.

An Arkansas statute reading as follows: "The following actions shall be commenced within one year after the cause of action shall accrue, and not after: First, all special actions on the case, for criminal conversation, assault and battery, and false imprisonment; second, all actions for words spoken slandering the character of another; third, all words spoken whereby special damages are sustained," it was held was L.R.A.1917A.

not limited in its application to the causes of action specifically enumerated, but would bar a special action on the case against directors of a national bank for losses occasioned by excessive loans, or by other acts of misfeasance or nonfeasance; but it was further held that such statute was repealed by implication by the subsequently adopted Code of Procedure, which contained the usual provisions abolishing all forms of action theretofore existing, and declaring that there should thereafter be but one form of action for private grievances, to be termed "a civil action;" and an action against bank directors for making excessive loans, or for other acts of misfeasance or nonfeasance, brought after the adoption of the Code, was held not to be barred until after the lapse of three years. *Cockrill v. Cooper* (1898) 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 7; *Cockrill v. Abeles* (1898) 30 C. C. A. 223, 58 U. S. App. 648, 86 Fed. 505.

An action by the receiver against the directors of a bank for losses resulting from their negligence in its management was held to come within a statute barring in five years actions for negligence. *Stone v. Rottman* (1904) 183 Mo. 552, 82 S. W. 76.

In *Percy v. White* (1844) 7 Rob. (La.) 513, an action by stockholders for damages against directors for negligence fraud and mismanagement were held barred in ten years, without disclosing the kind of actions described in the ten-year statute.

In *Ashhurst's Appeal* (1869 69 Pa. 290, a suit in equity by stockholders to compel directors to account for corporate property misappropriated by them, and in *Watts's Appeal* (1875) 78 Pa. 374, 8 Mor. Min. Rep. 222, an equitable action charging directors with fraudulent mismanagement of the corporate affairs, it was held, without disclosing the nature of the Statute of Limitations referred to, that a party claiming to hold another a trustee of property under a constructive trust, as in the cases in question, must assert the claim within six years, in analogy to the Statute of Limitations.

— applicability of statutes relating to actions for penalty.

Where statutes making directors liable for corporate debts in case of a violation of their provisions do not limit the liability to the injury or damage sustained by the creditors in consequence of the violation, the liability is usually held to be imposed not as an indemnity,

because it has no relation to the actual loss sustained by the party in whose favor the action is given, but as a penalty, and therefore an action under such a statute is barred by the Statute of Limitations applicable to penalties.

Thus, an action against a director of a corporation to recover a debt of the company by reason of the failure to file an annual report is for a penalty, and falls within the statute applicable to actions upon a statute for a penalty, and in New York is barred in three years. *Merchants' Bank v. Bliss* (1866) 35 N. Y. 412; *Losee v. Bullard* (1880) 79 N. Y. 404, 54 How. Pr. 319; *Knox v. Baldwin* (1880) 80 N. Y. 610; *Chapman v. Lynch* (1898) 156 N. Y. 551, 51 N. E. 275; *Morgan v. Hedstrom* (1900) 164 N. Y. 224, 58 N. E. 26; *Staten Island Midland R. Co. v. Hinchliffe* (1902) 170 N. Y. 473, 63 N. E. 545; *Nimmons v. Tappan* (1870) 2 Sweeny (N. Y.) 652; *Chapman v. Comstock* (1890) 58 Hun, 325, 34 N. Y. S. R. 517, 11 N. Y. Supp. 920, appeal dismissed in (1892) 134 N. Y. 509, 47 N. Y. S. R. 650, 31 N. E. 876, upon the ground that the case was not appealable; *Blake v. Clausen* (1896) 16 Misc. 400, 73 N. Y. S. R. 604, 25 N. Y. Civ. Proc. Rep. 310, 33 N. Y. Supp. 722, affirmed in (1893) 10 App. Div. 223, 75 N. Y. S. R. 1168, 41 N. Y. Supp. 772, which is affirmed in (1899) 158 N. Y. 727, 53 N. E. 1123.

And the same conclusion is reached under Colorado and Montana statutes fixing a one-year limitation for actions to recover a penalty. *Larsen v. James* (1892) 1 Colo. App. 313, 29 Pac. 183; *Colorado Fuel & Iron Co. v. Lenhart* (1895) 6 Colo. App. 511, 41 Pac. 834; *Clough v. Rocky Mountain Oil Co.* (1898) 25 Colo. 520, 55 Pac. 809; *Hazleton v. Porter* (1901) 17 Colo. App. 1, 67 Pac. 170; *Dart v. Hughes* (1910) 49 Colo. 465, 109 Pac. 952; *Nolds v. Hendrie & B. Mfg. Co.* (1913) 56 Colo. 322, 138 Pac. 22; *State Sav. Bank v. Johnson* (1896) 18 Mont. 440, 33 L.R.A. 552, 56 Am. St. Rep. 591, 45 Pac. 662.

An action to enforce against bank directors their statutory liability for having furnished false statements of the affairs of the bank to the state treasurer is an action *ex delicto* within the meaning of a statute to the effect that actions for damages resulting from offenses or quasi offenses are prescribed by one year. *Knoop v. Blaffer* (1887) 39 La. Ann. 24, 6 So. 9.

An action against directors for declaring and paying dividends when the corporation is insolvent, under a statute L.R.A.1917A.

making them liable if so doing for the debts of the corporation, is an action for a penalty which is barred at the end of three years. *Patterson v. Thompson* (1898) 86 Fed. 85; *Patterson v. Wade* (1902) 53 C. C. A. 1, 115 Fed. 770; *Merchants' Bank v. Bliss* (1866) 35 N. Y. 412.

An action under a statute making directors ordering or assenting to any violation of the act under which the corporation was organized liable for all debts thereafter contracted is an action upon a statute for a penalty which is barred in three years, and not one upon a liability created by statute other than for a penalty, which is not barred until after the lapse of six years. *Merchants' Nat. Bank v. Northwestern Mfg. & Car Co.* (1892) 48 Minn. 349, 51 N. W. 117.

An action to enforce the personal liability of directors under a statute requiring the capital stock to be paid into the treasury within a specified time, and making the directors ordering or assenting to a violation thereof which renders the company insolvent liable for all debts contracted after such violation, is an action for a penalty, and must therefore be brought within two years. *Brown v. Cowl* (1902) 158 Ind. 403, 62 N. E. 1006.

An action under a statute making bank directors who participate in or assent to the making of loans and discounts in violation of law individually liable for the debts of the bank is one *ex quasi delicto*, and not *ex quasi contractu*, and is therefore prescribed in one year under the statute barring in that time actions for damages resulting from offenses or quasi offenses. *Knoop v. Blaffer (La.) supra*.

But an action against directors for failure to file annual reports, or for making false reports, under a statute making them liable for all resulting damages to anyone deceived and damaged thereby, is not one for a penalty, but one for relief against fraud, and may therefore be brought at any time within six years after the cause of action accrues. *Brown v. Clow (Ind.) supra*; *American-Credit-Indemnity Co. v. Ellis* (1901) 156 Ind. 212, 59 N. E. 679.

An action by a shareholder under a statute making directors liable for the loss sustained by reason of untrue statements in the company's prospectus by one subscribing for shares in reliance thereon is not barred by the two-year statute applicable to actions for penalties, damages, or sums of money given to the party aggrieved by any statute.

Thomson v. Clanmorris [1900] 1 Ch. (Eng.) 718, 69 L. J. Ch. N. S. 337, 48 Week. Rep. 488, 82 L. T. N. S. 277, 16 Times L. R. 296.

A statute making directors personally liable for paying dividends when the corporation is insolvent is remedial, and not penal, and therefore an action by a receiver to recover from them an illegal dividend is not barred by the one-year Statute of Limitations applicable to penalties. Metzger v. Joseph (1916) — Miss. —, 71 So. 645.

It is held in Seglam v. Yeager (1899) 8 Kan. App. 655, 56 Pac. 508, following Frame v. Ashley (1898) 59 Kan. 477, 53 Pac. 474, that an action by a depositor against the directors of a bank under a statute making them individually responsible for deposits received when the bank is insolvent is an action upon a liability created by statute, which is barred in three years, and not one for a penalty, which is barred in one year.

The liability of national bank directors under a United States statute making them personally liable to anyone damaged by their violation of the Banking Law is not a penalty within the meaning of the section requiring actions for penalties under the laws of the United States to be brought in five years. Welles v. Graves (1890) 41 Fed. 459.

It was conceded in Zimmerman v. Western & S. F. Ins. Co. (1915) 121 Ark. 408, 181 S. W. 283, which was an action under a statute making directors who neglect or refuse to perform their statutory duties liable for the debts of the corporation, that the period of limitation applicable was three years, which is not the period applicable to penalties.

The liability of bank directors for

debts created in excess of the prescribed amount in violation of its charter is not penal, and therefore barred in six months, nor a matter of contract, and therefore barred in four or six years, but is a statutory liability in the nature of a specialty; and, no limitation being prescribed by statute, is subject to the rule of the common law in relation to domestic judgments, which presumes payment or satisfaction after twenty years. Neal v. Moultrie (1852) 12 Ga. 104; Banks v. Darden (1855) 18 Ga. 318; Hargroves v. Chambers (1860) 30 Ga. 580.

An action to enforce the personal liability of directors assenting to the incurring of an excessive indebtedness is not one for a penalty, which is barred in two years, but is governed by the five-year limitation of actions not otherwise provided for. Woolverton v. Taylor (1890) 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007.

And in Swan v. Burnham (1900) 70 N. H. 580, 49 Atl. 93, such an action was held to be barred in six years which is not the period of limitation applicable to penalties.

In Green v. Whitehead (1895) 5 Pa. Dist. R. 612 and 613, it was held that an action to enforce the individual liability of directors for exceeding the statutory debt limit, under § 39 of the Act of April 29, 1874, which section contained no limitation, was not barred by the limitation contained in § 15 of the same act, providing that no stockholder shall be personally liable for any debt of the corporation unless suit shall be brought against him within six months after the debt shall become due.

G. V. I.

MASSACHUSETTS SUPREME JUDICIAL COURT.

BOSTON SAFE DEPOSIT & TRUST COMPANY, Trustee, etc., of John W. Leighton, Deceased,

v.

FANNIE LEIGHTON LUKE et al.

(220 Mass. 484, 108 N. E. 64.)

Bankruptcy — effect on equitable estate.

The trustee has no right to the interest created for the bankrupt by a will giving property in trust to pay the income to him

Note. — For interest of cestui que trust in spendthrift trust as assets passing to trustee in bankruptcy, see annotation following this case, post, 989.
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during life, with the express provision that it is to be free from the interference or control of his creditors, although the interest is assignable and the Bankruptcy Act provides that all property shall vest in the trustee which, prior to the filing of the petition, the bankrupt could by any means have transferred.

For other cases, see Bankruptcy, II. a, in Dig. 1-52 N. S.

(March 9, 1915.)

RESERVATION by the Supreme Judicial Court for Suffolk County for determination by the full court of a petition for instructions as to whether the interest of defendant Luke, under a clause in the will, passed to the trustee in bankruptcy of her estate. Decree for defendant.

The clause of the will in question is as follows:

"I give, devise and bequeath to the Boston Safe Deposit & T. Co., a corporation duly established under the laws of the commonwealth of Massachusetts and located at Boston, in said commonwealth, the sum of seventy-five thousand dollars in money, but in trust nevertheless, to invest, hold, reinvest and manage the same separate and apart from all other property held by it in trust, and pay over the net income and principal thereof as follows:

"(1) The whole of the net income thereof to be paid my adopted daughter, Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline, during her life quarterly in each and every year together with such portion of the principal of said trust fund as shall make the amount to be paid her at least three thousand dollars a year during her life, said income to be free from the interference or control of her creditors."

Mr. H. F. Atwood for plaintiff.

Mr. R. H. Oveson for defendant Luke.

Mr. G. E. Kemp for the trustee in bankruptcy.

Loring, J., delivered the opinion of the court:

The trustee in bankruptcy seeks to take this case out of the decisions made in *Billings v. Marsh*, 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000, and *Munroe v. Dewey*, 176 Mass. 184, 70 Am. St. Rep. 304, 57 N. E. 340, because the bankrupt's equitable life interest in the case at bar was assignable. There is nothing in the will which forbids the life tenants assigning her equitable life interest. It follows that it was assignable. *Ames v. Clarke*, 106 Mass. 573; *Huntress v. Allen*, 195 Mass. 226, 122 Am. St. Rep. 243, 80 N. E. 949.

It is the contention of the trustee in bankruptcy that, being assignable, the life interest passed to him under § 70a(5) of the Bankrupt Act (Act July 1, 1898, chap. 541,

30 Stat. at L. 565, Comp. Stat. 1913, § 9654), which provides that all "property which, prior to the filing of the petition, he [the bankrupt] could by any means have transferred," shall vest in the trustee.

But the immunity of the equitable life interest in the case at bar does not depend on the kind of property which (by the terms of the Bankrupt Act) passes to the trustee in bankruptcy. The immunity of the equitable life interest goes farther back. It goes back to the fact that this equitable life interest is not subject to bankruptcy proceedings at all. By the terms of the will creating it the equitable life interest here in question is to be "free from the interference or control of her (the life tenant's) creditors." It is immaterial whether the machinery set in motion by the creditors is a bill in equity to reach and apply her equitable interest, or an involuntary petition in bankruptcy to secure all her property, legal and equitable. The equitable life estate created by the will here in question is to be "free from the interference or control of her creditors;" and under the doctrine of *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, that direction will be enforced. We have examined all the cases cited by the trustee in bankruptcy and find nothing in them which requires notice.

By the terms of the will "the whole of the net income" is to be "free from the interference or control of her [the life tenant's] creditors." The whole income, including all arrearages, is to be paid to the life tenant.

No question has arisen requiring the court to instruct the trustee as to the use of the principal to make the income up to \$3,000.

A decree must be entered directing the plaintiff to pay to the life tenant the whole income, including all arrearages, and it is so ordered.

Affirmed by the Supreme Court of the United States March 13, 1916, 240 U. S. 427, 60 L. ed. 723, 36 Sup. Ct. Rep. 391.

Annotation—Interest of cestui que trust in spendthrift trust as assets passing to trustee in bankruptcy.

A few cases only have involved the question of the effect of bankruptcy upon a trust or equitable estate which was made free from the interference or control of creditors, and while all of the cases which have passed upon the question have reached the conclusion that, under the facts involved, no restricted L.R.A.1917A.

interest in the trust passed to the trustee in bankruptcy of the beneficiary as assets of the bankrupt beneficiary's estate, it cannot be said that in no future case will or should a contrary conclusion be reached. However, it must now be regarded as the settled rule in bankruptcy that the equitable interest of the bene-

fiary in a trust created by a bequest of a fund to a trustee to pay the income thereof to the beneficiary during life, "free from interference or control of her creditors," does not pass to her trustee in bankruptcy under § 70a(5) of the Bankruptcy Act, which vests in the trustee all property that the bankrupt "could by any means have transferred," where the local law treats such restriction against interference or control by creditors as limiting the character of the equitable property, and inherent in it, it having been so held by the Supreme Court of the United States in *Eaton v. Boston Safe Deposit & T. Co.* (1916) 240 U. S. 427, 60 L. ed. 723, 36 Sup. Ct. Rep. 391. This decision affirmed the judgment in *BOSTON SAFE DEPOSIT & T. Co. v. LUKE*, ante, 988, wherein the court seemingly was of opinion that its conclusion would not be altered by the fact, if such it were, that the equitable interest was assignable by the bankrupt within the meaning of § 70a(5) of the Bankruptcy Act. But the Federal Supreme Court, in the affirming opinion above cited, intimated that this conclusion was broader than was necessary, saying: "If it be true without qualification that the bankrupt could have assigned her interest, and by so doing could have freed from the trust both the fund and any proceeds received by her, the argument would be very strong that the statute intended the fund to pass. There would be an analogy, at least, with the provision giving the trustee all powers that the bankrupt might have exercised for her own benefit, § 70a(3), and there would be difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts. The conclusion that the fund was assignable was based on two cases, and we presume was meant to go no farther than their authority required. The first of these simply held that an executor was not liable on his bond for paying over an annuity to an assignee as it fell due, when the assignor to whom it was bequeathed, free from creditors, had not attempted to avoid his act. *Ames v. Clarke* (1871) 106 Mass. 573. The other case does not go beyond a dictum that carries the principle no farther. *Huntress v. Allen* (1907) 195 Mass. 226, 122 Am. St. Rep. 243, 80 N. E. 949. It is true that where the restriction has been enforced there generally has been a clause against an-

ticipation, but the present decision, in following them, holds the restricting clause paramount, and therefore we feel warranted in assuming that the power of alienation will not be pressed to a point inconsistent with the dominant intent of the will. Whether, if that power were absolute, the restriction still should be upheld, as in case of a statutory exemption that leaves the bankrupt free to convey his rights, it is unnecessary to decide. The law of Massachusetts treats such restrictions as limiting the character of the equitable property in it. . . . The policy of the bankruptcy act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have, we are not prepared to say that the present bequest is not protected by the Massachusetts rule."

And again, in *Munroe v. Dewey* (1900) 176 Mass. 184, 79 Am. St. Rep. 304, 57 N. E. 340, 4 Am. Bankr. Rep. 264, where the income of certain property was willed to one for life, with the provision that no income or principal should be assignable or alienable by anticipation, or subject to attachment, levy, or seizure by any creditor of the beneficiary prior to his actual receipt thereof, it was held that the trustee in bankruptcy of the beneficiary was not entitled to receive such income from the trustee under the will, the court relying on the decision in *Billings v. Marsh* (Mass.) which is set out infra, and stating that it saw no ground for a distinction in the words of § 70 of the Bankruptcy Act.

And in *Durant v. Massachusetts Hospital L. Ins. Co.* (1877) 2 Low. Dec. 575, Fed. Cas. No. 4,188, 16 Nat. Bankr. Reg. 324, where the income of a fund was left in trust for the support of B and his wife C, and the education and support of their children, the principal and the annuity to be inalienable, and not to be subject to debts, it was held that the trustee in bankruptcy of B could acquire no part of the funds.

A case presenting a question similar to that raised in the above cases, with the exception that it involved the rights of an assignee in insolvency under a state statute which provided that all the estate, real and personal, of the debtor, shall be conveyed to and be vested in the assignee, is *Billings v. Marsh* (1891) 153 Mass. 311, 10 L.R.A. 764, 25 Am. St. Rep. 635, 26 N. E. 1000. In this case the will established a life trust in property, and provided that no part of it should be

"assignable" or "in any way liable to be taken" for any of the beneficiaries' debts or liabilities before payment, conveyance, or transfer to him; and it was held that the trust interest did not pass to the assignee in insolvency, as such interest was not property which the debtor "could have lawfully sold, assigned, or conveyed, or which might have been taken upon execution."

In a few instances wherein the trusts in question did not in terms free the beneficiaries' interest from the claims of their creditors, decisions have been rendered which are of interest in connection with the foregoing cases, and for that reason are included in the present treatment. Such cases follow.

Thus, trust funds have been held by virtue of local laws not to pass to the trustee in bankruptcy of the beneficiary, although the trust did not expressly exempt the fund from the claims of creditors. This was the conclusion reached in *Re McKay* (1906) 143 Fed. 671, 16 Am. Bankr. Rep. 238, wherein it was held that the interest of the beneficiary of an express trust of personal property did not pass to the trustee in bankruptcy of the beneficiary where, by the laws and decisions of New York, which were controlling, the right of a beneficiary to compel performance of a trust and receive the income of the personal property is inalienable, and ordinarily the rights and benefits granted cannot be assigned or transferred by the beneficiary.

In *Nichols v. Eaton* (1875) 91 U. S. 716, 23 L. ed. 254, 13 Nat. Bankr. Reg. 421, affirming (1873) 3 Cliff. 595, Fed. Cas. No. 10,241, where a trust was terminated by the bankruptcy of the beneficiary, such an effect having been expressly provided for, it was held that what came to the beneficiary after his bankruptcy, through the voluntary action of the trustees, under the terms of a discretion reposed in them to transfer to him absolutely any such portion, not exceeding one half, of the trust fund, as they saw fit, could not be subjugated to the control of the assignee in bankruptcy, the court saying that it was not prepared to adopt "the doctrine that the owner of property, in the free exercise of his will in disposing of it cannot so dispose of it but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors." And upon the question of moneys paid to the bankrupt by the trustees under a discretion vested in

them by the instrument creating the trust, see also *Perry v. Avery* (1907) 148 Mich. 211, 111 N. W. 746.

In *Spindle v. Shreve* (1879) 9 Biss. 199, 4 Fed. 136, where a will creating a trust provided that the beneficiary shall have no power or right to encumber the trust estate or anticipate the rent thereof, it was held that there was no interest or estate in the trust property which would pass to the trustee in bankruptcy of the beneficiary.

But, even though a trust income can neither be transferred by the bankrupt beneficiary nor levied on or sold under judicial process, it has been held that where the local law, as in New York, provides that where a trust is created to receive the rents and profits of lands, and no valid direction for the accumulation is given, the surplus beyond the sum necessary for the support and education of the beneficiary shall be liable in equity to the claims of creditors in the same manner as other personal property which cannot be reached by an execution at law,—surplus income, on the bankruptcy of the beneficiary, may be claimed by the trustee in bankruptcy as assets of the estate. *Re Baudouine* (1899) 96 Fed. 536, 3 Am. Bankr. Rep. 55, reversed on question of jurisdiction in (1900) 41 C. C. A. 318, 101 Fed. 574, 3 Am. Bankr. Rep. 651. But a contrary conclusion was reached in *Butler v. Baudouine* (1903) 84 App. Div. 215, 82 N. Y. Supp. 773, 16 Am. Bankr. Rep. 238, note, affirmed without opinion in (1903) 177 N. Y. 530, 69 N. E. 1121, it being held that the surplus referred to in the statute could not be reached by the trustee in bankruptcy of the beneficiary of the spendthrift trust. This was upon the ground that the provisions of the statute were only available to judgment creditors who had exhausted their remedies at law, and that the trustee in bankruptcy was not within that class. However, subsequent to this decision, and possibly in view thereof, Congress amended the Bankruptcy Act (Act June 25, 1910) by extending to trustees in bankruptcy the powers of a judgment creditor holding an execution duly returned unsatisfied, and it has been held (*Jenks v. Title Guarantee & T. Co.* (1915) 170 App. Div. 830, 156 N. Y. Supp. 478) that, by virtue of the power so conferred, a trustee in bankruptcy may reach the surplus income held by the trustee of a spendthrift trust.

G. J. C.

NORTH CAROLINA SUPREME COURT.

J. J. PRICE et al., by Next Friend, Appts.,
v.
BOARD OF TRUSTEES OF GOLDSBORO
TOWNSHIP.

(— N. C. —, 89 S. E. 1066.)

Municipal corporation — leaving explosives unguarded — liability for injury.

A municipal corporation is not liable for injury to a child, through the negligence of its servants engaged in constructing a highway, in leaving explosives unguarded with in his reach.

For other cases, see Municipal Corporations, II. g, 2, in Dig 1-52 N. S.

(September 27, 1916.)

APPEAL by plaintiffs from a judgment of the Superior Court for Wayne County sustaining a demurrer to a complaint filed to recover damages for personal injuries alleged to have been caused by the negligence of defendant's employees. Affirmed.

The facts are stated in the opinion.

Messrs. Dortch & Barham for appellants.

Mr. M. T. Dickinson for appellee.

Hoke, J., delivered the opinion of the court:

The complaint, in effect, alleges that in September, 1915, defendant, incorporated by act of general assembly (Public Local Laws 1913, chap. 327), and charged with duty of constructing and maintaining the public roads of Goldsboro township, Wayne county, were, through their employees and agents, in performance of their corporate duties, engaged in blasting out certain portions of a public road in said township, and using for the purpose dynamite cartridges, etc.; that said employees, while so engaged, by reason of a rainstorm suddenly arising, were forced to seek shelter in a barn of one Howard, situate near the roadway, and, on departing from said barn, wrongfully, carelessly, and negligently left therein a box of dynamite cartridges, and later a child of the owner, aged nine, found said

box, which had been left "on a sill in said barn, in easy reach and plain view," and the contents were distributed among his playmates who were present with him at the time; that one of these, Ollie Price, aged ten, was endeavoring to open the cartridge given to him with a pin, when it exploded, causing him serious and permanent injury, etc.

To this complaint defendant corporation entered formal demurrer, for cause chiefly that it appeared on face of the complaint that defendant corporation, in so far as connected with the transaction, is a municipal corporation, a branch of the county government, and was engaged at the time in building and grading the public roads, a work purely public and governmental in its nature, and in such case the corporation is not liable for the torts of its employees, agents, etc.

His Honor, being of opinion with defendant, entered judgment as stated, sustaining the demurrer, and the plaintiffs appealed.

It is the general rule in this jurisdiction that a municipal corporation, when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs of their employees and agents unless made so by statute. *Snider v. High Point*, 168 N. C. 608, 85 S. E. 15; *Harrington v. Greenville*, 159 N. C. 632, 75 S. E. 849; *Mellhenney v. Wilmington*, 127 N. C. 146, 50 L.R.A. 470, 37 S. E. 187; *Moffitt v. Asheville*, 103 N. C. 237, 14 Am. St. Rep. 810, 9 S. E. 695; *White v. Chowan County*, 90 N. C. 437, 47 Am. Rep. 534.

A limitation upon the general rule is recognized and established in several of the more recent decisions on the subject when the injury complained of amounts to a taking of private property of the citizen, within the meaning of the term "taking," as understood and defined in administering the rights of eminent domain. See *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377; *Hines v. Rocky Mount*, 162 N. C. 409, L.R.A. 1915C, 751, 78 S. E. 510, Ann. Cas. 1915A, 132; *Little v. Lenoir*, 151 N. C. 415, 66 S. E. 337. Again, it is held that the general rule, as first stated, does not obtain where

Note.—The liability of municipal corporations for injuries inflicted by the negligence of employees engaged in the repair or construction of highways is discussed in the notes to *Barree v. Cape Girardeau*, 6 L.R.A.(N.S.) 1090, and *Kippes v. Louisville*, 30 L.R.A.(N.S.) 1161.

Many other phases of the subject of the liability of municipalities as affected by the distinction between their public and private or proprietary functions are treated in notes cited in the Indexes to L.R.A. Notes, L.R.A.1917A.

under the title, "Municipal Corporations," subtitle, "Liability for Damages."

The general question as to liability for injury to children from explosives left accessible to them is treated in notes to *Akin v. Bradley Engineering & Machinery Co.* 14 L.R.A.(N.S.) 586; *Finkbeiner v. Solomon*, 24 L.R.A.(N.S.) 1257; *Juntti v. Oliver Iron Min. Co.* 42 L.R.A.(N.S.) 840; and *Folsom-Morris Coal Min. Co. v. De Vork*, L.R.A. 1917B, —.

the corporation, though partaking to some extent of the nature of a municipal agency, and exercising some such powers, is, in its primary and controlling purpose, a private enterprise, undertaken and organized for purpose of private gain. *Leary v. Drainage Comrs.* — N. C. —, 89 S. E. 803; *Southern Assembly v. Palmer*, 166 N. C. 73, 82 S. E. 18; *Drainage Comrs. v. Webb*, 160 N. C. 594, 76 S. E. 552. There is doubt if the limitation first suggested has been always sufficiently adverted to and observed in some of our cases, but, however that may be, there can be no question that, on the

facts of this record, the general rule should prevail, it appearing that the wrong complained of was in no sense an invasion of the proprietary rights of plaintiffs or any of them, but a tort pure and simple, perpetrated by defendant's agents and employees, if at all, while engaged in the performance of duties governmental in their nature and imposed upon and undertaken by defendant corporation entirely for the public benefit.

There is no error, and the judgment of his Honor sustaining the demurrer must be affirmed.

Affirmed.

GEORGIA SUPREME COURT.

MRS. J. D. CLEMENTS, Plff. in Err.,
v.

W. H. BLANCHARD.

(141 Ga. 311, 80 S. E. 1004.)

Landlord and tenant — unsanitary premises — negligence of tenant.

Where a dwelling house containing a cellar was rented on monthly payments, and because of a leakage through the wall a pond of filthy water accumulated in the cellar, rendering the house unfit for a home, and the landlord refused to repair the house, he will not be liable in damages to the tenant on account of the tenant's sickness, sustained three or four months after the refusal to repair, which sickness is attributed to the unsanitary condition of the house. The tenant, by remaining in the untenable premises, was guilty of such negligence as barred a recovery.

For other cases, see Landlord and Tenant, III. c, 2, a, in Dig. 1-52 N. S.

(Lumpkin, J., dissents.)

(February 18, 1914.)

ERROR to the Superior Court for Fulton County to review a judgment dismissing on demurrer an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. O. G. Battle and Hewlett & Dennis for plaintiff in error.

Messrs. Rosser, Brandon, Slaton, & Phillips, for defendant in error:

If the tenant could have avoided, in the exercise of reasonable care the consequences of defendant's act, there can be no recovery.

Headnote by EVANS. P. J.

Note. — As to liability of landlord to tenant for sickness due to unsanitary condition of premises, see annotation following this case, post, 994.
L.R.A.1917A.

Nicholas v. Tanner, 117 Ga. 223, 43 S. E. 489; *Roberts v. Glass*, 112 Ga. 457, 37 S. E. 704.

In the absence of agreement the landlord is not bound to repair patent defects.

Aikin v. Perry, 119 Ga. 263, 46 S. E. 93.

The landlord is not liable for defective construction except where the structure was built by him, or under his direction.

Adams v. Haigler, 123 Ga. 659, 51 S. E. 638.

EVANS, P. J., delivered the opinion of the court:

Mrs. J. D. Clements brought an action against W. H. Blanchard, claiming \$5,000 damages for personal injuries. She alleged that, about twelve months prior to the filing of her suit, she rented from the defendant a dwelling house having a cellar, and has since occupied it as a home; that at the time the house was rented the cellar was dry; that about seven or eight months after she moved into the house the surface water washed out the dirt along and outside of the west wall of the cellar, causing the wall to leak, and allowing the water to flow into the cellar and pond therein, creating a filthy, muddy, and unhealthy basin of water, from which arose noxious odors and gases, rendering the house unfit to live in as a home; that she promptly complained to the landlord of the defective condition, requesting him to repair and restore the premises to a condition suitable for occupancy, but he failed and refused to do so; that about three months thereafter she was stricken with malarial fever and confined to her bed as a result of the defendant's failure to repair the premises; that she paid a certain sum monthly as rent of the premises for each and every month she had lived in the house; and that it was negligence on the part of the defendant to fail and refuse to repair the premises,

after having notice of the dangerous and unhealthy condition of the same. Her petition was dismissed on general demurrer, and she excepted.

The statute (Civil Code of 1910, § 3699) requires a landlord to keep the rented premises in repair, and makes him liable for all substantial improvements placed upon them by his consent. Where the premises at the time of the rental contract are in a suitable condition for the purposes for which they were rented, and afterwards become unsuitable, and damages result to the tenant in consequence of the untenable condition of the rented premises, the landlord is liable therefor, provided he had notice of the defective condition of the premises and failed, after a reasonable time, to make the necessary repairs, and provided also that the tenant has not been guilty of such negligence as to bar a recovery. *Whittle v. Webster*, 55 Ga. 180. As was said in *Stack v. Harris*, 111 Ga. 149, 151, 36 S. E. 616, 8 Am. Neg. Rep. 380: "When rented premises become out of repair, it is the duty of the tenant to notify the landlord of this fact, and also to abstain from using any part of the premises the use of which would be attended with danger." The plaintiff's petition shows that

three months prior to her illness the water accumulated in the cellar because of the failure to repair the wall, and that the effect of the ponding of the water therein was to create such a condition as to render the house unfit to live in as a home. With knowledge that the house had been rendered unfit because of the water standing in the cellar, and after the landlord's positive refusal to repair, nevertheless the tenant continued to remain in the house. She could either have moved out and sued the landlord for damages for failure to keep the premises in repair, or, if the repairs were necessary to render the house tenantable, she could have caused the necessary repairs to have been made, and set them off against the landlord's claim for rent. Her continuance in the house for so long a time after the house was rendered untenable and the landlord had refused to repair constitutes such negligence as bars her of recovery. *Donehoe v. Crane*, 141 Ga. 224, 80 S. E. 712. There was no error in dismissing the petition on demurrer.

Judgment affirmed.

All the Justices concur, except Lumpkin, J., dissenting, and Hill, J., disqualified.

Annotation—Liability of landlord to tenant for sickness due to unsanitary condition of premises.

For a series of notes dealing with the liability of the lessor for personal injury to different classes of persons, due to the defective condition of the leased premises, see note to *Thomas v. Lane*, L.R.A.1916F, 1077, and notes therein referred to.

And as to the liability in general of the lessor for personal injuries to the tenant, due to the defective condition of the leased premises, see the following notes: L.R.A.1916D, 1224; 48 L.R.A. (N.S.) 917; 34 L.R.A. (N.S.) 798; and 34 L.R.A. 824. As to liability for injuries to third persons, see notes in 50 L.R.A. (N.S.) 286, 296, 312.

In general.

In order to hold the landlord liable for the death of the tenant, alleged to be due to the unsanitary condition of the leased premises, it must appear that the landlord was negligent with reference to the matter complained of, and that such negligence was the proximate cause of the death. *Devine v. Ficklin* (1915) 192 Ill. App. 593; *Stewart v. Cushing* (1910) 204 Mass. 154, 90 N. E. 545, holding that a tenant cannot hold the lessor responsible for sickness due L.R.A.1917A.

to the unsanitary condition of the leased premises unless there is evidence of his negligence in connection therewith.

Where lessor surrendered possession of premises.

Of course, in order to charge the lessor with negligence it must first appear that he was under some duty to the lessee to perform some act or do some thing with regard to the leased premises, and that the unsanitary condition of the premises was due to his negligent failure to perform. Hence the primary question is whether or not the lessor was under any duty to the lessee as to the sanitary condition of the leased premises. It is the general rule that, in the absence of fraud or concealment, the tenant assumes the risk of the unsanitary condition of the leased premises. Neither he nor anyone in privity with him can hold the landlord liable for sickness due to the premises becoming unsanitary during the term of the lease, owing to insufficient or defectively constructed drains and sewers. *Towne v. Thompson* (1895) 68 N. H. 317, 46 L.R.A. 748, 44 Atl. 492. And, subject only to the exceptions referred to, the lessor of

a building is not liable to an employee of a lessee for sickness caused by the unsanitary condition of the leased premises in which the employee lived, due to defectively constructed plumbing which permitted noxious gases to escape from the sewage pipes. *Angevine v. Knox-Goodrich* (1892) 3 Cal. Unrep. 648, 18 L.R.A. 264, 31 Pac. 529. To the same effect is *Blake v. Ranous* (1888) 25 Ill. App. 486, holding that, in the absence of fraud or artifice on the part of the landlord, he is not liable to the lessee for sickness due to defective plumbing, since the burden of repairing the leased premises rests upon the tenant.

The lessee cannot hold the lessor liable for the sickness of the former's family, due to escaping sewer gas, unless he shows that the lessor knew, at the time of the execution of the lease, of the existence of sewer gas on the leased premises, or that he knew the sewer pipes were out of repair, or that he made some representations or assurances to the lessee that such defect did not exist. *Sunasack v. Morey* (1910) 157 Ill. App. 278. Nor is the lessor liable for the sickness of the tenant, due to sewer gas escaping from an open drain, observable by the tenant as well as by the landlord, although neither of them knew that sewer gas escaped therefrom, and the fact that the landlord, after the tenant complained of gas, undertook to repair the drain, but failed effectively to do so, does not render him liable. *Rhoades v. Seidel* (1905) 139 Mich. 608, 102 N. W. 1025, 18 Am. Neg. Rep. 135. And see *Glenn v. Hill* (1908) 210 Mo. 291, 16 L.R.A. (N.S.) 699, 109 S. W. 27, holding that where the landlord was under no contractual obligation to repair the demised premises, he is not liable for the death of a tenant, caused by the cold, damp condition of the premises, due to his failure to install, within a reasonable time, a new furnace which he had gratuitously undertaken to install in place of a worn one. The court, however, pointed out that the landlord might have been liable if the recovery had been sought on the ground that he had negligently and carelessly failed to complete the work in a reasonable time.

The landlord is not liable for injuries to a tenant caused by gas fumes from a water heater; at least, where it did not appear that there was any defect in the vent pipe to the heater, or, if there was one, that it was concealed, or that knowledge of it was chargeable to the landlord, and that it was not discoverable

or ascertainable by the tenant. *Gatnemann v. Rosenfeld* (1914) 190 Ill. App. 110.

—effect of concealment of defect.

It is clear that if the lessor has knowledge of the infectious, unhealthy, or unsanitary condition of the leased premises, he is under duty to the lessee to inform him thereof; and if he conceals the fact, he is liable for the resulting injury. See note in 6 L.R.A. (N.S.) 977, as to liability for concealment of fact that a contagious disease has existed upon the premises. And the lessor is liable to the lessee for damages for sickness of the latter's family, due to a dead dog in a well on the leased premises, the presence of which the lessor gained knowledge of by examination of the well after the lessee went into possession, and of which he did not inform the lessee. *Maywood v. Logan* (1889) 78 Mich. 135, 18 Am. St. Rep. 431, 43 N. W. 1052.

—effect of breach of covenant to repair.

The lessor is not liable to a tenant for the death of the latter's child, due to a breach by the former of his agreement to keep the premises heated. *Dancy v. Walz* (1906) 112 App. Div. 355, 98 N. Y. Supp. 407. Nor for the tenant's sickness, due to a violation by the lessor of his covenant to keep the roof in repair. *Eschbach v. Hughes* (1894) 7 Misc. 172, 27 N. Y. Supp. 320. Nor is he liable for sickness of a member of the tenant's family, due to defective sewer pipes which he had covenanted to but did not repair. *O'Gorman v. Teets* (1897) 20 Misc. 359, 45 N. Y. Supp. 929. Nor for the death of a child of a tenant from diphtheria, alleged to have been caused by foul, noxious, and unwholesome odors, due to the stopping up of the water-closet, which the landlord had contracted to, but had neglected to repair. *Davis v. Smith* (1904) 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832.

Where lessor retained possession.

The lessor is liable to a member of the lessee's family for sickness caused in part by the fall of the ceiling, due to a leakage from the water-closet, and in part by such leakage, where the closet was maintained by the lessor for use in common by different tenants in the building, and he knew of the leakage and neglected to repair the pipe. *Domenicis v. Fleisher* (1907) 195 Mass. 281, 81 N. E. 191.

Assuming that the lessor is liable for the unsanitary condition of leased premises over which he retains control, where due to some defect that he negligently fails to discover or remedy, it has been held that where the landlord did not construct the building, but acquired it by purchase, he is not chargeable with knowledge that a water pipe connecting a water tank located on the roof with the lower portion of the building was not sufficiently protected underneath the roof and above the ceiling to keep it from freezing, and where he was without knowledge of the unprotected condition of this pipe and of the danger of its freezing, he is not liable for the sickness of the wife of a tenant of the lower floor, due to the damp condition of the walls and falling plaster, caused by the freezing and bursting of these pipes. *Queeney v. Willi* (1916) 171 App. Div. 588, 157 N. Y. Supp. 642.

Contributory negligence of lessee.

The existence of foul, noxious, and unwholesome odors due to the stopping up of the water-closet is a fact in its nature incapable of concealment, and of which the tenant must become aware at once; and he is not entitled to continue to expose his family to such dangerous condition, and thereby aggravate his damages for breach by the lessor of his covenant to repair. *Davis v. Smith* (1904) 26 R. I. 129, 66 L.R.A. 478, 106 Am. St. Rep. 691, 58 Atl. 630, 3 Ann. Cas. 832. And see *CLEMENTS v. BLANCHARD*, ante, 993, holding that where the unsanitary condition of the leased premises is due to a leakage through the cellar wall into the cellar, forming a pond in it, and the lessor refuses to remedy it, if the lessee continues to occupy the premises, it constitutes such negligence as to bar a recovery from the lessor.

A. G. S.

CALIFORNIA SUPREME COURT. (In Banc.)

WALTER BORDWELL

v.

W. B. WILLIAMS, County Clerk of Orange County.

(— Cal. —, 159 Pac. 869.)

Election — right of candidate to withdraw.

1. A candidate whose name has been duly certified for a place on the ballot at a primary election, and who has signed the statutory affidavit that, if nominated, he would accept such nomination and not withdraw, is not precluded from withdrawing his name before the primary election, although the statute provides that the names of all persons for whom nomination papers have been filed, as certified by the secretary of state, shall be printed on the ballots.

For other cases, see *Elections*, IV. in *Dig.* 1-52 N. S.

Mandamus — to compel omission of name from ballot — statutory authority.

2. A statute authorizing an application to court whenever it shall be made to appear that an error or omission has occurred or is about to occur in the placing of any name on the official primary ballot, and authorizing the court to order a correction of such error, applies to an action for mandamus to compel the omission from the ballot of the name of one who withdraws

his candidacy after being certified by the secretary of state for a place on the ballot. For other cases, see *Mandamus*, I. f, in *Dig.* 1-52 N. S.

(Angellotti, Ch. J., and Lawlor, J., dissent.)

(August 18, 1916.)

PETITION for a writ of mandamus to compel respondent to omit from the ballots to be prepared by him for use in a primary election the name of petitioner as a candidate for the Republican nomination for the office of United States Senator. Writ issued.

The facts are stated in the opinion.

Messrs. Samuel M. Shortridge, Catlin, Catlin, & Friedman, Frank P. Doherty, and C. E. Spencer for petitioner.

Mr. L. A. West for respondent.

Sloss, J., delivered the opinion of the court:

This is a proceeding in mandamus to compel the county clerk of Orange county to omit from the ballots to be prepared by him for use in the forthcoming primary election the name of the petitioner, Walter Bordwell, as a candidate for the Republican nomination for the office of United States Senator. The election is to be held on August 29, 1916. An alternative writ has issued, and the respondent has made return thereto. The material facts are not in controversy.

Pursuant to the provisions of the Direct Primary Law (Stat. 1913, p. 1379), a committee of five electors proposed the name of

Note.—The refusal to have one's name placed on a primary ballot is discussed in the annotation following *McCamant v. Olcott*, L.R.A.1916E, 709. L.R.A.1917A.

the petitioner as a candidate at the said primary election for the Republican nomination for the office of United States Senator. They duly appointed verification deputies in the several counties, and nomination papers signed by the requisite number of qualified electors were filed in the county of Los Angeles and other counties. The signatures were examined and the registrars or county clerks of the various counties duly certified to the secretary of state a sufficient number of qualified electors to entitle the petitioner to have his name placed upon the primary ballot. Within the time allowed by the statute,—i. e., not less than thirty-five days before the election (§ 5, subdiv. 4),—Mr. Bordwell filed with the secretary of state his affidavit stating, in addition to the other matters required, that, if nominated, he would accept such nomination and not withdraw, and that he would qualify as such officer if nominated and elected. The secretary of state thereupon certified the name of the petitioner to the respondent and to the county clerks and registrars in the several counties, directing said officers to print on the primary ballot the name of the petitioner as a candidate for the Republican nomination for the office of United States Senator.

After receiving such certificate, the respondent published, as required by § 10 of the act, the names and addresses of all persons, including the petitioner, for whom nomination papers had been filed in the office of the secretary of state. He also caused to be prepared sample ballots including, among other names, that of petitioner, and has directed the printing of official ballots in like form. On the 9th day of August, 1916, petitioner notified the secretary of state, the respondent herein, and all county clerks and registrars of voters, that he had withdrawn as a candidate for said nomination, and directed each of said officials not to print or publish his name upon any primary ballot to be used in said election on August 29th. The respondent refuses to have the name of the petitioner removed from the ballot, and the purpose of this proceeding is to compel such removal.

The right to seek election to any office is open to all persons possessing the constitutional or statutory qualifications. A citizen is, however, under no obligation to seek election to an office. He may be a candidate, or refuse to be such, at his option, and, in the absence of statutory provision to the contrary, the mere fact that he has once announced his candidacy for an office does not prevent him from withdrawing as a candidate whenever he sees fit so to do.

Does our statute change this rule? In L.R.A.1917A.

other words, does the fact that Mr. Bordwell, and the committee acting on his behalf, had taken the necessary steps to enable him to become a candidate at the August primary election, constitute a bar to his withdrawing his candidacy for such nomination prior to the election? The act contains nothing which in direct terms bears upon the question of withdrawal at this stage. Before any elector may have his name placed upon the ballot as a candidate, he must sign an affidavit stating that, if nominated, he will accept such nomination and not withdraw. But this provision, obviously, has application only to the condition existing after the primary election, at which, if at all, he will be "nominated." We need not here inquire whether the provision for this affidavit carries with it an implied prohibition against withdrawal by a candidate who has been successful in obtaining a party nomination at the primary. The court of appeals of Kentucky has held, under a statute very similar to ours, that a withdrawal may be made after the election. *Elswick v. Ratliff*, 166 Ky. 149, 179 S. W. 11. The contrary view has been expressed by the supreme court of Nevada. *State ex rel. Donnelley v. Hamilton*, 33 Nev. 418, 111 Pac. 1026. But, without regard to this question, it is perfectly clear that the statute does not, either in terms or impliedly, prohibit a withdrawal before the election. On the contrary, the fact that the statute in terms requires an affidavit that the candidate will not withdraw if nominated gives persuasive indication that a withdrawal before nomination (i. e., before the primary election) was contemplated by the framers of the act as authorized. And such is the holding in a late Nevada case (*State ex rel. Thatcher v. Brodigan*, 37 Nev. 458, 142 Pac. 520), in which the earlier decision in *State ex rel. Donnelley v. Hamilton* is distinguished upon this very ground.

If, then, the petitioner has the right to withdraw his candidacy for the nomination, the right should be made effectual and operative, unless some insuperable obstacle intervenes. We find no such obstacle in the statute. Much stress is laid upon the fact that, under § 10 of the act, the county clerk or registrar is required to publish the names which appear upon the certified list transmitted to him by the secretary of state, and that this list is to contain the names "of each person for whom nomination papers have been filed in the office of such secretary of state." So, too, § 12, defining the form of ballots, provides "that the names of all candidates for the respective offices for whom nomination papers have been duly filed shall be printed thereon." Undoubtedly the county clerk acts ministerially, and

the information upon which he so acts is that received by him from the secretary of state. But it does not follow that the certificate of the secretary of state must finally conclude everyone with respect to the form and contents of the ballot. Section 27 of the act authorizes an application to this court, to a district court of appeal, or to a superior court, whenever it shall be made to appear "that an error or omission has occurred or is about to occur in the placing of any name on an official primary election ballot, that any error has been or is about to be committed in printing such ballot, or that any wrongful act has been or is about to be done by any . . . county clerk, registrar of voters . . . or other person charged with any duty concerning the primary election," and authorizes the court to order the officer or person charged with such error, wrong, or neglect to correct the error, desist from the wrongful act, or perform the duty. This is broad language, and we think it was designed to vest in the courts a broad control over all officers performing duties in connection with the primary elections. With respect to the names of the candidates to be placed upon the ballots, the remedy is not, under this section, limited to an application to compel the secretary of state to issue the proper certificate. The power of that officer to transmit certified lists of candidates expires thirty days before the primary election. After that date all duties connected with the preparation of the ballots are confided to the county clerks or registrars of voters. It cannot have been contemplated that an error or impropriety in a proposed ballot should be beyond correction after the secretary of state had once issued his certificate and the time within which he could issue a corrected certificate had expired. If he should, on the last day allowed by law, issue a certificate which omitted the name of a candidate whose name should be upon the ballot, the only possible remedy would be by application to a court for an order requiring the county clerk or registrar of voters to make the necessary correction. Just such an application is, we think, contemplated and authorized by § 27 of the act, and we think the situation is the same where, by reason of circumstances arising after the secretary of state has made his certificate, the correct form of ballot is not that indicated by his certificate.

This interpretation of the statute is in accord with the fundamental purpose of all election laws; i. e., to enable the voters to exercise a free, orderly, and intelligent choice. We can conceive of no good reason why a ballot should contain the name of a person who is not in fact a candidate for

nomination, even though he may once have taken the steps which entitle him to become such candidate. The presence of his name (like that of a candidate who has died) could operate only to deprive uninformed electors of their votes, to the injury of one or more of the actual candidates, and to the possible perversion of the true popular will. We are not prepared to hold that the law requires this result. To give to the certificate of the secretary of state the conclusive effect contended for by the respondent would be to elevate form above substance. We believe, on the contrary, that the statute contemplates a submission to the electors of a choice between persons who are candidates in fact, and that where, from any cause, the ballots do not present that choice, the courts are authorized, under § 27 of the act, to direct the officials having control of the preparation of the ballots to prepare them in proper form.

It need hardly be said that an application of this kind must be made sufficiently early to enable the officials to have the necessary alterations put into effect. In the present case it appears that the time to intervene before the date of the election will be sufficient for the respondent to obey the writ which is to issue. We assume that the officials of other counties will take action in harmony with the views here expressed. If, as suggested at the hearing, it will be impossible in some instances to alter the sample ballots, the spirit of the present ruling can be carried out, as far as possible, by changing the form of the official ballots to be furnished to the voters.

A peremptory writ will issue as prayed.

We concur: Lorigan, J.; Melvin, J.; Henshaw, J.

Shaw, J., because of temporary absence, has not participated.

Henshaw, J., concurring:

I concur in everything that is said in the prevailing opinion. It certainly will not be questioned that an elector has the inherent right, under our system of government, of offering himself as a candidate for office, and, after having offered himself, to withdraw his name and retire from the political contest at any time that he sees fit. The sole limitation upon this unquestioned right is the limitation which may be fixed upon it by law. The only limitation which our law has seen fit to impose is that inferentially contained in the requirement of a candidate to make an affidavit that, "if nominated," he will continue his candidacy for and seek election to the office. The legislature having seen fit thus to restrict the

right of withdrawal after nomination, and having placed no restriction upon the right of withdrawal before nomination, under every canon of construction that right of withdrawal before nomination still rests with every candidate for office. Such was the unanimous view of the supreme court of Nevada in the case cited in the prevailing opinion. Therefore no right to withdraw his name as a candidate from the primary ballot is expressly or impliedly given to any candidate, because it is not necessary that it should be expressly or impliedly given. The right is his, unless it is taken away by positive law, and there is no positive law so doing. Nor is it necessary that there should be any specific mode prescribed by which any withdrawal can be effected. It is a reflection upon our jurisprudence to say that its general remedies are not adequate, as they were found to be by the supreme court of Nevada under a statute in all particulars identical with our own.

But, conceding the right of withdrawal to exist, the dissentient view is that the legislature designed that this right should have no effect, because the law also says that county clerks shall print the "names of all candidates for the respective offices for whom nomination papers have been duly filed." Such a construction is but the veriest sticking in the bark. To attribute such a meaning to the legislature is deliberately and unnecessarily to charge it with the design of deluding and deceiving the electors of the state. For under that construction it is not denied that it means that the name of a candidate who has died may not, even though the fact be timely and officially brought to the notice of the county clerks, be omitted from the ballot to be printed; that if the sole candidate of a political party has been convicted of a felony, and thus disqualified from holding office, the legislature designed in both such and all like cases that the name of the dead man and that the name of the felon should remain upon the ballot, notwithstanding that, if they received a majority of the votes, neither could take office, and the result would be, either that a man whom the people by their votes had not selected would fill the office, or that the state must be subjected to the added and unnecessary expense of another election. I am unwilling myself to charge the legislature in its enactment of the primary law with any such stupidity or evil design. Nor is it necessary that this should be done, whenever, as here, notification of withdrawal, of death, or of legal disqualification to hold the office, is under timely notice officially made known to the county clerk.

L.R.A.1917A.

The provisions of the primary law calling upon the county clerks to print upon the primary ballot the names that have been certified to them by the secretary of state by every reasonable intendment mean only that those names shall be printed unless changes shall have occurred within the contemplation of the law,—such changes as in fact are contemplated and provisions for which are made by § 27 of the act quoted in the prevailing opinion; and the forced construction which unnecessarily is sought to be given to this, I repeat, convicts the legislature, without any express language to that effect, of a design to make the primary election ridiculous, by compelling, to the deception of the voters, the retention of the name of a man who is dead or has been sent to the state prison.

Angellotti, Ch. J., dissenting:

I dissent. Desirable as may appear to be the result reached by the court in this proceeding, I am unable to concur therein in view of my understanding of the meaning of the provisions of the Direct Primary Act.

In proposing to place the name of Mr. Bordwell on the primary ballot as a candidate for the republican nomination for United States Senator, notwithstanding his attempted withdrawal as a candidate after having regularly qualified as such, and after his name had been regularly certified by the secretary of state to the various county clerks and registrars as a candidate, the county clerk of Orange county is, in my opinion, simply proposing to follow the plain mandate of the Primary Act. If this be the situation, of course, we have no authority to order him to do otherwise.

The clerk is simply proposing to print on the primary ballot, as candidates for the Republican nomination for United States Senator, the names of all persons "for whom nomination papers (including the affidavit of the candidate himself, stating that he desires to be a candidate) have been duly filed" (Primary Act, subdiv. 4, § 12), as such names have been correctly certified to him by the secretary of state (Primary Act, § 10), and all this the primary act expressly requires him to do.

No right to withdraw his name as a candidate from the primary ballot is expressly or impliedly given any such person by any provision of the Primary Act; no mode by which any withdrawal can be effected is even suggested by any provision of the act; and I cannot read the act otherwise than as clearly contemplating that there can be no

such withdrawal, and that the certificate of the secretary of state, when made in full accord with the law, is absolutely conclusive on county clerks and registrars as to the

names which shall be placed on the primary ballot.

I concur: Lawlor, J.

KANSAS SUPREME COURT.

KANSAS FLOUR MILLS COMPANY

v.

A. M. BRANDT, Appt.

(98 Kan. 587, 158 Pac. 1120.)

Sale — refusal to deliver — Liability.

Where one sells wheat in August and agrees to deliver the same September 15th or any time during the month of September before the 15th, and on September 9th notifies the purchaser that he will not deliver the wheat, the purchaser may go on the market at the place of delivery on September 9th and purchase the amount of wheat contracted for, and recover from the seller the difference between the contract price and that paid.

For other cases, see Sale, III. a, in Dig. 1-52 N. S.

(July 8, 1916.)

A PPEAL by defendant from a judgment of the District Court for Greenwood County in plaintiff's favor in an action brought to recover damages for failure of defendant to deliver wheat sold by him to plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. A. F. Sims, for appellant:

The market price on the date when the goods should have been delivered is to be taken as the measure of damages.

35 Cyc. 633; Benjamin, Sales, § 870, note; Sedgw. Damages, 313; Taylor Mfg. Co. v. Hatcher, 3 L.R.A. 580, 39 Fed. 440; 1 Sutherland, Damages, p. 82.

When delivery is to be made between certain dates the seller is not bound to deliver until the last day. So, if the agreement is that delivery shall be made within a designated month, the seller has until the last day of the month to make a delivery.

35 Cyc. 177; Grosvenor v. Magill, 37 Ill. 239; Bissell v. Beard, 28 L. T. N. S. 740; Curtiss v. Howell, 39 N. Y. 211.

Notice of default will not change the time of delivery or the date upon which to measure damages.

35 Cyc. 637; P. P. Emory Mfg. Co. v.

Headnote by MARSHALL, J.

Note. — For right of buyer to purchase on market before expiration of time for delivery where seller gives notice that he will not deliver, see annotation following this case, post, 1001, L.R.A.1917A.

Salomon, 178 Mass. 582, 60 N. E. 377; York-Draper Mercantile Co. v. Lusk, 45 Kan. 182, 26 Pac. 646; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Central Lumber Co. v. Arkansas Valley Lumber Co. 86 Kan. 131, 119 Pac. 321.

Messrs. Noftzger & Gardner for appellee.

Marshall, J., delivered the opinion of the court:

The plaintiff recovered judgment for \$510 damages for failure to deliver wheat sold to the plaintiff. The defendant appeals.

In August, 1914, the plaintiff purchased of the defendant 3,000 bushels of wheat at 83 cents per bushel, to be delivered September 15, 1914, or at any time during the month of September before the 15th. On September 9th, the defendant notified the plaintiff that he would not deliver the wheat, and the plaintiff on that day purchased other wheat of the same grade for \$1 per bushel, the then current price at the place of delivery. On the 15th day of September, 1914, wheat was worth 82 cents per bushel at the same place.

The only question for consideration is, Could the plaintiff purchase wheat on the 9th day of September and recover the damage sustained by reason of the difference in price, or must he wait until the 15th of September and then purchase the wheat and recover the damage sustained by him? If the latter, he sustained no loss, because wheat then sold for 1 cent per bushel less than he had agreed to pay, and his damage was nominal only. If he had the right to go on the market and purchase the wheat on the day he received notice that the contract would not be complied with, the judgment is correct and should be affirmed.

The plaintiff, when he was notified by the defendant that the wheat would not be delivered, had a right to reduce the damage that he would sustain, by going on the market and buying wheat in amount equal to that the defendant had agreed to sell, and collect the difference in price from the defendant. The authorities say that this should generally be done at the time and place of delivery. Stewart v. Power, 12 Kan. 596; York-Draper Mercantile Co. v. Lusk, 45 Kan. 182, 25 Pac. 646; 35 Cyc. 633. The damage to the plaintiff was caused by the defendant. He could have prevented damage to the plaintiff by per-

forming the contract on any of the days that he might select. He refused to perform his contract, and compelled the plaintiff to adopt such measures as he deemed best to reduce his losses. The defendant ought not to be permitted to cast on the plaintiff the burden of reducing these losses and then say that the plaintiff could have better reduced the losses by purchasing wheat on a different day. The rule ought to be, and we think it is, that the plaintiff, when notified by the defendant, had a right to go on the market on that day and purchase an amount of wheat equal to that contracted for, and recover from the defendant the difference in price. In *Central Lumber Co. v. Arkansas Valley Lumber Co.* 86 Kan. 131, 134, 119 Pac. 322, the rule is substantially stated in the following language: "The defendant, however, deprived itself of the benefit of this rule by its answer in which it alleged, and repeated in the most positive terms, that the plaintiff's default occurred on July 9, 1907. This allegation was very material because it fixed the date at which damages were provable and enabled the defendant to take advantage of the high price of shingles at that time. If the defendant desired to stand at all on the notification of November, 1906, that the contract would not be fulfilled, the duty rested upon it to mitigate damages by then going into the market and buying shingles, if it were able to do so. In that event the plaintiff might have

shown that the defendant could have supplied its needs at prices much below those prevailing the next July, and in the absence of such proof damages were still assessable, not as of July 9, 1907, but as of the true date when, under the contract, the shingles were to be delivered."

The headnote to *Shepherd v. Hampton*, 3 Wheat. 200, 4 L. ed. 369, reads "In an action by the vendee for the breach of a contract of sale by the vendor in not delivering the article, the measure of damages is the price of the article at the time of the breach of the contract, and not at any subsequent period."

See also 35 Cyc. 637; *Williams v. De Soto Oil Co.* 129 C. C. A. 538, 213 Fed. 194; *Craig & Co. v. Pierson Lumber Co.* 179 Ala. 535, 538, 60 So. 838; *Kehler v. Einstman*, 38 Ill. App. 91; *Slauter v. Wallbaum*, 45 Ill. 43; *Follansbee v. Adams*, 86 Ill. 13; *Hunter W. Finch & Co. v. New Ohio Washed Coal Co.* 156 Ill. App. 589, 601; *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575; *Masterson v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; *Boyd v. L. H. Quinn Co.* 17 Misc. 278, 40 N. Y. Supp. 370; *id.* 18 Misc. 169, 41 N. Y. Supp. 391; *David v. William Whitmer & Sons*, 46 Pa. Super. Ct. 307, 311.

The judgment of the District Court is affirmed.

All the Justices concur.

Annotation—Right of buyer to purchase on market before expiration of time for delivery where seller gives notice that he will not deliver.

There is some difference of opinion among the courts as to the right of the buyer upon receiving notice from the seller that he will not or cannot fulfil the contract by delivery at the time set out in the contract. Some courts apparently refuse to give such notice any effect whatever unless the buyer treats the contract as broken and sues for the

breach before time for delivery. Some of these courts apply the general rule that the measure of damages is the difference between the market price of the goods, if they are purchasable on the market, at the time set out in the contract for delivery, and the contract price regardless of the market price at the time notice was given.¹ If the buyer

¹ *Leigh v. Paterson* (1818) 2 J. B. Moore, 588, 20 Revised Rep. 552. 8 Taunt. 640, 129 Eng. Reprint, 493; *Missouri Furnace Co. v. Cochran* (1881) 8 Fed. 463, 10 Mor. Min. Rep. 309; *York-Draper Mercantile Co. v. Lusk* (1891) 45 Kan. 182, 25 Pac. 646, second appeal in (1897) 6 Kan. App. 629, 49 Pac. 788; *Central Lumber Co. v. Arkansas Valley Lumber Co.* (1911) 86 Kan. 131, 119 Pac. 321; *P. P. Emory Mfg. Co. v. Salomon* (1901) 178 Mass. 582, 60 N. E. 377; *Leo Austrian & Co. v. Springer* (1892) 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; *Morris v. Supplee* (1904) 208 Pa. 253, 57 Atl. 566; *Brewer v. Neatherly* (1914) — Tex. Civ. App. —, 162 S. W. 1185.

This appears to be the theory upon which L.R.A.1017A.

the Kansas court has based its decisions. In *York-Draper Mercantile Co. v. Lusk* (1891) 45 Kan. 182, 25 Pac. 646, second appeal in (1897) 6 Kan. App. 629, 49 Pac. 788, it was held—the buyer had not purchased in the market—that the market price at time of delivery less contract price is the measure of damages, in the absence of evidence by the seller showing that the buyer could have bought in the market after the notice, and before time for delivery, at a price that would have mitigated the damages. There is a direct implication here that it is the duty of the buyer to purchase in the market, but on the second appeal the court of appeals held that it was not his duty to buy unless he could

goes into the market and buys the goods before the time for delivery, it has been

held by two of these courts that he does so at his own risk, and his act may

buy at or below the contract price so as to protect himself against a fall in price. In *Central Lumber Co. v. Arkansas Valley Lumber Co.* (1911) 86 Kan. 131, 119 Pac. 321, the court quoted with approval from the decision in 45 Kan. 182. See footnote 6, *infra*, for comment on *KANSAS FLOUR MILLS Co. v. BRANDT*, ante, 1000.

And this would seem to be the rule underlying the decision in *Leigh v. Paterson* (1818) 8 Taunt. 540, 129 Eng. Reprint. 493. The contract price was 65s. per cwt. The seller had until December 31 to deliver, at which time the market price was 81s. per cwt. Notice of rescission was given on October 1st, when the market price was 71s. per cwt. The judges spoke as follows: Dallas, Ch. J.: "The contract, being mutually made, could only be dissolved by the consent of both parties; it could not be dissolved by the one without the consent of the other. The defendant had a right to deliver the tallow at any time before 12 at night on the 31st of December; he had all that month to deliver it in, and the plaintiff was bound to receive the tallow at any moment until after the 31st. It is said that he might have bought other tallow in the market; the answer is, he was not bound to do so; but, further, the defendant might have bought other tallow in the market on the 1st of October or any subsequent day, and have delivered it if he would. The price, therefore, which is to regulate the plaintiff's damages is the price on the 31st of December." Park, J.: "For anything that appears, the plaintiff never assented to rescind the contract; and the defendant might have delivered the tallow at any moment up to the 31st of December, and the price on that day should have regulated the verdict of the jury." Burrough, J.: "The plaintiff was not bound to go into the market and buy. He never assented to rescind the contract; therefore, the direction of the undersheriff to the jury was wrong."

In *P. P. Emory Mfg. Co. v. Salomon* (1901) 178 Mass. 582, 60 N. E. 377, the court said: "This is an action of contract for a failure to sell and deliver certain metals as agreed. The contract was to ship on February 1, 1899. On January 25 the defendants wrote to the plaintiff that they would not keep their contract. The plaintiff replied that it should hold them to their bargain, and on February 2 made a further demand of performance. At the trial, the contract and breach having been proved, the plaintiff asked the judge to rule that the measure of damages was the difference between the contract price and market price on February 1. The judge refused the request, and ruled that the date to be taken was that of the defendant's letter, January 25. The plaintiff excepted. The ruling requested should have been given. Even in England, where

perhaps the courts would go further than we do in the way of allowing an anticipatory notice that the defendant will not perform his contract to be treated by the plaintiff as a breach, it seems to be settled that 'the promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance.' *Frost v. Knight* (1872) L. R. 7 Exch. (Eng.) 112, 41 L. J. Exch. N. S. 78, 26 L. T. N. S. 77, 20 Week. Rep. 471; *Johnstone v. Milling* (1886) L. R. 16 Q. B. Div. (Eng.) 470, 55 L. J. Q. B. N. S. 162, 54 L. T. N. S. 629, 34 Week. Rep. 238. 50 J. P. 694; *Roehm v. Horst* (1900) 178 U. S. 1, 19, 44 L. ed. 953, 960, 20 Sup. Ct. Rep. 780. A fortiori the same is true when, as in this case, the promisee, had he wished to do so, would not have been allowed to treat the notice as a breach. *Daniels v. Newton* (1874) 114 Mass. 530, 19 Am. Rep. 384. *O'Brien v. Boland* (1896) 166 Mass. 481, 44 N. E. 602. A notice which gives the promisee no right to damages cannot bind him as conclusive that the contract will not be performed, and so put upon him a responsibility to see that the damages are no greater than they need be. It is a mere prophecy, and as such may be disregarded. Until the moment when a refusal to perform is a wrong, he has a right to expect that when the time comes a wrong will not be done. *Sedg. Damages*, 8th ed. § 224. The case has nothing in common with that of a refusal after the time of performance has arrived. *Kadish v. Young* (1883) 108 Ill. 170, 48 Am. Rep. 548; *Davis v. Bronson* (1892) 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836. See *Martin v. Meles* (1901) 179 Mass. 114, 60 N. E. 397. See further, for the rule of damages which we adopt, *Leigh v. Paterson* (1818) 2 J. B. Moore, 588. 20 Revised Rep. 552, 8 Taunt. 540, 129 Eng. Reprint, 493; *Phillpotts v. Evans* (1839) 5 Mees. & W. 475, 151 Eng. Reprint, 200, 9 L. J. Exch. N. S. 33; *Kadish v. Young* (Ill.) supra; *Sedgw. Damages*, 8th ed. § 758."

The rule also seems to have been adopted in *Leo Austrian & Co. v. Springer* (1892) 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50, where the goods were to be delivered on or before May 15, the letter of notice was sent May 1st and the goods were purchased on the market June 28. The plaintiff did not treat the contract as broken, and testified that he expected it to be fulfilled. He paid more for the goods than they would have cost him on May 1st, but apparently no orders could be placed at that date. It was held that he could recover the difference between the price paid and the contract price. The court said: "It was held in *Goodrich v. Hubbard* (1883) 51 Mich. 70, 16 N. W. 232, that, the plaintiff not having elected to consider the contract

inure to the benefit of the seller.² In such case it is held that the price actually paid, less the contract price, will be the measure of damages, provided it does not exceed the market price at delivery time, less the contract price.³ So, by purchasing before time for delivery the buyer can gain nothing, except for the seller, and if there is a drop in prices he must stand the loss. The rule is maintained upon the theory that the buyer cannot recover more than his loss in any case, and if his loss exceeds his recovery the excess is due to the fact

that he voluntarily acted in advance of the time when the seller had agreed to supply him with the goods.⁴ Theoretically, if he buys at the time when the delivery was to be made, at the market price, there can be no unrecoverable loss. To buy just at that particular time, however, is not always practicable, especially where the goods were to be delivered in frequent instalments as needed in the buyer's industry.⁵ Another objection to the rule is that when the buyer feels compelled to buy in order to protect himself, he is forced to take the

broken before the arrival of the time for its full performance, he was entitled to the difference in value as of that time. See also *Schmertz v. Dwyer* (1866) 53 Pa. 335; *Kribs v. Jones* (1876) 44 Md. 398. The court instructed the jury that plaintiff was entitled to wait a reasonable time for the goods to reach Chicago, after the final date of shipment, and in this we think there was no error. It is very evident from this record that there was, in fact, no market price for mirror glass during any time in the month of June, and under the testimony the goods could not have reached plaintiff before some time in that month."

In *Brewer v. Neatherly* (1914) — Tex. Civ. App. —, 162 S. W. 1185, the court apparently held that the market price on the last day for delivery less the contract price is the measure for damages where notice of breach had been previously given. The market price on that date was not proved, and the court took the nearest date to it on which it had the market price. There was no purchase on the market by the purchaser.

In *Goyert & Vogel v. Stoner* (1883) 9 Ohio Dec. Reprint, 125, 11 Ohio L. J. 53, the court apparently took the same position taken by the Illinois court in *Staley v. Lyman*, cited under footnote 8, *infra*, except that mere silence until time for delivery was regarded as no recognition of the breach, while in the Illinois case the buyer had replied to the notice, stating affirmatively that he refused to release the seller and would expect delivery.

² See cases cited under footnote 3, *infra*.

³ *Missouri Furnace Co. v. Cochran* (1881) 8 Fed. 463, 10 Mor. Min. Rep. 309; *Morris v. Supplee* (1904) 208 Pa. 253, 57 Atl. 566. For particular holding in the *Cochran* Case, see footnote 5, *infra*.

In *Morris v. Supplee* (Pa.) *supra*, it was held, contrary to the holding in *KANSAS FLOUR MILLS Co. v. BRANDT*, that if the buyer purchases in the market before the time set for delivery his recovery will be limited to the difference between the market price at the time for delivery and the contract price; so, in case he actually purchased for less than the market price of the delivery date, his damages will be the difference between what he actually paid and the contract price. That is, by pur-

chasing before delivery date he takes the risk of the falling prices.

⁴ See cases cited under footnote, 3, *supra*.

⁵ In *Missouri Furnace Co. v. Cochran* (Fed.) *supra*, where a yearly contract of sale required the delivery of so much of the coal each day to the buyer's factory at \$1.20 per ton, the vendor, at a time when coal was selling on the market at \$4 per ton, without a valid excuse, notified the vendee that he rescinded the contract and thereafter delivered no more coal, it was held that, notwithstanding the fact that the vendee went into the market and in good faith secured the coal on another contract for the remaining part of the year at \$4 per ton, he could recover from the vendor only the difference between the daily market price of coal and the original contract price, the market price having dropped soon after the new contract was made to \$1.30 per ton. The court said: "I see nothing in the present case to distinguish it from the ordinary case of a breach by the vendor of a forward contract to supply a manufacturer with an article necessary to his business. For such breach what is the true measure of damages? Says Kelly, C. B., in *Brown v. Muller* (1872) L. R. 7 Exch. 319, 41 L. J. Exch. N. S. 214, 27 L. T. N. S. 272, 21 Week. Rep. 18, 23 Eng. Rul. Cas. 527: 'The proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed.' That result—which is compensation—is secured, it seems to me, by the rule given to the jury here, unless the case is exceptional. The vendee's real loss, whether delivery is to be made at one time or in instalments, ordinarily is the difference between the contract price and the market value at the times the goods should be delivered. If, however, the article is of limited production, and cannot, for that or other reason, be obtained in the market, and the vendee suffers damage beyond that difference, the measure of damages may be the actual loss he sustains. *McHose v. Fulmer* (1873) 73 Pa. 367, 10 Mor. Min. Rep. 173; *Richardson v. Chynoweth* (1870) 26 Wis. 656; *Sedgw. Damages*, 554. With this qualification to meet exceptional cases, the rule that the damages are to be assessed with reference to the times the contract should

risk that the party at fault should be compelled to carry. The notice is frequently given at a time when prices are above the contract price, and yet if they fall to its level the seller escapes liability at the expense of the buyer, whom he had contracted to protect. That the buyer cannot recover more than the market price at the time set for delivery less the contract price, even though he bought before that time at a higher market price, is a proposition that it would seem ought not to be upheld by the same courts that adopt the rule that in no case can he recover more than his loss, no matter how high the market price at the time for delivery. If the

general rule that the market price at the time for delivery governs is to give way to the rule that the injured party can never recover more than he actually lost, it should also give way sufficiently to permit him to recover all that he has lost.⁶ Otherwise the advantage is always with the breacher of the contract, and against the innocent party who in good faith made an attempt to minimize the loss, which position can be justified only upon the theory that the buyer has no right whatever to buy in the market until time for delivery has passed.⁷

On the other hand, some courts treat the notice that the seller will not deliver the goods, as a breach,⁸ especially where

be performed, furnishes, I think, a safe and just standard from which it would be hazardous to depart. In this case I fail to perceive anything to call for a departure from that standard. There was no evidence of any special damage to the plaintiff by the stoppage of its furnaces or otherwise. Furthermore, the contract with Hudson, February 27, 1880, was made at a time when the coke market was excited and in an extraordinary condition. Unexpectedly and suddenly coke had risen to the unprecedented price of \$4 per ton; but this rate was of brief duration. The market declined about May 1, 1880, and by the middle of that month the price had fallen to \$1.30 per ton. The good faith of the plaintiff in entering into the new contract cannot be questioned, but it proved a most unfortunate venture. By the last of May the plaintiff had in its hands more coke than was required in its business, and it procured—at what precise loss does not clearly appear—the cancellation of contracts with Hutchinson to the extent of 20,000 tons. As the plaintiff was not bound to enter into the new forward contract, it seems to me it did so at its own risk, and cannot fairly claim that the damages chargeable against the defendant shall be assessed on the basis of that contract.”

⁶ This seems to be the theory upon which *KANSAS FLOUR MILLS Co. v. BRANDT*, ante, 1000, was decided. Reference to the Kansas cases cited and discussed under footnote 1, supra, show that the court does not take the position taken by the courts in the cases cited in footnote 8, infra, and the reasoning of the court seems to bear out this interpretation.

⁷ The court in *KANSAS FLOUR MILLS Co. v. BRANDT* has well said that “the damage to the plaintiff was caused by the defendant. He could have prevented damage to the plaintiff by performing the contract on any of the days that he might select. He refused to perform his contract, and compelled the plaintiff to adopt such measures as he deemed best to reduce his losses. The defendant ought not to be permitted to cast on the plaintiff the burden of reducing these losses and then say that the plaintiff could L.R.A.1917A.

have better reduced the losses by purchasing wheat on a different day. The rule ought to be, and we think it is, that the plaintiff, when notified by the defendant, had a right to go on the market on that day and purchase an amount of wheat equal to that contracted for, and recover from the defendant the difference in price.”

⁸ *Follansbee v. Adams* (1877) 86 Ill. 13; *Kehler v. Einstman* (1890) 38 Ill. App. 91; *Staley v. Lyman* (1909) 151 Ill. App. 137; *Barnett v. Elwood Grain Co.* (1911) 153 Mo. App. 458, 133 S. W. 856.

In *Follansbee v. Adams* (Ill.) supra, where the contract was for the sale of wheat and the delivery thereof at the option of the plaintiff at any time during the month of July, 1874, and in June the seller failed and became insolvent, and notified the buyer of his inability to fulfil his contract, it was conceded that the buyer had the right to go into the market and buy wheat of the same grade at the then market price on the date of the notice, and collect from the seller the difference between the then price and the contract price; and it was further held that he was not under obligation to actually buy the wheat, but that a settlement might be made or damage calculated upon the market price of the wheat at the date of the notice.

Kehler v. Einstman (1890) 38 Ill. App. 91, on a certain day before the expiration of the time in which it was understood that the wheat should be delivered, the seller wired the buyer asking him to buy in wheat that day sufficient to complete the contract. The court treated this as a notice of rescission, and held that the market price on that day, which was the same as the contract price, must govern, and refused to permit the buyer to choose any time thereafter within the contract time as the day for fixing the market price.

In *Staley v. Lyman* (1909) 151 Ill. App. 137, the Illinois cases here cited are interpreted as holding that the plaintiff had elected to treat the contract as broken; and it was held that where the buyer writes, refusing to recognize the right of the seller to rescind the contract by notice, and then goes into the market and buys the goods,

the buyer goes into the market and purchases the goods at the then market price. If the contract is breached at the time of sending the notice, of course, the application of the general rule of damages results in adopting the market price at the time of the notice less the contract price as the measure of damages.⁹ This rule may and perhaps does give way to the principle that the buyer can never recover more than his actual loss, as where he purchases at less than the market price, and no loss is suffered by him. Some courts hold that if the buyer expects to recover consequential damages, he must, upon receipt of the notice, go into the market and buy,¹⁰ if that is possible,¹¹ in order to avoid or minimize the damages, but if he is not seeking consequential damages he

owes the seller no duty to buy in the market.¹²

The rule here discussed, i. e., measuring the damages by the market price at the time of the notice less the contract price, is as favorable to a contract breaker as anyone ought to expect, and in addition it has the merit of substantially executing the contract; for when the seller repudiates his agreement, or attempts to do so, the reasonable inference is that he does not expect the price to fall in time to be of any benefit to him, so it can be assumed that the date of the notice is the date that he would have selected for delivery or to buy for delivery, if he really had intended to fulfill his agreement. It should also be noted that most of the cases cited under footnote 1, *supra*, are cases in which it was the buyer who was contending for the

he perpetuates the contract for both parties, and when he sues after time for delivery, the measure of damages will be the difference between the market price at time of delivery and the contract price. In the absence of evidence of the market price at the time for delivery, the damages will be nominal. See *Goyert & Vogel v. Stoner*, cited under footnote, 1, *supra*, where it was held that mere silence by the buyer at time of notice will prevent the contract from being broken by the mere notice.

⁹ See cases cited under footnote, 8, *supra*.

¹⁰ The difference between the market price at the time of the notice and the contract price is the measure of damages whether buyer purchases on the market or not, and he is under no obligation to so purchase unless he is seeking to recover consequential damages, in which case it is his duty to minimize the damages by purchasing. *Barnett v. Elwood Grain Co.* (1911) 153 Mo. App. 458, 133 S. W. 856. The court said: "If plaintiffs were seeking to recover consequential damages by reason of the failure of defendant to furnish the corn contracted for, such as losses by reason of their inability thereby to furnish such corn previously sold to customers, then, under the rule, the duty would devolve upon them to go upon the market and buy other corn in order to avoid such loss as far as possible. But, as the case stands, the suit is not for consequential damages, and plaintiffs were not required to go upon the market to buy other corn, as the difference between the market price and the price fixed by the contract would be the same whether they bought other corn or not. The court instructed the jury properly that, if they found for plaintiffs, they would assess their damages at the difference between the contract price of the corn and the price at which a like amount, to be at the time provided in the contract, could have been purchased in the market the day after they received notice of defendant's intention to L.R.A.1917A.

cancel the contract. *Creve Cœur Lake Ice Co. v. Tamm* (1901) 90 Mo. App. 189."

In *Harrison v. Argyle Co.* (1908) 128 App. Div. 81, 112 N. Y. Supp. 477, affirmed in (1910) 198 N. Y. 628, 92 N. E. 1086, the court said: "The defendant also urges, with great elaboration of detail and supported by many authorities, that the plaintiff, when he knew that the contract had been repudiated by the defendant, owed the active duty of making the loss as small as possible, and that he had no right to wait from the early part of May to August and September, when the deliveries were due, and then measure his damage by what it would cost to purchase the goods in the open market, it appearing from the evidence that it was at that time necessary to purchase of jobbers, rather than of manufacturers, at greatly enhanced prices. A very complete answer to this proposition is the fact that the court charged the jury upon this question precisely in line with the evidence, and that the defendant made no objection and took no exception to the rule as stated. Upon the basis of that ancient maxim of the common law, that 'that to which a person assents is not esteemed in law an injury' (*Broom's Legal Maxims*, 4th Am. ed. 193), the defendant is in no position to raise this question upon appeal."

But the rescission must be unconditional, and if the buyer is justified in believing that the seller will yet deliver, it is not his duty to buy in the market in order to minimize the loss. *Reid, M. & Co. v. Somerset Canning Co.* (1913) 182 Ill. App. 112.

¹¹ See Kansas cases cited under footnote, 1, *supra*, holding that the burden of showing that it was possible is upon the seller, where no purchase has been made and the buyer is claiming the difference between the market price at the time of delivery and the contract price.

¹² See footnote, 10, *supra*.

application of the general rule by using the market price at time of delivery less the contract price as the measure of damages. There could be no objection to permitting the buyer to elect in the matter of the two dates, provided he elects at the time of the notice. Silence at time of notice ought to be regarded as electing to choose that time, since such notice sometimes is in reality merely a request that the buyer secure the goods in the market and adjust differences.¹³

Where no time is fixed for the delivery of the goods, it is uniformly held that the market price at the time of the no-

tice or other refusal to deliver less the contract price is the measure of damages.¹⁴ This of course is upon the theory that the time for delivery, being indefinite, becomes fixed and definite at the time of the notice; so that time of notice and time for delivery are one and the same. It is of course impossible for the buyer to go into the market and purchase before time for delivery, and the cases are governed by the same rules that govern those cases where the purchase is made after time for delivery, which cases are not within the scope of the present note.

¹³ See *Kehler v. Einstman*, cited under footnote 8, *supra*, for a case in which the notice actually took the form of a request. Also see *Staley v. Lyman*, cited under footnote, 8, *supra*, and *Goyert & Vogel v. Stoner*, cited under footnote, 1, *supra*, on the question of mere silence at time of notice to perpetuate the contract.

¹⁴ *Ward v. Cotton Seed Products Co.* (1915) 193 Ala. 101, 69 So. 514; *Walnut Ridge Mercantile Co. v. Cohn* (1906) 79 Ark. 338, 96 S. W. 413; *Pope Metal Co. v. Sandoval Zinc Co.* (1909) 148 Ill. App. 444; *Williams v. Wood* (1860) 16 Md. 220; *Howard v. Haas* (1909) 139 Mo. App. 591, 123 S. W. 1048; *Fowler v. Gress Mfg. Co.* (1916) 94 Misc. 650, 158 N. Y. Supp. 524 (controlled by statute).

In *Ward v. Cotton Seed Product Co.* (1915) 193 Ala. 101, 69 So. 514, the court said: "It has been held, also, that where no time is fixed in the instrument for the completion of the contract—that is, for the delivery of the goods—damages may be calculated from the period at which the defendant refused to perform it. 2 *Mechem. Sales*, § 1748; *Williams v. Woods* (1860) 16 Md. 220. As said by the authorities, such a refusal on his part leaves no further locus penitentiæ to himself, and of course the plaintiff cannot treat the agreement as longer subsisting."

In *Walnut Ridge Mercantile Co. v. Cohn* (1906) 79 Ark. 338, 96 S. W. 413, the court said: "The evidence shows that the plaintiff purchased the cotton in the market as soon as he ascertained definitely that the defendant did not intend to perform his contract. He was therefore entitled to recover the difference between the contract price and the market price of cotton of same grade called for in the contract on the day he ascertained that defendant would not perform its contract."

L.R.A.1917A.

In *Williams v. Wood* (1860) 16 Md. 220, the court said: "From a letter of the plaintiffs, dated the 1st of September, 1853, it appears that on the preceding day (the 31st of August) they had knowledge of the peremptory refusal of the firm of William Howell & Son to comply with the alleged contract of sale. In *Mayne on Damages*, 82, in the Law Library, when treating of 'actions for not delivering goods,' after commenting upon several cases, it is said: 'In all these cases there was a stated time fixed for the completion of the contract. Where there is no time fixed, damages will be calculated from the period at which the defendant refuses to perform it. Such a refusal leaves no further locus penitentiæ to himself, and of course the plaintiff cannot treat the agreement as any longer subsisting.'"

Where the contract calls for 375 cases and the letter of notification said, "I find now that I cannot deliver you over about 200 cases," it was held in *Howard v. Haas* (1909) 139 Mo. App. 591, 123 S. W. 1048, that the letter was not sufficiently definite to cast upon the buyer the duty of going into the market at that date to purchase the 175 cases at the then market price.

Fowler v. Gress Mfg. Co. (1916) 94 Misc. 650, 158 N. Y. Supp. 524, was decided under a statute which provides: "Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

J. W. M.

OHIO SUPREME COURT.

STATE OF OHIO, Plff. in Err.,

v.

CLEVELAND & PITTSBURGH RAIL-
ROAD COMPANY et al.

(— Ohio St. —, 113 N. E. 677.)

Water — harbor lines — power of government.

1. Under the constitutional grant of authority to regulate interstate and foreign commerce, the United States government has paramount control of navigable waters, and power to establish therein harbor lines and regulations.

For other cases, see Commerce, I. in Dig. 1-52 N. S.

Same — riparian rights.

2. The title and rights of littoral and riparian proprietors in the subaqueous soil of navigable waters, within the limits of a state, are governed by the laws of the state, subject to the superior authority of the Federal government.

For other cases, see Waters, I. c, 4, in Dig. 1-52 N. S.

Lake — title to bed.

3. The title of the land under the waters of Lake Erie within the limits of the state of Ohio is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted.

For other cases, see Waters, I. c, 4, in Dig. 1-52 N. S.

Water — state control of harbor.

4. The state has control of a harbor within a harbor line and may enact legislation prescribing regulations in connection therewith and to secure the rights of the public, provided it does not conflict with the regulations of the Federal government.

For other cases, see Waters, I. c, 4, in Dig. 1-52 N. S.

Same — right of access.

5. The littoral owner is entitled to access to navigable waters on the front of which his land lies, and, subject to regulation and control by the Federal and state governments, has, for purposes of navigation, the right to wharf out to navigable water.

For other cases, see Waters, I. c, 4, c, in Dig. 1-52 N. S.

Same — surrender of public right.

6. The ownership of the waters of Lake Erie and of the land under them within the

state is a matter of public concern. The trust with which they are held is governmental, and the state, as trustee for the people, cannot, by acquiescence or otherwise, abandon the trust property, or permit a diversion of it to private uses different from the object for which the trust was created. The littoral owner is charged with knowledge that nothing can be done by him that will destroy the rights of the public in the trust estate.

For other cases, see Waters, I. c, 4, a, in Dig. 1-52 N. S.

(February 29, 1916.)

ERROR to the Court of Appeals for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendants in an action brought to enjoin them from further filling in the waters of the harbor in front of their land and for the restoration of the waters to their former condition. Affirmed.

Statement by the Court:

This was a proceeding brought in the court of common pleas of Cuyahoga county by the state against the Cleveland & Pittsburgh Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Pennsylvania Company, and the New York Central Railroad Company.

The petition alleges that the defendants are the owners of certain lands, forming a contiguous tract, having a frontage of about 1,415 feet on the south shore of Lake Erie, just west of the mouth of the Cuyahoga river where it enters the artificial harbor created by the United States government breakwater.

It is averred that all of the land covered by the waters of Lake Erie within the boundaries of the state of Ohio, and especially that part of such land constituting the bed of said waters contiguous to the above-described tracts of land, is owned by the state of Ohio as proprietor thereof, subject to the common-law rights of the defendants and the general public to the use of the waters over said land for the purposes of navigation and fishery.

It is averred that, within a period of about six months previous to the filing of the petition, the defendants had been filling in the waters of the harbor in front of their

Headnotes by the Court.

Note. — The right to erect wharves is discussed generally in the note to *Madison v. Mayers*, 40 L.R.A. 635.

The right to obstruct or destroy rights of navigation, including obstruction by wharves, is discussed in the note to *Hutton v. Webb*, 59 L.R.A. 33.

The right to obstruct or destroy wharf rights in navigable waters for public purposes without compensation is treated in the L.R.A. 1917A.

note to *Northern P. R. Co. v. Slade Lumber Co.* 34 L.R.A. (N.S.) 423.

Generally as to improvement of navigability of stream, see note to *Beidler v. Sanitary Dist.* 67 L.R.A. 820.

Other questions in relation to rights of navigation and ownership of soil under navigable water are treated in notes cited in Index to L.R.A. Notes under the title, "Waters, I."

land, and had proceeded with the fill along said frontage out from the shore for a distance of from 15 to 165 feet; that the territory so filled had been in the past, and was still being, used as the anchorage for considerable of the water craft using said harbor of the city of Cleveland, and that the effect of the fill and threatened filling will be to prevent or limit such use thereof in the future, and to limit the space available in said harbor as a refuse harbor for the water craft of the lake and an anchorage for all craft using said harbor, including log crafts, as it has been used, is now being used, and will be more extensively used in the future.

The petition alleges that the submerged territory in front of the defendants' lands is owned by the state of Ohio as proprietor thereof, and that defendants are filling up the waters of Lake Erie without any grant of right to do so from the government of the United States, or the state of Ohio, or from any person, officer, or corporation vested with any right or authority to grant such privilege.

The prayer of the petition is for an injunction to stop further filling, and that the defendants be ordered to restore the waters to their original condition.

The defendants, in their answer, for a first defense admit their ownership of the uplands, the filling in as alleged in the petition, and deny the other allegations in the petition.

For a second defense they allege the establishment by the United States government of a harbor line, previous to September, 1910, about 1,000 feet out in the harbor in front of the uplands of defendants, and that the territory between the shore line and the harbor line was shallow and nonnavigable.

They further aver that in order to avail themselves of the riparian rights vested in them by reason of the ownership of the tracts of land above mentioned, abutting on the shore of said lake, it is necessary to fill in upon the bed of said lake in order to wharf out to said harbor line and thereby reach navigable water; that the distance between the present shore line and said harbor line is so great that it is impracticable, as well as impossible, for said defendants to place themselves in a position where they may be able to avail themselves of and enjoy the use of said riparian rights in connection with the navigable waters of said lake without so wharfing out by filling in upon the bed of the lake.

For a third defense they aver that, with the knowledge and acquiescence of the state, adjoining owners of property had made fills which had caused the water in front of de-

fendants' uplands to become more shallow, and had caused deposits of sand in bars upon the bed of said lake in front of defendants' property, thereby making it impossible to use the waters of said lake immediately in front of said defendants' tracks, or at any point inside of the established harbor line, for the purpose of navigation.

For a fourth defense it is alleged that since a very early period in the history of the city of Cleveland, to wit, 1845, there had existed a custom for property owners and the city to make fills along the shore of the harbor of the city of Cleveland, to the knowledge and with the acquiescence of the authorities of the state of Ohio; that under favor of said custom certain railroad companies created what is known as the "Bath street tract," lying immediately east of the easterly pier of the Cuyahoga river at said harbor, consisting of an area of upwards of 80 acres of land; that said property has been extended to the harbor line established by the United States government; that millions of dollars have been expended in the construction thereon of slips, docks, loading and unloading plants for coal and iron ore, warehouses, depots, and track facilities; that the city of Cleveland, acting under favor of riparian rights, has filled in upon the bed of said lake until it has reclaimed from said lake upwards of 50 to 60 acres of land; that said custom was well known to the authorities of the state of Ohio; and that they never raised any objection or made any claim that the bed of the lake was owned by the state, or that any filling in thereon was a trespass.

For a fifth defense it is alleged that transportation facilities in and out of said city of Cleveland are inadequate to properly handle the traffic, for the reasons that the tonnage of raw material and merchandise has increased with such rapid strides during recent years as to make it impossible for railroads to keep pace with the same, and that the city of Cleveland and the corporations whose lines of railroad center there have in contemplation joint improvements involving extensive changes in the handling of traffic in and out of the city, both by rail and boat; that the contemplated improvements will require a change in the present bridge over the Cuyahoga river and the construction of a second bridge across said river, and the filling in of the bed of the lake from the shore to the harbor line. They allege that the filling now being prosecuted is to meet the present needs of the defendants and in view of the more extensive changes contemplated. They allege that in the filling in upon the bed of the lake they are only doing that which the

great needs of the public demand at the Cleveland harbor, and improving their property through the exercise of their riparian rights so as to enable them to meet the demands of the public and discharge their duties as common carriers.

The state in its reply admits the establishment of the harbor line by the United States government along a part of the water frontage of Cleveland, including the particular upland in question, and that certain littoral owners, including the city of Cleveland, had made certain fills, but alleges that all of said fills had been made without notice to or consent of the state, and further alleges that the filling done by the city of Cleveland was not with any intention of claiming any interest adverse to the plaintiff, but was for the protection and benefit of the rights of the public generally.

The plaintiff further admits that there is a demand at the port of Cleveland for increased dockage and other transportation facilities, and that such demand has been the subject of much discussion between the defendants and the representatives of the city of Cleveland and civic organizations of said city, involving numerous plans; but that no general or particular plans have yet been decided upon, and at no time has the interest of the city or public sought by this suit to be protected been overlooked, nor has any plan contemplated by the city involved the surrender of the control of the territory here in question.

At the close of the state's case the trial court sustained a motion of the defendants that the petition of the plaintiff be dismissed, and judgment be rendered for the defendants. The court of appeals affirmed this judgment, and this proceeding is brought to reverse the judgments of the courts below.

Messrs. Edward C. Turner, Attorney General, Robert M. Morgan, and Clarence D. Laylin, for the State:

The state of Ohio holds the territory in question as actual proprietor as well as in its sovereign capacity.

Gavit v. Chambers, 3 Ohio, 495; Blanchard v. Porter, 11 Ohio, 138; Sloan v. Biemiller, 34 Ohio St. 492; June v. Purcell, 36 Ohio St. 396; Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep. 71; Pollock v. Cleveland Ship Bldg. Co. 56 Ohio St. 655, 47 N. E. 582; Shively v. Bowlby, 152 U. S. 1, 13, 38 L. ed. 331, 336, 14 Sup. Ct. Rep. 548; Com. v. Alger, 7 Cush. 53; Murphy v. Bullock, 20 R. I. 35, 37 Atl. 348; Providence v. Comstock, 27 R. I. 537, 65 Atl. 307; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; Brookhaven v. Smith, 188 N. Y. 74, 9 L.R.A.(N.S.) 326, 80 N. E. 665, 11 L.R.A.1917A.

Ann. Cas. 1; Stevens v. Paterson & N. R. Co. 34 N. J. L. 532, 3 Am. Dec. 269; Naglee v. Ingersoll, 7 Pa. 185; Bailey v. Philadelphia, W. & B. R. Co. 4 Harr. (Del.) 389, 44 Am. Dec. 593; Day v. Day, 22 Md. 530; French v. Bankhead, 11 Gratt. 136; Ward v. Willis, 51 N. C. (6 Jones, L.) 183, 72 Am. Dec. 570; State v. Pacific Guano Co. 22 S. C. 50; Johnson v. State, 114 Ga. 790, 40 S. E. 807; State ex rel. Ellis v. Gerbing, 56 Fla. 603, 22 L.R.A.(N.S.) 337, 47 So. 353; State v. Black River Phosphate Co. 32 Fla. 82, 21 L.R.A. 189, 13 So. 640; Turner v. Mobile, 135 Ala. 73, 33 So. 132; Bullock v. Wilson, 2 Port. (Ala.) 436; Martin v. O'Brien, 34 Miss. 21; Galveston City Surf Bathing Co. v. Heidenheimer, 63 Tex. 559; Dana v. Jackson Street Wharf Co. 31 Cal. 118, 89 Am. Dec. 164; Pacific Mill & Elevator Co. v. Portland, 65 Or. 349, 46 L.R.A.(N.S.) 363, 133 Pac. 72; Eisenbach v. Hatfield, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539; State v. Korrer, 127 Minn. 60, L.R.A. 1016C, 139, 148 N. W. 617, 1095; Atty. Gen. ex rel. Askew v. Smith, 109 Wis. 532, 85 N. W. 512; Revell v. People, 177 Ill. 468, 43 L.R.A. 790, 69 Am. St. Rep. 257, 52 N. E. 1052; State v. Venice of America Land Co. 160 Mich. 680, 125 N. W. 770; Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154; Ravenswood v. Fleming, 22 W. Va. 52, 46 Am. Rep. 485; State ex rel. Cates v. West Tennessee Land Co. 127 Tenn. 575, 158 S. W. 746, Ann. Cas. 1914B, 1043; Harrison v. Fite, 78 C. C. A. 447, 148 Fed. 781; State ex rel. Dawson v. Akers, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B, 543; Tomlin v. Dubuque, B. & M. River R. Co. 32 Iowa, 106, 7 Am. Rep. 170; United States v. Mackey, 214 Fed. 137; Callahan v. Price, 26 Idaho, 745, 146 Pac. 732.

There is no common-law easement right to wharf, and where, by virtue of local legislation or otherwise, the right is conceded, such local law is expressly recognized as being in derogation of, and not declaratory of, any previously existing common-law rule.

Shively v. Bowlby, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Com. v. Alger, 7 Cush. 53; Austin v. Rutland R. Co. 45 Vt. 215; Providence v. Comstock, 27 R. I. 537, 65 Atl. 307; Narragansett Real Estate Co. v. Mackenzie, 34 R. I. 103, 82 Atl. 804; Stevens v. Paterson & N. R. Co. 34 N. J. L. 532, 3 Am. Rep. 269; Naglee v. Ingersoll, 7 Pa. 185; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597; Baltimore v. White, 2 Gill, 444; Day v. Day, 22 Md. 530; French v. Bankhead, 11 Gratt. 136; State v. Black River Phosphate Co. 32 Fla. 82, 21 L.R.A. 189, 13 So. 640; Martin v. O'Brien, 34 Miss. 21; Dana v. Jackson Street Wharf Co. 31 Cal. 118, 89 Am. Dec.

164: *Pacific Mill. & Elevator Co. v. Portland*, 65 Or. 349, 46 L.R.A. (N.S.) 363, 133 Pac. 72; *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L.R.A. 632, 26 Pac. 539; *Revell v. People*, 177 Ill. 408, 43 L.R.A. 790, 69 Am. St. Rep. 257, 52 N. E. 1052; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485; *Lincoln Park v. Fahrney*, 250 Ill. 256, 95 N. E. 194.

Even where under the local law the riparian or littoral owner owns the bed of the water front of his upland, his title to such bed and his access to and from the water may be cut off by improvements authorized by Congress, in aid of navigation.

Gibson v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *United States v. Chandler-Dunbar Water Power Co.* 229 U. S. 53, 57 L. ed. 1063, 33 Sup. Ct. Rep. 667; *Ex parte Easton*, 95 U. S. 68, 24 L. ed. 373.

The title of a state at common law to the navigable waters within its limits is such that the state itself can build or can authorize a municipal corporation to build public wharves in front of privately owned littoral lands without compensation to the owners of such lands.

Sage v. New York, 154 N. Y. 61, 38 L.R.A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485; *Oakland v. Oakland Water Front Co.* 118 Cal. 100, 50 Pac. 277; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Tomlin v. Dubuque*, B. & M. River R. Co. 32 Iowa, 106, 7 Am. Rep. 176; *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Fish v. Chicago G. W. R. Co.* 125 Minn. 380, 147 N. W. 431; *Frost v. Washington County R. Co.* 96 Me. 76, 59 L.R.A. 68, 51 Atl. 806.

Calling the state's title one held in trust does not give any rights to riparian owners.

Home for Aged Women v. Com. 202 Mass. 422, 24 L.R.A. (N.S.) 79, 89 N. E. 124; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Long Sault Development Co. v. Kennedy*, 212 N. Y. 1, 105 N. E. 849, Ann. Cas. 1915D, 56.

The powers of Congress under the "commerce clause" do not take away the power or title of a state, but the state's title and powers are merely subject to the exercise of such powers by Congress.

Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; *Montgomery v. Portland*, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313. L.R.A. 1917A.

Messrs. Squire, Sanders, & Dempsey, Samuel H. West, William C. Boyle, William L. Day, and W. L. Fleming for defendants in error.

Johnson, J., delivered the opinion of the court:

The Federal government, under the constitutional grant of authority to regulate interstate and foreign commerce, has power to establish harbor lines in navigable waters. In the exercise of that power it did establish a harbor line in Lake Erie about 900 feet out from the shore in front of defendants' land. The defendant companies and other littoral proprietors have made extensive fills and wharves between the shore and the harbor line.

The contention of the plaintiff is that the state is the absolute owner of the subaqueous land between the shore and the harbor line, and that the littoral owner has no right to wharf out, either by filling in or otherwise, to reach navigable water. It is contended that this is the rule fixed by the English common law, which it is claimed prevails in Ohio.

The defendants concede that the title to the submerged land is in the state, not as absolute proprietor, but as trustee for the public in the protection of navigation and fisheries, subject to the paramount right of the Federal government in the regulation of navigation. They claim that incident to the ownership of the upland the littoral owner has a right to wharf out to navigable water, and that this is a property right which cannot be taken from him under the Constitution without compensation. They insist that where the United States government establishes a harbor line it fixes at that point navigable water, and the right exists in the owner of the foreshore to wharf out, by filling in or otherwise, over the shallow waters between the shore and the harbor line, in order to reach the point of navigability thus established.

It is well settled that the title and rights of riparian and littoral owners in the subaqueous soil of navigable waters within the limits of a state are governed by the laws of the state, subject to the paramount rights of the government of the United States. There has been no general legislation by the state of Ohio regulating the construction of wharves.

Impressed with the importance of the subject, counsel have submitted able and exhaustive briefs on the question. They disclose a wide diversity of view as to public and private rights in subaqueous land below the high-water mark of navigable waters. It may be safely said that there is scarcely any question which has caused

greater conflict of opinion or produced more diverse results than that relating to the title of land under water. In many instances, different conclusions have been arrived at in the same jurisdiction under various circumstances. Courts have differed in the method of reasoning, as well as the grounds upon which they have arrived at their conclusions.

Counsel for the state insist that by the common law of England the littoral owner has no right to wharf out under such circumstances as are found in this case, and that, in the absence of statutory or constitutional provisions to the contrary, that law applies in Ohio. We think that the latter proposition, as stated, is too broad. There has been full recognition of our indebtedness to the English common law as the fundamental source of our system of jurisprudence, but our courts have realized that it is not in all cases suitable to our institutions and our circumstances. It has been repeatedly determined by the courts of this state that they will adopt the principles of the common law as the rules of decision so far only as those principles are adapted to our circumstances, state or society, and form of government. *Lindsley v. Coats*, 1 Ohio, 243. In *Bloom v. Richards*, 2 Ohio St. 387, Judge Thurman spoke for the court: "The English common law, so far as it is reasonable in itself, suitable to the condition and business of our people, and consistent with the letter and spirit of our Federal and state Constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio. But wherever it has been found wanting, in either of these requisites, our courts have not hesitated to modify it to suit our circumstances, or, if necessary, to wholly depart from it."

In *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201, Judge Ranney declared: "We profess to administer the common law of England, in so far as its principles are not inconsistent with the genius and spirit of our own institutions, or opposed to the settled habits, customs, and policy of the people of this state, thereby rendering it inapplicable to our situation and circumstances."

The strict rule of the common law of England which deprived the littoral and riparian owner of the right to wharf out, and which originated in the time of the Stuarts, has been much relaxed in Great Britain. In *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, 41 L. J. Exch. N. S. 137, 27 L. T. N. S. 1, 3 Eng. Rul. Cas. 455, decided in 1872, there was a material modification of the original rule,

made in favor of the riparian owner. In that case the right of access was held to belong to the riparian owner, as also in *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662, 46 L. J. Ch. N. S. 68, 35 L. T. N. S. 569, 25 Week. Rep. 165, 23 Eng. Rul. Cas. 141, decided in 1876. In this country many courts have pointed out the differences in our situation from that in England which prevent the application of the strict rule of the common law. For example, in *Bell v. Gough*, 23 N. J. L. 624, it is said, at page 669: "Indeed, it is doubtful if any of the states recognize the doctrines of the common law of England on the subject of rivers and other waters precisely as they are held there. Those doctrines grew out of a state of things and of usages different from ours, and cannot be literally applied to circumstances so materially different as those found to exist in the United States."

In *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548, Mr. Justice Gray instructively develops the learning on the subject. He sets out a very complete history of the growth of the law in England and in the United States. He begins with a review of the treatise *De Jure Maris*, written by Lord Chief Justice Hale, who is conceded to be the great authority in the law of England on this subject. The English common-law rule, as above stated, is set out in the opinion, as well as the modification made in *Buccleuch v. Metropolitan Board of Works*, supra. Mr. Justice Gray also reviews at great length decisions in the different courts of the United States. It is wholly unnecessary to here refer to those cases in detail. The court concluded that at common law the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation: that upon the settlement of the colonies like rights passed to the grantee in the royal charters, in trust for the communities to be established; that upon the American Revolution these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States: that the new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters, and in the lands under them, within their respective jurisdictions, and that the title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution. The court held that the question of the use of the shores by the owners of uplands was left to the sovereign control of each state, subject only to the rights

vested by the Constitution in the United States. The right to wharf out was denied in that case, because of the law of Oregon, where the case arose.

In *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, in which there is also a very interesting discussion of the same questions, it was held that the ownership of the soil in Lake Michigan is in the state, and that the riparian proprietor is entitled to access to the navigable part of the water on the front on which lies his land, and for that purpose to make a landing, wharf, or pier, for his own use, or for the use of the public. Such right terminates at the point of navigability. The courts of Illinois, however, have finally declared that the common-law rule controls there. They hold that ownership on the shore of Lake Michigan extends only to the water's edge; that the only right the owner has is the right of access to the waters of the lake, and that he has no right to build piers, or to wharf out. *Revell v. People*, 177 Ill. 468, 43 L.R.A. 790, 69 Am. St. Rep. 257, 52 N. E. 1052; *Lincoln Park v. Fahrney*, 250 Ill. 256, 95 N. E. 194.

The ground upon which the right to wharf out is put, in the cases sustaining the right, is that it is an aid to navigation and to the advancement of commerce. In *1 Farnham on Waters*, 521, the author says: "Although the primary purpose of a waterway is for navigation yet that is merely one element of the combined whole which is necessary to constitute commerce, and must be held subordinate to it. If navigation is held supreme, the very purpose for which it exists may be defeated by its own demands. Therefore, since commerce is the thing which is supreme, and navigation merely an aid to it, navigation must accord to commerce the right to satisfy its own needs, and must permit the erection of such wharves and piers in the spaces which are naturally available for navigation as are necessary to facilitate the interchange of commerce. These rights must, however, be exercised so as not to interfere needlessly with the right of navigation. Both rights exist, and each is necessary to the other. . . . When it is said that the waterways are held in trust for the benefit of the people, and must be kept open for the benefit of navigation, it is not meant that the erection therein of structures which are absolutely necessary to navigation is to be prohibited, because by such interpretation the execution of the trust would defeat the very purpose for which it was established. As said in *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 22 L. ed. 619: 'Wharves and piers are as necessary almost

to the successful use of the stream in navigation as the vessels themselves, and are to be considered as an important part of the instrumentalities of this branch of commerce.'"

In *Sloan v. Biemiller*, 34 Ohio St. 492, 513, the court considered the rights of littoral owners on Lake Erie and its bays, and held that there was no exclusive right of fishery vested in the littoral proprietors, but that such waters were as open to the public for fishing purposes as though they were subject to the ebb and flow of the tides. The court expressly state in the opinion that it was not required to consider any question in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation; but Judge White remarks: "It was held in *Dutton v. Strong* that these rights of the riparian owner apply to the lakes as well as to tidewaters. 1 Black, 23, 17 L. ed. 29. See also *Austin v. Rutland R. Co.* 45 Vt. 215."

With reference to the nature of the title of the state to the subaqueous land of Lake Erie, this is said: "And although the dominion over and the right of property in the waters of the sea and its inland waters were, at common law, in the crown, yet they were of common public right for every subject to navigate upon and to fish in, without interruption. *Id.* [Angell, *Tide Waters*] 21. They were regarded as the inherent privileges of the subject, and 'classed among those public rights denominated *jura publica* or *jura communia* and thus contradistinguished from *jura corone*, or private rights of the crown.' *Id.* 22, 80; *Hargrave's Law Tracts*, 11. The sovereign was the proprietor of these waters as the representative or trustee of the public. In this country the title is vested in the states upon a like trust, subject to the power vested in Congress to regulate commerce. *Martin v. Waddell*, 16 Pet. 367, 412, 10 L. ed. 997, 1013; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248."

In *Dutton v. Strong*, 1 Black, 23, 32, 17 L. ed. 29, 32, *supra*, it is said: "Our ancestors, when they immigrated here, undoubtedly brought the common law with them, as part of their inheritance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low water mark to the accomplishment of these objects."

In *New York* a rule seems to have been finally determined in the case of *Brookhaven v. Smith*, 188 N. Y. 74, 9 L.R.A.(N.S.) 326, 80 N. E. 665, 11 Ann. Cas. 1. In this case

it was held that a riparian owner whose land is bounded by navigable waters has the right of access thereto from the front of his lot, and such right includes the construction of a pier on the land under water, beyond high-water mark, for his own use or for the use of the public, subject to such general rules and regulations as Congress or the state legislature may prescribe for the protection of the rights of the public, although under the common law of England such structure is regarded as a purpresture or an unlawful encroachment upon the rights of the sovereign, and subject to removal at his pleasure. It is also held that an owner of upland adjoining Great South Bay has a right of access to the waters thereof from the front of his lot, and such right includes the construction of a pier on the land under water beyond high-water mark, for his own use or the use of the public, without the consent of the town of Brookhaven, which acquired the title in fee to such land under royal grant in 1666, 1686, and 1693, although at that time, under the common law of England, riparian owners had no such right, and such structure in the absence of license therefor was a purpresture, and subject to removal at pleasure. In the opinion the court say, at page 79 of 188 N. Y.: "The adoption by the people of this state of such parts of the common law as were in force on the 20th day of April, 1777, does not compel us to incorporate into our system of jurisprudence principles which are inapplicable to our circumstances, and which are inconsistent with our notions of what a just consideration of those circumstances demands. The common law of England, upon the subject of the rights of riparian owners, has but an imperfect application to the situation in a state like this, with its numerous large navigable bodies of waters, in bays, rivers, and inland lakes."

However, since the decision in the Brookhaven Case, the New York court of appeals, in *Barnes v. Midland R. Terminal Co.* 193 N. Y. 378, 127 Am. St. Rep. 962, 85 N. E. 1093, has distinctly held that the riparian owner must exercise his right reasonably, and so as not to unnecessarily interfere with public passage. It is held that to this extent "defendant's rights are superior to all others, save those reserved to Congress and the state legislature."

After a careful examination we are convinced that in most of the states of the United States the conclusion has been arrived at, either by judicial reasoning or by statutory provision which has been upheld, that, subject to regulation and control by the Federal and state governments, the littoral owner has the right to wharf out to navigable waters, provided he does not in-

terfere with the public rights of navigation or fishery, and that the state holds the title to the subaqueous land of navigable waters as the trustee for the protection of the public rights therein. Piers and wharves are a necessary aid to navigation, as much so as the harbor itself, and the right to construct them is as important and essential. Without them the operations of commerce would be seriously weakened. If they are to be useful, these piers must extend into water of sufficient depth to float loaded vessels. The littoral owner has an unodubted right of access to the water, and if this right is to be of value, it must be such access as will enable him to reach navigable water and to do the things necessary to that end. Courts in ascertaining and declaring these rights must regard the object for which they are conferred. In this case that object is to aid the commerce of the lake and develop the business of the country.

It is matter of common knowledge that vast quantities of iron ore are brought from ore beds in Northern Michigan and Minnesota to ports in Ohio on Lake Erie, and that this ore is an essential element in making that general neighborhood one of the great iron-producing sections of the country. These conditions, in connection with the other great manufacturing and commercial enterprises of that section, create a situation which invokes the exercise of every legitimate energy in aid of commerce.

But it is contended on the other hand, with much earnestness, and, it must be conceded, with much force, that piers and wharves may be extended into the harbor in such a manner, and may be constructed and used in such a way, as to occupy all the space and to practically destroy the harbor. It is pointed out that wharves and piers having been made by fills or otherwise may then be diverted to private uses, wholly disconnected from navigation, and thereby hinder and interfere with navigation itself. It is manifest that there must be some governmental power to exercise such control and make such regulations as will secure the rights of the public and prevent interference with navigation. As shown, the state holds the title to the subaqueous land as trustee for the protection of public rights. The power to prescribe such regulations resides in the legislature of the state.

When, as in this case, the United States government has fixed a harbor line, the state has power to regulate navigation and fishing between that line and the shore, provided its regulations do not conflict with those of the general government. Our general assembly has enacted no legislation providing such regulations. Until the enactment of appropriate legislation the littoral owner,

for the purposes of navigation, should be held to have the right to wharf out to the line of navigability, as fixed by the general government, provided he does not interfere with public rights. Otherwise, through the mere absence of legislation by the state, the supreme utility and value of navigable waters—navigation and commerce—would be defeated. Whatever he does in that behalf is done with knowledge on his part that the title to the subaqueous soil is held by the state as trustee for the public, and that nothing can be done by him that will destroy or weaken the rights of the beneficiaries of the trust estate. His right must yield to the paramount right of the state as such trustee to enact regulatory legislation. It must be remembered that his right, pending appropriate legislation, is one that can be exercised only in aid of navigation and commerce, and for no other purpose. What he does is therefore in furtherance of the object of the trust, and is permitted solely on that account.

The state as trustee for the public cannot by acquiescence abandon the trust property, or enable a diversion of it to private ends different from the object for which the trust was created. If it is once fully realized that the state is merely the custodian of the legal title, charged with the specific duty of protecting the trust estate and regulating its use, a clearer view can be had. An individual may abandon his private property, but a public trustee cannot abandon public property. Mere non-user of the trust property by the public cannot authorize the appropriation of it by private persons to private uses, and thus thwart the purposes of the trust. In *Louisville & N. R. Co. v. Cincinnati*, 76 Ohio St. 481, 81 N. E. 990, it is held that public streets, squares, landings, and grounds are held in trust for the public, and that it is not in the power of the legislature, unless in the exercise of the power of eminent domain, to authorize property dedicated to the public for a specific purpose to be used for a purpose inconsistent with the purpose for which it was dedicated. Estoppel was pleaded in that case, but was not sustained. On page 507 it is said: "There being an entire absence of power to make the grant, there is no room for an estoppel."

And it was said that delay on the part of the officials should not prejudice the public. In *Lake Shore & M. S. R. Co. v. Elyria*, 69 Ohio St. 415, 69 N. E. 738, it was held that the city was not authorized to agree to the exclusive occupation of a street, and that the company could be compelled to restore the street to its former condition without compensation. Concerning a wharf dedicated to public use, it is held in *Pittsburg v. L.R.A.1917A*.

Epping Carpenter Co. 194 Pa. 318, 45 Atl. 129, that when the public right has been acquired, it cannot be lost by nonuser or by municipal action not expressly authorized by law. Any occupation of the property inconsistent with the public right is a nuisance, and no length of time will legalize a public nuisance. In *Sloan v. Biemiller*, 34 Ohio St. at page 512, it is said: "We are not called on in this case to review the doctrine laid down in *Gavit v. Chambers*, 3 Ohio, 496. The question before us is whether the rule there laid down, as applicable to navigable rivers, applies to the owners of land bonding on Lake Erie and Sandusky Bay. In our opinion, it clearly does not. In *Canal Com'rs. & Appraisers v. People*, 5 Wend. 423, Chancellor Walworth said: 'Our large freshwater lakes or inland seas are wholly unprovided for by the law of England. As to these, there is neither flow of the tide nor thread of the stream; and our local law appears to have assigned the shores down to ordinary low-water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public.' And in Kent's Commentaries it is laid down that 'in this country our great navigable lakes are properly regarded as public property, and not susceptible of private property any more than the sea.' 3 Kent. Com. 429, note a. The doctrine thus stated is fully supported by the adjudged cases" (citing a number of cases).

In *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, it is held by the United States Supreme Court that the trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it. In the opinion Mr. Justice Field says (146 U. S. at page 453): "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. . . . So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely be-

yond the direction and control of that state."

It is further said, at page 455 of 146 U. S.: "The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."

The defendants in error contend that the right of the littoral owner to wharf out is a property right which cannot be taken without compensation under the Federal and state Constitutions. A similar contention was made in *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 59 L. ed. 930, 35 Sup. Ct. Rep. 551, where the wharves had been erected in keeping with Federal and state lines. The claim was not sustained. The proposition announced was: "The power of the sovereign state or nation is perpetual, not exhausted by one exercise, and all privileges granted in public waters are subject to that power, the exercise of which is not a taking of private property for public use, but the lawful exercise of a governmental power for the common good."

In *Scranton v. Wheeler*, 179 U. S. 141, 164, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48, 57, it is said: "The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection, under competent authority, of

structures on the submerged lands in front of his property, for the purpose of improving navigation."

The authorities show that the right of a riparian or littoral owner is always subject to the paramount authority of the state and Federal governments for the ends set forth.

In this case the defendants aver in their answer that the work complained of was and is for the purpose of enabling them to reach navigation and to perform their duties as common carriers. They insist they have no other object. No other purpose, and no other result, is allowable. In the absence of legislation by the state touching the subject, and until the enactment of such legislation, this was their right.

The record does not disclose any different purpose, nor that defendants appropriated any part of the public property with the ulterior motive of diverting it to private ends. Therefore the judgments below must be affirmed.

It is to be presumed that the legislature, in the enactment of legislation on the subject, will appropriately provide for the performance by the state of its duty as trustee for the purposes stated; that it will determine and define what constitutes an interference with public rights, and that it will likewise, in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners.

Judgment affirmed.

Nichols, Ch. J., and Donahue and Jones, JJ., concur.

PENNSYLVANIA SUPREME COURT.

ANDREW MULCHANOCK, Appt.,

v.

WHITEHALL CEMENT MANUFACTURING COMPANY.

(253 Pa. 262, 98 Atl. 554.)

Blasting — Liability for casting débris upon neighboring property.

One casting rock upon his neighbor's property by blasting is bound to respond in damages, although he is not guilty of negligence.

For other cases, see *Blasting*, in *Dig. 1-52 N. 8*.

(April 17, 1916.)

Note. — As to liability, in absence of negligence, for damages to land or buildings from substances thrown in blasting, see annotation following this case, post, 1016. L.R.A.1917A.

APPEAL by defendant from an order of the Court of Common Pleas for Lehigh County refusing to take off a compulsory nonsuit in an action brought to recover damages for injury to plaintiff's building by blasting. Reversed.

The facts are stated in the opinion.

Messrs. William H. Schneller and Milton C. Henninger, for appellant:

The maxim *sic utere tuo ut alienum non lædas* applies.

McCune v. Pittsburgh & B. Coal Co. 238 Pa. 83, 85 Atl. 1102; *Harvey v. Susquehanna Coal Co.* 201 Pa. 63, 88 Am. St. Rep. 850, 50 Atl. 770; *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 6 L.R.A. 280, 17 Am. St. Rep. 701, 18 Atl. 1012; *Robb v. Carnegie Bros.* 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 694, 22 Atl. 649; *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 366, 20 L.R.A. 642, 34 Am. St. Rep. 710, 26 Atl. 644; *Elder v. Lykens Valley Coal*

Co. 157 Pa. 490, 37 Am. St. Rep. 742, 27 Atl. 545; *Hindson v. Markle*, 171 Pa. 138, 33 Atl. 74; *Robertson v. Youghiogheny River Coal Co.* 172 Pa. 566, 33 Atl. 706.

Mr. Thomas F. Diefenderfer, for appellee:

There is no testimony whatever that the defendant in its operations has failed to exercise due care in the performance of the work, or that it did not exercise that degree of care measured by the danger to adjoining property that may reasonably be anticipated from the character of the work.

Driscoll v. Newark & R. Lime & Cement Co. 37 N. Y. 637, 97 Am. Dec. 761; *Mitchell v. Prange*, 110 Mich. 78, 34 L.R.A. 182, 64 Am. St. Rep. 329, 67 N. W. 1096; 12 Am. & Eng. Enc. Law, 509; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541, 4 Am. St. Rep. 659, 13 Atl. 690; *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 294, 18 L.R.A. 702, 34 Am. St. Rep. 645, 25 Atl. 597; *Hauck v. Tidewater Pipe Line Co.* 153 Pa. 374, 20 L.R.A. 642, 34 Am. St. Rep. 710, 26 Atl. 644; *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 214, 28 Atl. 702; *Pfeiffer v. Brown*, 165 Pa. 267, 44 Am. St. Rep. 660, 30 Atl. 844.

Potter, J., delivered the opinion of the court:

This is an appeal from the refusal of the court below to take off a judgment of compulsory nonsuit. The plaintiff and defendant were owners of properties which were separated only by a public road. The defendant operated a stone quarry, distant some 250 feet from the premises of plaintiff. The blasting operations were so conducted that large pieces of rock were frequently cast upon the property of plaintiff. It appears that prior to the explosion the defendant was good enough to notify the plaintiff, or members of his family, of the impending danger, and to suggest that the occupants of the house should retire to a place of safety, in order to escape injury from the blast. In giving this notice, defendant seemed to consider that it had discharged the full measure of its duty to plaintiff. The trial judge held that there could be no recovery of damages, unless it was shown that defendant was malicious or negligent in the operation of the quarry,

and he further held that in this case the question of negligence was one of law for the court, and, being of the opinion that the testimony did not establish negligence, he refused to take off the judgment of compulsory nonsuit. The court below seems to have overlooked the fact that the evidence showed direct injury to plaintiff's property. It showed that as a result of the blasting operations large pieces of rock were repeatedly cast upon and against the dwelling house and premises of plaintiff, breaking windows, and breaking slate upon the roof, and depriving him of the quiet possession and enjoyment of his property. Such acts amounted to a forcible breaking of the plaintiff's close, and the injuries resulting therefrom would under the common-law system of pleading have been regarded as immediate, and an action of trespass *quare clausum fregit* would have been the proper remedy. It is true that in his statement plaintiff also claimed damages for consequential injuries. But it is an established principle that "an injury is considered as immediate when the act complained of itself, and not merely a consequence of that act, occasions the injury." 1 Chitty, Pl. 117.

It is clear that the evidence here disclosed a case of aggravated wrong to the rights and property of the plaintiff. If the defendant so conducted its work of blasting upon its premises as to cause damages to the adjoining property by casting rocks thereupon, this amounted to a direct trespass upon the premises injured, for which the liability of defendant was absolute, and for which it is bound to respond in damages, without regard to the question of negligence. Both the court below and counsel for the appellee cited and relied upon the decision in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445, 6 Atl. 453, but that decision has no proper application to the facts here disclosed. As the present Chief Justice said in *Sullivan v. Jones & L. Steel Co.* 208 Pa. 540, 549, 66 L.R.A. 712, 57 Atl. 1068, the doctrine of that case "has never been, and never ought to be, extended beyond the limitations put upon it by its own facts."

The assignments of error are sustained, and the judgment is reversed, with a procedendo.

Annotation—Liability, in absence of negligence, for damages to land or buildings from substances thrown in blasting.

This note is a continuation of the one upon the same subject in 34 L.R.A.(N.S.) 211.
L.R.A.1917A.

The general rule therein set out that he who, by blasting on his own premises, commits an actual trespass upon his

neighbor's land or building by throwing substances thereon, is liable in damages, irrespective of negligence, is upheld by the following later cases. *MULCHANOCK v. WHITEHALL CEMENT MFG. CO.* ante, 1015; *Ex parte Birmingham Realty Co.* (1913) 183 Ala. 444, 63 So. 67; *Lexington & E. R. Co. v. Baker* (1913) 156 Ky. 431, 161 S. W. 228; *Stancourt Laundry Co. v. Lamura* (1914) 147 N. Y. Supp. 895; *Cumberland Teleph. & Teleg. Co. v. Stoneking* (1910) 1 Tenn. C. C. A. 241.

In *Stancourt Laundry Co. v. Lamura* (1914) 147 N. Y. Supp. 895, where the complaint alleged that the defendant carelessly and negligently conducted blasting operations by failing to properly cover the blasts and to safeguard the plaintiff's property, in consequence of which many large pieces of stone were forcibly thrown upon the plaintiff's premises to his damage, it was held that the allegation of negligence might be disregarded as surplusage, as allowing the missiles to be cast upon the plaintiff's premises was a trespass.

Upon an appeal from a judgment for plaintiff for damages from the breaking of his water pipe by the falling in of a large section of rock above the pipe, caused by a blast set off by defendant's workmen in blasting out rock for a trench, the court, in granting a new trial upon the ground that they could not tell whether the break in the solid rock was the direct result of, or merely consequential damages from, the explosion, said that the defendant was liable for trespass, if the rock was hurled upon the water pipe, but he was not liable (no negligence was shown), if the rock fell merely from concussion, and not as a direct result of the blast. *Adler v. Fox* (1911) 74 Misc. 483, 132 N. Y. Supp. 302.

But, in *Spencer v. Gainesville* (1913) 140 Ga. 632, 79 S. E. 543, where the defendant held a quarry under a deed from the plaintiff, which purported to convey all the rock and stone, both surface and subsurface, located on the described land, and recited that the party of the first part further granted to the party of the second part the right and easement to use said land in any way whatever that might be necessary or expedient to quarry, blast, crush, and remove all of said stone and rock, it was held that such grant and covenant authorized blasting, and the mere fact that the stones fell upon the plaintiff's adjacent land and injured his property would not render defendant liable in trespass for the injury. L.R.A.1017A.

So in *Arthur v. Henry* (1911) 157 N. C. 393, 73 S. E. 206, it was held that one who consented to the operation of a quarry by an adjoining owner could not recover damages from stones, dirt, dust, and other substances being thrown upon his premises by blasting, unless it was negligently done.

And in *Ex parte Birmingham Realty Co.* (1913) 183 Ala. 444, 63 So. 67, it is stated that the aforesaid general rule of liability is qualified by the principle that where the defendant has by law or contract acquired an easement as against the plaintiff's premises, which expressly or impliedly authorizes the operation of blasting, either directly or as a reasonably necessary incident to some other lawful purpose, liability arises only as the result of some proximate negligence on the part of the defendant.

In connection with the cases in the earlier note upon the question whether, where part of a man's land has been taken by a railroad in condemnation proceedings, he may proceed against the railroad for damages, by blasting, to the remaining part of his land, which, as there stated, is not within the scope of this note, the reader is referred to the case of *Gordon v. Elmore* (1912) 71 W. Va. 195, 76 S. E. 344, which holds that where a contractor in constructing a railroad through land from which the right of way has been taken by condemnation does the work prudently and carefully in relation to the landowner, removal, in a reasonable time, of the rock necessarily falling on the land will absolve him from damages; but if he negligently leaves such rock on the land an unreasonable time, he is liable for injury caused by his negligence in the premises.

G. V. I.

WISCONSIN SUPREME COURT.

SARAH LE BEAU, Appt.,

v.

MINNEAPOLIS, ST. PAUL, & SAULT
SAINTE MARIE RAILWAY COMPANY,
Respt.

(— Wis. —, 159 N. W. 577.)

Proximate cause — carrying passenger
beyond station — illness.

1. The carrying by a railroad company

Note. — As to measure of damages for carrying passenger beyond destination, see notes to *Dalton v. Kansas City, Ft. S. & M. R. Co.* 17 L.R.A. (N.S.) 1226, and *Ft. Smith & W. R. Co. v. Ford*, 41 L.R.A. (N.S.) 745.

of a passenger a few miles past his destination is not the proximate cause of illness caused by his attempt to walk back in inclement weather, where he was comfortably housed where he could have remained until a return train which would cause him only an immaterial delay, and bus and delivery service was obtainable within his means.

For other cases, see Proximate Cause, III, in Dig. 1-52 N. S.

Appeal — submission to judgment — waiver of errors.

2. One submitting to a compromise judgment to terminate the litigation waives errors which have been committed against him.

For other cases, see Appeal and Error, VII, k, in Dig. 1-52 N. S.

(October 3, 1916.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marinette County in her favor for less than her claims in an action brought to recover damages for defendant's negligence in carrying her, while a passenger on one of its trains, beyond her destination. Affirmed.

Statement by Marshall, J.:

The action was for damages claimed to have been caused plaintiff by negligence of defendant in carrying her, while a passenger on one of its trains, beyond her destination.

The claim of plaintiff was that January 1, 1915, she was on defendant's train with a ticket entitling her to travel thereon from Goodman, Wisconsin, to Gladstone, Michigan; that the train was scheduled to arrive there at 5:30 A. M.; that the conductor took her ticket and placed a check in the window at her seat, indicating the terminal point of her journey; that the trainmen neglected to take such check and call her station as the train arrived there; that in consequence she was carried by to Masonville, a distance of some seven miles; that she had no funds, and could not procure any, to defray expenses back to Gladstone, so was compelled to, and did, walk back; that she had important business requiring her to reach Gladstone before noon; that the day was cold and stormy, and she was not properly clad to make the journey from Masonville to Gladstone on foot, and, in so doing, she caught a severe cold and was physically disabled.

Defendant answered, putting in issue de-

And see later case, *Mobile & O. R. Co. v. Moreland*, 46 L.R.A. (N.S.) 52.

The liability of a carrier for punitive or exemplary damages for refusal or failure to transport passengers is discussed in the note to *Woodward v. Southern R. Co.* L.R.A. 1915C, 477. L.R.A.1917A.

defendant's allegations of negligence, and pleading contributory negligence.

There was evidence to this effect: Plaintiff was carried by her destination, as alleged. She was accompanied by her son, who was twenty-two years of age. He was sleeping when the train arrived at Gladstone. She was unfamiliar with the country and relied on the trainmen to notify her of the arrival at Gladstone. As to whether she was so notified the evidence was in conflict. There was further evidence to this effect: The conductor discovered plaintiff had been carried by her destination when the train had proceeded not over two miles beyond it; but he refused to enable her to alight, saying he had to stop at Masonville, which was five miles from Gladstone, and she could leave the train there, which she did. She and her son then went to the home of a family, living nearby, with which the son was acquainted, and took breakfast. About 9:30 A. M. she started to walk to Gladstone. She was accompanied a short distance by her son and a young woman of the family where she had taken breakfast. The son was keeping company with the young woman. There was a livery stable right across the way from where she took breakfast, at which she could have gotten a conveyance for Gladstone at a cost of \$1.50. There was a bus making regular trips to Gladstone, and the fare was 50 cents. There was an opportunity to return to Gladstone by train, but it was too late in the afternoon to satisfy her needs. She had 50 cents in money and her son at least \$2.50. It required 25 cents to pay her fare from Gladstone to Escanaba, to which place she was bound to see a sick child of her daughter. She was informed by some one that it would cost her \$5 to be taken back to Gladstone, but she did not inquire for any bus, nor make inquiry at the livery stable. It was a very stormy day, so plaintiff's clothes were wet through, and it took her some three hours to complete her journey. She was made sick and was considerably disabled in consequence of her walk. She arrived at Gladstone and took an interurban car, so she reached her daughter's home at about 2:45 in the afternoon. The jury found in her favor, that she was carried by her destination through negligence of defendant; that such negligence was the proximate cause of her injury; that she was not guilty of contributory negligence, and was damaged to the extent of \$1,250.

The trial court held that the consequences to plaintiff of her walking to Gladstone were not proximately related to defendant's negligence, and that unless defendant would

consent to a judgment for \$200, a new trial should be had. It thereupon so consented.

Motions were regularly made on behalf of defendant for relief from the verdict, including one for judgment in its favor on the evidence and one for a new trial, which were overruled. It excepted to the rulings in that regard, and stated in writing that the consent to judgment was for the purpose of bringing about an amicable settlement of the case; but it reserved its right to claim a reversal upon appeal by plaintiff, upon the grounds stated in the motions after verdict; that defendant was satisfied the plaintiff was not entitled to judgment, and, in any event, not to judgment for \$200. Judgment was rendered in plaintiff's favor, on defendant's motion, for \$200 and costs.

Notice was duly served under § 3049a. Stats., that, upon plaintiff's appeal, defendant would assign errors because the trial court overruled its motion for a directed verdict, and its motions after verdict.

Plaintiff duly excepted to the order compelling her to submit to a judgment in her favor for \$200 and costs, and appealed from such judgment.

Messrs. **Rex I. McCreery and Kaftan & Reynolds**, for appellant:

The court erred in reducing the damages found by the jury.

Nelson v. Chicago & N. W. R. Co. 130 Wis. 214, 109 N. W. 933.

The court erred in holding that injuries suffered by plaintiff by reason of her walk back to her station were not proximately caused by defendant's negligence.

Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911, 7 Am. Neg. Cas. 203; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Stutz v. Chicago & N. W. R. Co.* 73 Wis. 147, 9 Am. St. Rep. 769, 30 N. W. 653; *Nelson v. Chicago & N. W. R. Co.* 130 Wis. 214, 109 N. W. 933; *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600, 2 So. 337; *Kreuziger v. Chicago & N. W. R. Co.* 73 Wis. 158, 40 N. W. 657; *Georgia R. & Electric Co. v. McAllister*, 126 Ga. 447, 7 L.R.A.(N.S.) 1177, 54 S. E. 957; *Texas & P. R. Co. v. Mansell*, — Tex. Civ. App. —, 23 S. W. 549; *Fordyce v. Dillingham*, — Tex. Civ. App. —, 23 S. W. 550; *Kentucky C. R. Co. v. Biddle*, 17 Ky. L. Rep. 1363, 34 S. W. 904; *Rawlings v. Wabash R. Co.* 97 Mo. App. 511, 71 S. W. 535; *Case v. Delaware, L. & W. R. Co.* 191 Pa. 450, 43 Atl. 319, 4 Am. Neg. Rep. 387; *Adams v. Missouri, P. R. Co.* 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, 4 Am. Neg. Cas. 621; *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala. 315; *Louisville, N. O. & T. R. Co. v. Mask*, 64 Miss. 738, 2 So. 360; *Pitts-* L.R.A.1917A.

burgh, C. C. & St. L. R. Co. v. Klitch, 11 Ind. App. 290, 37 N. E. 560; *Texas & P. R. Co. v. Hartnett*, — Tex. Civ. App. —, 34 S. W. 1057; *International & G. N. R. Co. v. Terry*, 62 Tex. 380, 50 Am. Rep. 529; *Missouri, K. & T. R. Co. v. Hennesey*, 20 Tex. Civ. App. 316, 40 S. W. 917; *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *St. Louis South Western R. Co. v. Foster*, 46 Tex. Civ. App. 517, 103 S. W. 194; *Chicago & E. I. R. Co. v. Mitchell*, 56 Ind. App. 354, 105 N. E. 396.

Messrs. **W. A. Hayes and John L. Erdall**, for respondent:

If plaintiff is entitled to any damages, they ought not, in all fairness, to exceed from \$15 to \$25.

St. Louis, I. M. & S. R. Co. v. Cates, 87 Ark. 162, 112 S. W. 202; *Olson v. Northern P. R. Co.* 49 Wash. 626, 18 L.R.A.(N.S.) 209, 96 Pac. 150.

Marshall, J., delivered the opinion of the court:

It will be seen that judgment on the verdict as rendered was denied upon the ground of there being no proximate relation between the damages to plaintiff by reason of her walking from Masonville to Gladstone, and the negligent act of respondent. Did the court err in that regard? That is the question we have to deal with.

We must distinguish between proximate relation from the point of view of respondent when the wrong was committed, and such relation in respect to resulting damages. In the former there must be, at the instant of the wrong, the element that the wrongdoer in the exercise of ordinary care ought reasonably to have apprehended that some personal injury might probably follow to another. As to the latter, the element of reasonable apprehension is immaterial. It is only vital that there should be a direct causal connection between the injury and the damage; not, necessarily, an immediate causal connection, but such connection by an unbroken chain of events so it may be said that the damage was a natural consequence of the injury, having regard for the usual course of nature and of cause and effect in a line of unbroken causation. *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 359, 41 Am. Rep. 41, 11 N. W. 356, 911, 7 Am. Neg. Cas. 203; *Crouse v. Chicago & N. W. R. Co.* 104 Wis. 473, 483, 80 N. W. 752; *Fisher v. Western U. Teleg. Co.* 119 Wis. 146, 153, 96 N. W. 545; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259. If the damage follow the wrongful act "in an unbroken sequence, that is, without any intervening, independent cause

to break the continuity," then such damage is proximate to the injury, though the wrongdoer had no reasonable ground to apprehend it would occur from the negligent act.

This court has admonished in respect to the importance of distinguishing between the result as applied to the injury and that as applied to the damage. *Fisher v. Western U. Teleg. Co.* 119 Wis. 146, 153, 96 N. W. 545. This case falls within the second class mentioned. The wrong was complete when appellant was negligently carried by her destination. No damage to speak of was the immediate result. All, substantially, was such result of the walk back to Gladstone, which did not commence until several hours after the arrival at Masonville. In the meantime appellant was perfectly safe. She found comfortable quarters at the home of a family with which her son was acquainted, where she had breakfast. Her peril commenced when she began her five-mile walk, which took her some three hours. That she was seriously damaged by such journey appears, pretty clearly, from the evidence. Was such journey a natural consequence of the negligent act of respondent, undertaken in the exercise of ordinary care under all the circumstances? If it were not, then it was her voluntary act, and broke the chain of causation starting with respondent's negligence, and commenced a new chain which reached to and included the disabilities forming the basis, in the main, of the finding as to the damages.

Counsel for appellant relied below, and here as well, on *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 359, 41 Am. Rep. 41, 11 N. W. 356, 911, 7 Am. Neg. Cas. 203, and similar cases. It was properly held that such cases were not controlling if appellant unreasonably made the journey on foot. In the *Brown* Case, the recovery for the sickness immediately produced by the walk was sustained because plaintiff was caused to leave the train and under such circumstances that she reasonably walked three miles, in the nighttime, and in inclement weather, to her destination. When she so left, she did not know where she was. There were no buildings in sight. A long freight train obstructed her view in the direction of such buildings as there were. In such circumstances she started west on the track and kept on to her destination, without seeing any building until she got so near such destination that it seemed she better go on rather than seek shelter otherwise. This court held that she was not guilty of any fatal negligence under the circumstances.

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Thus it will be seen that the decision in the *Brown* Case was grounded on the fact that it was characterized by an unbroken chain of causation reaching from the negligent act of the railway company to the damage sought to be recovered. The idea was that she was placed in a situation of peril by the carrier, and was not guilty of any want of ordinary care in extricating herself from it. Here the trial court was of the opinion that the principle of the *Brown* Case did not apply because there was an efficient intervening cause happening after the wrong of the carrier,—the voluntary negligent act of appellant in making the perilous journey she did.

The principle of *Brown v. Chicago, M. & St. P. R. Co.* was controlling in *Patry v. Chicago, St. P. M. & O. R. Co.* 82 Wis. 408, 52 N. W. 312; *Nelson v. Chicago & N. W. R. Co.* 130 Wis. 214, 109 N. W. 933, and other cases decided by this court, and in many found in other jurisdictions. The following are good illustrations: *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391; *Texas & P. R. Co. v. Cole*, 66 Tex. 562, 1 S. W. 629; *Carter v. Southern R. Co.* 75 S. C. 355, 55 S. E. 771; *Natchez C. & M. R. Co. v. Lambert*, 99 Miss. 310, 37 L.R.A.(N.S.) 264, 54 So. 836; *Chicago, R. I. & P. R. Co. v. Brisbane*, 24 Ill. App. 463; *Chicago & E. I. R. Co. v. Mitchell*, 56 Ind. App. 354, 105 N. E. 396; *St. Louis Southwestern R. Co. v. Foster*, 46 Tex. Civ. App. 517, 103 S. W. 194; *International & G. N. R. Co. v. Terry*, 62 Tex. 380, 50 Am. Rep. 529.

Perhaps the most significant case cited is *Indianapolis, B. & W. Co. v. Birney*. Plaintiff, a physician, who was on his way to see a patient, was wrongfully left at a station several miles from his destination. He had his option to remain six hours for the next train, or procure some other conveyance. He could have so remained in a safe place. It was such a cold day that to walk to the next station was, as he must have known, perilous to his health. He did not use reasonable care to obtain passage by train, or some other comfortable way, but unnecessarily risked his health by walking. Damages resulted. It was held that his conduct broke the chain of causation between the negligent act of the railway company and the damages, and therefore he could not recover, the court saying: "He should have used all precautions in so making the journey as to produce the least injury to himself that reason would dictate. He had no right to act with recklessness or wantonly, and then claim compensation for the injury thus inflicted. Had he attempted to walk to the next station barefoot, and his feet had been

frozen, would any sane man believe he could have recovered for such injury?"

The injury was unnecessarily, if not recklessly, incurred. It was the improper act of the appellant. He must be confined to the proximate and natural damages resulting from the wrong. The element of proximate relation was thus spoken of in respect to whether the chain of circumstances, commencing with the carrier's negligent act, was severed by negligence of the plaintiff.

The principle by which this case is to be tested is clearly defined in *Brown v. Chicago, M. & St. P. R. Co.* and if the trial court was not clearly wrong in holding that appellant's conduct broke the chain of causation commencing with respondent's negligent act, so it did not reach to her sickness resulting immediately from her walk to Gladstone, then the decision that she was not entitled to recover therefor cannot be disturbed.

After carefully studying the evidence, we are unable to hold in favor of appellant. It appears beyond dispute that she was not in any danger until she started out on the walk to Gladstone. She was comfortably located with a family with whom her son was well acquainted. There was no pressing necessity for her to immediately complete her journey. She and her son had ample money to pay her expenses from Masonville to Escanaba. She did not make reasonable efforts, under the circumstances, to reach Gladstone without doing so by walking. The conditions were so bad that the railroad trains were behind time and it took her some three hours to walk the five miles. The snow and slush were so bad on the railway track, and it was so stormy, that anyone, however strong, would not have made the journey she did unless there was some very pressing necessity therefor. The situation can best be told by the condition she testified she was in at the end

of her journey, and her relation as to the weather. She said: "The track was full of snow and it was storming awfully. When I reached Gladstone I was almost frozen. I was wet clear up to my waist, and ice and icicles up over my skirts, and my shoes were wringing wet. You could wring water out of them."

Facing the foregoing, is there any wonder that appellant experienced serious consequences from her journey? If those consequences were proximately connected with respondent's negligent act, it should repair her damage; but if it were the result of her own voluntary, imprudent act, it should not, and such is the rule of *Brown v. Chicago, M. & St. P. R. Co.* We are unable to reach the conclusion that the trial court was wrong in respect to the matter. There does not appear any satisfactory evidence to justify appellant in subjecting herself to the danger which she did. She doubtless could have remained where she was entertained at breakfast until the train came back in the afternoon, by which she could have returned to Gladstone for about 15 cents. It would have postponed her arrival at her sister's for a few hours, but that does not appear very material. Had she exercised reasonable care in the matter, she would have discovered that she could return to Gladstone by bus for 50 cents, or livery for \$1.50, and have obtained that service. More need not be said.

As to the exceptions urged upon our attention on behalf of respondent, it seems that the claimed errors were waived by respondent formally accepting the offer of opportunity to submit to a judgment for \$200 and costs, and so terminate the litigation, and causing judgment to be entered accordingly. Such is the reasonable conclusion, and is required by *Agnew v. Baldwin*, 136 Wis. 263, 118 N. W. 641.

The judgment is affirmed.

OKLAHOMA SUPREME COURT.
(Division No. 1.)

CROWDER STATE BANK, Plff. in Err.,
v.

ÆTNA POWDER COMPANY et al.

(41 Okla. 394, 138 Pac. 392.)

Master and servant — benefiting by
servant's contract — ultra vires.

1. Where a cashier of a bank makes a

Headnotes by ROBERTSON, C.

Note. — As to remedies which the parties to an ultra vires contract are entitled to pursue apart from an action on the contract itself, see annotation following this case, post, 1026.

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contract which is beyond his power and authority, but the bank, by reason thereof, secures a benefit or beneficial effect, it will not thereafter be heard to urge nonliability thereunder on the plea of ultra vires.

For other cases, see *Banks*, III. b; *Estoppel*, III. k, in *Dig. 1-52 N. S.*

Corporation — ultra vires — right to defense.

2. It may be considered as settled law in this state to-day that, when a corporation goes outside of its legitimate business and makes a contract, and that contract is executed, and the corporation has received the benefits of the contract, the courts will not listen to a plea of ultra vires.

For other cases, see *Corporations*, IV. d, 2, in *Dig. 1-52 N. S.*

Contract — ultra vires — theory of liability.

3. When suit is brought on an ultra vires contract against a corporation, the contract being evidenced by a written instrument, the action is not maintained by virtue of the written instrument, but on the implied contract of the corporation to return the property delivered by virtue thereof or to place the parties in statu quo. To maintain such an action is not to affirm, but to disaffirm, the original or unlawful contract. For other cases, see *Contracts, I. b; Corporations, IV. d, in Dig. 1-52 N. S.*

(December 23, 1913.)

ERROR to the County Court for Pittsburg County to review a judgment in plaintiff's favor in an action to recover the contract price for supplies furnished a railroad contractor, funds to meet which the bank had agreed to retain in the contractor's deposit account. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Robert N. McMillen, for plaintiff in error:

The allegations of plaintiff show that the undertaking assumed by the bank was ultra vires.

10 Cyc. 1109, 1115; *Bacon v. Farmer's Bank*, 79 Mo. App. 406; *Sturdevant Bros. & Co. v. Farmers' & M. Bank*, 62 Neb. 472, 87 N. W. 156, affirmed on rehearing in 69 Neb. 220, 95 N. W. 819; *Mine & Smelter Supply Co. v. Stockgrowers' Bank*, 98 C. C. A. 229, 173 Fed. 859; *Ayer v. Hughes*, 87 S. C. 382, 69 S. E. 657.

The allegations of the plaintiff fail to show that the bank received notice within a reasonable time that said order for dynamite had been accepted and filed.

Lawson, Contr. § 12; Bishop, Contr. 2d ed. § 333; 9 Cyc. 248.

To entitle a plaintiff, in an action for breach of contract, to recover more than nominal damages for its breach, there must be shown an actual, substantial loss or injury sustained.

13 Cyc. 18; *Mansur-Tebbetts Implement Co. v. Willet*, 10 Okla. 383, 61 Pac. 1066; *Sproul v. Huston*, 42 Wash. 106, 84 Pac. 631; *Stevens v. Rogers*, 16 Utah, 105, 51 Pac. 261.

Messrs. **Wright & Boyd**, for defendants in error:

A doubtful or ambiguous contract that is of no interest to the corporation will generally not be enforced; but if such a contract clearly contemplates acts that are highly beneficial to the corporation, courts will go far in upholding and enforcing it.

3 *Thomp. Corp. § 2116.*

Where the transaction is auxiliary and beneficial to the main business for which a L.R.A.1917A.

corporation is formed, although not within the exact scope of its powers, contracts will be upheld and the defense of ultra vires will not be permitted.

Malone v. Lancaster Gaslight & Fuel Co. 182 Pa. 309, 37 Atl. 932; *Lyndeborough Glass Co. v. Massachusetts Glass Co.* 111 Mass. 315; *Sherman Center Town Co. v. Russell*, 46 Kan. 382, 26 Pac. 715; 1 *Clark & M. Priv. Corp. § 214b*, pp. 569-571; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* 48 N. J. L. 530, 7 Atl. 523.

Where the contractor is for a lawful purpose in itself, has been entered into in good faith and fairly executed by the party who seeks to enforce it, ultra vires is an unconscionable defense which may not be set up to exempt from liability the party so pleading it.

Denver F. Ins. Co. v. McClelland, 9 Colo. 11, 59 Am. Rep. 134, 9 Pac. 771; *Chicago, R. I. & P. R. Co. v. Union P. R. Co.* 47 Fed. 15; *Bowman v. Foster & L. Hardware Co.* 94 Fed. 592; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 3 Am. St. Rep. 674, 14 N. E. 370; *Memphis & L. R. R. Co. v. Dow*, 22 Blatchf. 48, 19 Fed. 388, 120 U. S. 287, 30 L. ed. 595, 7 Sup. Ct. Rep. 482.

Even although it may have been made without express authority, the contract must be allowed to stand, as the plainest rules of good faith demand.

Castle v. Lewis, 78 N. Y. 131.

The plea of ultra vires should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary, would accomplish a legal wrong.

Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; *Atlantic State Bank v. Savery*, 82 N. Y. 291.

Robertson, C., filed the following opinion:

In the year 1907 W. A. Lovejoy, then engaged as a contractor by the M., K. & T. Ry. Co. in Pittsburg county, Oklahoma, being in need of powder and dynamite with which to prosecute his work, ordered a large quantity thereof from the *Ætna Powder Company*; the order was in writing, and at the bottom of the paper, and under the signature of Lovejoy, was the following:

We agree to hold the amount of this bill out of funds due Mr. Lovejoy when same is received by us.

The Crowder State Bank,

By J. L. Henderson, Cashier.

Aug. 2, '07.

And on the reverse side of the order appear the words: "J. J. Burba above guarantees account ——— of Crowder, I. T."

By virtue of said order and the indorsements thereon, as aforesaid, the Ætna Powder Company, on August 10, 1907, shipped Lovejoy powder and dynamite to the value of \$189, and the same was received and used by him. On February 1, 1908, Lovejoy's employer, the M., K. & T. Ry. Co., issued its check to him for the sum of \$3,275.87, and on March 2d thereafter another check for \$1,243.02, in part payment of the work performed by him under his contract; both these checks were issued to Lovejoy subsequent to the order and shipment of the powder and dynamite, and were indorsed and deposited by him with the plaintiff in error, the Crowder State Bank, and by it collected in the usual course of business; that, notwithstanding that said sum of \$4,518.90 belonging to the defendant Lovejoy came into the possession of defendant bank subsequent to the giving of the order for the powder and dynamite, as aforesaid, with the indorsement of said bank, the said bank failed and refused to withhold the amount of the bill due the Ætna Powder Company, and failed and refused absolutely to apply \$189 of said amount on the payment of said bill, which, by its indorsement, it was bound to do. Suit was instituted by the Ætna Powder Company against Lovejoy, the Crowder State Bank, and Burba for the recovery of the amount. No service was had on Lovejoy, and the suit proceeded against his codefendants and resulted in a judgment against the bank for the full amount. Burba recovered a judgment for his costs, the jury finding for him on the merits of the case. The bank brings this appeal and insists that there is error in the record in that: (1) Plaintiff's petition fails to state facts sufficient to constitute a cause of action. (2) The evidence fails to show a cause of action in favor of plaintiff and against defendant. (3) The evidence fails to show that plaintiff suffered any substantial damage by the failure of defendant bank to withhold the money from Lovejoy's account. (4) The court erred in giving instruction No. 3 to the jury. (5) The court erred in rendering judgment against defendant. (6) The court erred in overruling defendant bank's motion for new trial.

While the petition in error contains six separate assignments of error, it is evident that the principal question in the case is: The allegations of the petition and the proof show that the undertaking assumed by the bank was ultra vires and therefore not binding upon it.

The evidence clearly shows that Lovejoy, the contractor, was a customer of the bank; at times he had large deposits while at other times he was overdrawn; at the time the L.R.A.1917A.

powder and dynamite were ordered, August 2, 1907, it is not shown what the condition of his account was; on December 6, 1907, Mr. Hawley, manager of the Ætna Powder Company at St. Louis, wrote to the bank as follows:

St. Louis, Mo., Dec. 6, 1907.

Crowder State Bank,
Crowder, Okla.

Gentlemen:

We hand you herewith statement of account against Mr. W. A. Lovejoy, Crowder, Oklahoma, amount of same \$189, which is long past due, the account being dated August 10th. When this order was given by Mr. Lovejoy you made a notation on the order saying that you would hold the amount of this bill out of funds due Mr. Lovejoy when same was received by you. As we have not heard from Mr. Lovejoy for some time and are quite eager to close our books for the year, will you kindly send us a check for the amount if you have the funds on hand. Very truly,

The Ætna Powder Company,

B. E. W. Hawley.

Mr. Lovejoy is expecting his money every day now, and when paid will be attended to.
Received Dec. 14, 1907. Chicago.

The notation on the letter under Hawley's signature was made by Henderson, the cashier of defendant bank, and after making it he returned the letter to the powder company.

On January 28, 1908, Mr. Rodgers, the auditor of the powder company, wrote the bank the following letter:

Chicago, January 28, 1908.

Crowder State Bank,
Crowder, Oklahoma.

Dear Sirs:

On December 6th we received a notation on the bottom of our letter of that date regarding our account against W. A. Lovejoy of your city, stating that payment would be forwarded to us in a few days as Mr. Lovejoy was expecting his money. This is now almost sixty days ago and as the account is quite old we would thank you to advise us when we may expect payment.

Very truly yours,
The Ætna Powder Company,
By J. H. Rodgers, Auditor.

This letter was received by the bank, and Mr. Henderson, the cashier, returned the same to the powder company at Chicago on February 2, 1908, with the following indorsement on the back (Record, p. 47): "It is my understanding that Mr. Lovejoy will

remit you just as soon as the Katy pays him his November estimates. The Katy is about sixty days behind. Expect settlement next week."

Mr. Hoyt, the salesman for the powder company, testified that he sold Lovejoy the powder and dynamite in August, 1907; that Lovejoy signed the order in his presence; that Henderson, the cashier, signed the indorsement in his presence also. This is not denied.

Henderson, the cashier, testified that he indorsed the order as charged by the powder company; that he had made the notations on the letters above set out; that he did not call the attention of the board of directors to the fact that the powder company held the bank liable for the account; that he did not remember the circumstances transpiring at the time the order was signed, except that Mr. Lovejoy wanted some powder and that the powder company wanted the bank to pay them for it when the money came to Mr. Lovejoy; that the bank had an assignment of all of Lovejoy's money due him on his estimates, and that he told the powder company that when the money came to the bank, if there was anything left after paying the bank, the powder company would be paid; that Lovejoy was then depositing his money in the bank, and that at the time he was in Crowder doing some construction work for the Katy Railway; that because Lovejoy wanted him to indorse the order he would do so to encourage him as much as he could; that he knew Lovejoy had the money coming to him; that the bank did what it could to suit Lovejoy's convenience; that the bank permitted Lovejoy to check out the balance of \$1,421.64, which was to his credit on February 5, 1908; that the bank had its other indebtedness secured by assignment; that the bank knew the order had not been paid, but did not consider it had guaranteed the same. From his testimony it is further shown that Lovejoy on December 6, 1907, had a credit in the bank of \$90.34; that on January 28, 1908, he had overdrawn \$1,662.82; that on May 18, 1908, he closed his account with the bank; that the last time there was a credit balance to him was April 8, 1908, to the amount of \$41.48; that on the day the order was made his balance was \$171.14; that on February 5, 1908, he deposited \$3,273.87; that at the time he made this last deposit he owed the bank \$1,774.14, and that after making the deposit he had a credit balance of \$1,425.64; that on the 4th day of April, 1908, his balance was \$837.38.

The action in the court below proceeded apparently on the theory that the cause of action was predicated upon a written instrument, and not for damage by reason of

the breach of contract. Of this phase of the case we will deal later, but now, without enunciating any general rule, it will be sufficient for us to determine whether or not the facts, as stated, bring this case within the doctrine of ultra vires as relied upon by the bank. The plea of ultra vires as used herein is intended doubtless to mean that act of the cashier in guarantying payment of the account to the powder company without the knowledge, consent, or ratification of the board of directors. It is not used in its primary sense or meaning as being beyond the scope of the powers of the corporation to perform it under any circumstances or for any purpose. There are many shades of meaning and distinction employed and understood by the term, but, as we use it here, it is meant thereby to challenge the authority of the cashier of defendant bank to bind the same as a guarantor without the knowledge or consent or ratification of the board of directors. Used in this sense, it becomes a matter of primary importance to ascertain at first whether or not the bank secured a benefit or a beneficial effect of the alleged contract. Ordinarily, where the bank or corporation secures a benefit or beneficial effect from the contract, or when the contract is not plainly beyond the scope or power of the parties making it, the above principle cannot be invoked or relied upon. It is only in cases of ambiguity or vagueness, or where the contract is doubtful in this respect, that it can be applied. But if the contract complained of is one which clearly contemplates some act beneficial to the corporation, it will generally be upheld and the plea disregarded. 3 Thomp. Corp. § 2116.

Where the contract is auxiliary and beneficial to the main business for which a corporation is formed, although not within the exact scope of its powers, contracts will be upheld and the defense of ultra vires will not be permitted. *Malone v. Lancaster Gas-light & Fuel Co.* 182 Pa. 309, 37 Atl. 932.

In the case at bar it is clearly inferable from the record that the bank was interested in having Lovejoy perform his contract with the railway company. It had his assignment of estimates and collected the amounts due him and permitted him to make overdrafts at certain times. Without powder and dynamite Lovejoy could not perform his contract with the railway company, and, for the purpose of enabling him to do so, it became necessary that he have credit upon which to purchase the necessary instrumentalities with which he could successfully prosecute his work. For this purpose, and this alone, the bank, through its cashier, lent him aid by indorsing as guarantor the written order for the

powder. By the use of the powder he was enabled to perform his contract, and by performing his contract he was able to close his account at the bank without a loss to it. Banks are often permitted to go into other business in order to save a debt. Many courts hold that public policy requires that a bank should have broad powers in the exercise of the judgment of the officials in order to protect itself from losses, and again, that, although a corporation may exceed its powers by entering into contracts not permitted by its charter, nevertheless, if those contracts are not *malum in se*, the corporation itself cannot avoid them by pleading *ultra vires*. And it seems to us that, whether a contract is *ultra vires* or not, if the corporation has permitted its execution and allowed innocent parties to surrender property or other things of value thereunder without objection, and it is impossible to restore their status quo and at the same time itself receive and keep the benefits or beneficial effects, it will not then be heard to plead *ultra vires* or lack of authority of one of its principal officers to bind it in that particular respect.

It is now very well settled "that a private corporation cannot avail of the defense of *ultra vires* where the contract has been in good faith fully performed by the other party, and the corporation has had the benefit of the contract and the performance." *Darst v. Gale*, 83 Ill. 141.

"Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not . . . prevail where it would defeat the ends of justice or work a legal wrong." *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693.

"The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided." *San Antonio v. Mehaffy*, 96 U. S. 315, 24 L. ed. 817.

"The plea of *ultra vires* will not be allowed to prevail, . . . when it will not advance justice, but, on the contrary, will accomplish a legal wrong." *Lewis v. American Sav. & L. Asso.* 98 Wis. 203, 39 L.R.A. 559, 73 N. W. 793.

"A corporation cannot defend against a contract liability growing out of a business in which it is actually engaged on the ground that such business was done in excess of its corporate powers." *Linkauf v. Lombard*, 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472.

"In case of a transaction which is simply *ultra vires*, neither party will be heard to allege its invalidity while retaining its L.R.A.1917A.

fruits. Limitation of the contractual power of a corporation does not prevent making restitution of money or property obtained under an unauthorized contract." *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383.

"It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the fruit of which he retains." *Sedgw. Stat. & Const. Law*, p. 73.

"And this is especially true where the contract has been executed and third parties have acquired rights on the faith of it." 29 Am. & Eng. Enc. Law, 2d ed. 51.

"It may be considered as settled law today that where a corporation goes outside of the scope of its legitimate business and makes a contract, and that contract is executed, and the corporation has received the benefits of the contract, the courts will never listen to a plea of *ultra vires*." 29 Am. & Eng. Enc. Law, 2d ed. 52; *Holt v. Winfield Bank (C. C.)* 25 Fed. 812.

"In cases of contracts upon which corporations could not be sued because they were *ultra vires*, "the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiffs use." *Salt Lake City v. Hollister*, 118 U. S. 263, 30 L. ed. 176, 6 Sup. Ct. Rep. 1055.

"The executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith so require." *Parish v. Wheeler*, 22 N. Y. 509.

"Where a corporation enters into a contract *ultra vires*, and the other party, in reliance thereon and in execution thereof, expends money, the corporation is liable on the contract, provided it be not in violation of its charter nor prohibited by law." *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702.

"At the present time, the defense of *ultra vires* is very generally regarded by the courts as an ungracious and odious one. And it is very well settled that neither party to the contract can avail himself of such a defense when the contract has been fully performed by the other party, and he has received the full benefit of the performance and of the contract. If an action cannot be brought directly upon the contract, either equity will grant relief, or an action in some other form will prevail." 29 Am. & Eng. Enc. Law, 2d ed. 45.

"The modern rule has been well stated thus: 'If the act is one which is lawful in itself, and not otherwise prohibited, is done

for the purpose of serving corporate ends, and is reasonably tributary to the promotion of those ends in a substantial, and not in a remote and fanciful, sense, it may fairly be considered within charter powers.'” 29 Am. & Eng. Enc. Law, 2d ed. 47.

“To say that a corporation cannot sue or be sued upon an ultra vires arrangement is one thing; to say that it may retain the proceeds thereof which may have come into its possession, without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud.” Green’s Brice, Ultra Vires, 2d Am. ed. 721.

It may be urged that the instrument sued on was not a written contract inasmuch as its execution was ultra vires. It is unnecessary to give consideration to this suggestion further than to say that, even though the claim might not be upheld on the written contract, because unlawful, nor according to its terms, yet it will be sustained upon the implied contract of the bank to return the property delivered by virtue thereof or to place the parties in statu quo. This, it is conceded, cannot be done, because the powder has been used in the prosecution of that work which enabled the bank to protect itself as to Lovejoy, and which was the beneficial effect of the contract flowing to and accepted by the bank.

Thus it was said in *Central Transp. Co. v. Pullman’s Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, by Mr. Justice Gray: “A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation,

by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting the property or money parted with on the faith of the unlawful contract to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.”

Inasmuch as the contract under consideration has, long prior to the commencement of this action, been fully executed and was of beneficial force and effect to the bank, and the bank, notwithstanding these facts, failed and refused to protect the powder company when it had the opportunity, it will not now be heard to urge the plea of ultra vires as relied upon in the court below.

The other questions presented by the record, in view of the foregoing conclusion, become immaterial, and no further consideration need be given them.

The judgment should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied February 3, 1914.

Annotation—Remedies which the parties to an ultra vires contract are entitled to pursue apart from an action on the contract itself.

I. Introductory:

1. *Scope of monograph, 1027.*
2. *Alleged inadequacy of independent remedies, 1027.*

II. English authorities reviewed:

3. *Action on a quantum meruit, 1028.*
4. *Action for money had and received, 1028.*
5. *Reclamation of the specific property involved, 1031.*
6. *Adjustment of competing claims in winding up proceedings, 1032.*
7. *Right of lender to retain money voluntarily repaid by corporation, 1034.*
8. *Action for damages, 1035.*

III. American authorities reviewed:

9. *Action on agreement implied from the circumstances attending the transaction; generally, 1035.*
10. *Action on a quantum meruit or quantum valebat, 1036.*
11. *Action for recovery of money paid or property delivered in pursuance of the contract, 1037.*
12. *Same subject; right of action where the money sued for was borrowed or lent by the corporation in excess of its powers, 1043.*
13. *Rule where the corporation is asking to be relieved from the obligations of the contract, 1045.*

III.—continued.

14. *Operation of the principle, in part delicto, 1045.*

15. *Action based upon breach of duty to use reasonable care, 1050.*

I. *Introductory.*1. *Scope of monograph.*

In the monograph appended to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* ante, 737, and *Calumet & C. Canal & Dock Co. v. Conkling*, L.R.A.1917B, —, the extent to which the principle of estoppel has been held to be admissible for the purpose of excluding the defense of invalidity in an action brought upon an ultra vires contract has been fully discussed. In the following sections it is proposed to consider the nature of the remedies which a party to such a contract is entitled to pursue apart from an action on the contract itself. Nearly all the cases which bear upon this subject were decided in jurisdictions in which the admissibility of the principle of estoppel is denied,—a state of the authorities which is obviously due to the fact that, in jurisdictions in which the principle is accepted, it is usually more advantageous to sue upon the contract itself.

2. *Alleged inadequacy of independent remedies.*

In the well-known opinion delivered by Chief Justice Comstock in a leading case,¹ one of the arguments which he adduced in support of his theory that an action on the contract should be allowed

was founded upon the alleged inadequacy of the relief which is in many instances afforded by the remedies extrinsic to such an action.² So far as regards the facts presented in the particular case before the court, the objection thus raised seems to have been satisfactorily met by Selden, J., who pointed out that an action of tort, founded on the negligence of the defendant, was open to the injured person. See § 15, *infra*.³ It is submitted that the statement of the learned Chief Justice is also incorrect with regard to other descriptions of cases. His proposition that the independent remedies of which parties to ultra vires contracts may avail themselves are inadequate cannot, in the present state of the law, be supported unless it is assumed, in despite of logic and analogy, that such persons are entitled to more favorable treatment than those who enter into other kinds of prohibited contracts. No grounds upon which such a distinction can be predicated have ever been suggested, and, if it is conceded to be untenable, the conclusion seems unavoidable that his argument in this point of view was unsound. The doctrine which he criticized simply declares that the remedies open to the former class of persons are of precisely the same nature and extent as those open to the latter. In those cases in which the ultra vires transaction involves the occupation and use of property or the performance of services, an action on a quantum meruit or a quantum valebat may reasonably be regarded as affording redress as complete as justice demands. In nearly all, if not all, the

¹ *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258, where the plaintiff claimed damages in respect of an injury received while he was traveling in a train the operation of which over the line on which the accident occurred was ultra vires of the defendant.

² The following passage shows the position of the learned judge in this point of view: "I answer, further, that while in many cases the remedy of a suit in disaffirmance of the agreement, and to recover back the consideration, will be sufficient to prevent wrong, in many others it will be entirely worthless. All collateral securities must fall to the ground with the principal contract, and all its consequences and results. The present case will afford the best illustration. The defendants, in consideration of a trifling sum received from the plaintiff for fare, agreed to perform the service of carrying him in their cars, perhaps some 200 miles. By the negligent performance of that agreement, they inflicted on him injuries for which a jury has said the proper compensation was \$2,500. This L.R.A.1917A.

being the measure of damages for the breach of the contract, the absurdity, not less than the injustice, of confining him to the remedy of disaffirmance because the agreement was ultra vires, must be quite apparent."

³ It should be observed that the authorities are not agreed concerning the question whether an action can be maintained against a corporation in respect of a tort committed by a servant while it was engaged in an ultra vires business or undertaking. See *Labatt, Mast. & S.* §§ 2243, 2243a. But, for the purposes of the present discussion, this difference of opinion is not conclusive. So far as regards jurisdictions in which the right of recovery has been recognized, there is clearly no ground upon which the objection of inadequacy of remedies can be based. On the other hand, the courts which have not yet explicitly declared their opinion upon the point would, in view of the conflict of precedents, be justified in affirming the existence of the right.

remaining classes of cases, the essential element is a transfer of money or other tangible property, and in these the requirements of justice would seem to be fully satisfied, by the concession of the remedial rights discussed in §§ 12–15, *infra*. It is difficult to concede that a party who is entitled to maintain, in disaffirmance of the invalid contract, an action which will enable him to recover whatever he has transferred in pursuance of it, or the pecuniary equivalent thereof, has any real grievance. In England, it is true, the recent case which has established the doctrine that an ultra vires loan cannot be recovered in an action for money had and received (see § 4, *infra*) has in one important respect rendered the scope of independent remedial rights narrower than it is in the American states. From the very broad language used by Lord Haldane it would seem to be a permissible if not necessary inference that the lender is in that country precluded from enforcing restitution of the loan even by means of an equitable suit for an accounting. That such enforcement is feasible whenever the money can be identified so as to be made the subject of a “tracing order” is fully settled. See § 5, *infra*.

It is submitted, therefore, that, so far as the American states are concerned, there is little, if any, foundation for the theory that the doctrine of estoppel is justified by the consideration that the remedies afforded by actions in disaffirmance of the contract are inadequate. It may even be contended that in some instances—as where the judgment will injuriously affect the rights of innocent shareholders—such remedies, so far from being inadequate, will give the plaintiff more than he is entitled to upon broad principles of justice. (See the remarks made concerning the fourth of the objections to the doctrine of estoppel which are discussed in § 65 of the note to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* ante, 737). This is an aspect of the matter which has escaped the notice even of the courts by which the possibility that such shareholders may be prejudiced by the operation of the doctrine of estoppel has been specified as one of the reasons for condemning that doctrine. But the fact that there are certain classes of cases in which the allowance of the right of maintaining an action in disaffirmance of the contract may produce the anomalous consequence that one who is a party to it, and as such a participant in the violation

of a statute, will be benefited at the expense of one who is entirely free from blame, lends additional support to the suggestion advanced in § 66 of the note just referred to, that claims arising out of ultra vires transactions should always be settled by courts of equity. It is only by means of the broad principles and flexible procedure of such tribunals that the interests of shareholders and all other persons who are interested in the financial welfare of the corporation can be satisfactorily adjusted.

II. *English authorities reviewed.*

3. *Action on a quantum meruit.*

That a party to an ultra vires contract for the performance of services is entitled to maintain a direct action on a quantum meruit is perhaps a permissible deduction from a decision of the Privy Council, which in a judgment setting aside an unauthorized contract for construction work on a railway, allowed the contractor the value of the work actually done by him.¹ But as the court was dealing with an equitable suit for affirmative relief, the precise significance of the case in this regard is obviously a matter of uncertainty. See § 21 of the former of the two monographs specified at the commencement of § 1, ante.

4. *Action for money had and received.*

In the important case the facts of which are stated in § 6, *infra*, one of the questions considered was whether, in the words of Lord Haldane, an action for money had and received would have lain against a building society which was being wound up, “on the footing that although its conduct in receiving the depositors’ money was ultra vires, it had become improperly, as between itself and the depositors, enriched thereby, so that the amount received was money held to the depositors’ use, and recoverable as a debt, independently of any right to trace and follow.” In the court of appeal, Cozens-Hardy, M. R., expressed the opinion that to allow an action for money had and received “would destroy the whole doctrine as to ultra vires borrowing,” and that the court was “bound by the decisions which have negatived the existence of any legal or equitable debt, and have directed a division of the assets

¹ *Great North-West C. R. Co. v. Charlebois* [1899] A. C. (Eng.) 114, 68 L. J. P. C. N. S. 25, 79 L. T. N. S. 35, reversing (1895) 26 Can. S. C. 221.

inconsistent with the contention now raised."¹ By the House of Lords it was held that no such action could be maintained.² The rationale of this doctrine was thus explained by Lord Haldane: "If it be outside the power of a statutory society to enter into the relation of debtor and creditor in a particular transaction, the only possible remedy for the person who has paid the money would on principle appear to be one in rem, and not in personam, a claim to follow and recover specifically any money which could be earmarked as never having ceased to be his property. To hold that a remedy will lie in personam against a statutory society, which, by hypothesis, cannot in the case in question have become a debtor or entered into any contract for repayment, is to strike at the root of the doctrine of ultra vires as established in the jurisprudence of this country. That doctrine belongs to substantive law and is the outcome of statute, and cannot be made different by any choice of form in procedure. It is, therefore, binding both at law and in equity. In the jurisprudence of England the doctrine of ultra vires must now be treated as established in a stringent form by acts of the legislature and decisions of great authority which have interpreted these acts. This is a principle which it appears to me must to-day be taken as a governing one, not only at law, but in equity. I think it excludes from the law of England any claim in personam based even on the circumstance that the defendant has been improperly enriched at the expense of the plaintiff by a transac-

tion which is ultra vires. . . . My Lords, notwithstanding the wide scope of the remedy so described, I think that it must be taken to have been given only, as I have already said, where the law could consistently impute to the defendant at least the fiction of a promise. And it appears to me that, as matter of principle, the law of England cannot now, consistently with the interpretation which the courts have placed on the statutes which determine the capacity of statutory societies, impute the fiction of such a promise where it would have been ultra vires to give it. The fiction becomes, in other words, inapplicable where substantive law, as distinguished from that of procedure, makes the defendant incapable of undertaking contractual liability. For to impute a fictitious promise is simply to presume the existence of a state of facts, and the presumption can give rise to no higher right than would result if the facts were actual." Lord Parker stated his views as follows: It has been settled by earlier cases,³ "that an ultra vires borrowing by persons affecting to act on behalf of a company or other statutory association does not give rise to any indebtedness either at law or in equity on the part of such company or association. It is not, therefore, open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent. The implied promise on which the action for money had and re-

¹ Re Birkbeck Permanent Benefit Bldg. Soc. [1912] 2 Ch. (Eng.) 208. See also the following remarks of Buckley, L. J., at p. 233 [i. e., that such an action can be maintained]: "If the proposition is true, numerous cases which bind this court must have been decided by judges of the greatest eminence in forgetfulness or ignorance of that which would have been a complete justification of a claim which failed. If the proposition be true, it is immaterial whether the borrower had or had not power to borrow; it would have been unnecessary to determine that there resulted no legal or equitable debt, and those authorities by which the lender was remitted to a claim to subrogation or a claim to a tracing judgment were idly decided, for he might have come for a larger remedy by way of action for money had and received." Fletcher Moulton, L. J. (dissenting), was of opinion that the principle which the authorities had laid down carried with it the consequence that the court would not, even in the case of an ultra vires transaction which could give rise to no debt, as between the parties to L.R.A.1917A.

the transaction, permit the one who had wrongfully received the money to keep it merely because he was in possession of it. He thought that, as the money must be taken to have been received by the misrepresentation or carelessness of its agents, the society could not keep it as against the depositors.

² Sinclair v. Brougham [1914] A. C. (Eng.) 398.

³ The authorities cited were Re National Permanent Benefit Bldg. Soc. (1869) L. R. 5 Ch. (Eng.) 309, 22 L. T. N. S. 284, 18 Week. Rep. 388, 34 J. P. 341; Blackburn Bldg. Soc. v. Cunliffe (1882) L. R. 22 Ch. Div. (Eng.) 61, 52 L. J. Ch. N. S. 92, 48 L. T. N. S. 83, 31 Week. Rep. 98, affirmed in (1884) L. R. 9 App. Cas. 857, 54 L. J. Ch. N. S. 376, 52 L. T. N. S. 225, 33 Week. Rep. 309, and Wenlock v. River Dee Co. (1883) L. R. 10 App. Cas. (Eng.) 354, 54 L. J. Q. B. N. S. 577, 53 L. T. N. S. 62, 49 J. P. 773. See § 20, of the note to Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co. ante, 737.

ceived is based would be precisely that promise which the company or association could not lawfully make."

That the House of Lords did not intend to go further than to declare that an action for money had and received does not lie in respect of money of which possession was acquired under an ultra vires contract of borrowing is shown by the comments made upon two earlier cases,³ and by the explicit statement of Lord Parker, who, after having referred to certain decisions, said that there seemed to be nothing in them "which would bind the House, if they were considering whether an action would lie in law or in equity to recover money paid under any ultra vires contract which was not a contract of bor-

rowing; for example, money paid to a company or association for the purchase of land which the company had no power to sell and the sale of which was therefore void, or money paid to the company or association by way of subscription for shares which it had no power to issue. In such cases the implied promise on which the action for money had and received depends would form no part of, but would be merely collateral to, the ultra vires contract."⁴

In a case involving an ultra vires contract of borrowing, one of the principles with reference to which the rights of the parties were determined was, that money paid on an "illegal contract cannot be recovered."⁵ In this instance the expressions "ultra vires" and "illegal"

* Lord Haldane said: "Two authorities were cited in support of the argument that such an action could have been brought successfully. One of these was a judgment of Sir William Page Wood, V. C., in the case of *Re Phoenix Life Assur. Co.* (1862) 2 Johns. & H. (Eng.) 441, 31 L. J. Ch. N. S. 749, 9 Jur. N. S. 15, 7 L. T. N. S. 191, 10 Week. Rep. 816. The other was a decision of the court of appeal in Ireland which followed his judgment in *Flood v. Irish Provident Assur. Co.* (1912) 46 Ir. L. T. 214, [1912] 2 Ch. 597, note, 107 L. T. N. S. 540, note. In these cases the principle of tracing was not relied on, but it was apparently held that the amount of certain premiums which had been paid in respect of policies, the issue of which was ultra vires, could be recovered as money had and received. My Lords, if these decisions had related to the recovery of borrowed money, I should find it difficult to reconcile them with principle. . . . I am accordingly of opinion that while the decisions of Sir William Page Wood and of the Irish court of appeal to which I have referred may possibly, notwithstanding that the issue of the policies was ultra vires, be supported on the ground that they related merely to the failure of consideration for the premiums paid (a question on which it is unnecessary for me to express any opinion), they cannot be invoked as authorities for the proposition that an action for money had and received would have lain in a case of borrowing ultra vires."

The learned judge did not allude to *Ernest v. Croysdill* (1860) 2 De G. F. & J. (Eng.) 175, 29 L. J. Ch. N. S. 580, 6 Jur. N. S. 740, 2 L. T. N. S. 616, 8 Week. Rep. 736, where the right of one company to recover certain money lent to another for the purpose of being deposited under an ultra vires contract for the purchase of certain property, and subsequently recovered in an action brought against the vendor on the ground that the contract was ultra vires, was affirmed on the ground that the one company had no power to make the loan and the other had no power to accept it, that the L.R.A.1917A.

transaction was therefore a breach of trust as regards the shareholders of the lending company; and that the borrowing company had, through their directors and their finance committee, notice that it was so. This decision seems to be essentially inconsistent with the rule laid down by Lord Haldane, unless it is to be regarded as an instance of a "tracing judgment." See § 5, *infra*. In *Walsley v. Rent Guarantee Co.* (1881) 29 Grant, Ch. U. C. 484, it was one of the authorities cited for a ruling that the plaintiff was entitled to recover money which the defendant company had, in excess of its powers, received on deposit.

* In *Cree v. Somervail* (1879) L. R. 4 App. Cas. (Eng.) 648, 41 L. T. N. S. 353, 28 Week. Rep. 34, it was remarked, *arguendo*, by Lord Blackburn, that, if the object of the action had been to get back money paid by the company in question under an ultra vires contract for the purchase of its own shares, the respondent "would have had to refund it, or to defend themselves from that claim as they best might."

In another case, it was held that a shareholder of a company which had entered into an ultra vires contract for the purchase of property was entitled to maintain a bill for the recovery of a sum of money which had been paid on deposit. *Bryson v. Warwick & B. Canal Co.* (1863) 1 Smale & G. (Eng.) 447. This decree was affirmed by the court of appeal. See *Ernest v. Croysdill* (1860) 2 De G. F. & J. (Eng.) 194, 29 L. J. Ch. N. S. 580, 6 Jur. N. S. 740, 2 L. T. N. S. 616, 8 Week. Rep. 736.

In *Flood v. Irish Provident Assur. Co.* (1912) 46 Ir. L. T. 214, [1912] 2 Ch. 597, note, 107 L. T. N. S. 540, note, it was held that premiums paid by policy holders on void contracts of insurance must be repaid on the ground of a total failure of consideration. See comments on this case in note, 3, *supra*.

* *Cotton, L. J.*, in the judgment delivered for the court in *Blackburn & D. Benefit Bldg. Soc. v. Cunliffe* (1885) L. R. 29 Ch. Div. (Eng.) 909, 54 L. J. Ch. N. S. 1091, 53 L. T. N. S. 741.

were obviously treated as synonymous; and, although the decision itself was overruled by the House of Lords in the case cited under the preceding paragraph, nothing was said by any member of that tribunal which indicates that, for the purpose of the application of the principle, there is a distinction between the terms. Furthermore, it is evident that the result of that case is to render the distinction of no material importance in the present connection, even if it be a proper one in some points of view. See § 16 of the note to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* ante, 737.⁶ Under these circumstances it seems scarcely possible to accept as correct—at all events in so far as it depends upon the theory of a distinction between “ultra vires” and “illegal” contracts—a recent decision of a divisional court to the effect that the liquidator of the society whose affairs were under consideration in the House of Lords case was entitled to recover a sum of money which the directors had lent to the defendant by way of overdraft, while it was carrying on the ultra vires business of banking.⁷ Ridley, J., relied upon the statement of Buckley, L. J., that “a transaction which is illegal is forbidden by law; a transaction which is ultra vires is precluded by the incompetence of the action.”⁸ But it is submitted that, in the judgment in which these words are found, there is nothing to show that the difference which the learned judge thus predicated was regarded by him as involving the consequences here deduced from it.

From the foregoing remarks it is obvious that, so far as regards the availability of the remedy now under dis-

cussion in cases where the money sued for was lent to the corporation under an ultra vires contract, the law as now settled in England is different from that adopted by the American courts. See § 12, *infra*. But the English reports do not contain any decisions or data which indicate the existence of antagonistic views in respect of unauthorized contracts of any other description.

5. Reclamation of the specific property involved.

One of the propositions which, in a recent case, Buckley, L. J., declared to be now established with regard to ultra vires contracts of borrowing, was this: “If the lender can identify his money or the investment of his money in the hands of the borrower, he can call for its return. In such case he is entitled to what is commonly called a tracing judgment.”¹ This doctrine was also affirmed by the House of Lords.² Its scope and rationale were thus stated by Lord Parker: “It appears to be also well settled that the lender in an ultra vires loan transaction has a right to what is known as a tracing order. A company or other statutory association cannot by itself or through an agent be party to an ultra vires act. If its directors or agents affecting to act on its behalf borrow money which it has no power to borrow, the money borrowed is in their hands the property of the lender. At law, therefore, the lender can recover the money, so long as he can identify it, and even if it has been employed in purchasing property, there may be cases in which, by ratifying the action of those who have so employed it, he may recover the property purchased. Equity, however, treat-

⁶ The language used by the members of the House of Lords apparently destroys the authority of the following remarks made by Vaughan, Williams, L. J., in *Re Wrexham, Mold & Connah's Quay R. Co.* [1899] 1 Ch. (Eng.) 456. “If the ultra vires loan is to be treated as an illegal prohibited transaction, as distinguished from a contract into which the company have no capacity to enter, there is no action at law or in equity by which the lender can recover back moneys which he has paid over in pursuance of the illegal contract. If, on the other hand, the ultra vires loan is to be treated merely as something ultra vires, and not as an illegal transaction, there is no reason why the lender should not recover the money thus paid from the company, as money received to the use of the lender, by reason of the failure of consideration arising out of the incapacity of the company to borrow, provided always that the dealing by the company with the money L.R.A.1917A.

has not been such as to shew, notwithstanding the form of action adopted, the money has really been so dealt with by the company as that, in the interval between the lending of the money and the bringing of the action, the company has increased its borrowing obligations beyond its borrowing powers.”

⁷ *Brougham v. Dwyer* (1913) 29 Times L. R. (Eng.) 234, 108 L. T. N. S. 504.

⁸ *Re Birkbeck Permanent Benefit Bldg. Soc.* [1912] 2 Ch. (Eng.) 183, 81 L. J. Ch. N. S. 769, 106 L. T. N. S. 968, 28 Times L. R. 451.

¹ *Re Birkbeck Permanent Benefit Bldg. Soc.* (Eng.) *supra*. See also the statement of Cozens-Hardy, M. R., that, “if the persons who have purported to lend to the society can follow the money into particular investments, what is known as a tracing judgment may be obtained.”

² *Sinclair v. Brougham* [1914] A. C. (Eng.) 938.

ed the matter from a different standpoint. It considered that the relationship between the directors or agents and the lender was a fiduciary relationship, and that the money in their hands was, for all practical purposes, trust money. Starting from a personal equity, based on the consideration that it would be unconscionable for anyone who could not plead purchase for value, without notice, to retain an advantage derived from the misapplication of trust money, it ended, as was so often the case, in creating what were in effect rights of property, though not recognized as such by the common

law." It was held, however, that, under the circumstances, the lenders were not entitled to relief upon this footing. See next section.

6. *Adjustment of competing claims in winding-up proceedings.*

The extent of the right of persons from whom a company has borrowed money in excess of its powers to share in the distribution of its assets in winding-up proceedings has been lately considered by the court of appeals and the House of Lords.¹

In a case where three companies, each

¹ In *Re Birkbeck Permanent Benefit Bldg. Soc.* [1912; C. A.] 2 Ch. (Eng.) 183, 81 L. J. Ch. N. S. 769, 106 L. T. N. S. 968, 28 Times L. R. 451; judgment modified in *Sinclair v. Brougham* [1914] A. C. (Eng.) 398, 83 L. J. Ch. N. S. 405, 111 L. T. N. S. 1, 30 Times L. R. 315, 58 Sol. Jo. 302. The object of the society, according to its certified rules, was to enable the members to raise a fund out of which they might be individually enabled to buy or build houses. There were two classes of shareholders,—those to whom loans were granted and those who were mere investors. Under an amending rule the investing shares were divided into two classes, "A" shares and "B" shares, differing mainly in this respect, and the "A" shares matured and were to be paid off after a certain period, while the "B" shares were permanent. The shareholder could, however, in either case, give notice and withdraw the amount of his share. During the earlier period of the society's existence the funds, which were derived both from shares and from loans by depositors, were laid out in mortgages to members. Later on, while the society continued its business as a building society, it began gradually to increase its deposits and to do the business of a banker. Subsequently it began to call itself the Birkbeck Bank, and at the time when it was wound up it had, while still retaining its business as a building society, turned much the larger part of its enterprise into that of a bank, thus exceeding its powers. An order having been made for the winding up of the Society, Neville, J., ordered the assets to be applied, firstly, in payment of costs; secondly (by general consent), in paying debts properly incurred to outside creditors; thirdly, in paying the unadvanced members or shareholders the amounts due to them in respect to the subscription paid on their shares, including any bonus and interest to which they were entitled by the rules; and, fourthly, in distribution of the balance among the customers of the society on deposit or current account in proportion to the amount standing to their credit in the books. The majority in the court of appeal (the Master of the Rolls and Buckley, L. J.,—Fletcher Moulton, L. J., dissenting) took the same view. The ratio decidendi was that the L.R.A.1917A.

contracts between the depositors and the society with respect to its banking business were void, and consequently that, unless money deposited was shown to have been applied in the payment of legitimate debts, so that the doctrine discussed in §§ 22 and 23 of the note to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* ante, 737, could be invoked, or the depositors could identify their money as earmarked so that they could follow it under a tracing judgment, their only right was to an order such as was made in the case of *Re Guardian Permanent Benefit Bldg. Soc.* (1882) L. R. 23 Ch. Div. (Eng.) 440, 52 L. J. Ch. N. S. 857, 48 L. T. N. S. 134, 32 Week. Rep. 73, which would give them the surplus assets after payment of all legitimate debts and of twenty shillings on the pound to the members or shareholders. The judgment was based upon the theory that the claims of the depositors could not be brought within either of these excepted cases. On appeal to the House of Lords it was urged that the depositors were entitled to succeed in recovering their deposits, either on the footing of being money had and received by the society to their use, or as being money which never truly formed part of the assets, and which could now be followed in the hands of the society's agents and the liquidator. But this contention was rejected. The judgment of Neville, J., was, however, modified, in accordance with the view that the principle to be adopted in the distribution must be apportionment on the footing that depreciation and loss were to be borne pro rata. The conclusions of Lord Haldane were thus stated: "I think that this direction [i. e., to Neville, J.] should be that, without disturbing anything that has up to now been settled or agreed, he should apportion the entirety of the remaining assets (including mortgages and loans) between the depositors and the shareholders in proportion to the amounts paid by the depositors and the shareholders respectively. In this way I am of opinion that the nearest approach practicable to substantial justice will be done. I think that this is the utmost extent to which, consistently with well-established principles, a court of justice can go in compelling the society to restore that

of which had power to borrow money on the security of debentures, issued joint debentures, by which the companies jointly and severally agreed to pay to the holder the amount advanced by him, with interest thereon, it was held by the court of appeal, in proceedings taken by the official liquidator to have the joint debentures declared void, that, although the

debentures were ultra vires, so far as they purported in substance to pledge the credit and assets of each company for money not coming to that company alone, but to the other companies also, they should nevertheless be upheld as against each company to the extent to which the money borrowed came into the coffers of the company.²

of which it has become possessed through its ultra vires transactions. . . . It is not the method of distribution directed in the case of *Re Guardian Permanent Benefit Bldg. Soc.* (Eng.) supra, where the court of appeal said that not only the directors of the society, but the unadvanced members, must be paid in the first instance, and the balance only divided among the lenders from whom advances had been obtained without legal authority. But I do not think that the decision there upon this point can be upheld, unless on the facts in that case no reliable attempt to trace was held to be possible. If such presumptions as to the source of the assets could have been made as I think must be made in the present case, the method of distribution adopted would not have been justifiable on the assumption that the principle I have stated is the right one. There is much force in the criticism of the judgments in that case, made by Fletcher Moulton, L. J., and by Buckley, L. J., in the present case. The reasoning implied in those judgments appears to me to have been pushed to an extent which, unless carefully qualified, establishes, not its conclusion, but either too much or too little." Lord Parker said: "The ultra vires lenders and the members are willing that these liabilities and the costs of the liquidation, which are in effect costs of administering the fund, shall be first paid. If this is done, what is left may be taken to represent in part the moneys of the ultra vires lenders and in part the moneys of the society wrongfully employed in the business. The equities of the ultra vires lenders and of the society are equal, and it follows that the remainder of the assets ought to be divided between the ultra vires lenders and the society ratably, according to the capital amount contributed by such lenders and the society respectively. This mode of distribution gives effect to all the equities of the parties, and there is in it nothing necessarily inconsistent with the decision in the *Calvert Case* (1882) L. R. 23 Ch. Div. (Eng.) 445, for there the business actually carried on was intra vires, and thus belonged to the society, except in so far as the ultra vires lenders could establish any equitable claim. It depends solely on the fact that the assets for distribution being assets not of a legitimate, but an ultra vires business are not the assets of the society, except in so far as they can substantiate some equity to them, and that such equity as they have can arise only from an application of the same principles to which the ultra vires lenders are them-

selves entitled to have recourse." In consequence of the modification of the judgment of the court of appeal by the House of Lords, the B class of shareholders were required, upon the application to the liquidator, to repay four shillings in the pound. See *Re Birkbeck Permanent Benefit Bldg. Soc.* [1915] 1 Ch. (Eng.) 91, [1914] W. N. 416, 84 L. J. Ch. N. S. 189, 112 L. T. N. S. 213, 31 Times L. R. 51, 59 Sol. Jo. 89, [1915] H. B. R. 31.

This decision of the House of Lords qualifies pro tanto the judgment in *Re Guardian Permanent Benefit Bldg. Soc.* (1882; C. A.) L. R. 23 Ch. Div. (Eng.) 440, 52 L. J. Ch. N. S. 857, 48 L. T. N. S. 134, 32 Week. Rep. 73. Where Sir George Jessel, M. R. relied upon a "plain principle of equity," under which the surplus, after giving 20s. the pound to the members of the society, belonged to the improper lenders. In the judgment which he delivered in the court of appeal in the *Birkbeck Permanent Benefit Bldg. Soc. Case*, Buckley, L. J., observed that he was unable to say what this "principle" was, and continued thus: "The moneys lent," said the learned judge, "either are or are not assets of the society, and the lenders either are or are not creditors or entitled in some form of action to claim repayment. If the moneys are assets of the society, and the lenders are not creditors, then in the liquidation of the society each member is entitled to his proportionate part in the distribution of the assets amongst the members, and such right is not confined to 20s. in the pound upon his shares. Further, if at the time when the loan was made the assets were sufficient only to give the members 10s. in the pound, I can see no principle upon which the members are to have another 10s. out of the moneys lent, and are not to have their share of any surplus then remaining. If they are to have a further 10s. out of the money lent, then I see no principle upon which they are not to have such further sum as is the proportionate share of each member of the total sum. If, on the other hand, the lenders are creditors, then they come before the members, and the members can take no part in the assets until the obligation towards the creditors has been discharged." In the House of Lords, Lord Haldane expressed his agreement with these remarks.

² *Re Johnston Foreign Patents Co.* [1904] 2 Ch. (Eng.) 234. Romer, L. J., said: "So far as each company, through the machinery of that joint account, got moneys and used them for its own purposes.

7. Right of lender to retain money voluntarily repaid by corporation.

In one case the court of appeal held that the liquidator of a building society could recover from the bankers' money paid to them by the society and applied in discharge of the money which they had lent to it by way of overdraft, and so lent ultra vires.¹ But on the appeal of a more recent case to the House of Lords, Lord Haldane expressed the opinion that this decision "was wrong, under the circumstances of the case, in the ab-

sence of proof by the society, who, by the fact of repayment, had made an admission to the contrary effect, that the money advanced by the bankers had been lost and could not be treated as repaid. The society ought, in my opinion, to have been regarded, in the absence of evidence to this effect, as having simply returned to the bankers the latter's own money."² This criticism seems to have weakened, if not destroyed, the authority of some earlier decisions besides the one which was expressly disapproved.³

that company, while purporting to make itself liable for a larger sum, did at any rate borrow the amount which it got, and made itself liable for that amount. I agree that the joint covenant was inoperative, and that the joint account was, as a piece of machinery, irregular; but still the company did intend to borrow money which was to come to itself. It intended to borrow money part of which should and did come to itself, and I think each company may be said to have borrowed that part, and the borrowing of it was within its powers. To that extent I think there is no objection to holding the transaction valid."

¹ Blackburn & D. Benefit Bldg. Soc. v. Cunliffe (1885; C. A.) L. R. 29 Ch. Div. (Eng.) 902. The grounds upon which the decision was based are shown by the following extract from the judgment delivered by Cotton, L. J., for the court: "It was urged on behalf of the appeal that the moneys sought to be recovered were applied by order of the directors in repayment of the moneys borrowed under a mistake of law as to their power to borrow, and that no one can recover money so paid voluntarily, or money paid on an illegal contract. This is correct where the same person who made the payment, or was party to the contract, seeks to recover the money. But here the liquidators are suing on behalf of the society, and complain that the directors, both in borrowing and in directing the application of the moneys of the society, acted in excess of the authority given to them; and that their acts do not bind the society, and that the bankers knew that the directors had no authority so to deal with the moneys of the society. This, in our opinion, is correct, and consequently the acts of the directors were unauthorized, and are not to be considered as acts of the society, and this objection cannot be maintained."

² Sinclair v. Brougham [1914] A. C. (Eng.) 426.

³ In the case just cited, Lord Haldane "entertained considerable doubt" as to the correctness of the decision in *Ex parte Watson* (1888) 21 Q. B. D. 301. There it was held, on the authority of the decision of the court of appeal, cited in note 1, supra, that a deposit note by which a company, after it had acquired borrowing powers, acknowledged itself to be indebted to a person from whom it had borrowed money L.R.A.1917A.

before those powers were conferred, was not binding upon it. The theory adopted was that a note "given under such circumstances can have no greater validity than the alleged debt for which it is substituted." Wills, J., observed: "In this instance every cardinal fact was equally within the knowledge of, and equally known to, both of the parties, and the very object of the transaction was that which is its essential vice, according to my view, viz., that the money was borrowed for the purpose of repaying a loan illegally contracted and to the payment of which, as a loan, the funds of the society could not be legally applied. If this be the true result of the facts, it is clear that the contract belongs to a class to which effect cannot be given by a court of justice, however innocent the parties may have been of any fraudulent or immoral motive. They intended to do a thing which was against the law. It matters not that they did not appreciate the fact. The courts will not permit a bargain to stand which was a part of such whole." Both Cave, J., and Wills, J., disagreed with the doctrine which seemed to be reflected in a statement of Wood, V. C., who, in *Fountain v. Carmarthen & C. R. Co.* (1886) L. R. 5 Eq. (Eng.) 324, 22 Eng. Rul. Cas. 132, after declaring that the claimant's debenture was void ab initio, added: "The directors did not, as they ought to have done, put him in a proper position by issuing to him a new debenture." By Wills, J., it was pointed out that, "if the directors ought to have issued a fresh debenture, when the company became legally capable of borrowing, in exchange for one which did not bind the company, they certainly would have been at liberty to pay the original debt out of the funds of the company; and yet this is exactly what the court of appeal in the *Blackburn & D. Benefit Bldg. Soc. v. Cunliffe* (Eng.) supra, held could not be done." *Ex parte Watson*, was cited without any moment by Cozens-Hardy, M. R. in the Court of Appeal. See *Re Birkbeck Permanent Benefit Bldg. Soc.* [1912; C. A.] 2 Ch. (Eng.) 203, 81 L. J. Ch. N. S. 769, 106 L. T. N. S. 968, 28 Times L. R. 451.

In *Re Bottomgate Industrial Soc.* (1902) 65 L. T. N. S. (Eng.) 712, 40 Week. Rep. 139, 56 J. P. 216, it was held by the Queen's bench division, relying on *Re Companies Acts* (Eng.) supra, that a rule of a society,

8. Action for damages.

It has been held by the House of Lords that an action for damages may be maintained by a person who has been led by a representation of a company to engage in a transaction with it which it could not consummate without exceeding its powers.¹

III. American authorities reviewed.

9. Action on agreement implied from the circumstances attending the transaction; generally.

The broad theory which has been adopted in the United States is that a party to an ultra vires contract is entitled to any description of relief which may be obtainable in an action that is not founded on the contract itself.¹ The

general doctrine of the law of contracts with reference to which this remedial right is predicable was thus formulated by a text-writer in language which has frequently been approved: "This distinction is taken in the books; namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavouring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover."² For the purposes of this doc-

making deposits previously received in violation of rules a charge upon the assets, was invalid, because (1) such a rule purported to secure a nonexistent debt upon the assets; (2) it was not competent for the society to ratify the invalid loans, and make them a charge upon the assets; and (3) the business on which the society embarked when it took loans on deposit was in reality a banking business prohibited by the statute regulating such societies.

¹ *Balkis Consol. Co. v. Tomkinson* [1893] A. C. (Eng.) 407, 63 L. J. Q. B. N. S. 134, 1 Reports, 178, 69 L. T. N. S. 598, 42 Week. Rep. 204, affirming (C. A.) [1891] 2 Q. B. 614. There one P., after having transferred certain shares in the defendant company to other parties, fraudulently executed a transfer of the same shares for value to T., who thereupon received from the company a certificate under its common seal, stating that he was the proprietor of the shares. The company subsequently refused to register as proprietor a person to whom T. sold the shares. In order to fulfil his contract with the purchaser, T. then bought other shares in the market and sued the company for the price. Held that the company were estopped by their certificate from denying that T. was the proprietor of the shares, and that he was entitled to recover from the company the damages which he had in fact sustained owing to their refusal to register T.'s vendee as proprietor. Lord Herschell said: "The case of *Ashtbury R. Carriage & Iron Co. v. Riche* (1875) L. R. 7 H. L. (Eng.) 663, 44 L. J. Exch. N. S. 185, 33 L. T. N. S. 451, 24 Week. Rep. 794, which was much pressed upon your Lordships in the argument for the appellants, appears to me to have no bearing on the question at issue between the parties to this appeal. The argument was put, as I understand, in this way: The company, it was said, are only authorized to issue a limited number of shares; and to hold it liable by estoppel, as is sought to be done in this case, to a person who is not the proprietor of any of those shares, would L.R.A.1917A.

in effect enable them to contract a liability in respect of shares beyond their authorized issue. I do not think this argument is a sound one. A person to whom the company is liable by estoppel to pay damages for refusing to register his transfer does not, by reason thereof, become a shareholder. Indeed, the very title by estoppel implies that he is not one. It has never been laid down and is manifestly not the law that a company is not authorized to employ its funds in paying damages for a wrong done, and if his right by estoppel is established, the company have as much committed a wrong by refusing to register as shareholder the person whose title they deny as if his title to be registered had in fact been a good one." Lord Field said: "It was argued that the appellants were not liable because as a corporation they could not exceed their powers by registering stock which was already registered in the names of other proprietors; and if this had been an application to compel them to do so or to purchase other stock of an equal amount, that might have been so. But this is an action to recover damages for a wrong to which no such principle can apply any more than other breaches of contract or duty of which they might have been guilty.

¹ "It is now very well settled that a corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail." *Parish v. Wheeler* (1860) 22 N. Y. 494. This language, which was quoted in *Memphis & L. R. R. Co. v. Dow* (1884) 22 Blatchf. 48, 19 Fed. 388, was made in a state in which the doctrine of estoppel prevails; but it also states with substantial correctness the position of the courts by which that doctrine has been rejected.

² 2 Comyn, Contr. 109. This passage has

trine ultra vires contracts, like others which are invalid merely for the reason that they are prohibited, are regarded as belonging to a different category from contracts which are invalid for the reason that they involve moral turpitude.³

The right to obtain relief upon the footing thus indicated may, it is clear, be asserted either in jurisdictions in which an ultra vires contract is held not to be susceptible of being indirectly validated by an estoppel predicated on the ground of a receipt of benefits, or in jurisdictions in which the doctrine of estoppel prevails. But it is evident that, as a means of affording redress to aggrieved parties, the value of the right is, for practical purposes, much greater in jurisdictions of the former description. The general character of the position taken in such jurisdictions is sufficiently shown by the following statements: "The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or de-

livered property under a void agreement, and which in justice he ought to recover. But courts will not, in such endeavor, permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."⁴

"Looking at the case as one where the parties have so far acted under such a contract [i. e., ultra vires], that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands."⁵

10. Action on a quantum meruit or quantum valebat.

In some classes of cases the suitable remedy for giving effect to the general doctrine stated in the preceding section is a suit on a quantum meruit or quantum valebat for the recovery of the actual value of the benefits derived by the defendant from the performance of the contract.¹

It has been held that this remedy is not available in favor of a person whose

been cited in the following cases, among others: *White v. Franklin Bank* (1839) 22 Pick. (Mass.) 181 (affirming right of depositor to recover back money deposited under a contract prohibited by Mass. Rev. Stat. chap. 36, § 57); *Parkersburg v. Brown* (1882) 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Utica Ins. Co. v. Kip* (1827) 8 Cow. (N. Y.) 20.

³ For cases in which this distinction was recognized, see *United States Brewing Co. v. Dolese & S. Co.* (1913) 259 Ill. 274, 47 L.R.A.(N.S.) 898, 102 N. E. 753; *White v. Franklin Bank* (Mass.) supra; *Williams v. Bank of Commerce* (1894) 71 Miss. 858, 42 Am. St. Rep. 503, 16 So. 238; *Manchester & L. R. Co. v. Concord R. Corp.* (1887) 66 N. H. 100, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383.

In *Pratt v. Short* (1880) 79 N. Y. 437, 35 Am. Rep. 531, the court made the following remarks: "It is no doubt the general rule of law, that no right of action can spring out of an illegal contract. And the rule that an illegal contract cannot be enforced applies as well to contracts *malum prohibitum*, as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and if justice and equity require a restoration of money or property, received by either party there-
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under, it will, and in many cases has, given relief."

⁴ *Pullman's Palace Car Co. v. Central Transp. Co.* (1897) 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

⁵ *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1886) 118 U. S. 290, 317, 30 L. ed. 83, 94, 6 Sup. Ct. Rep. 1094.

¹ For cases in which the availability of this remedy was affirmed, see *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* (1888) 131 U. S. 371, 389, 33 L. ed. 157, 163, 9 Sup. Ct. Rep. 770, cited as to this point in *Central Transp. Co. v. Pullman's Palace Car Co.* (1890) 139 U. S. 24, 59, 35 L. ed. 55, 68, 11 Sup. Ct. Rep. 478; *Merchants' Bank v. Baird* (1908) 17 L.R.A.(N.S.) 526, 90 C. C. A. 338, 160 Fed. 642 (suit held not to be maintainable, as no benefits had, in point of fact, been received); *Imperial Bldg. Co. v. Chicago Open Bd. of Trade* (1908) 238 Ill. 100, 87 N. E. 167; *United States Brewing Co. v. Dolese & S. Co.* (1913) 259 Ill. 274, 47 L.R.A.(N.S.) 898, 102 N. E. 753; *Franklin Co. v. Lewiston Inst. for Savings* (1877) 68 Me. 43, 28 Am. Rep. 9 (recovery denied on the ground that benefit was not proved); *Bailey v. Methodist Episcopal Church* (1880) 71 Me. 472; *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.* (1893) 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525; *Williams v. Bank of Commerce* (1894) 71 Miss. 858, 42 Am. St. Rep. 503, 16 So. 258; *Northern R. Co. v. Lister* (1867) 27 U. C. Q. B. 57 (action by corporation); *Buckeye Marble & F. Co. v. Harvey* (1892) 92 Tenn. 115, 18 L.R.A. 252, 36 Am. St. Rep. 71, 20 S. W. 427 (right of action evidently approved, though the court declined to render an explicit decision upon the point, the question not being presented

claim against a county for reasonable compensation in respect of construction work performed by him and accepted by the defendant cannot be satisfied without violating a constitutional provision which defines the amount of indebtedness that a subdivision of the state may lawfully incur in each year, without the assent of the voters.²

11. Action for recovery of money paid or property delivered in pursuance of the contract.

The appropriate kind of action in an-

by the record); *Tennessee Ice Co. v. Raine* (1901) 107 Tenn. 151, 64 S. W. 29 (value of goods sold was held to be recoverable citing *Hawkins Co. v. East Tennessee & V. R. Co.* 1 Shannon, Cas. (Tenn.) 297; *Tennessee Ice Co. v. Raine* (Tenn.) supra; *Metropolitan Stock Exch. v. Lyndonville Nat. Bank* (1903) 76 Vt. 303, 57 Atl. 101.

In *Hitchcock v. Galveston* (1877) 96 U. S. 341, 350, 24 L. ed. 650, 661, where a city was sued for damages for putting an end to a contract with the plaintiffs for the improvement of its sidewalks, the only invalid part of the contract was its promise to pay in bonds, which it was not empowered to issue. Held, that the invalidity of that promise was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract. The court, said: "It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all."

In *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* (1885) 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094, the court was in doubt as to whether a railroad company which had operated a line under an ultra vires lease could be compelled to pay the lessor for the use of it. A decision upon the point being unnecessary under the circumstances, it was left unsettled. But the later rulings of this court have resolved the question in favor of the right of action. See Federal Cases cited at the beginning of this note.

In *Ft. Worth City Co. v. Smith Bridge Co.* (1893) 151 U. S. 294, 38 L. ed. 167, 14 Sup. Ct. Rep. 339, where the action was brought to recover on bonds stipulated to be given in payment for the construction of a bridge, the court said that, even if the statutory provision relied upon by the defendant "could be regarded as invalidating so much of the contract as provided that the consideration should be paid in bonds, which is not to be conceded, the company, having received benefits at the expense of the other contracting party, cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform," and would still L.R.A.1917A.

other class of cases is that which is indicated by the following statement in a leading case: "A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the

remain liable on its contract, otherwise within its lawful powers."

In *Dresser v. Traders' Nat. Bank* (1895) 165 Mass. 120, 42 N. E. 567, the court alluded to the question whether the plaintiff could maintain an action upon an implied contract to pay him the fair value of his services, but did not render any express decision upon the point, because it was not open upon the pleadings.

In *Valley R. Co. v. Lake Erie Iron Co.* (1888) 46 Ohio St. 44, 1 L.R.A. 412, 18 N. E. 486, the plaintiff, the Lake Erie Iron Co., agreed to accept a certain number of the shares of the defendant in payment of goods to be delivered by it. The court, having declared that the agreement was ultra vires, and that consequently no action could be maintained upon it in respect of goods delivered in pursuance of it, thus discussed the question whether the plaintiff could recover the value of the goods: "It is quite certain that the simple fact that the plaintiff was under no legal obligation to deliver the goods, the contract of subscription being void, is no ground for a recovery of their value against the defendant, although the plaintiff may have been ignorant of the law affecting the contract. Bishop Contr. §§ 615 and 681. To warrant a recovery in such case, it must further appear that the delivery was made in ignorance of the facts, or else that it was an involuntary one. . . . The delivery was a voluntary one, with full knowledge of the facts, which forbids a recovery of the value of the goods so delivered, unless some reason exists why corporations should be assisted against the consequences of their voluntary acts, in cases where private persons would not." Upon the facts this decision is manifestly inconsistent with those cited above, some of which, it will be observed, were of earlier date. It is evident that the principle upon which they were based was not brought to the attention of the court. The present writer ventures to express the opinion that the cases as to voluntary payments upon which it relied were not, properly speaking, relevant precedents with respect to a contract which was in substance a sale of goods, and that the conclusion reached was erroneous.

² *Gillette-Herzog Mfg. Co. v. Canyon County* (1898) 85 Fed. 396.

faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the de-

fendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."¹

¹ Central Transp. Co. v. Pullman's Palace Car Co. (1890) 139 U. S. 24, 60, 35 L. ed. 55, 60, 11 Sup. Ct. Rep. 478. The court continued thus: "The ground and the limits of the rule concerning the remedy, in the case of a contract ultra vires, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Mr. Justice Miller in a passage already quoted, where he said that the rule 'stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;' and that 'where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands.' Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 317, 30 L. ed. 94, 6 Sup. Ct. Rep. 1094." Reference was also made to the statement in Salt Lake City v. Hollister (1886) 118 U. S. 263, 30 L. ed. 178, 6 Sup. Ct. Rep. 1055, that in cases of contracts upon which corporations could not be sued because they were ultra vires, "the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use."

In Pullman's Palace Car Co. v. Central Transp. Co. (1897) 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, reversing (1896) 22 C. C. A. 246, 39 U. S. App. 246, 76 Fed. 401, the Central Company was held to be entitled to recover from the Pullman Company the value of the property transferred by it to that company when the lease in question took effect, with interest, as that property had substantially disappeared and could not be returned.

In Logan Nat. Bank v. Townsend (1891) 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496, a national bank refused to perform a contract made with the plaintiff to replace to him at the same or a less price certain bonds which he sold to it. In an action brought against the bank in a Kentucky court to recover the difference between the amount it paid for the bonds, and their value at the time they were demanded, it was held to be no defense that the bank had no authority, under its charter and the National Banking Act, to make the alleged agreement and purchase. See (1887) 8 Ky. L. Rep. 694, 3 S. W. 122. This decision was affirmed by the Federal Supreme Court. Harlan, J., said: The defendant "is not under a duty to surrender possession until re-

imbursed the full amount due to it; it has the right to hold the bonds as security for the return of the consideration paid for them; but when such amount is returned, or tendered back to it, and the surrender of the bonds is demanded, its authority to retain them no longer exists. And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and at the same time refuse to comply with the terms of purchase. If the bank's want of power under the statute, to make such a contract of purchase, may be pleaded in bar of all claims against it, based upon the contract,—and we are assuming, for the purposes of this case, that it may be,—it is bound, upon demand, accompanied by a tender back of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the National Banking Act."

In Citizens' Central Nat. Bank v. Appleton (1910) 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364, affirming (1907) 190 N. Y. 418, 32 L.R.A.(N.S.) 543, 83 N. E. 470 (which reversed (1906) 119 App. Div. 889, 105 N. Y. Supp. 1105), the action was brought by Appleton, the receiver of the Cooper Exchange Bank, against the Citizens' Central National Bank, the successor to the Central National Bank. The complaint in effect alleged that the Cooper Exchange bank had advanced to one Samuels \$12,000, relying upon the guaranty of the Central National Bank; that previous to the obtaining of this loan of \$12,000, Samuels agreed with the Central National Bank to pay to it \$10,000 of the \$12,000 so obtained, and the said loan was obtained by Samuels and was guaranteed by the Central National Bank, in order that it might obtain this sum of \$10,000 which was owed to it by the said Samuels before the transaction was consummated. Held by the Federal Supreme Court that even if the guaranty was assumed to be ultra vires, the dismissal of the action was improper, because it "need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank, whereby the latter, under the circumstances disclosed by the record, came under a duty to account to the former for the \$10,000 of the \$12,000 actually paid to Samuels at its request and on

Under this head special attention should be directed to the decisions which

its guaranty." In the judgment of the New York court of appeals it was remarked that "whatever the difference of view there may be as to the effect of ultra vires on corporate contracts, in no jurisdiction can a party retain what it has received under such a contract and refuse to perform the contract." The position was taken that the defendant's power to guarantee was limited by the extent of its interest in the subject matter of the guaranty, and that it was not authorized to guarantee the payment by one of its debtors of a larger sum in order that the bank might receive or retrieve a lesser sum. But it was held that the plaintiff was entitled to recover an amount representing that part of the loan which the defendant had used for its own recoupment. The court pointed out that, assuming the case to be controlled by the law of ultra vires as it prevails in Federal courts, and not by the local law, the imposition of liability was in accord with the decisions of the Federal Supreme Court.

In *Davis v. Old Colony R. Co.* (1881) 131 *Mass.* 258, 41 *Am. Rep.* 221, the court said, arguendo: "A corporation may indeed be bound to refund to a person, from whom it has received money or property for a purpose unauthorized by its charter, the value of that which it has actually received; for, in such a case, to maintain the action against the corporation is not to affirm, but to disaffirm, the illegal contract."

In *Whitney v. Leominster Sav. Bank* (1886) 141 *Mass.* 85, 6 *N. E.* 551, two persons named Stratton executed a promissory note to the Leominster Savings Bank, and the plaintiff and two other persons signed it as sureties. Subsequently the Strattons, for the purpose of securing this note and saving the sureties harmless, gave to the savings bank a mortgage of all their interest in two copartnerships. Acting under the power of sale in the mortgage, the savings bank went through the form of a sale of the mortgaged property, and it was bid in by the First National Bank of Leominster, the other defendant. The bill alleged that this was a pretended sale, made under an arrangement between the two banks and the said Strattons, whereby the property was to be transferred to the National Bank, to be held for the benefit of the said Strattons; that it was fraudulent as to the plaintiff; and that the National Bank received the property impressed with a trust in favor of the plaintiff. The court took the position that, assuming such an arrangement to have been made, its effect was to render the sale under the mortgage inoperative as a foreclosure of the plaintiff's claim to the property. The argument of the defendants' counsel, that they were not liable, because, if such an arrangement was made by the two banks, it was without consideration and was ultra vires, was rejected. "As they have taken and disposed of property on which, in equity and good conscience, the plaintiff has a lien, they

cannot defeat his claim and apply the proceeds to their own use, upon the ground that their act was illegal and ultra vires."

In *Interstate Hotel Co. v. Woodward & B. Amusement Co.* (1903) 103 *Mo. App.* 198, 77 *S. W.* 114, the action was held to be maintainable, since it was brought, not "to recover damages for a breach of the contract, but rather to recover for a breach of the implied promise of defendants to return to the plaintiff the money which it had expended in carrying out the contract up to the time of the repudiation."

In *Norton v. Derry Nat. Bank* (1882) 61 *N. H.* 589, 60 *Am. Rep.* 334, where it was held that no recovery could be had upon an ultra vires guaranty, the court said that the plaintiff might have amended his declaration by adding an appropriate count for the recovery of the land conveyed as part of the transaction, or its value if it had been sold. "The defendants cannot be permitted to repudiate the unauthorized contract, and retain the fruits of it."

In *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 *N. Y.* 305, *Selden, J.*, observed: "It has been repeatedly held by this court, that where corporations, by means of contracts or engagements prohibited by law, i. e., which are unauthorized by their charters, have obtained from other persons any money or other thing of value, while the contract itself is void and can never be enforced, the corporation may nevertheless be compelled, in a suit brought in disaffirmance of the contract and founded upon the equities of the case, to restore what it has obtained. This rule removes from corporations all temptation to engage in illegal transactions; and while it tends thus to promote the public policy of the state, it at the same time protects individuals from any gross injustice."

In *Carr v. National Bank & Loan Co.* (1901) 167 *N. Y.* 375, 82 *Am. St. Rep.* 725, 60 *N. E.* 649, affirming (1899) 43 *App. Div.* 101, 59 *N. Y. Supp.* 618, which affirms (1898) 23 *Misc.* 368, 52 *N. Y. Supp.* 61, and affirmed in (1903) 189 *U. S.* 426, 47 *L. ed.* 881, 23 *Sup. Ct. Rep.* 513, the plaintiff, who had purchased certain bonds from the defendant, was held to be entitled to rescind the transaction after having discovered that the defendant's president, Sherman, had misrepresented the value of the securities. The court said: "The question of ultra vires, which defendant raises, has no place in the case. The plaintiff did not know the defendant in the transaction, and she is not seeking to avail herself of anything that Sherman did for it. She asks to be restored to the possession of her property, of which she was unfairly deprived to the defendant's advantage, through its agent's misconduct, and upon the plainest principles of equity she was entitled to her judgment."

In *McVity v. E. D. Albro Co.* (1904) 90 *App. Div.* 109, 86 *N. Y. Supp.* 144, affirmed in (1905) 180 *N. Y.* 554, 73 *N. E.* 1126,

have affirmed the right of a corporation to recover money lent in pursuance of a

contract of which one of the incidents was the execution of an invalid secur-

the plaintiff, an employee of the defendant corporation, had lent his money to it, taking from it a promissory note payable upon demand. Afterwards he was induced to surrender that obligation upon the distinct representation by the defendant's president that certain stock which the defendant had offered to sell him was stock of the company, with a guaranty of a dividend of 6 per cent, and that the corporation had power to issue stock with such a guaranty. Relying upon this representation the plaintiff accepted the stock, delivered up the obligation of the company, and received what purported to be the stipulated guaranty. Held, that the plaintiff was entitled to rescind the purchase of the stock, and to receive back the obligation of the company, upon his delivery to it the stock which he had received.

In *Herring v. Cumberland Lumber Co.* (1913) 159 N. C. 382, 42 L.R.A.(N.S.) 64, 74 S. E. 1011, s. c. second appeal (1913) 163 N. C. 481, 79 S. E. 876, the plaintiff and his neighbors, who joined with him in an agreement to sell their timber to the Wallace Manufacturing Company, one of the defendants, were influenced in fixing the price of the same by the stipulation of the said company to construct a railroad, as they believed that, if the road was built the benefit they would derive from its operation would compensate them for the loss of the difference between the price charged by them for the timber and the real value thereof. Held, that the defendants could not repudiate their stipulation, and rely on its invalidity for the purpose of evading the payment of a reasonable price for the timber. If that stipulation was invalid, "the plaintiff, if participants criminis, is not in pari delicto. He can recover the amount of his loss without declaring upon the alleged illegal stipulation, and relief can be given without enforcing this part of the contract."

In *Wright v. Pipe Line Co.* (1882) 101 Pa. 204, 47 Am. Rep. 701, the court, after having quoted the statement in *Swan v. Scott* (1824) 11 Serg. & R. (Pa.) 164, that "the test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case," proceeded thus: The converse of this proposition is equally true: that where the plaintiff has made out his case without calling the illegal transaction to his aid, the defendant, who has enjoyed its benefits cannot set up the defense of ultra vires. In *Northampton County's Appeal* (1858) 30 Pa. 305, it was said by Porter, J.: "A man who has enjoyed a privilege has no right to say that because he ought not to have enjoyed it he will not pay for it. However unlawful the act, it would be unsound policy to give him this immunity."

In *Emigh v. Earling* (1908) 134 Wis. 565, L.R.A.1917A.

27 L.R.A.(N.S.) 234, 115 N. W. 128, where a national bank had taken over and carried on the business of a creamery company, with a view of securing payment of a debt owed to it by that company, the decision proceeded upon the ground that, even if the bank had no power to assume control of the business for such a purpose, it was bound to turn over money which belonged to the persons by whom it had been supplied with milk, and which had come into its possession while it was conducting the business. This decision was affirmed in *Rankin v. Emigh* (1910) 218 U. S. 27, 54 L. ed. 915, 30 Sup. Ct. Rep. 672.

In *Humboldt Min. Co. v. American Mfg. Min. & Mill Co.* (1894) 10 C. C. A. 421, 22 U. S. App. 334, 62 Fed. 356, relief was denied, on the ground that "no money or property was paid by the plaintiff to the guarantor defendant, and there is no way by which the parties can be restored to their condition before the contract was entered into and performed."

For other cases in which the right to bring suit on the footing specified in the text has been affirmed or recognized, see *Congress & E. Spring Co. v. Knowlton* (1880) 103 U. S. 49, 36 L. ed. 347 (installment of purchase price of corporate shares to be issued to increase the capital stock of the corporation, illegally or without authority, was allowed to be recovered back); *American Nat. Bank v. National Wall-Paper Co.* (1896) 23 C. C. A. 33, 40 U. S. App. 646, 77 Fed. 85 (bank bound to return securities, or account for their value); *Emmerling v. First Nat. Bank* (1899) 38 C. C. A. 399, 97 Fed. 739 (suit to recover value of securities turned over to national bank for a certain purpose,—verdict held to have been erroneously directed for the defendant on the ground of ultra vires); *Central R. & Bkg. Co. v. Farmers' Loan & T. Co.* (1901) 116 Fed. 700, affirmed in (1902) 52 C. C. A. 149, 114 Fed. 263 (holders of railroad bonds indorsed by Central R. & Bkg. Co. were held to be entitled to money in a sinking fund created for the redemption of the bonds by money paid over to the indorser by the company issuing them); *Richmond Guano Co. v. Farmers' Cotton Seed Oil Mill & Ginnery Co.* (1903) 61 C. C. A. 630, 126 Fed. 712 (purchasing company must, upon disaffirmance of contract of sale, retain goods received under it); *Central Trust Co. v. Terre Haute & I. R. Co.* (1904) 66 C. C. A. 433, 133 Fed. 371, affirming (1903) *Cox v. Terre Haute & I. R. Co.* (1903) 123 Fed. 439 (doctrine stated in the text was recognized by the court, arguendo); *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (1884) 19 Fed. 804 (railroad company held to be bound to account to another for sums received in excess of its proper share under a pooling contract); *Central Trust Co. v. Ohio Central R. Co.* (1885) 23 Fed. 306 (receiver of one company was directed to pay over amount found to be due to

ity.² This doctrine was much discussed in a well-known series of early New York

cases relating to certain transactions of the Utica Insurance Company, which

another under a pooling contract); *Harri-
man v. First Bryan Baptist Church* (1879)
63 Ga. 186, 36 Am. Rep. 117 (money paid
in pursuance of ultra vires contract for
hire of vessel was held to be recoverable);
Brennan v. Gallagher (1902) 199 Ill. 207,
65 N. E. 227, reversing (1901) 99 Ill. App.
81 (money deposited with union held to
be recoverable); *L'Herbette v. Pittsfield
Nat. Bank* (1894) 162 Mass. 137, 44 Am.
St. Rep. 354, 38 N. E. 368 (fact that de-
fendant's cashier made certain ultra vires
agreements at the time when the deposits
in question were received from the plain-
tiff did not entitle the defendant to retain
the money for its own use, or debar the
plaintiff from recovering it back); *Nashua
& L. R. Corp. v. Boston & L. R. Corp.*
(1895) 164 Mass. 222, 49 Am. St. Rep. 454,
41 N. E. 268 (action held to be maintain-
able for money received under contract for
joint operation of railroad by two com-
panies); *Kelly v. Biddle* (1901) 180 Mass.
147, 61 N. E. 821 (plaintiff entitled to re-
cover money paid in pursuance of a part-
nership agreement in which a company
participated); *Cogswell v. Rockingham Ten
Cents Sav. Bank* (1879) 59 N. H. 43 (set-
tlement of claims in insolvency proceed-
ings); *Hall v. Paris* (1879) 59 N. H. 71
(settlement of claims in insolvency pro-
ceedings); *Greeley v. Nashua Sav. Bank*
(1884) 63 N. H. 145 (recovery denied on
the ground that defendant had received no
benefit from securities delivered to em-
ployee); *Latulippe v. New England Invest.
Co.* (1913) 77 N. H. 31, 86 Atl. 361 (cor-
poration not entitled to retain money paid
for stock); *Chapman v. Comstock* (1890)
58 Hun, 325, 11 N. Y. Supp. 920, affirmed
in (1892) 134 N. Y. 509, 31 N. E. 876, but
this point was not adverted to (right to
recover deposit received in violation of the
restraining act was assumed); *CROWDER
STATE BANK v. AETNA POWDER CO.* ante,
1021, and the cases cited in the following
notes to this section, and in notes 1 and 2
to the next section.

For cases in which the principle of the
above cases was recognized with respect
to public corporations, see *Marsh v. Fulton
County* (1870) 10 Wall. (U. S.) 676, 19 L.
ed. 1040, where it was laid down that "if
a county obtains the money or property of
others without authority, the law, inde-
pendently of any statute, will compel re-
stitution or compensation." *Louisiana v.
Wood* (1880) 102 U. S. 294, 26 L. ed. 153;
Chapman v. Douglas County (1882) 107 U.
S. 348, 27 L. ed. 378, 2 Sup. Ct. Rep. 62.

In *Chapman v. Lynch* (1898) 156 N. Y.
551, 51 N. E. 275, an action for the recovery
of money was sought to be maintained
against the defendant upon the ground that
he was a director of the corporation which
owed it, and as such had, in company with
his associates, failed to file the annual re-
port required by the statute. The ques-
tions presented were whether, assuming

that the money had been delivered by the
plaintiff to the corporation as a deposit,
and was not payable until demanded, such
a contract was valid and authorized, and
whether it prevented the running of the
Statute of Limitations. The default in
filing the report had already occurred when
the deposit was made; but, under the al-
leged contract for deposit, it was contend-
ed that no action could be maintained
thereon until after demand had been made
and payment refused. The plaintiff thus
had it in his power to prevent the running
of the statute by neglecting to make a de-
mand for the money, and thus definitely
perpetuate the liability of the defendant
for the penalty. The contention of the
defendant was that, if there was a contract
that the money should be received by the
corporation on deposit, it was ultra vires,
unauthorized, and void, and that an action
as for money had and received was avail-
able to the plaintiff from the date of the
deposit. The court sustained the latter of
these contentions, and affirmed a judgment
for the defendant.

* A leading decision on this point is
White v. Franklin Bank (1839) 22 Pick.
(Mass.) 181, where the plaintiff was held
to be entitled to recover money deposited
with the defendant bank, although the de-
positor had received a cashier's certificate,
which was illegal, as containing a stipula-
tion for the payment of the money at a
future day certain. The court relied upon
Robinson v. Bland (1760) 2 Burr. 1077, 97
Eng. Reprint, 717, where in an action on
a bill of exchange given for money lent
and for money won at play, it was held
that the plaintiff was not entitled to re-
cover on the bill of exchange, because it
was void under the Gaming Act, but that
he might recover on the money counts for
the money lent, although it was lent at
the same time and place that the other
money for which the bill was given was
won. The court cited the *Utica* insurance
cases referred to in note 3, *infra*. It also
relied upon the ground that "this action
proceeds in disaffirmance of an executory
illegal contract, and was commenced before
the money which the defendants contracted
to pay was, by the terms of the contract,
payable; the plaintiff therefore had a right
to rescind the contract, or rather to treat
it as a void contract, and to recover back
the consideration money." The above case
was followed in *Atlas Bank v. Nahant Bank*
(1842) 3 Met. (Mass.) 581, when the il-
legal agreement was one of a like nature.

For other decisions of a similar purport
see *Williams v. American Nat. Bank* (1898)
29 C. C. A. 203, 56 U. S. App. 316, 85 Fed.
376 (loan held to be recoverable, although
certificate of stock given as collateral se-
curity was issued without authority);
Littlewort v. Davis (1874) 50 Miss. 403
(trustee of school funds, authorized to lend
them on a promissory note with good per-

had, in violation of the New York restraining act, carried on the business of discounting paper, exercising in respect thereto ordinary banking power. The position was taken that the securities given on such discounts were void, but that the money loaned could be recovered

by the company.³ Upon full consideration, these decisions were followed in two cases decided many years afterwards.⁴

Where the essential object of the claimant is to recover money paid in pursuance of the contract, he may resort either to an action for money had and

sonal sureties, lent them on the security of a deed, absolute in terms, but intended as a mortgage); *Tracy v. Talmage* (1856) 14 N. Y. 191, 67 Am. Dec. 132 (corporation entitled to recover reasonable value of stocks transferred); *Rome Sav. Bank v. Krug* (1886) 102 N. Y. 331, 6 N. E. 682, affirming (1884) 32 Hun, 270 (amount of loan recoverable by corporation even if the notes given for it were void); *First Nat. Bank v. Cornell* (1896) 8 App. Div. 430, 40 N. Y. Supp. 850 (loan recoverable, although the note of a third person given as security for it violated a statute).

In *Philadelphia Loan Co. v. Towner* (1839) 13 Conn. 249, where a company made a loan on legal consideration, and afterwards took a note as security, thereby contravening a provision of its charter, it was held that, though there could be no recovery on the note, the money lent might be recovered on the money counts. The court was unable to see how the note could have the effect of extinguishing the original cause of action, or in any manner contaminating it.

In *Curtis v. Leavitt* (1857) 15 N. Y. 97, a banking corporation in New York borrowed of bankers in Philadelphia certain sums of money, for which the borrower issued to the lenders time certificates of deposit, and also pledged its bonds as security for the payment of the certificates. The certificates were held to be illegal and void, and it was claimed that the bonds pledged to secure the certificates must fall with them. But it was held that, the loan being valid, the law, notwithstanding the form of the transaction, annexed the pledge to the debt for the money lent, and not to the void certificates. The bonds were accordingly enforced against the assets of the corporation. This decision was cited with approval in *Pratt v. Eaton* (1880) 79 N. Y. 449.

³ *Utica Ins. Co. v. Scott* (1818) 19 Johns. (N. Y.) 1; *Utica Ins. Co. v. Cadwell* (1829) 3 Wend. (N. Y.) 296; *Utica Ins. Co. v. Kip* (1829) 3 Wend. (N. Y.) 369; *Utica Ins. Co. v. Bloodgood* (1830) 4 Wend. (N. Y.) 652.

⁴ In *Pratt v. Short* (1880) 79 N. Y. 437, 35 Am. Rep. 631, the court said: "In view of the special language of the restraining act, and the specification of the consequences which should follow the unlawful discount of commercial paper, there is great force in the suggestion that the legislature regarded the particular penalty imposed, and the remedy by quo warranto or by an action in equity to restrain the exercise by a corporation of unauthorized powers, as L.R.A.1917A.

a sufficient protection against corporations or individuals unlawfully engaging in the business of discounting paper, and that it was not intended that they should also forfeit all claim to money loaned or advanced upon the prohibited security. . . . If the defendants avoid their indorsement, it is the plainest equity that they shall restore the money which they received on the faith of it." The court declined to accept the argument advanced, "that the loan or advance of the money, and the taking of the note with the indorsement as security therefor, constituted one single and indivisible act, incapable of separation, and that the transaction as a whole falls under the condemnation of the law, so that neither the corporation nor its assignees in bankruptcy have a remedy either upon the security, or to recover back the money advanced upon the void paper."

The above decision was cited as a controlling precedent in *Pratt v. Eaton* (1880) 79 N. Y. 449, reversing (1879) 18 Hun, 293. The P. Company, to which the defendant had executed his bond and mortgage to secure it for any indebtedness it had against him "upon any promissory note, bill of exchange, check, overdraft, or otherwise," lent him various sums of money upon the discount of his notes. The grounds upon which a suit for the foreclosure of the mortgage was held to be maintainable were thus stated: "The notes were void, but the company, by the express terms of the 11th section [of its charter might invest in] bonds and mortgages and other securities specified. There was a loan in this case, and this created an indebtedness to the bank, which was within the condition of the mortgage. The words, 'or otherwise,' in the declaration of trust, are broad enough to cover any debt which the company might hold against the mortgagor. The fact that the loan was made by way of discount of commercial paper, and upon the security of the notes as well as of the mortgage, does not vitiate the valid security. The substance of the transaction in respect to the mortgage was that it was taken to secure the loan, and not the notes, which at most were mere evidence of the loan."

These rulings seem to have destroyed the authority of the criticisms which had previously been passed upon the *Utica* insurance cases, on the ground that they implied an acceptance of the theory that the different parts of an entire illegal contract might be discriminated, and one part held valid, and the other void. *Tracy v. Talmage* (1856) 14 N. Y. 162, 67 Am. Dec. 132; *Curtis v. Leavitt* (1857) 15 N. Y. 9.

received, or to an equitable suit for an accounting.⁵ Numerous cases involving one or other of these classes of actions are collected in the footnote.⁶ The appropriate relief may also be decreed in some instances as an incident of an equitable suit for the avoidance of the contract and a declaration that the defendant is a trustee in respect of the money paid thereunder.⁷

In a case where a foreign corporation which had advanced money upon a draft issued by a New York bank was held to be entitled to recover it back, the ratio decidendi was, that the plaintiffs were not presumed to have notice of the New York statutes, and consequently stood "in precisely the same situation as

though the money had been paid by them under a mistake as to material facts."⁸

The obligation of a public corporation to restore money received for bonds issued in excess of its powers has been affirmed in several cases.⁹ But no relief is granted where they were issued in violation of an expressly prohibitory provision of a state Constitution.¹⁰

12. Same subject; right of action where the money sued for was borrowed or lent by the corporation in excess of its powers.

In many of the cases in which the availability of the remedy discussed under the preceding section has been affirmed, the action was brought for the

⁵ For a case in which this was explicitly laid down, see *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (1905) 102 Md. 335, 2 L.R.A.(N.S.) 887, 111 Am. St. Rep. 362, 62 Atl. 351.

In an Iowa case in which it was declared that, where an ultra vires contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account, *Twiss v. Guaranty Life Assn.* (1893) 87 Iowa, 733, 43 Am. St. Rep. 418, 55 N. W. 8, the word "account" seems to be used in its broader sense.

*** Action for money had and received.**

Logan County Nat. Bank v. Townsend (1891) 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496, affirming (1887) 8 Ky. L. Rep. 694, 3 S. W. 122 (National Banking Act "does not give a national bank an absolute right to retain bonds coming into its possession, by purchase, under a contract which it was without authority to make"); *Central R. & Bkg. Co. v. Smith* (1884) 76 Ala. 572, 52 Am. Rep. 353; *Brennan v. Gallagher* (1902) 199 Ill. 207, 65 N. E. 227, reversing (1901) 99 Ill. App. 81; *United States Brewing Co. v. Dolese & S. Co.* (1913) 259 Ill. 282, 47 L.R.A.(N.S.) 898, 102 N. E. 753; *Morville v. American Tract Soc.* (1877) 123 Mass. 129, 25 Am. Rep. 40; *Peterson v. People's Bldg. Loan & Sav. Assn.* (1900) 124 Mich. 573, 83 N. W. 606 (assumpsit by shareholder for money paid on a certificate for shares); *Interstate Hotel Co. v. Woodward & B. Amusement Co.* (1903) 103 Mo. App. 198, 77 S. W. 114; *Green v. Ashe* (1914) 130 Tenn. 615, 172 S. W. 293 (corporation entitled to recover money paid in pursuance of a contract for the purchase of its own stock); *Crutcher v. Nashville Bridge Co.* (1847) 8 Humph. (Tenn.) 403 (money paid in pursuance of a contract for the purchase of land held to be recoverable); *Northwestern Union Packet Co. v. Shaw* (1875) 37 Wis. 655, 19 Am. Rep. 781 (corporation entitled to recover money paid in advance on a contract of purchase).
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In *Burrows v. Niblack* (1808) 28 C. C. A. 130, 53 U. S. App. 712, 84 Fed. 111, where a bank had purchased the stock of another corporation, the court laid it down that, "the money having been unlawfully paid out, the bank had an immediate right of action to recover it in an action of assumpsit. It was not necessary to go into equity, nor to offer a return of stock."

In *Whitney v. Peay* (1862) 24 Ark. 22, it was held that money advanced on an illegal pledge might be recovered in an action on a quantum meruit. This is clearly a technical error.

Suit for accounting.

Aldrich v. Chemical Nat. Bank (1899) 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (1884) 19 Fed. 804; *Central Trust Co. v. Ohio C. R. Co.* (1885) 23 Fed. 306; *Pauly v. Pauly* (1895) 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* (1895) 164 Mass. 222, 49 Am. St. Rep. 454, 41 N. E. 268; *Greenville Compress & W. Co. v. Planters' Compress & W. Co.* (1893) 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879; *Manchester & L. R. Co. v. Concord R. Corp.* (1889) 66 N. H. 100, 9 L.R.A. 689, 3 Inters. Com. Rep. 319, 49 Am. St. Rep. 582, 20 Atl. 383; *Standard Oil Co. v. Scofield* (1885; Sup. Ct. Spec. Term) 16 Abb. N. C. (N. Y.) 372; *Moore v. Swanton Tanning Co.* (1888) 60 Vt. 459, 15 Atl. 114.

⁷ *Hamilton v. Savannah, F. & W. R. Co.* (1892) 49 Fed. 412.

⁸ *Bank of Chillicothe v. Dodge* (1850) 8 Barb. (N. Y.) 233.

⁹ *Parkersburg v. Brown* (1882) 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442 (plaintiff entitled to call for reconveyance of land); *Read v. Plattsburgh* (1882) 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208; *Paul v. Kenosha* (1867) 22 Wis. 272, 94 Am. Dec. 598.

¹⁰ *Litchfield v. Ballou* (1885) 114 U. S. 190, 29 L. ed. 132, 5 Sup. Ct. Rep. 820.

recovery of money borrowed by the company in excess of its powers, either as regards amount or in some other respect.¹ In other cases the right of recovery was affirmed with regard to a corporation which made an ultra vires loan to the defendant.² It is obvious, however, that whenever contracts of these descriptions are concerned, the virtual

effect of allowing an action to be maintained as for money had and received is the enforcement of the contracts themselves. Considered merely with reference to the test of technical correctness in pleading, this objection is not very serious in jurisdictions where the liberal rule of modern systems of procedure has been adopted. But it is impossible to

¹ *Manville v. Belden Min. Co.* (1883) 5 McCrary, 391, 17 Fed. 425 (demurrer sustained to answer alleging ultra vires in an action in which the plaintiff sought to recover, as "money advanced at the special instance" of the defendant company, a loan which exceeded the amount which it was authorized to borrow); *Whitney v. Peay* (1862) 24 Ark. 22; *Williams v. Bank of Commerce* (1894) 71 Miss. 858, 42 Am. St. Rep. 503, 16 So. 238 (money borrowed for foreign corporation which had not complied with the statutory prerequisites to doing business); *Connecticut River Sav. Bank v. Fiske* (1880) 60 N. H. 363 (decision possibly to be classified under this head, though the ratio decidendi is not entirely clear); *International Trust Co. v. Davis & F. Mfg. Co.* (1899) 70 N. H. 118, 46 Atl. 1054; *Anthony v. Household Sewing Mach. Co.* (1889) 16 R. I. 571, 5 L.R.A. 575, 18 Atl. 176; *Crutcher v. Nashville Bridge Co.* (1947) 8 Humph. (Tenn.) 403. See also *Vanatta v. State Bank* (1858) 9 Ohio St. 27, § 14, note 3, *infra*.

In *Aldrich v. Chemical Nat. Bank* (1899) 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498, where the money in question had been obtained under a loan negotiated by the president of the F. Bank, it was held that, as the money borrowed by the defendant, a national bank, had been used in its business and for its own benefit, the borrower, having enjoyed the fruits of the transaction could not avoid accountability to the lending bank, even if it were true, as contended, that the borrower could not, consistently with the law of its creation, have itself effected a loan of the money. The court said: "There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing."

In *Farmers' Bank v. Burchard* (1860) 33 Vt. 346, the court thus states its conclusions: "If, then, it is to be held, as we think it should be, that the principals, Smith, Dwight, & Company, were liable for the money loaned to them, and that such liability might be enforced by an action of assumpsit counting on the implied promise to pay, in our opinion it might as well be enforced upon a security, as a note, covering that liability, and expressly promising to pay. It would follow, of course, that a surety upon such note would be bound to the same extent as such principal, so far as depended on the validity and sufficiency of the consideration."

In *Standard Sav. & L. Asso. v. Aldrich* L.R.A.1917A.

(1908) 20 L.R.A.(N.S.) 393, 89 C. C. A. 640, 163 Fed. 216, the court made the following remarks: "Conceding the utter illegality of the contract, the appellants in the court below and here say that they abandon and repudiate the contract and sue only to recover money which the appellee association received, and which, *ex æquo et bono*, it ought [not] to retain. The principle to which the appellants appeal is perfectly plain and well settled. Although the managers of the Michigan Association had no power to borrow money for such purposes, yet, to the extent that the money has not been expended, or has been paid out in discharge of legitimate obligations of the association, it would be unjust and inequitable that it should not be held accountable. This right of recovery is based upon an implied promise to return the money or property so received, or to make compensation to the extent that it has actually benefited by its application to the discharge of actual liabilities incurred in the legitimate course of business." Recovery was denied on the ground that no direct benefit had been received by the corporation. For another case in which the action failed for the same reason, see *Travelers' Ins. Co. v. Johnson City* (1900) 49 L.R.A. 123, 40 C. C. A. 58, 99 Fed. 666.

In *Keokuk v. Ft. Wayne Electric Co.* (1894) 90 Iowa, 67, 57 N. W. 680, it was laid down broadly that "no court has ever decided that a corporation may borrow money, and keep it because it was forbidden by its charter to borrow money." That this assertion is not strictly correct even as regards the American courts is shown by the case cited in § 14, note 2, *infra*. It is, of course, quite defective as a statement of the purport of the English authorities. See §§ 4-6, *supra*.

² In *Leigh v. American Brake Beam Co.* (1903) 205 Ill. 147, 68 N. E. 713, affirming (1903) 107 Ill. App. 444, the declaration in an action brought by a corporation which had lent money to certain persons and taken their notes therefor contained special counts on the notes and the common money counts. The court after stating that no action could be maintained upon the contract, said (p. 152): "That rule of law, however, does not prevent a recovery from the defendant of the moneys of the plaintiff received by him. Although a party is not liable to pay according to a contract which is ultra vires, that fact is not permitted to work injustice where the law can afford a remedy without enforcing the illegal contract, and the

ignore the consideration that, in cases where the corporation is the defendant, innocent shareholders may frequently be prejudiced if the mere fact that it had received the benefit of the money is regarded as rendering it liable therefor. So far as the present writer knows, the difficulty thus suggested has not been discussed by any of the courts which have affirmed the right of action.

In one case the right to recover a loan was denied on the ground that "a recovery under a common count would be an enforcement of a void contract as effectively as if it had been under a special count, setting forth the contract."² The position thus taken is in effect similar to that of the English courts; which, however, do not base their views on simply formal grounds. See §§ 4-6, *supra*.

13. Rule where the corporation is asking to be relieved from the obligations of the contract.

In most of the cases in which recovery has been allowed independently of the contract, the corporation was the defendant, either actually or in effect. But it is clear that the considerations upon which the courts proceeded in this class of cases are equally controlling where the corporation is the moving party. Its own claim will not be enforced unless it makes such restitution or pays such compensation to the plaintiff as may be

courts will give relief where it can be given independently of the contract. It would be unjust to hold that one who has received money or property under a contract which is *ultra vires* need not account for it because the contract was illegal, but the law implies a contract to return what has been received. Where a contract is not *malum in se* or *malum prohibitum*, and it has been executed or benefits have been received, the party benefited, whether the corporation or individual, will not be permitted to retain the fruits of the transaction without compensation."

In *Lester v. Howard Bank* (1870) 33 Md. 563, 3 Am. Rep. 211, a claim for a debt due upon a loan made by a bank in violation of its charter was allowed, the court saying that in cases "arising under contracts made in violation of a statute, . . . it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it."

See also *Santa Cruz v. Wykes* (1913) 120 C. C. A. 485, 202 Fed. 357.

² In *Grand Lodge v. Waddill* (1860) 36 Ala. 313.

¹ *New Castle Northern R. Co. v. Simpson* (1884) 21 Fed. 533, s. c. subsequent hearing (1885) 23 Fed. 214 (fair compensation for work done under contract was awarded in L.R.A.1917A.

deemed equitable under the circumstances. The same rule is applicable whether the redress sought is the annulment of the contract,¹ or the recovery of a debt,² or an injunction to restrain proceedings against itself.³

14. Operation of the principle, in part delicto.

In an early Massachusetts case one of the grounds upon which the claimant was held to be entitled to recover money received by the defendant under an illegal contract of deposit was that, "although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not in *pari delicto*. . . . Where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times." It was stated that the rule is different "where the illegality of the contract arose from any moral turpitude."¹

In an early Ohio case, where it was held that a corporation could not, in an action of *assumpsit* against the acceptor of bills discounted by it, recover for the money loaned even upon the common counts, the reason assigned was that, "as

a suit in which it was annulled at the instance of the corporation); *Madison Ave. Baptist Church v. Baptist Church* (1878) 73 N. Y. 82 (corporation required to restore money paid by purchaser of property illegally conveyed).

² *Hall v. Paris* (1879) 59 N. H. 71 (assignee of savings bank in liquidation was required to set off against a debt due from the defendant the amount of a special deposit made by him).

Compare also *Ely v. Oakland Circuit Judge* (1910) 162 Mich. 466, 125 N. W. 375, 127 N. W. 769, where, in mandamus proceedings to compel a circuit judge to enter an order for the assessment of the members of an insurance company to pay losses, it was held that the holders of *ultra vires* policies were entitled in equity to the return of the unearned portion of premiums paid.

³ *Southern Bldg. & L. Asso. v. Casa Grande Stable Co.* (1900) 128 Ala. 624, 29 So. 654 (suit to enjoin foreclosure of *ultra vires* mortgage not maintainable unless complainant offers to do equity by restoring to defendant the amount remaining due thereon).

¹ *White v. Franklin Bank* (1839) 22 Pick. (Mass.) 181. For further information as to this case, see § 11, note 2, *supra*.

to the money actually received by the defendant, both parties were in *pari delicto*.”² But this decision was rendered by a divided court; and, although it was not categorically disapproved in a later case in which it was criticized, the comments made upon it have considerably abridged its authority as a precedent.³

The ratio decidendi in some of the New York cases was the “well-settled

principle that where money is paid by one of two parties to the other on an illegal contract, in a case where they may be considered as *particeps criminis* and in *pari delicto*, an action cannot be maintained after the contract is executed to recover the money back again, for in *pari delicto potior est conditio defendantis*.”⁴ In other cases decided in this state, the action was held to be maintain-

² *Miami Exporting Co. v. Clark* (1844) 13 Ohio, 1. The court reasoned thus: “It has been said, with much propriety, that it is wrong for the defendant to refuse a compensation for the money actually received. But, with equal propriety, it may be said to be wrong in the plaintiff to do what the law forbids. Both plaintiffs and defendant were violators of the law,—the one in loaning, and the other in receiving, on an illegal contract. Can the transaction be dissected so as to enable us to separate the good from the evil, to reject the bad, and enforce the remainder? The money was all received at once; was a single transaction, and the whole contract is alike tainted with the fraud and illegality. Again, the parties made their own contract. True, it was void for want of capacity or power in the plaintiff to make it; void because it was a fraud upon the law continuing the plaintiff’s existence as a bank. In this view of the case can it be seriously contended that the law will make out of their illegal contract a legal one? that it will imply a contract differing substantially from the express contract made by them? Clearly this cannot be.”

In the earlier case of *Spalding v. Bank of Muskingum* (1841) 12 Ohio, 544, the ground upon which it was held that money paid on a usurious contract could not be recovered back was that both parties were in *pari delicto*.

³ *Vanatta v. State Bank* (1858) 9 Ohio St. 27. The second of the two aspects under which the case was presented was thus dealt with: “The answer shows the transaction to have been, not the discounting of a valid business note of a third party, but in fact a loan of money, evidenced by a note drawn in a form which the law prohibited, and which was void for want of power in the bank to receive it in that form. The substantial contract of the parties was untainted with usury or any other illegality: the sole vice was in the negotiable form of the note. As commercial paper this note was utterly void; the bank could maintain no action upon it; and the statute prohibited its assignment, even if valid, except for the use of the bank, now, can the defendant be permitted to claim that this void note, in respect of which they stand *pari delicto* with the bank, shall operate as a discharge and satisfaction of a *bona fide* indebtedness for money loaned?” The court then made the following comments upon the earlier case: “The vice in that case was usury, which tainted not

only the paper sued upon, but the contract of loan itself. Independent of the note, the contract was one which the Miami Exporting Company had no power to make. But here, as we have said, everything is legal, except the form of the paper. In that case, a recovery could not have been had if no note had been taken, but here it is clearly otherwise. . . . We think the whole object of the requirement of the statute as to the form of discounted paper is accomplished, and indeed can only be attained, by holding that securities, taken in a prohibited form, are simply void, and do not affect the independent rights or liabilities of the parties. The mischief intended to be remedied is thus guarded against while the *bona fide* assets of the bank are preserved for the benefit of bill holders and creditors. A party should not be permitted to plead his own violation of the law as a discharge from legal obligation to pay an honest debt. The authorities are numerous, both in this country and in England, in support of the principle that money loaned on a written security which the statute makes void may be recovered in an action on the common counts. Indeed, I am aware of no authority to the contrary, where the vice of the paper is merely in its form.”

⁴ *Knowlton v. Congress & E. Spring Co.* (1874) 57 N. Y. 518. There an action brought for the recovery of money paid by a trustee of the defendant in pursuance of a subscription for stock illegally issued was held not to be maintainable. The contention of counsel that the plaintiff was not in *pari delicto* with its defendant was rejected for reasons thus stated: He was “an active participant and agent in the origin and consummation of the unlawful scheme, in the preparation of the subscription agreement, and in procuring signatures thereto, and nothing appears to have been done for the purpose of carrying out those objects without his approbation and consent. The defendant is an artificial body, acting only as moved by its trustees or corporators and stockholders, having no will or capacity to act except through their action and instrumentality; and, although it is liable for all the legal consequences of its transactions, done under their direction and authority, it appears to be a perversion of every rule and principle in determining the relative culpability or fault of parties, to say that a corporation thus acting and impelled to such action is more culpable than a living, intelligent trustee, who was

able upon the ground that, under the circumstances in evidence, the claimant was not in *pari delicto* with the defendant corporation.⁵ As bearing upon the evolution of the law in that state, these cases are interesting for the reason that, if they had been presented at a some-

what later date, it would probably have been argued that the defendants were estopped under the circumstances from alleging the invalidity of the transactions impeached. Such a contention would presumably have been rejected on the ground that the invalidity was the

a party moving and active in causing the action to be had; and, in this connection, I will add, that the proposition or point of the plaintiff's counsel, that 'the contract was *ultra vires*,' and, therefore, the corporation was the more guilty party, is not sound. No living or artificial body is authorized to do an illegal act, and an individual is no less guilty in doing what is unlawful than an inanimate or artificial body deriving its existence from legislative action."

In *Cunningham v. Massena Springs & Ft. C. R. Co.* (1892) 63 Hun, 439, 44 N. Y. S. R. 723, 18 N. Y. Supp. 600, affirmed in (1893) 138 N. Y. 614, 33 N. E. 1082, the plaintiff had, in pursuance of a contract with Foster, the contractor in chief for the construction of the defendant's road, built a pile bridge and a small piece of road, which were beyond defendant's line, but supposed by plaintiff to be a part of it. The defendant furnished materials for the work and made certain payments thereon. The ground upon which the action was held to be maintainable was that the plea of *ultra vires* in respect of the making of the contract was not available after the defendant had gone into possession of the bridge and piece of road. But the court, citing the above case as a precedent, added: "Were it otherwise, however, if plaintiff could not enforce the contract as to the bridge, because beyond the power of defendant to make it, yet defendant, having paid \$1,857.49 on the illegal contract, could not recover the said sum of the plaintiff. . . . Hence, if it were the fact that, for want of power to make the contract on the part of defendant, plaintiff could not recover a part of the sum allowed by the referee, it would only be the amount allowed for the small part of defendant's road between the bridge and defendant's line,—two or three hundred dollars."

⁵ In *Tracy v. Talmage* (1856) 14 N. Y. 162, 67 Am. Dec. 132, where the vendor of stocks to a banking corporation agreed by the contract of sale to receive, and did receive, therefor notes, payable at a future day, which the corporation was not authorized to make, and from issuing which it was prohibited under a penalty, the vendor was held to be entitled to recover the value of the stocks. The court, after having pointed out that the issuance of the certificates in question was a violation of §§ 3, 6, and 7 of the act concerning unauthorized banking (1 Rev. Stat. 712), and that the penalties of the statute were imposed exclusively upon the corporation violating the provisions of the act, and upon its officers and members, proceeded thus: L.R.A.1917A.

"So far, therefore, as the defense is based upon a violation of the restraining act, there is that statutory designation of the guilty party upon which most of the cases to which I have referred are made to rest. But it is obvious that the general principle for which I contend applies equally to that branch of the defense which rests upon the ground that the act of the banking company, in issuing the notes, was *ultra vires* and against public policy. The imposition of the penalties for a violation of the restraining law upon the corporation alone does not make it the guilty party, but it is simply evidence that the legislature so regarded it; and the reasons are equally strong for fixing the principal guilt upon the same party where its acts merely violate the principle of public policy. Although persons dealing with corporations are, for certain purposes, presumed to know the extent of their corporate powers, yet this is by no means a safe rule by which to measure the moral delinquency of the respective parties. To me, therefore, it seems plain, that whether we regard the act of the Trust & Banking Company in issuing the certificates in question as a violation of the restraining law, or as simply *ultra vires*, or as against public policy, the corporation is to be regarded as comparatively the guilty party."

In *Curtis v. Leavitt* (1857) 15 N. Y. 9, two banks in Philadelphia had lent the banking corporation which purchased the stocks mentioned in *Tracy v. Talmage* (N. Y.) supra, a sum of money, to be repaid in instalments, and had taken its post notes. These notes, being within the prohibition of the act of May 14th, 1840, against time paper, it was assumed that they were void. But collateral securities were at the same time pledged to the lenders, and if the whole contract was illegal or was disaffirmed, the title to those securities would be lost, and they were in fact claimed by the receiver of the company for the benefit of other creditors. Held, that the lenders were not partakers in the offense committed by the borrowing bank in issuing its post notes, and consequently that they were not without remedy. The further question was then considered, whether the remedy was confined to a disaffirmance of the whole contract; in other words, simply to an implied *assumpsit* for money had and received. The court decided that the contract was valid in all its parts except the prohibited post notes. This conclusion sustained the loan, the obligation to repay at the times agreed on, and the pledge of the collateral securities. In respect to the innocent party, the inval-

effect of an expressly prohibitory provision.⁶ In two cases, one decided in New York and the other in Illinois, the right of recovery was referred both to the theory that the parties were not in *pari delicto*, and to the principle of estoppel.⁷

It is obvious that the delinquent corporation itself cannot "invoke the aid of the doctrine that the legislature may prohibit the contract and punish the guilty

parties, and yet leave the contract to stand in favor of innocent parties not included in the terms of the prohibition."⁸

It has sometimes been laid down that the doctrine in *pari delicto* is not applicable in cases where ultra vires contracts are concerned, but merely in cases where the contracts are in violation of some positive law, or involve moral turpi-

idity of the notes was regarded as a voidness merely, and not as a contamination infecting an entire contract which was in all other particulars lawful.

In *Sacketts Harbor Bank v. Codd* (1858) 18 N. Y. 240, the defendant, an individual banker, under the general banking act of 1838, received from the plaintiff, an incorporated bank, two sums in Canada bank bills, at an illegal rate of discount. In both instances the bills were received for the purpose of sending them to Canada for redemption, and this object was known to the plaintiff. Held, that an action might be maintained on the drafts exchanged for the checks which the defendant had given for the price of the bills. The court returned a negative answer to the question which it declared to be involved, viz., "whether a private citizen, lawfully holding a foreign bank note, and paying or delivering it to a bank or banker within this state, not intending it to go into circulation, but with the expectation and understanding that it is to be sent to the maker for redemption, is to be deemed an offender against this statute, on the ground that the receiving bank exacts of him a greater discount than it is allowed to take." The ratio decidendi was that "the language in which the offense is defined and the penalty declared evidently does not include the customer making the deposit or delivering the notes. No degree of guilt, therefore, attaches in such a case to anyone except the corporation and its agents, or the individual banker, receiving the notes at the prohibited rate of discount. . . . The defendant, in exacting too high a rate of discount, was a public offender. But the offense was strictly statutory. It resided in the act of taking the notes at the prohibited rate, and the criminality rested on him alone. So also does the punishment. The plaintiff has forfeited nothing, because the law does not adjudge him to be a sharer in the guilt." *Selden, J.*, dissented on the ground that, although the plaintiff was entitled to recover the value of the bills as upon an implied assumption, the contract itself could not be set up as establishing that value.

In *Oneida Bank v. Ontario Bank* (1860) 21 N. Y. 490, it was held that a person who had taken the illegality issued post-dated drafts of a bank to which he had lent money had not thereby become a public offender, in such a sense as to preclude him from recovering his loans.

The principle applied in the above cases was cited with approval by Mr. Justice L.R.A.1917A.

Hunt, in his concurring opinion in *Nashville v. Ray* (1873) 19 Wall. (U. S.) 484, 22 L. ed. 171, and held to furnish a sufficient ground for allowing recovery on municipal bonds. He laid it down that, even though it should be assumed that their reissue was "not ultra vires merely, but was positively prohibited by law, the city was still responsible to the holder of the checks for the money it had received and still retained." In *Perkins v. Boothby* (1880) 71 Me. 91, this view was accepted as correct.

⁶ See § 44 of the note to *Creditors' Claim & Adjustment Co. v. Northwest Loan & T. Co.* ante, 837.

⁷ In *First Nat. Bank v. Cornell* (1896) 8 App. Div. 427, 40 N. Y. Supp. 850, *Tracy v. Talmage* was cited as an authority for holding the plaintiff to be entitled to recover a loan to the corporation of which the defendants were directors. The court said: "The guilty party, the one whose act was in direct violation of the law, was the corporation, which, through its treasurer, took the note instead of money for the stock which this same treasurer had purchased, and the only sense in which the plaintiff can be said to be in *pari delicto* was in taking a note thus executed, with knowledge of the circumstances attending its execution. This hardly makes the plaintiff equally guilty with the maker, but it rather presents a case in which the court may afford relief to the party whose guilt or responsibility is comparatively insignificant." A second and distinct ground assigned for the decision was that the corporation had received the benefits of the contract.

In *Watertown F. Ins. Co. v. Rust* (1891) 40 Ill. App. 119, affirmed in (1892) 141 Ill. 85, 30 N. E. 772, a foreign insurance company was held liable to a person who did not know when he received the policy in suit that the company had not complied with the prescribed conditions precedent to doing business in the state in which the policy was issued.

⁸ *Bank of Salina v. Alvord* (1865) 31 N. Y. 473, where, in an action on drafts discounted in violation of an express statutory provision limiting the rate of interest, the court thus stated its conclusions: "The contract was one and entire, and the illegal element introduced into it vitiated it altogether. The substance of the agreement was to loan to the borrowers a sum of money, provided they would pay interest at 7 per cent, and the principal sum within sixty-three days, and secure their agree-

tude.⁹ This view necessitates an adoption of the theory that, for the purposes of the maxim, there is an essential distinction between contracts which are expressly prohibited and those which are merely prohibited by implication. Such a theory seems to be untenable on general principles. It is also inconsistent with the language used in the case reviewed under the preceding paragraph,¹⁰ and with the decision cited below.¹¹ It is important to notice, however, that a similar distinction has been predicated by some courts in respect of the applicability of the doctrine that the fact of a

corporation having accepted the benefits of an ultra vires contract precludes it from setting up the plea of invalidity.

In two New York cases the contention that equitable results can be achieved without the aid of the doctrine of estoppel, because restitution or compensation can be procured in an action brought in disaffirmance of the invalid contract, has been met with the argument that the allowance of such a remedy necessarily violates the principle now under discussion.¹² But the fact that an action of this character has been very generally held to be maintainable is sufficient to

ment by these drafts; and in pursuance of this agreement the loan was made and the drafts taken. To recover upon the drafts in suit the bank must rely upon this agreement; and by recovering, it reaps the fruits of the illegal contract. . . . I think, also, that the loan under the contract proved was illegal, as well as the security taken. The object of the statute was to protect borrowers against the oppressive exactions of banks, and the policy of the law would be defeated by holding that the plaintiffs could recover the money loaned."

⁹ *Maryland Hospital v. Foreman* (1868) 29 Md. 524. In this case the following rule was laid down: "The contract in all such cases will be regarded as void, and the party who delivered the property or advanced the money to such corporation will be entitled to his legal remedy, not founded upon, but in repudiation of, the contract, to recover the property or the money from the corporation, upon the principle that it had acquired no right or title to either under the contract."

See also *Kraniger v. People's Bldg. Soc.* (1895) 60 Minn. 94, 61 N. W. 904, where it was held that there was no delictum in a case where an excessive borrowing was involved.

¹⁰ The conclusion of the passage quoted in note 5, supra, from the opinion in *Tracy v. Talmage*, may fairly be said to show that the court regarded it as being immaterial for the purposes of the decision, whether the transaction was considered as a violation of a prohibitory law or simply as ultra vires. In the later cases which treated this decision as a controlling authority nothing was said that indicates that this part of the opinion was disapproved.

¹¹ In *Herrington v. Cumberland Lumber Co.* (1912) 159 N. C. 382, 42 L.R.A.(N.S.) 64, 74 S. E. 1011, s. c. second appeal (1913) 163 N. C. 481, 79 S. E. 876, the reason assigned for allowing the plaintiff to recover the reasonable value of a commodity sold in consideration of the performance of an ultra vires contract was that he was not in pari delicto with the defendant.

¹² In *Bissell v. Michigan S. & N. I. R. Cos.* (1860) 22 N. Y. 258, Chief Justice Comstock made the following remarks: "It is also L.R.A.1917A.

said, in order to render this doctrine [i. e., ultra vires] less offensive to the reason and conscience, that the innocent dealer may, upon the voidness of the contract and a disaffirmance of it, recover back the value or consideration with which he has parted. This position necessarily concedes that the corporation, as a legal person, made the unauthorized contract, and received the money, or value, under and according to it; thus overthrowing the main objection to its liability to respond directly upon the contract. It also concedes the innocence of the other contracting party; thus, according to all the analogies of the law, refuting the only other objection (illegality) on which the absolute invalidity of such dealings is claimed to rest; for, surely, after conceding that the corporation actually made the contract, it will not be contended that it can set up that it ought not to have made it, against an innocent person who has given up his money or property on the faith of the same contract."

In *Bath Gaslight Co. v. Claffy* (1896) 151 N. Y. 24, 36 L.R.A. 664, 45 N. E. 390, the court said: "It has been suggested, to avoid the apparent injustice which would result from holding that there could be no recovery on the contract for past-due rent, that there might be a remedy on an implied contract to pay the value of the use of the property. But if the express contract was illegal in a proper sense, and the parties to the lease were guilty of a public wrong, so as to preclude a court of equity to entertain jurisdiction on the application of a lessor to be relieved from the lease and to be restored to the possession of the leased property, as was held in the case of *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* (1892) 145 U. S. 393, 36 L. ed. 738, 12 Sup. Ct. Rep. 953, then surely it would be a mere evasion and would be inconsistent with legal principles for the court to imply a contract from the occupation under the illegal lease to relieve the wrongdoer from the dilemma into which he had voluntarily placed himself. We think the rule which should be applied is that the lessee is bound by the contract so long as he remains in possession."

show that the preponderance of judicial opinion is decidedly unfavorable to the view thus advanced.

15. Action based upon breach of duty to use reasonable care.

In a leading New York case, in which a passenger injured while traveling on a train which was then being operated on a line outside the territorial limits within which the defendant was authorized to do business was held to be entitled to recover damages, Selden, J., was of opinion that such recovery although not warranted on the ground of an estoppel, as argued by Comstock, Ch. J., might properly be allowed for reasons thus stated: "The plaintiff's claim . . . rests not upon his contract, but upon the right which every man has to be protected from injury through the carelessness of others. It has the same legal foundation as that of one who has been injured by the negligent driving of some person upon the public highway, or who has been run over by a train of cars, when crossing the railroad track. The duty to observe care in these cases arises, not upon any contract, but from the obligation which rests upon all persons, whether natural or artificial, so to conduct as not

through their negligence to inflict injury upon others. . . . It may be said that the plaintiff, by consenting to travel in the defendants' cars, became a participant in their unlawful conduct, and hence is not entitled to recover; but for this position there is not a shadow of authority. The law offended against by entering into the illegal contract in this case is a law of restriction upon the defendants, and not upon the plaintiff. The implied prohibitions which were violated rested solely upon them. There was no law prohibiting the plaintiff from traveling in their cars. I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the other party is to be treated as comparatively innocent, and may have relief against the more guilty party even in an action *ex contractu*. If, then, he is entitled to enforce a mere equity against the other party, a *fortiori* may he claim redress for injuries consequent upon their tortious acts."¹

¹ Bissell v. Michigan S. & N. I. R. Cos. (1860) 22 N. Y. 305. For some comments upon these remarks of the learned judge, see § 2, note 3, supra. C. B. L.

IOWA SUPREME COURT.

MRS. B. P. BALLAGH

v.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Appt.

(— Iowa, —, 155 N. W. 241.)

Insurance — accident — blood poisoning.

1. The infection of a wound with streptococci causing blood poisoning and death does not prevent the wound from being the direct cause of death without intervening cause within the meaning of an accident insurance policy.

For other cases, see *Insurance*, VI. b, 3, *et*, in *Dig.* 1-52 N. S.

Same — provision for blood poisoning — exclusiveness.

2. Full liability on an accident insurance policy cannot be avoided in case of death from blood poisoning resulting by infection of a wound which was within the terms of the policy, by the fact that the policy provides that there shall be no liability for death resulting from infection, except that whenever as a direct result of an injury

the skin has been abraded, and there shall be introduced into the system through said abrasion and by the very instrument causing the abrasion, any specific bacteria which shall produce blood poisoning, the insurer's liability shall be only a small percentage of the face of the policy.

For other cases, see *Insurance*, VI. c, 2, in *Dig.* 1-52 N. S.

(December 18, 1915.)

A PPEAL by defendant from a judgment of the District Court for Jasper County in plaintiff's favor in an action brought to recover the amount alleged to be due on an accident insurance policy. Modified.

The facts are stated in the opinion.

Messrs. Dunshee & Haines, for appellant:

The testimony of the plaintiff failed to establish that the death of plaintiff's decedent resulted directly and without intervening cause from the injury, even in the strict legal sense of the terms.

Delaney v. Modern Acci. Club, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; Omberg v. United States Mut. Acci. Asso. 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; Martin v. Equitable Acci. Asso. 61 Hun, 467, 16 N.

Note. — As to liability on accident policy for sickness or death caused by blood poisoning, see annotation following this case, post, 1056. L.R.A.1917A.

Y. Supp. 279; *Bacon v. United States Mut. Acci. Asso.* (Stedman v. United States Mut. Acci. Asso.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; *National Ben. Asso. v. Grauman*, 107 Ind. 289, 7 N. E. 233; *Isitt v. Railway Passengers Assur. Co. L. R. 22 Q. B. Div. 504*, 58 L. J. Q. B. N. S. 191, 60 L. T. N. S. 297, 37 Week. Rep. 477; *Winspear v. Accident Ins. Co. L. R. 6 Q. B. Div. 42*, 50 L. J. Q. B. N. S. 292, 43 L. T. N. S. 459, 29 Week. Rep. 116, 45 J. P. 110; *Lawrence v. Accidental Ins. Co. L. R. 7 Q. B. Div. 216*, 50 L. J. Q. B. N. S. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 781; *Carr v. Pacific Mut. L. Ins. Co.* 100 Mo. App. 602, 75 S. W. 180; *Commercial Travelers' Mut. Acci. Asso. v. Fulton*, 24 C. C. A. 654, 45 U. S. App. 578, 79 Fed. 423; *National Masonic Acci. Asso. v. Shryock*, 20 C. C. A. 3, 36 U. S. App. 658, 73 Fed. 774; *Modern Woodmen Acci. Asso. v. Shryock*, 54 Neb. 250, 39 L.R.A. 826, 74 N. W. 607; *Simpkins v. Hawkeye Commercial Men's Assn.* 148 Iowa, 543, 126 N. W. 192; *Caldwell v. Iowa State Traveling Men's Assn.* 156 Iowa, 327, 136 N. W. 678; *McAuley v. Casualty Co.* 37 Mont. 256, 96 Pac. 131; *Morrow v. National Masonic Acci. Asso.* 125 Iowa, 633, 101 N. W. 468; *Vernon v. Iowa State Traveling Men's Assn.* 158 Iowa, 597, 138 N. W. 696; *Driskell v. United States Health & Acci. Ins. Co.* 117 Mo. App. 362, 93 S. W. 880.

Messrs. Read & Read and Morgan & Korf for appellee.

Weaver, J., delivered the opinion of the court:

Plaintiff alleges that her husband, now deceased, was in his lifetime and at the date of his death a member of the defendant association, which issued to him a benefit certificate of membership, and that during the remainder of his life he conformed to all the conditions of such membership, and was in good standing in the association when he died. She further alleges that by the terms of said certificate the defendant undertook upon the death, accidentally occasioned, of a member in good standing, to pay the person properly designated by him for that purpose the proceeds of one assessment of \$2 on each member of the association, not exceeding in the aggregate the sum of \$5,000. The death of her said husband, she alleges, was the result of bodily injury effected solely by external, violent, and accidental means, and without intervening cause, and that such death occurred within less than six months from the date of the injury; and she further alleges that said association has more than 2,500 members, and that a single assessment at \$2 each upon the membership will produce more L.R.A.1917A.

than \$5,000. For answer the defendant admits its corporate capacity and its business as alleged, and that defendant's husband was a member of the association in his lifetime, becoming such member in October, 1909, and continuing in good standing during the remainder of his life, and that plaintiff is his widow and duly appointed beneficiary. It also admits that proofs of death were furnished in due form and in due time, and that its membership is such that a single assessment will produce more than \$5,000. It denies, however, that the benefit contract is as alleged by plaintiff, and denies that it is indebted to plaintiff upon said contract in any sum whatever. It further alleges that, under its contract, liability to pay benefits can arise only when the death of the member results from bodily injury produced through external, violent, and accidental means, independent of all other causes, and that the right to demand and receive such benefits is subject to the limitations and conditions of its constitution and by-laws as they stand at the date of death. It further alleges that at the time when the deceased received his injury the laws of the association provided that the association should not be liable for the disability or death of a member resulting from infection, except as provided in § 3 of article 6 of the by-laws, which is hereinafter set forth in full. It is finally alleged that the proofs of death furnished by plaintiff disclosed the fact or claim that the deceased in oranking a motor car received a slight abrasion on the leg, and that the wound became infected by a certain bacteria known to the medical profession as streptococci, which produced blood poisoning, ending in death, and that after investigation by the defendant it became convinced that the death of the deceased did not result solely and without intervening cause from an accidental injury, but that death was caused or contributed to by reason of a diseased condition existing in the body of such member long prior to the date of said accident. Defendant therefore refused to acknowledge liability to any extent beyond \$500, which sum it tendered to plaintiff, who refused to accept it, and the tender has since been kept good, and is brought into court for plaintiff's use.

At the close of the testimony the defendant moved for a directed verdict in its favor on the ground that, under the terms of the contract, and under the conceded facts, it conclusively appears that plaintiff was not entitled to recover. The motion having been overruled, plaintiff moved for a directed verdict in her favor for the sum of \$5,000, and interest, because there appears to be no conflict in the evidence requiring the consideration of the jury, and plaintiff's right to re-

cover is manifest upon the face of the record. This motion was sustained, a verdict returned as directed, and judgment entered accordingly.

No error is assigned upon the failure or refusal of the court to send the issues to the jury, and the sole question before us is the construction and effect of the contract, and whether the evidence is sufficient to sustain a finding that the death of plaintiff's husband was a casualty upon the happening of which defendant had undertaken to pay the full benefit of \$5,000 mentioned in the certificate sued upon.

The testimony relating to the death of the member is very brief and wholly undisputed. It is, in substance, as follows: The deceased and one Sterling were driving an automobile. During the trip deceased had occasion to crank the engine, and in so doing said to his companion that he had hurt himself, and rubbed his knee several times. On arriving home he told his wife he had nearly broken his leg, and that in cranking the car he had hurt his left leg below the knee. This was on Thursday evening of August 20, 1914. The next morning he continued to complain, rubbed the leg, and said it was sore. On Saturday he was still suffering pain. On Sunday he was worse, and a physician was called, but he continued to fail until his death on the following Thursday. So far as surface appearance was concerned the marks of injury were slight, being chiefly indicated by a red streak or scratch below the knee. The attending physician testifies that when he was called to treat the deceased he found him suffering from a very virulent case of "streptococci poisoning," commonly known as blood poisoning or septicemia, and that there was an apparent abrasion of the skin upon the left leg just below the knee. In the opinion of the witness, the blood poisoning was without doubt introduced into the system of deceased through the injury to his left leg. He adds: "The cause of his death was undoubtedly streptococci poisoning, and I am sure there was no other cause which contributed to his death, nor was he diseased in any other way at the time. I am unable to give an opinion as to when he got the poisoning, except that it must have been at least forty-eight hours prior to the time I was called to see him. Streptococci germs may get into the system from the open air, and it is impossible for them to get into the system except through an abrasion of the skin, thus permitting the bacteria to get into the blood. It is possible the germs got into his system through exposure of the wound to the open air, or from touching an article, or in almost any

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way; there is no way to tell how it happened."

As stating the terms and conditions of the contract sued upon, the plaintiff relied upon the following provision of the defendant's articles of incorporation, which is substantially embodied in the certificate:

"Article V., section 10.—The association shall pay to the beneficiary designated in writing by any member of the accident department, who must be either the surviving wife or an heir of such member, the proceeds of one assessment of \$2 on each member of the accident department in good standing at the time of the accident to an amount not exceeding \$5,000 on account of the death of any member of the accident department occurring within ninety days from the happening of the accident and resulting directly and without intervening cause from a bodily injury sustained by the member while in good standing and effected solely by external, violent and accidental means, subject only to the conditions, provisions and limitations of the by-laws."

And, as limiting and modifying the effect of such provision, the defendant relies upon certain of its by-laws reading as follows:

"Article IV. § 2.—This association shall not be liable to any member of the accident department, nor to any person claiming by, through or under any certificate issued to a member, for the payment of any benefits or indemnity on account of disability or death resulting from poison, voluntarily or involuntarily taken, administered, absorbed, or inhaled or from contact with poisonous ivy or other poisonous animal, mineral, or vegetable substance, or resulting from the inhalation, voluntary or involuntary, of illuminating or other gas; or resulting from infection, except as provided in section 3 of article VI. of these by-laws."

"Article VI. section 3.—Whenever, as the direct result of an injury occurring solely by external, violent, and accidental means, the skin or the outer covering of the eye shall be abraded, cut, or punctured, and there shall be introduced into the system through said abrasion, cut, or puncture, and by the very instrument or means causing said abrasion, cut, or puncture, any specific bacteria, which shall, within a period of ten days after said injury produce septicemia, pyemia, or tetanus or any other kind of blood poisoning or infection, the liability of the association for the payment of the benefits or indemnity on account of disability, loss or death resulting therefrom shall in no case exceed the amount of \$500."

I. The fundamental proposition upon which appellant relies is that the evidence failed to establish that the death of plaintiff's husband resulted directly and without

intervening cause from the injury he received; in other words, even if the effect of the by-laws upon the extent and scope of the insurance be disregarded, the blood poisoning is still an "intervening cause," within the terms of the contract, and there can be no recovery on the contract. In the words of the brief: The proof established only that a bodily injury insignificant in itself furnished a portal of entry for the streptococci which poisoned the blood stream and produced death. It was not even in the most technical legal sense a cause of death. It was merely a passive condition."

Counsel candidly admit that in *Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91, this court reached a conclusion which is directly opposed to the proposition for which he here contends, and asks that we now overrule it as unsound. To that end he takes up and reviews the several authorities cited in that opinion, criticizes its reasoning, and undertakes to demonstrate that the holding is indefensible upon principle. We are not prepared to thus introduce confusion into our cases. The precedent thus established has stood the test of time unchallenged for the last twelve years or more; there is nothing intrinsically unjust in the doctrine there affirmed and the opinion has the support of the weight of authority. It takes up and considers the very proposition which counsel now urges to affirm, and upon both principle and precedent rejects it as unsound. Upon such consideration the conclusion was reached that it is wholly "immaterial when or how the specific bacilli which caused the disease known as blood poisoning resulting in the death of *Delaney* were introduced into the wound, whether at the time it was inflicted or subsequently. Blood poisoning is a disease just as many other pathological conditions of the human system resulting from the introduction of other specific bacilli are diseases. It is wholly immaterial whether the pathological condition which resulted in death was due to bacilli or not. The simple question is whether the death of *Delaney* resulted through natural causes, without the interposition of a new and independent cause from the wound on his finger. Disease brought about as the result of a wound, even though not the necessary or probable result, yet, if it is the natural result of the wound, and not of an independent cause, is properly attributed to the wound, and death resulting from the disease is a death resulting from the wound, even though the wound was not in its nature mortal, or even dangerous."

This conclusion was concurred in by the entire court. It has since been cited and followed in *Lehman v. Great Western Acci. L.R.A.1917A*.

Asso. 155 Iowa, 740, 42 L.R.A.(N.S.) 562, 133 N. W. 752; Caldwell v. Iowa State Traveling Men's Asso. 158 Iowa, 329, 136 N. W. 678; Simpkins v. Hawkeye Commercial Men's Asso. 148 Iowa, 543, 126 N. W. 192; Rathjen v. Woodmen Acci. Asso. 93 Neb. 629, 141 N. W. 815; Moon v. Order of United Commercial Travelers, 96 Neb. 65, 52 L.R.A.(N.S.) 1203, 146 N. W. 1037, Ann. Cas. 1916B, 222.

That the cases cited by the author of that opinion may not all present an exact parallel with the one there being considered is not particularly important. They do deal with the interpretation of contracts of the same general character, and affirm rules and principles in point with the position there taken. For example, the opinion in *Omberg v. United States Mut. Acci. Asso. 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909*, dealing with a case of blood poisoning from the bite of an insect, says: "The blood poisoning was consequent on the wound. The bite would therefore be the proximate cause of death."

In *Freeman v. Mercantile Mut. Acci. Asso. 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013*, it is said: "An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death, if he dies by reason of it, even if he would not have died if his temperament or previous health had been different; and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes."

Thus we might go again over the precedents cited by the author of that opinion, and note where each in some of its features is fairly in point in the matter then under discussion, but we think it unnecessary. The cases so mentioned are but few of the very many holding to the principle of the *Delaney Case*, and we suggest with all due deference that even the savage assault thereon which counsel indulges in cannot disturb its standing as respectable authority.

To hold as counsel contend for would tend but to one result, and that is that the defendant association could be held to liability upon its contracts for no death loss whatever except where death is the instant result of the accident; for, if the injured party survives any substantial length of time, there are numerous diseases of traumatic origin, some one of which is practically certain to make its appearance, lay its hand upon the injured body, and thus become the medium or instrument through which the injury effects its fatal results. Yet in all such cases, if the appellant is

right in this case, the intervening disease is an independent intervening cause, and the insurance does not cover the loss so occasioned. That such is not the reasonable interpretation of the contract has so often been held that we are hardly justified in consuming time and space to add to the citation of authorities made in the Delaney Case. We venture, however, to quote from Judge Sanborn in *Western Commercial Travelers' Asso. v. Smith*, 40 L.R.A. 653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401. There the injury was an abrasion of the skin upon the toe of the injured person caused probably by wearing an ill-fitting shoe, and this was followed by blood poisoning. The court says: "If the death was caused by bodily injuries effected by external, violent, and accidental means alone, the association was liable to pay the promised indemnity. If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent, and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such a case the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable, not to the disease, but to the *causa causans*,—to the accident alone."

To the same effect is *Cary v. Preferred Acci. Ins. Co.* 127 Wis. 67, 5 L.R.A. (N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 Ann. Cas. 484. This also was a case of blood poisoning not materially unlike the case at bar, and the court there says: "The bacterial infection and the resultant septicemia were, in the natural course of events, dependent upon and set in motion by the abrasion of the skin caused by the fall. The entry of bacteria into the system cannot be considered as an independent cause and as having intervened between the accidental fall and the death because of the fact that it was conditioned on the existence of the abrasion of the skin, and was wholly incidental to and set in motion by it, thus making it one of the events in the chain of causation."

The list of authorities affirming this rule is very great, but enough has been mentioned to show the trend of judicial thought upon the subject. It is true that cases may be found giving some support to the views advanced on the part of appellant, but they are not in harmony with the course of our L.R.A.1917A.

own decisions, and are opposed to the weight of authority in other jurisdictions.

II. It is next argued that, even if the decision in the Delaney Case be adhered to, the insurance contract in the present case was prepared after that decision was announced, with the express purpose of avoiding liability in cases of this nature; and that, as the association may lawfully choose for itself the classes of risks against which it is willing to offer indemnity, the court should give effect to that purpose. Counsel may know the impelling motive and purpose of the change in the phraseology of the contract, but the court can ascertain such purpose by reference to the contract alone. Without stopping to examine the record in the Delaney Case, we think we are correct in saying that the contract there considered was substantially what appears in this case in article 5, § 10, of the articles of incorporation, which we have above quoted. But, if it be true that the words, "without intervening cause," now appearing therein, are a part of the change subsequently made, they add nothing whatever to the meaning or effect of that section; for the limitation of the insurance to members dying "solely by accidental means" necessarily excludes deaths attributable to the intervention of some other cause. Reliance seems to be placed particularly upon the effect of the provisions of the two other sections quoted from the by-laws of the association. Of these sections the one last quoted (§ 3 of article 6) seems at first blush to be without relevance to this case, as it professes to deal solely with accidental injuries to the "skin or the outer covering of the eye." If, however, a critical reading and interpretation of this language should justify the conclusion that the word "skin," as there employed, has reference to the skin of the body generally, and not simply to the "outer covering of the eye," such reading does not, for reasons which we are about to state, relieve the defendant from liability to pay the promised indemnity. The exceptions made in the contract to the general liability assumed by the association in article 5, § 10, of its articles of incorporation, are found in article 4, § 2, of the by-laws, which is also quoted in a previous paragraph of this opinion. The excepted cases there listed include all those where death has resulted from poison voluntarily or involuntarily taken, administered, absorbed, or inhaled, and from contact with poisonous ivy or other substance, mineral or vegetable, or resulting from the inhalation of gas, or resulting from infection. It is upon the last clause, "or resulting from infection," that appellant plants its chief defense. The argument is that the deceased

did not die from the accidental injury received, but from the blood poisoning which followed the injury; that blood poisoning is infection or the result of infection, and the case is therefore within the plain meaning of the exception. This brings us once again to the same question which is considered in the first paragraph of this opinion, and that is whether, conceding that the injury to the deceased was in its origin comparatively slight, and not necessarily fatal, and that blood poisoning through the wound either accompanied the injury or followed it as a natural consequence thereof, and that blood poisoning is infection within the proper significance of that word, and that this series of events led in natural order to the death, it follows that the proximate cause of such death was the infection or blood poisoning, or was the original injury. We have already expressed our agreement with the precedents which hold that in such cases the original injury is the sole proximate cause, and that the death in such case is not a "death resulting from infection," within the meaning of the contract. The court has had very recent occasion to consider the principle here involved in, an opinion by Ladd, J., where the cases are quite thoroughly reviewed, and a result is reached contrary to the contention of the appellant. See *Berry v. United Commercial Travelers*, 172 Iowa, 429, L.R.A.1916B, 617, 154 N. W. 598. We content ourselves at this point with an additional reference to a pertinent authority upon the true meaning of "proximate cause:" "The 'proximate cause' . . . is the dominant cause, not the one which is incidental to that cause, its mere instrument. . . . The inquiry must always be whether there was any intermediate cause disconnected from the primary fault and self-operating which produced the injury." *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395.

Finally, we wish to note the issue tendered by the defendant's answer. The only plea there offered, except that of bare denial and a plea of tender, is the affirmative allegation that its refusal to recognize plaintiff's claim and pay the promised benefits was upon the ground that, having investigated the claim, it was found or believed that the death of the deceased did not result solely and without intervening cause from an accidental injury, but that the death was contributed to by the reason of a diseased condition existing in the body of deceased "long prior to the date of the alleged accident." It would seem that appellant here selected the ground on which it chose to contest the plaintiff's claim, though it was wholly lost sight of in the court below, and is not urged in this court. No evidence.

dence of any kind was offered in its support, nor is there anything in the record from which such an inference could be drawn. It follows that the only issues here to be considered are such as are raised by the denials in the answer, and to these we have given sufficient attention.

For the reasons stated, the judgment of the District Court is affirmed.

Evans and Preston, JJ., concur.

Deemer, Ch. J., specially concurring:

I do not wish to dissent from the conclusion reached in this case, because of the nature of the issues tendered by the defendant, but, to avoid any misapprehension as to the effect of defendant's by-laws, art. 4, § 2, and art. 6, § 3, I wish to emphasize the thought that, if the issue had been properly tendered, I think the case should at least have gone to the jury for it to determine whether or not the death of the assured did not result directly from an abrasion or cut of the skin through which there was introduced into the system by the instruments or means causing the abrasion or cut a specific bacteria, which, within a period of ten days after the injury, produced blood poisoning or infection, and that, had the jury so found, the limit of plaintiff's recovery would have been \$500. We must give these two by-laws some effect, and the most that can be said for them is, if the pleader had properly tendered the issue, that defendant is liable for the death of assured due to blood poisoning or infection to the full amount of the policy in the event that the germ which was brought into the system was not introduced through an abrasion or cut, but in some other way, and that the abrasion or cut was the direct result of an accident. I am not prepared to say that, in view of the issues tendered and the motion filed by defendant, the question is now before us as to whether the matter should have gone to the jury at all. What I wish to be clear about is that, in my opinion, had the issue been properly tendered, defendant, on the testimony appearing in the record, was entitled to have the question above mooted submitted to a jury. Defendant undoubtedly intended to limit its liability in certain cases of blood poisoning or infection, and had enough testimony to take the case to the jury upon the question of its limited liability.

For these reasons, I am impelled to file this separate opinion.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on May 5, 1916 (— Iowa, —, 157 N. W. 726):

A petition for rehearing filed by appellant

in this case has been presented in which the several points made in our original opinion are reviewed and reargued with much thoroughness, but it is essentially a reargument along the lines pressed upon our attention in the former hearing, and we adhere to the conclusion already announced.

In view, however, of the explanatory statement made by counsel concerning certain language employed by them upon the original submission and criticized by us in disposing of the case, we modify that opinion as follows:

By omitting therefrom all that part beginning with the words, "we have," in the 19th line of first column of page 243 of vol. 155 of the Northwestern Reporter, where the same is printed, down to and including the words, "judicial labors," in the 50th line of

the same column, and by inserting in place thereof the following: "We are not prepared to thus introduce confusion into our cases. The precedent thus established has stood the test of time unchallenged for the last twelve years or more; there is nothing intrinsically unjust in the doctrine there affirmed, and the opinion has the support of the weight of authority."

Also by omitting all that part beginning with the words, "we should not," in the 51st line of the second column of the same page down to and including the words, "ill afford," in the 67th line of the same column.

The reporter in preparing copy of the original opinion for official publication will correct the same as herein indicated.

The opinion being thus modified, the petition for rehearing is overruled.

Annotation—Liability on accident policy for sickness or death caused by blood poisoning.

The earlier cases on this question are discussed in the annotation to Cary v. Preferred Acci. Ins. Co. 5 L.R.A.(N.S.) 926.

As to liability on health insurance policy for death or disability caused by blood poisoning, see annotation to Jones v. Pennsylvania Casualty Co. 5 L.R.A.(N.S.) 932.

As to death from taking poisonous substance as accident or accidental means within accident policy, see annotation to Johnson v. Fidelity & C. Co. L.R.A.1916A, 481.

As to liability under accident policy for condition caused by external infection without cut or abrasion, see annotation to Sullivan v. Modern Brotherhood, 42 L.R.A.(N.S.) 140, and later case of Railway Mail Asso. v. Dent, L.R.A.1915A, 314.

As to liability under accident policy for death or injury caused from surgical operation or medical treatment, see annotation to Gardner v. United Surety Co. 26 L.R.A.(N.S.) 1004, and Stokely v. Fidelity & C. Co. L.R.A.1915E, 955.

As to applicability of provisions in accident policy exempting insurer or limiting its liability for disability arising from a specified condition when such condition is itself the result of an accident occurring after the issuance of the policy, see annotation to Kelsey v. Continental Casualty Co. 8 L.R.A.(N.S.) 1014, and Berry v. United Commercial Travelers, L.R.A.1916B, 617.

As to previous diseased condition as affecting liability for death or injury from accident, see annotation to Stanton L.R.A.1917A.

v. Travelers' Ins. Co. 34 L.R.A.(N.S.) 445, and Moon v. Order of United Commercial Travelers, 52 L.R.A.(N.S.) 1203.

It will be noticed that the court in *BALLAGH v. INTERSTATE BUSINESS MEN'S ACCI. ASSO.* ante, 1050, refused to overrule *Delaney v. Modern Acci. Club*, set out in the prior annotation, in 5 L.R.A.(N.S.) 926, and relied upon that case in reaching its conclusion that the infection of an accidental wound with streptococci causing blood poisoning and death did not prevent the wound from being the direct cause of death without intervening cause within the meaning of the policy, which insured against death resulting from accidental means independent of all other causes.

Other cases decided since the earlier annotation have reached a like result.

The decision in *Cary v. Phoenix Preferred Acci. Ins. Co.* 5 L.R.A.(N.S.) 926, was followed in *French v. Fidelity & C. Co.* 135 Wis. 259, 17 L.R.A.(N.S.) 1011, 115 N. W. 869, where death from blood poisoning following a slight accidental abrasion of the skin was held the result of "bodily injuries sustained through external, violent, and accidental means, independently of all other causes;" the court refusing to hold that death was due to an independent intervening cause, namely, the germs which entered the system through the wound.

And death from blood poisoning resulting from accidentally falling results "directly from the accident independently and exclusively of all other causes." *Thompson v. Columbian Nat. L. Ins. Co.* (1915) 114 Me. 1, 95 Atl. 229.

In *Jenkins v. Hawkeye Commercial Men's Asso.* (1910) 147 Iowa, 113, 30 L.R.A. (N.S.) 1181, 124 N. W. 199, it was held that death from blood poisoning due to perforation of the rectum by a bone presumably swallowed with food was caused by external, violent and accidental means within the meaning of an accident policy.

And disability which is caused by blood poisoning resulting from an accident results from the accident, and not from an illness, within the meaning of an accident policy which in express terms provides that peritonitis, carbuncles, ulcers, and certain other denominated ills are illnesses within the terms of the policy, no matter what may have brought them on, but does not mention blood poisoning; since in accident-insurance jurisprudence blood poisoning resulting from an accident is regarded as a part of the accident, and an injury or death from it as an accidental injury or death, and if the insurer desires to classify blood poisoning resulting from accident as a disease it must do so in express terms. *Continental Casualty Co. v. Matthis* (1912) 150 Ky. 477, 150 S. W. 507.

In *National Life & Acci. Ins. Co. v. Singleton* (1915) 193 Ala. 84, 69 So. 81, the evidence was held sufficient to carry the question to the jury whether or not the insured's death resulted from or was caused by a gash cut in his lip while he was shaving, there being testimony that the gash became infected, and that infection spread to his entire face and neck and other portions of his body, and that his death resulted from this infection. The court observed that if death did result from the accidental cutting of the lip while shaving, it would be within the terms of the policy providing for indemnity in case of "bodily injuries effected through external, violent, and accidental means."

In *Caldwell v. Iowa State Traveling Men's Asso.* (1912) 156 Iowa, 327, 136 N. W. 678, where the plaintiff sought recovery under a policy insuring against death caused solely by external, violent, and accidental means, and contended that the insured received a slight accidental injury which caused an abrasion of the skin, and that this resulted in erysipelas, the testimony of the attending physician that he discovered the abrasion, that in his opinion the disease from which the insured died was infectious and could not have resulted except through infection of some wound or abrasion, that the disease first made its appearance at the edges of the wound,

and that in his opinion the death resulted solely from the infection of the wound, was held sufficient to sustain a finding that death was the proximate result of the abrasion.

In *Rathjen v. Woodmen Acci. Asso.* (1913) 93 Neb. 629, 141 N. W. 815, a verdict for the plaintiff suing on a policy insuring against death caused directly and exclusively by a bodily injury effected by external, violent, and accidental means, was held supported by evidence that the insured accidentally injured his knee, that the injury resulted in a swelling which was treated by two physicians, who testified that death was the result of blood poisoning caused by the injury to the knee, although there was other medical testimony that the death was caused by Bright's disease.

In this case an instruction that if the jury found that the insured received a bodily injury through external, violent, and accidental means, and that a disease commonly known as Bright's disease or blood poisoning resulted and was brought about by the injury, and that the disease so resulting contributed to or hastened the insured's death, that would not be such a disease or bodily infirmity as would prevent recovery, was held not inconsistent with other instructions, the purport of which does not appear, and was held proper under the testimony in the case.

In *Maloney v. Maryland Casualty Co.* (1914) 113 Ark. 174, 167 S. W. 845, where the policy insured against bodily injuries effected independently and exclusively of all other causes through external, violent, and accidental means, and provided that subject to its terms it covered the insured in the event of death or disability from septicemia or blood poisoning due directly to a bodily injury sustained, there was evidence that the insured, while at a hospital for treatment for rheumatism, was struck by a pan, that infection resulted, and that he died from blood poisoning. It was held that from this testimony the jury might have found that but for this accidental injury there would have been no cause for infection, and that there might have been an abrasion of the skin through which the disease germ entered the body and produced death, and that if they so found, the wound produced by the accident was the proximate cause of his death, and that a recovery might be had under the policy.

And in this case instructions that, if the insured's death was not the result of the alleged accident alone, but was due to both the accident and a disease

from which he was suffering, no recovery could be had; and also that, if they found that he came to his death as the direct or indirect consequence of disease, or that his death was caused wholly or in part by bodily infirmities or diseased conditions, and that the accident or injury was not the exclusive and independent cause of his death, no recovery could be had,—were held erroneous, for the reason that if death resulted on account of aggravation of a disease by the accidental injury, the insurer was liable even though death might have resulted at a later period regardless of the injury.

In *Vernon v. Iowa State Traveling Men's Asso.* (1912) 158 Iowa, 597, 138 N. W. 696, under a policy which provided for insurance of a member who "shall through external, violent, and accidental means receive bodily injuries which shall independently of all other causes result in death;" and further provided that the insurer should not be liable for any indemnity or benefit for accidental death "resulting wholly or partially, directly or indirectly, from any of the following causes, conditions, or acts . . . to wit, disease,"—the plaintiff claimed that the death was due to blood poisoning consequent upon an abrasion of the skin made by a bath attendant, and the defendant alleged that death was caused or contributed to by the diseased condition of the kidneys. The court instructed the jury that the plaintiff could recover if death ensued as the sole result of the abrasion from which blood poisoning had set in, but that if they found that the death resulted, directly or indirectly, from or in consequence of disease, there could be no recovery. It was held that there was no error in refusing a further instruction that, if the insured was in any manner affected by disease or bodily infirmity, there could be no recovery. The court said that it would not do to hold that no recovery could be had if the insured was afflicted with any disease or bodily infirmity, either at the time he received his injuries or at the time of his death; remarking that very few persons are free from some form of disease, and if a condition, without reference to its causal connection with death, should be held a bar to recovery, the proposed insurance would be a delusion and a snare.

The policy involved in *New Amsterdam Casualty Co. v. Mays* (1915) 43 App. D. C. 84, stated that it did not exclude indemnity for loss, among other

things, by septicemia, but in the event of loss so resulting, the liability should be one half of the amount of the ordinary indemnity; and, under the head of definitions, stated that loss of life by accident was "deemed to mean death from bodily injuries not intentionally inflicted by the insured, which independently of all other causes are effected solely and exclusively by external, violent, and accidental means." It was held that, if the septicemia or blood poisoning from which the insured died was solely the result of an injury to his leg, his death was caused by bodily injury "effected solely and exclusively by external, violent, and accidental means," but that if the deceased was afflicted with some disease or bodily infirmity which was a contributing cause of the septicemia, then the septicemia did not result solely from the accident, and to some extent was a contributing cause to the death within the meaning of the special indemnity clause.

Where the evidence was conflicting as to whether the insured at the time he was injured was suffering from diabetes, and whether this was a contributing cause of the septicemia, it was held a question for the jury whether he was suffering from such disease and whether the blood poisoning was solely the result of the accident. (D. C.) *Ibid.*

In *Rheinheimer v. Aetna L. Ins. Co.* (1907) 77 Ohio St. 360, 15 L.R.A.(N.S.) 245, 83 N. E. 491, it was held that a recovery might be had in case of death from blood poisoning at once introduced into the system by an accidental cut or scratch on his finger, it appearing that prior to the accident the insured was not afflicted with any known physical or mental infirmity, under a policy which provided for the payment of a certain sum if death resulted solely from accidental injuries within ninety days, although it excepted cases in which death resulted wholly or partly, directly or indirectly, from bodily or mental infirmity or disease in any form proximate or contributory as a primary, secondary, or final cause.

In *United States Health & Acci. Ins. Co. v. Harvey* (1906) 129 Ill. App. 104, it was held that full recovery might be had under an accident policy insuring against injuries caused solely and exclusively by external, violent, and accidental means, where blood poisoning followed an accidental puncture of the hand, although the policy provided for a limitation of liability in case of injuries resulting directly or indirectly,

accidentally, or otherwise from poison or infection.

And it should be noted that the court in *BALLAGH v. INTERSTATE BUSINESS MEN'S ACCL. ASSO.* ante, 1050, decides that the insurer was liable for the full amount of the policy for death from blood poisoning resulting from the infection of a wound which was within the terms of the policy, although there was a provision that there should be no liability for death resulting from infection, except that whenever as a direct result of an injury the skin has been abraded, and there has been introduced into the system through the abrasion and by the instrument causing the abrasion blood poisoning, in which case a limited liability was provided for.

And in *GARVEY v. PHOENIX PREFERRED ACCL. INS. CO.* (1908) 123 App. Div. 106, 108 N. Y. Supp. 186, under a policy which provided "in the event of injuries . . . or disability resulting directly or indirectly, accidentally, or otherwise . . . from poison or infection," the insurer's liability should be limited to one tenth of the amount otherwise designated, and to twenty-six weeks' disability, it appearing that the insured fell and injured his leg, and his disability for the first ten days was caused by the injury to the bone, after which blood poisoning ensued as the natural consequence of the injury,—it was held that the original disability was within the terms of the policy, and that whatever naturally and in the ordinary course of events followed the injury was fairly within the scope of the policy, and that the words, "the injuries or disability," referred to in the clause quoted, related to the time of the accident, and that the injury and disability in question did not "result" from the poison or infection, if such existed, but that the latter resulted from the injuries.

In *SIMPKINS v. HAWKEYE COMMERCIAL MEN'S ASSO.* (1910) 148 Iowa, 543, 126 N. W. 192, where the insured, an undertaker, died from blood poisoning which resulted from an accidental puncture of his hand with an embalming needle, it was held that the insurer was not relieved from liability by an exception from liability for injuries arising "from the intentional taking of poison and from contact with poisonous substances." The court referred to the cases in the prior annotation, stating that in other cases where death had resulted from blood poisoning following a wound it had been held not to be an injury "from

contact with poisonous substances," on the theory that death in such cases was, in a legal sense, the result of the wound, and that the infection was a mere incident to the original injury.

The evidence in this case was held sufficient to show an accidental injury to the insured, and the accidental nature of his death, although there was no evidence that the wound to his hand was accidentally received while embalming a body, except that furnished by his statements made on his return from the operation, in which he spoke of the injury received and showed his injured hand.

In *FARNER v. MASSACHUSETTS MUT. ACCL. ASSO.* (1907) 219 Pa. 71, 123 Am. St. Rep. 621, 67 Atl. 927, the policy insured against accidental injuries resulting in death, and also provided for weekly indemnities in case of certain sicknesses, and provided "that all cases of sunstroke, freezing, carbuncles, boils, ulcers, felons, abscesses, contact with poison or with poisonous or infectious substances, are covered only under the health provisions of this policy." It was contended that the death of the insured, which was due to inoculation with some poisonous generating germ from the saliva of a dog which bit him, or from its tooth, or its mouth or from his own thumb, presented a case of contact with poison or with a poisonous or infectious substance within the meaning of the last provision, and that therefore no recovery could be had under the accident provision of the policy; but the court held that this contention could not be sustained, stating that the policy was *prima facie* an accident policy, that the insured died from the bite of a dog, which was an accident, and not a disease; that the proximate cause of death was the bite, and that the way in which it operated to produce death followed by hemorrhage or lock-jaw or blood poisoning was a medical detail which did not affect the material fact that death resulted from the accident.

In *PACIFIC MUT. L. INS. CO. v. MCCABE* (1914) 157 Ky. 270, 162 S. W. 1136, the policy provided that "in the event of any claim arising under this policy (irrespective of its cause) due directly or indirectly, wholly or in part, to sunstroke, peritonitis . . . blood poisoning . . . , then and in all such cases benefits shall be paid solely under illness benefits as provided under clause filed with this policy; except that in the event of claim arising due to infection

or blood poisoning following immediately after and as a direct result of accident, such infection or poisoning having its inception while insured is under the care of a physician, then in such case benefit shall be paid under accident benefits" as provided in designated clauses. It was held that under this provision in cases of the diseases mentioned only sick benefits could be recovered unless there was an infection the direct result of accident and this infection produced the disease, in which case accident benefits for death might be recovered; and that such benefits might be recovered; it appearing that the insured died of peritonitis resulting from infection which in turn was caused by an accident and followed immediately thereafter, and as a direct result of it, and that the infection had its inception while he was under the care of a physician.

It has been held that bodily injury by external, violent, and accidental means need not be shown to sustain a recovery for death from septicemia, under an accident policy which, after insuring against bodily injuries from such means, allows a recovery of one half the amount of the policy for loss of life resulting wholly or in part from sunstroke, freezing, septicemia, or the involuntary or unconscious inhalation of gas or other poisonous vapor, as such a policy insures against septicemia, although it is not the effect of bodily injury caused by external, violent, and accidental means. *Schumacher v. Great Eastern Casualty & Indemnity Co.* (1909) 197 N. Y. 58, 27 L.R.A.(N.S.) 480, 90 N. E. 353. (See note to this case in 27 L.R.A.(N.S.) 480, as to whether general requirement as to external, violent, and accidental means applies to a separate provision as to liability in case of death or injury from certain specified causes.)

In *Maryland Casualty Co. v. Morrow* (1914) 52 L.R.A.(N.S.) 1213, 130 C. C. A. 179, 213 Fed. 599, it was held that no recovery could be had under an accident policy covering bodily injuries effected solely through accidental means, which independently of all other causes resulted in death, where the death of the insured resulted from gangrene following the breaking of a bone because of a diabetic condition.

The decision in *Herdie v. Maryland Casualty Co.* (1906) 146 Fed. 396 (set out at p. 928 of the earlier annotation), was affirmed in (1906) 79 C. C. A. 158, L.R.A.1917A.

149 Fed. 198, the court holding that death from septicemia not caused by accidental means, but ensuing upon a surgical operation for appendicitis, was not covered by a policy insuring against injury sustained through accidental means and subject to its conditions covering death from septicemia.

In *Vernon v. Iowa State Traveling Men's Asso.* (1912) 158 Iowa, 597, 138 N. W. 696, where the only claim of accident under the policy which insured against injury by accidental means was an abrasion inflicted by a bath attendant, and under the instruction given the plaintiff was bound to show such an abrasion to justify a recovery, there was held to be no prejudicial error, in view of the instruction given, in refusing to instruct that if the insured, by reason of an operation performed upon him to relieve a sore or boil, came to his death, there was no accident within the meaning of the law. (Generally as to death caused from surgical operation or medical treatment, see notes in 26 L.R.A.(N.S.) 1064, and L.R.A.1915E, 955.)

It has been held that blood poisoning from septic matter thrown, when a patient coughed, against the membrane of the eye without abrading, breaking, or rupturing the surface, is not within the meaning of a provision in an accident policy issued to an operating dentist insuring against blood poisoning from septic matter introduced into the system "through wounds suffered in professional operations." *Fidelity & C. Co. v. Thompson* (1907) 11 L.R.A.(N.S.) 1069, 83 C. C. A. 324, 154 Fed. 484, 12 Ann. Cas. 181.

In *McAuley v. Casualty Co. of America* (1908) 37 Mont. 256, 96 Pac. 131, it was held that the plaintiff had failed to prove a cause of the insured's death under a policy insuring against injuries effected solely through external, violent, and accidental means which should directly and independently of all other causes result in loss of life, where there was evidence that the insured received a slight injury while alighting from a car and that she died of erysipelas, but no testimony to the effect that the erysipelas germ was communicated through the abrasion which she sustained, nor any evidence that the abrasion caused the disease to become manifest.

In *Farmer v. Massachusetts Mut. Acci. Asso.* (1907) 219 Pa. 71, 123 Am. St. Rep. 621, 67 Atl. 927, it was held that the insured was "immediately disabled" within the meaning of the accident pol-

icy, where he was bitten in the thumb, and his hand was bandaged at once, and though the gravity of the injury was not at first appreciated yet the use of his hand was interfered with from the beginning and continued to grow worse until his death, two weeks later from lockjaw or blood poisoning.

In *Continental Casualty Co. v. Matthis* (1912) 150 Ky. 477, 150 S. W. 507, where the policy provided for indemnity for total disability caused "at once and continuously," the insured was held continuously disabled where he was totally disabled for three days after injuring his finger, and then, incited by a desire to be at work, was permitted by his physician to go and for three days did a part of his work, at the end of which period he went to bed, and was confined there for months by blood poisoning which resulted from his injury. The court said that to hold that these three days of partial activity while the poison was developing broke the immediacy or the continuity of the accident would be to hold that an accident policy did not cover blood poisoning from accident, since there must always be an interim of time for the disease to develop.

In *Doyle v. New Jersey Fidelity & Plate Glass Ins. Co.* (1916) 168 Ky. 789, 182 S. W. 944, it appeared that the insured, a dentist, while operating upon a patient, accidentally wounded his finger and became ill, but for several days thereafter went to his office and performed a part of his duties; that in five or eight days he was found to be suffering from blood poisoning resulting from his wound, and was forced to go to bed; that after about a month in bed, contrary to the advice of his physician, he returned to his office and for over three months he was at his office regularly and performed at times substantially all of his accustomed duties though feeling badly much of the time; that about four and a half months after the injury he was taken violently ill and died suddenly. The policy sued on provided for indemnity if the insured's injuries should immediately, continuously, and wholly disable and prevent him from performing any and every kind of duty pertaining to his occupation and it was contended that the disability suffered by the insured was not immediate or continuous within the meaning of the policy during the period while the infection was developing, that is, from the time he received the injury until he was obliged to take to his bed; but the court, relying on *Continental Casualty Co. v. Matthis* L.R.A.1917A.

(Ky.) supra, held the contention unsound.

The insurer's further contention, however, that the evidence did not show that the insured's disability from the time he returned to his office, after having left his bed against the physician's advice, to the time of his death, was continuous and entire was upheld; the court holding that the evidence did not even tend to show that his disability was such as prevented him from continuously performing all of the substantial acts required of him during this period, and laid down the rule that under the provision in question a recovery should not be denied where the evidence shows that the insured was able to be up and about and do minor trivial things or direct his business and do some of the work himself, if the injuries were such that common prudence demanded that he desist from his labors and rest so long as reasonably necessary to effect a speedy cure, and he was unable to do the things which constitute substantially all of his occupation, or wholly disabled from doing all the substantial and material acts necessary to be done. (Generally as to what constitutes total disability, see note in 34 L.R. A.(N.S.) 126, and earlier notes there referred to.)

In *Doyle v. Maryland Casualty Co.* (1916) 168 Ky. 795, 182 S. W. 946, where the first six sections of the policy were under the heading, "Accident Benefits," and § 6 provided, "subject to its terms, limits, and conditions this policy covers the assured in the event of death or disability due to freezing . . . ; likewise in event of death or disability from septicemia or blood poisoning due directly to a bodily injury sustained while this policy is in force," it was held that this section should be construed in connection with § 1 of the policy, which provided for the payment of benefits for injuries which should independently, and exclusively of all other causes, continuously and wholly disable and prevent the insured from performing any and every kind of duty pertaining to his occupation, and that it should not be construed separately and apart from this section, and having reached this conclusion, the decision in *Doyle v. New Jersey Fidelity & Plate Glass Ins. Co.* (Ky.) supra, which involved the same facts, was held controlling, and a peremptory instruction for the defendant was held proper.

J. T. W.

KANSAS SUPREME COURT.

BELLE RIDGEWAY

v.

MODERN WOODMEN OF AMERICA,
Appt.

(98 Kan. 240, 157 Pac. 1191.)

Insurance — change of occupation — waiver.

1. Where the by-laws of a fraternal beneficiary society provide that the engaging by a member in a specified dangerous occupation shall exempt it from liability on account of his death directly traceable thereto, the acceptance of dues from a member after he has engaged in such occupation, with knowledge of the fact, does not constitute a waiver of the exemption referred to.

For other cases, see Insurance, V. b, 5, d, in Dig. 1-52 N. S.

Same — furnishing claim blanks.

2. No waiver results in that situation from the fact that the society, after learning that a member has lost his life through engaging in the prohibited occupation, at the request of the beneficiary, furnishes blanks upon which to make proofs of death, without giving notice of an intention to resist payment, otherwise than by a general statement that the supplying or use of the blanks should waive no right to deny liability.

For other cases, see Insurance, V. b, 5, g, in Dig. 1-52 N. S.

(June 10, 1916.)

A PPEAL by defendant from a judgment of the District Court for Saline County, in plaintiff's favor, in an action brought to recover the amount alleged to be due on a benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. Truman Plants, George G. Perrin, and L. W. Hamner, for appellant:

The contract between William H. Strohm and Modern Woodmen of America is composed of his application for membership, the benefit certificate, and the by-laws.

Bacon, Ben. Soc. 3d ed. § 161; Fitzgerald v. Metropolitan Acci. Asso. 106 Iowa, 457, 76 N. W. 809; Lehman v. Clark, 174 Ill. 279, 43 L.R.A. 648, 51 N. E. 222; Covenant Mut. Life Asso. v. Kentner, 188 Ill. 431, 53 N. E. 966; Fullenwider v. Supreme Council, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; Hoover v. Royal Neighbors,

65 Kan. 616, 70 Pac. 595; Modern Woodmen v. Von Wald, 6 Kan. App. 231, 49 Pac. 782.

Members of fraternal beneficiary societies and their beneficiaries are presumed to know the by-laws and are bound by them.

Miller v. National Council, K. L. S. 69 Kan. 234, 76 Pac. 830; Hexom v. Knights of Maccabees, 140 Iowa, 41, 117 N. W. 19; Bacon, Ben. Soc. 3d ed. § 81; Benes v. Supreme Lodge, K. L. H. 231 Ill. 134, 14 L.R.A.(N.S.) 540, 121 Am. St. Rep. 304, 83 N. E. 127; Fry v. Charter Oak L. Ins. Co. 31 Fed. 197; Baldwin v. Begley, 185 Ill. 180, 56 N. E. 1065; Voss v. Northwestern Nat. L. Ins. Co. 137 Wis. 492, 118 N. W. 212; Fraternities Acci. Order v. Armstrong, 106 Va. 746, 56 S. E. 565; United Order. Golden Cross v. Hooser, 160 Ala. 334, 49 So. 354; Burchard v. Western Commercial Travelers' Asso. 139 Mo. App. 606, 123 S. W. 973; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893.

Associations such as appellant are self-governing, and courts are disinclined to interfere with or restrict their power to legislate for themselves in all matters consistent with their purpose and necessary for their welfare. They will not interfere except for the most urgent reasons.

Ross v. Modern Brotherhood, 120 Iowa, 692, 95 N. W. 207; Cooley, Briefs on Ins. p. 704; State ex rel. Stone v. Grand Lodge, A. O. U. W. 78 Mo. App. 546.

The benefit certificate would have been payable on the death of William H. Strohm from any cause other than from a hazardous occupation, but the contract specifically provided that it did not apply to death resulting from employment in specific hazardous occupations, one of which was lineman in the employ of an electric light or power company.

Abell v. Modern Woodmen, 96 Minn. 494, 105 N. W. 65, 906; Modern Woodmen v. Talbot, 76 Neb. 621, 107 N. W. 790; Crites v. Modern Woodmen, 82 Neb. 298, 117 N. W. 776; Showalter v. Modern Woodmen, 156 Mich. 390, 120 N. W. 994; Modern Woodmen v. Weekley, 42 Okla. 25, 139 Pac. 1138; Frain v. Modern Woodmen, — Colo. —, 155 Pac. 330.

Under the contract in question, there could be no waiver by a local camp officer.

Modern Woodmen v. International Trust Co. 25 Colo. App. 26, 136 Pac. 806; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; McWilliams v. Modern Woodmen, — Tex. Civ. App. —, 142 S. W. 641; Lathrop v. Modern Woodmen, 56 Or. 440, 106 Pac. 228, 109 Pac. 81; Larkin v. Modern Woodmen, 163 Mich. 670, 127 N. W. 786; Bixler

Headnotes by MASON, J.

Note. — For furnishing blanks for proofs of loss or claim as a waiver of breaches of condition or forfeiture of insurance policy, see annotation following this case, post, 1065.
L.R.A.1917A.

v. Modern Woodmen, 112 Va. 678, 38 L.R.A. (N.S.) 571, 72 S. E. 704.

The authority of the clerk of the local camp was limited, and he had no authority to waive any of the provisions of the by-laws.

Modern Woodmen v. International Trust Co. 25 Colo. App. 26, 136 Pac. 806; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Bixler v. Modern Woodmen, 112 Va. 678, 38 L.R.A. (N.S.) 571, 72 S. E. 704.

An agent cannot bind his principal by his unauthorized act.

Driscoll v. Modern Brotherhood, 77 Neb. 282, 109 N. W. 158; Supreme Lodge, K. H. v. Oeters, 95 Va. 610, 29 S. E. 322; Royal Highlanders v. Scovill, 66 Neb. 213, 4 L.R.A. (N.S.) 421, 92 N. W. 206; Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Supreme Lodge, K. H. v. Jones, 35 Ind. App. 121, 69 N. E. 718.

Mr. Z. C. Millikin, for appellee:

Notwithstanding its by-laws, an officer or agent of a beneficiary society may waive any defense.

Shultice v. Modern Woodmen, 67 Wash. 65, 120 Pac. 531; Modern Woodmen v. Colman, 64 Neb. 162, 89 N. W. 641; Collver v. Modern Woodmen, 154 Iowa, 615, 135 N. W. 67; Trotter v. Grand Lodge, I. L. H. 132 Iowa, 513, 7 L.R.A. (N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; Dougherty v. Supreme Court, I. O. O. F. 125 Minn. 142, 145 N. W. 813; Hendrickson v. Grand Lodge, A. O. U. W. 120 Minn. 36, 138 N. W. 946; Modern Woodmen v. Jameson, 48 Kan. 718, 30 Pac. 460; Mosiman v. Occidental Mut. Ben. Asso. 82 Kan. 670, 109 Pac. 413.

A fraternal society is bound by the law of waiver or estoppel to the same extent as an old line company.

Trotter v. Grand Lodge, I. L. H. 132 Iowa, 513, 7 L.R.A. (N.S.) 569, 109 N. W. 1099, 11 Ann. Cas. 533; Zahm v. Royal Fraternal Union, 154 Mo. App. 70, 133 S. W. 374; Modern Woodmen v. Jameson, 48 Kan. 718, 30 Pac. 460; Swedish American Ins. Co. v. Knutson, 67 Kan. 75, 100 Am. St. Rep. 382, 72 Pac. 526.

If, in any negotiations or transactions with the insured, after knowledge of the forfeiture, the insurer recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture as matter of law is waived, and such a waiver need not be based upon any new agreement or an estoppel.

3 Cooley, Briefs on Ins. p. 2460; 29 Cyc. 193; Hendrickson v. Grand Lodge, A. O. U. W. 120 Minn. 36, 138 N. W. 946; Supreme Tent, K. M. v. Volkert, 25 Ind. App. 627, L.R.A. 1917A.

57 N. E. 203; Kidder v. Knights Templars' & M. Life Indemnity Co. 94 Wis. 538, 69 N. W. 364; Western Ins. Co. v. Ashby, 53 Ind. App. 518, 102 N. E. 45; Standard Life & Acci. Ins. Co. v. Davis, 59 Kan. 521, 53 Pac. 856; Burnham v. Interstate Casualty Co. 117 Mich. 142, 75 N. W. 445.

Mason, J., delivered the opinion of the court:

William H. Strohm obtained a beneficiary certificate in the Modern Woodmen of America. Thereafter he became a lineman for an electric light company, and met his death through contact with a live wire while in that employment. The by-laws contained a provision that engaging in such an occupation by a member should exempt the society from liability on account of his death directly traceable thereto. His mother, the beneficiary, brought an action upon the certificate. The society defended upon the ground that it was released from liability by the fact that his death was due to his engaging in the hazardous occupation referred to. The plaintiff relied upon a waiver of the right to defend upon that ground. She recovered a judgment, and the defendant appeals.

1. It is argued that a waiver resulted from the receipt of dues with knowledge of the fact that the member had entered the dangerous employment. Inasmuch as his engaging in a hazardous occupation relieved the company from liability only in case the member came to his death by reason of it, he had a motive in keeping up his dues as a protection to the beneficiary in the event of his dying from some other cause, and their receipt by the society with knowledge of his change of employment could not result in a waiver of any of its rights. Note in 27 L.R.A. (N.S.) 446; Modern Woodmen v. Weekley, 42 Okla. 25, 139 Pac. 1138.

2. The verdict was obviously based on the theory that a waiver resulted from the conduct of the society after the member's death. The head clerk sent to the local clerk blank forms for use in presenting a claim against the society, which were delivered to the attorney of the beneficiary and used for that purpose. The jury found specifically that at the time they were sent the society knew the cause of the death. This finding was based on the testimony of the local clerk that he made a written report to the head clerk in which he "supposed" he stated that Strohm had been killed by coming in contact with a live wire while working as a lineman for the electric light company. Notice to produce the report was served upon the society, but was responded to by a statement that it had no such paper, excepting an official report by the local clerk, which

was produced, and which appears not to have been the one referred to. The jury also found that the blanks were not delivered upon the request of the plaintiff's attorney, but upon that of the head clerk. The evidence was that the attorney asked the local clerk for them. It is argued in support of the finding that the delivery was made by request of the head clerk that a by-law prescribed this procedure. The by-law referred to, however, concludes with the sentence: "The only duty to be performed by the camp clerk under this section is to deliver said blank forms for proofs of the death of the member to said beneficiary or beneficiaries at the request thereof."

However, we do not regard it as material whether or not the blanks were delivered in response to a request for them. In either event they were, of course, furnished with the expectation and understanding that they were to be used. No demand or request for their execution was made by the society. There was evidence that the plaintiff incurred the expense of an attorney's fee in the preparation of the proofs. The question for determination is this: Was it the duty of the society, if it intended to resist the payment of the policy on the ground that the death had taken place under circumstances then known to it, which relieved it from liability, to give some expression to that intention at the time it furnished the blanks to be used in making proofs in support of a claim against it? The test is whether the conduct of the society was such as to induce in the mind of the beneficiary a reasonable belief that the claim might be paid, notwithstanding the death was not one for which, under the by-laws, it was liable. The general doctrine is that a known breach of condition is waived by inducing the claimant to go to trouble and expense for the purpose of perfecting his claim. *German Ins. Co. v. Allen*, 69 Kan. 729, 77 Pac. 529; 2 Bacon, Ben. Soc. 3d ed. § 435; 3 Cooley, Briefs on Ins. p. 2748; 29 Cyc. 198. The question is whether the mere furnishing of blanks can be regarded as such an inducement.

In *Burnham v. Interstate Casualty Co.* 117 Mich. 142, 75 N. W. 445, it was held (two justices out of five dissenting) that the supplying to a beneficiary, upon request, of blanks for proofs of death, the preparation of which entailed expense, accompanied by a mere general statement that this should not be deemed a waiver, precluded an insurance company from interposing a defense based on the failure of the insured to give notice of additional insurance. There, however, the company not only failed to indicate a purpose to rely on that

particular defense, but foreshadowed a reliance upon an entirely different one,—a circumstance that is referred to in a later case as a ground for distinction. *Showalter v. Modern Woodmen*, 156 Mich. 390, 396, 120 N. W. 994. On the other hand, the mere furnishing of such blanks has been held not a sufficient basis of waiver. *Elhart v. Pacific Mut. L. Ins. Co.* 47 Wash. 659, 92 Pac. 419. See also *Tuttle v. Iowa State Traveling Men's Assn.* 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131; *Loesch v. Union Casualty & Surety Co.* 176 Mo. 654, 75 S. W. 621. A different situation arises where the company requests the submission of proofs, or in any other way gives affirmative encouragement to the prosecution of the claim. In *Modern Woodmen v. Taylor*, 67 Kan. 368, 71 Pac. 807, the plaintiff presented the question here involved, under somewhat similar conditions, saying: "Instead of standing upon these defenses which they claim to have known of long before his death, the society required the beneficiary to go to the trouble and expense of making proof of a fact which, in view of the defenses now alleged, would be as vain an act as one could possibly require." Brief and argument of defendant in error, p. 14.

In the opinion of the court it was said: "We do not think that the requiring of proofs of loss after the death of Taylor constituted a waiver by the order of any of its rights under the certificate or by-laws." p. 375.

Each of the blanks furnished by the society was headed by a statement, under the caption, "Take Notice," to the effect that the supplying or use thereof should waive none of its rights to deny liability. The beneficiary's personal statement of her claim concluded with the words: "I further state that . . . when said blanks were executed I understood and now further agree that the execution thereof, or any demand made therefor, . . . shall not be construed or considered as a waiver of any right of said society to deny its liability under the said benefit certificate."

The situation is not one which gave the society an option to declare a forfeiture. The provision exempting the society from liability for a death caused by engaging in a prohibited occupation was self-executing. The denial of a right to recover on account of such a death does not result from a forfeiture in such sense as to be the occasion of any especial readiness in granting relief from it. A death resulting from pursuing a specified dangerous calling was not one that was insured against.

We conclude that the established facts

do not constitute a waiver nor justify the finding of a waiver, and that therefore no recovery can be had on the certificate.

The judgment is reversed, and the cause remanded, with directions to render judgment for the defendant.

Annotation—Insurance: furnishing blanks for proofs of loss or claim as a waiver of breaches of condition or forfeiture.

As to waiver of provision as to change of occupation by continued receipt of dues, see annotation to *Johnson v. Modern Brotherhood*, 27 L.R.A. (N.S.) 446.

As indicated by its title, the present note is confined to the question whether the mere furnishing of blanks for proofs of loss constitutes a waiver, and does not include the question whether a waiver results where the insurer specifically requests that proofs of loss be made, or gives other affirmative encouragement to the prosecution of the claim than the furnishing of blanks.

It will be noted that in *RIDGEWAY v. MODERN WOODMEN*, ante, 1062, no waiver of the insurer's right to defend on the ground that the insured was engaged in a prohibited occupation was held to have resulted from the furnishing of blanks for making proofs of death, at the beneficiary's request, after the insurer had knowledge of the change of occupation, although it gave no notice of its intention to resist payment otherwise than by a general statement that the supplying or use of the blanks should waive no right to deny liability.

This holding is in harmony with the conclusion reached in the other cases where the insurer did not request or affirmatively require proofs of loss or death, but merely furnished blanks at the request of the beneficiary, accompanied by a statement indicating that it did not thereby intend to waive any of its defenses.

Thus, in *Burnham v. Interstate Casualty Co.* (1898) 117 Mich. 142, 75 N. W. 445, where the beneficiary's attorneys wrote the insurer that the insured had been accidentally drowned, and asked it to send the blank proofs, but did not intimate that the insured had taken out additional insurance in violation of the policy a divided court held that there was no waiver of the breach of this condition by reason of the insurer's furnishing blank proofs accompanied by a letter stating that, although it did not understand how the beneficiary was going to affirmatively prove accidental death under the circumstances, yet it forwarded the blanks subject to the notices and stipulations printed thereon, one of which was that the blanks

were sent to permit a statement of facts, and that the furnishing of them should not be held to be a waiver of any of the agreements or conditions of the policy or the application, nor of the rights of the insurer, in the event of any violation of such agreement or condition. The court said: "The letter inclosing the blank proofs of loss called the attention of Mrs. Winans to the conditions of the policy and the application, and expressly stated that it would insist on every defense it had for violation of any agreement or condition therein. This was the first occasion on which defendant had been called upon to say anything. What language could be more definite, what statement more complete? This statement was made a part of the letter just as effectually as though it had been copied in the letter. This is not controverted, and yet it is claimed that, because the defendant did not specifically and expressly state every defense it had or was informed of, and did in its letter hint at one defense, all others are waived. If the defendant had not stated in that letter, 'We do not understand how you are going to affirmatively prove accidental death,' would it have been held that it had waived the defense of suicide by its silence, because its agent in Detroit had written that Mr. Winans committed suicide? If defendant had inclosed proofs of loss without any letter, or with one stating that it waived no defense, would it have waived all violations of the contract of which it had before been informed? The logical result of plaintiff's contention is to close the door to every defense, in the face of the most positive assertion that it relied upon all, and waived none. The defense of breach of warranty is a meritorious one. The defendant clearly did not intend to waive it. In language unmistakable it notified Mrs. Winans that it did not intend to waive it, and yet, because it did not specifically state this defense, a waiver is claimed. While some authorities have gone very far to sustain a waiver particularly of technical defenses, I find none that have gone to the extent now claimed."

And in *Showalter v. Modern Wood-*

men (1909) 156 Mich. 390, 120 N. W. 994, it was held that the insurer did not waive its right to defend on the ground that the insured came to his death by an accident due to employment in a prohibited occupation, where, at the request of the attorneys of the beneficiary, it sent a set of blanks for proof of death, accompanied by a letter in which it stated that it did not consider itself liable, but that if the beneficiary wished to present facts for the consideration of the board of directors she might do so, and for that purpose the blanks for proof of death were inclosed, but that by the furnishing of such blanks the society did not waive its right to deny any and all liability to the beneficiary under the contract.

The court in this case pointed out as a ground of distinction that in *Burnham v. Interstate Casualty Co.* (Mich.) *supra*, a distinct ground of defense was foreshadowed by the insurer's letter, that is, whether there had been an accidental death, and that it subsequently sought to set up another entirely distinct defense, i. e., that the insurer had taken additional insurance, whereas in the *Showalter Case* there had been no waiving as to the nature of the defense to the claim.

In *Elhart v. Pacific Mut. L. Ins. Co.* (1907) 47 Wash. 659, 92 Pac. 419, there was held to be no waiver by the insurer of its right to deny liability on the ground that the insured was engaged in a prohibited occupation, where the beneficiary's attorney wrote requesting blanks for proof of loss, and blanks were forwarded, which contained a provision that the insurer in furnishing the blanks expressly stipulated that it did not waive any rights, and especially that it waived no right to set up the defense that the insured was engaged in a prohibited occupation; and it appeared that the beneficiary a few days later forwarded an affidavit of proof of death, upon receipt of which the insurer wrote stating that it required proofs on its blanks and that such blanks had been sent to her attorney, but that they inclosed a duplicate set subject to the same provision contained in the first set. The contention was that, when the insurer refused to accept the affidavit and required proof to be made upon blanks furnished by the company, this constituted a waiver of its right to declare a forfeiture of the policy because of a violation of its terms; that the insurer before sending the second blanks knew that the deceased had been en-

gaged in a prohibited occupation, and that the sending of the blanks was in effect a demand upon her to do something to perfect her claim. The court in holding this contention unsound said: "In the facts as shown by this record we see no evidence of any intention on the part of the respondent to waive its right to defend against this policy. We see nothing in its conduct calculated to mislead the appellant or take any advantage of her. She received the first set of blanks. For reasons which do not appear she did not use them but sent to the company an affidavit prepared by herself or her attorneys, setting forth the facts concerning her son's death. The home office, not knowing that she had received the first blanks sent and evidently supposing that she had not, sent her a duplicate set containing the same notice as to the company not waiving any of its rights by reason of the occupation and manner of death of the deceased. It seems to us that this, on the part of the company, was a matter of courtesy that could not, in any reasonable manner, be construed into a waiver on its part."

And an insurer does not waive the defense of suicide by mailing blanks for proofs of loss at the beneficiary's request, with knowledge of the facts, with an express statement that they were sent for her convenience and with a distinct understanding that no rights of the insurer were waived. *Tuttle v. Iowa State Traveling Men's Assn.* (1905) 132 Iowa, 652, 7 L.R.A.(N.S.) 223, 104 N. W. 1131. The court stated that nothing was done by the beneficiary at the instance or request of the insurer, and that its letter did not carry any assurance save that the blanks were forwarded for her convenience; and further stated that proofs of death were exacted as a condition precedent to payment for loss by the by-laws, and that the courtesy exhibited in supplying these blanks at the beneficiary's request ought not alone to be construed into a waiver of a defense which the insurer was then under no obligation to disclose, remarking that the test to be applied was whether the acts and conduct of the insurer were inconsistent with the intention to insist on this defense.

And an insurer is not estopped to assert that the policy had lapsed, and was not in force, where at the request of the beneficiary it furnished her with proof blanks accompanied by a letter stating that they were furnished at her request without prejudice to or waiver of any

rights of the insurer, and that the policy in question had lapsed because of non-payment of assessment prior to the insured's death, and concluding with a statement that if the beneficiary persisted in making claim under the policy the insurer would require the performance of all conditions precedent as provided in the contract, the court holding that such letter could not be construed as an invitation to the beneficiary to incur labor or expense in making proofs in the belief that the claim would be recognized. *Roth v. Mutual Reserve L. Ins. Co.* (1908) 89 C. C. A. 262, 162 Fed. 282.

Neither does an insurer waive the right to defend on the ground that the policy had been forfeited because a post mortem examination was held without notice to it, by giving a blank form on which to make proof of loss to an agent of the beneficiary who had been sent for it, where the blank was first stamped on its face, "In furnishing this blank the company reserves all its rights under its policy contract and waives none of the conditions thereof," and at the same time the agent was given a letter addressed to the beneficiary in which it was stated that in furnishing the blanks the insurer did not waive any of the terms and conditions of the policy, or any forfeiture that had accrued thereunder. *Loesch v. Union Casualty & Surety Co.* (1903) 176 Mo. 654, 75 S. W. 621.

And an insurer does not waive the failure to comply with a provision of an accident policy on a horse, requiring notice of sickness, where at the request of the insured it forwards proof blanks accompanied by a letter stating that they were sent as requested, but that the insurer had no information upon the subject whether the insured animal died before the policy was canceled, except the insured's statement, nor any information with reference to the circumstances attending the animal's death. *Alston v. Northwestern Live Stock Ins. Co.* (1898) 7 Kan. App. 179, 53 Pac. 784.

In *Jones v. Modern Brotherhood* (1913) 153 Wis. 223, 140 N. W. 1059, the insurer was held not prevented from setting up the defense that the insured was engaged in a prohibited occupation, by reason of the fact that it sent the beneficiary blank proofs of loss after knowledge of the facts, where the by-laws of the society expressly provided that the furnishing of such blanks or the execution thereof should in no case be construed as a waiver of a forfeiture for any cause, and that in every case it should

be the duty of the claimant to furnish proofs of death as provided by the by-laws.

And in *Ronald v. Mutual Reserve Fund Life Asso.* (1892) 132 N. Y. 378, 30 N. E. 739, where it was a condition precedent to the maturity of the claim that proofs of death should be furnished by the beneficiary, there was held to be no waiver of the defense that the policy had been forfeited for nonpayment of dues by certain acts of the insurer's agents, one of which was the furnishing of blanks and giving instructions as to the manner of filing them, such acts being held mere acts of courtesy.

And in *Alsbaugh v. British-American Ins. Co.* (1897) 121 N. C. 290, 28 S. E. 415, there was held to be no waiver of the insurer's right to defend on the ground that there had been a breach of a condition of the policy that the insured's factory should not be operated at night, by reason of certain conduct on the part of the insurer and its agents, among which was the furnishing of blanks to make proof of loss by the company's adjuster after he had been informed that the mill had been run at night.

In *Fire Asso. of Philadelphia v. Masterson* (1901) 25 Tex. Civ. App. 518, 61 S. W. 962, it was contended that there was a waiver of the insured's failure to take and preserve an inventory of his stock as required by the policy, by a letter written by the insurer's general agent in response to the insured's request for blank proofs of loss, in which he stated that he could not comply with this request; that the proofs which the company furnished him were to be used when the adjuster had arrived at a satisfactory settlement of a loss; and further stated that if he did furnish the insured with blank proofs of loss it might be contended that the insurer thereby waived any defense under the policy, and advised the insured that he could obtain blank proofs of loss from a book store. This contention, however, was held unavailing, the court stating that the letter upon its face showed that the agent was seeking to avoid doing anything that might be regarded as a waiver of any defense.

In *Supreme Tent, K. M. v. Volkert* (1900) 25 Ind. App. 627, 57 N. E. 203, it was held that the insurer was estopped from claiming a forfeiture on the ground that the insured engaged in a prohibited occupation, where, with knowledge that the insured had so been engaged, it sent duplicate blank forms for proof of death,

together with blank claimants' affidavits, and required them to be filled out and sworn to by the beneficiary. The decision in this case, however, rests almost

entirely upon the fact that the insurer affirmatively required the making of the proofs of loss. J. T. W.

OHIO SUPREME COURT.

WILLIAM S. THOMAS, Plff. in Err.,
v.
MABEL T. MATTHEWS.

(— Ohio St. —, 113 N. E. 669.)

Evidence — breach of contract — performance by plaintiff.

1. Where a plaintiff seeks to recover damages for breach of a contract, the burden is upon him to show either substantial performance or tender of the performance of the conditions on his part to be performed. *For other cases, see Evidence, II. k, in Dig. 1-52 N. S.*

Contract — delay in performance — provision for.

2. Where a contract provides for delay in the performance of any part thereof for a specified time, and further provides that performance shall not be required until the reasons stated in the contract for the delay in the performance have ceased to exist, no action can be maintained upon such contract at the end of the specified period, unless it further appears that the reasons for the delay no longer exists, or that they still exist through fault of the defendant.

For other cases, see Contracts, VI. a, in Dig. 1-52 N. S.

Contract — action of corporate director — validity.

3. A contract made by a director of a corporation with reference to his official action as such, based upon a consideration personal to himself, is against public policy and void.

For other cases, see Contracts, III. c, 3, in Dig. 1-52 N. S.

Same — interference with free action.

4. A contract made by a director of a corporation that limits or restricts him in the free exercise of his judgment or discretion, or that places him under direct and powerful inducements to disregard his duty to the corporation, its creditors, and other stockholders in the management of corporate affairs, is against public policy and void.

For other cases, see Contracts, III. c, 3, in Dig. 1-52 N. S.

(February 29, 1916.)

ERROR to the Court of Appeals for Clark County to review a judgment reversing

Headnotes by the Court.

Note.—For validity of individual contract of director to pay dividends, see annotation following this case, post, 1077. L.R.A.1917A.

a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover damages for breach of a contract for the payment of dividends. Reversed.

Statement by the Court:

On the 31st day of December, 1912, Mabel T. Matthews filed a petition in the common pleas court of Clark county against William S. Thomas, to which the defendant filed a motion to make the same more definite and certain. This motion was sustained, and on March 1, 1913, an amended petition was filed in which the plaintiff asked a judgment against the defendant in sums equal to an additional dividend which she claimed should have been declared on stock in the Thomas Manufacturing Company, a corporation organized under the laws of Ohio, for the year 1910, and for the whole amount of a dividend of 7 per cent which she claimed should have been declared by the directors of that company in the year 1911.

The petition avers, among other things, that the company earned 10 per cent on its capital stock in the year 1910, and declared and paid a dividend of only 8 per cent; that in the year 1911 it earned 7 per cent on the capital stock of the company, but did not declare or pay any dividends in that year.

The claim of the plaintiff against the defendant for dividends not declared or paid in 1910 and 1911 is predicated upon a contract which reads in words and figures following, to wit:

Springfield, Ohio, April 29, 1905.

The heirs of John H. Thomas, deceased, having settled and adjusted various matters of controversy and agreed upon a division of the balance of said estate as indicated upon the sheets hereto attached, which are identified by the signatures of A. N. Summers and J. E. Bowman, as part of said adjustment, it is agreed as follows:

First. Said heirs will give the executors of said estate receipts for their respective distributive shares as heretofore ordered distributed by the probate court of Clark county. Said heirs hereby ratify the action of said executors in handing over to Mabel Matthews, W. S. Thomas, and Findlay B. Thomas, certain assets intended for them viz.:

To Mabel Matthews the following notes:
A. C. Black \$8,000.00
Wm. A. and M. Buffembarger.... 1,500.00

Moores & Co. and H. H. Moores ..	7,500.00
Ed. and A. J. Ryan	5,000.00
J. H. Thomas	1,817.00
Thomas Mfg. Co. notes	30,635.98
To Findlay B. Thomas the following notes:	
J. S. Crowell	\$7,500.00
R. F. and F. A. Hayward	300.00
E. and M. Harshman	4,000.00
Emma A. Reed et al.	3,000.00
G. W. and K. Sheaff	1,000.00
J. H. Thomas	7,868.00
Thomas Mfg. Co. notes	24,917.96

To W. S. Thomas the following notes:

H. R. Geiger	\$3,100.00
J. A. Hemphill	2,500.00

And they agree that no further accounting shall be had in the probate court, unless assets are discovered which are not covered or considered in said adjustment; and they further agree that if new liabilities of said estate are discovered, they will each contribute one fourth to the payment of same.

Second. It is agreed that so long as either Mrs. Summers or Mrs. Matthews hold at least \$10,000 par value of stock in the Thomas Manufacturing Company the present salaries of W. S. Thomas and H. H. Bean shall not be increased without their consent, excepting for a year in which the company earns and pays a dividend of at least 6 per cent, and, further, that for each 1 per cent of dividend above 6 per cent earned and paid in any year there may be for such year an increase of not more than 10 per cent in one or both of said salaries, not to exceed, however, in any year, a salary of \$10,000 for W. S. Thomas and \$5,000 for H. H. Bean; also that whenever the net earnings of the company in any year will permit a dividend of at least 4 per cent, a dividend of the largest whole per cent permitted by the entire net earnings shall be declared and paid, unless otherwise agreed; but that no such dividend need be paid in the present or in the next six years during which the company has unusual payments to make to the heirs of the J. H. Thomas estate, the payment of any such dividends being postponed until after said last-mentioned payments are made.

It is further agreed that neither by additional salaries nor by any other means resorted to for such purpose shall the future net earnings of the company be absorbed so as to prevent dividends, without the consent of Mrs. Summers and Mrs. Matthews so long as they or either of them remain a stockholder of said company in at least the amount above named.

It is further agreed that Mrs. Summers and Mrs. Matthews, so long as they re-

main stockholders in said company in any amount, shall annually receive a statement of the company's condition and transactions in detail as full as the one given them February 1st of this year; and it is further agreed that no mortgage shall be placed upon the company's property without their consent.

Third. Mrs. Summers and Mrs. Matthews shall each receive a complete detailed inventory of the estate held in trust for Findlay B. Thomas, the same to be delivered within a reasonable time after the execution hereof.

Fourth. The trust deed given W. S. Thomas for the Whiteley property shall not be acted upon without consent of all parties thereto, and upon demand of any party thereto at any time W. S. Thomas, the trustee in said deed of trust, shall reconvey to such party a one-fourth interest in said property.

Fifth. No part of the fees that may be charged by J. E. Bowman for services in these adjustments shall be charged to the Thomas Manufacturing Company, or to the estate of J. H. Thomas.

Sixth. Clause 2 hereof shall be binding only on W. S. Thomas, and after the expiration of the six-year period above referred to the provisions of section 2 hereof shall be binding on W. S. Thomas only so long as he remains in the management of the affairs of the Thomas Manufacturing Company, or through his ownership of stock therein is able, with the assistance of other parties hereto, to control the management thereof.

Seventh. During the six-year period above referred to neither Mrs. Summers nor Mrs. Matthews shall institute any legal proceedings to dissolve the Thomas Manufacturing Company if in her opinion the letter and spirit of this agreement has been faithfully kept by W. S. Thomas.

Eighth. As to the dividends that may be declared during the next six years the same shall be payable in the year 1911, excepting as to the excess of any such dividend above 4 per cent the company shall have the option either to pay the same in cash, or to issue therefor preferred stock at par, bearing 6 per cent cumulative dividends, and redeemable by the company at par at the end of five years after its issue: Provided in case of such preferred stock being issued to any stockholder the same shall be issued to all stockholders in the same proportion and on the same terms. Such option shall be exercised on or before the 1st day of November, 1911, and if preferred stock is to be issued the same shall be issued so soon as the necessary steps can reasonably be taken to issue the same.

Witness the signatures of the parties on the date above named.

William S. Thomas

Nellie T. Summers.

Mabel T. Matthews.

William S. Thomas,

Trustee of Findlay B. Thomas.

The amended petition further avers that the Thomas Manufacturing Company was at the date of the contract indebted to W. S. Thomas and C. E. Thomas, as executors of the John H. Thomas estate, in the sum of \$100,000, and to plaintiff and other legatees under the will of John H. Thomas in a sum in excess of \$70,000, which indebtedness was then past due. It is further averred that the indebtedness of the company to the executors had arisen through their unlawfully loaning the assets of John H. Thomas to the Thomas Manufacturing Company. The amended petition further avers that this plaintiff and Nellie T. Summers, her sister, were demanding payment by the Thomas Manufacturing Company of all the money due and owing by it to these executors, and that the corporation should be dissolved; that W. S. Thomas, who was the president of the company and the owner of a large number of shares of its corporate stock, objected to the corporation making immediate payment, for which reason the plaintiff and her sister consented to an extension of the time for the payment of said sums, released the executors, as executors, from the payment of the same, and agreed to take in lieu thereof the notes of the Thomas Manufacturing Company, whereby the said indebtedness was distributed over a period of five years.

To this amended petition the defendant filed a general demurrer, which was overruled by the court. Thereupon the defendant filed an answer admitting the execution of the written agreement dated April 29, 1906, admitting that the net earnings of the Thomas Manufacturing Company in the year 1910 were equal in amount to 10 per cent of its capital stock and that the earnings in the year 1911 were equal in amount to 7 per cent of its stock, but denying that such earnings permitted a dividend of 4 per cent, or any other per cent in excess of 8 per cent in the year 1910, for the reason that said net earnings were not of a character that could be distributed by way of dividends, but consisted of accounts due the company and accretions to its assets made necessary for the successful conduct of its business, averring further that the company was largely indebted; that the indebtedness mentioned in the petition and contract, which was paid as required to the plaintiff and her sister, was in large part borrowed

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from other persons and banks in order to make such payments, and that said company had large indebtedness in addition thereto; that all of the income of the company that could be spared from the conduct of its business was applied to the reduction of its indebtedness; and that no dividend could have been declared or paid without an injustice to creditors and injury to its stockholders. Defendant further avers that the money which plaintiff would have received, had dividends been declared and paid, had all been used for her benefit in the preservation of the business and prosperity of the company by reduction of its debts, and for this reason she had sustained no damage by reason of the failure of the company to declare and pay dividends.

For a second defense, the defendant avers that at the time of the execution of the contract, and for some years prior thereto, he was one of a board of five directors of said company; that he had no control over the other directors of the company; that he could not at any time have procured the declaration of dividends by the company beyond those dividends that were declared; that by reason of the large indebtedness of the company and the state of its business no dividends such as claimed by the plaintiff ought to have been declared, having due regard for the rights of creditors and stockholders; that neither he nor any other member of the board of directors could have voted in favor of declaring further dividends without a wilful violation of his duty as such director; that the plaintiff and her sister, during the years in question, failed and refused to participate in the election of directors of said company, or to assist the defendant in any way to control the action of its board of directors in the premises; and that the management and control of the affairs of said company ever since the date of said contract has resided in its board of directors, and not in this defendant.

For a third defense, the defendant avers that, notwithstanding the provisions of the contract, and during the six-year period covered thereby, the plaintiff, in conjunction with her sister, in March, 1909, wrongfully began legal proceedings to dissolve the Thomas Manufacturing Company, and prosecuted such suit to final judgment in the circuit court of Clark county, Ohio; that said suit was pending at the time of the commencement of this suit, and had only been finally adjudicated against the plaintiff and her associates, as plaintiffs in that suit, within a few days preceding the filing of this answer; and that at the time of the filing of the answer no entry of the judgment of the circuit court had yet been made on the journal of that court.

Defendant avers that these proceedings to dissolve said company greatly embarrassed the company in the conduct of its business, and the expense of defending said proceedings greatly increased the cost of carrying on the business of the company; that its credit was greatly impaired and its earnings reduced from what they otherwise would have been; and that for these reasons it was impossible for the company to declare and pay dividends.

The plaintiff for reply denied specifically the allegations in the several defenses of the answer, except such as were admissions of the averments in the petition, and averred that the defendant refused to act with her or her sister or their representatives on the board of directors in the management of said corporation, and that they then were, and at all times had been, willing to unite with the defendant in the control of said corporation and the declaring and paying of the dividends provided for in said contract.

Upon the issue joined by the pleadings the jury returned a verdict in favor of the defendant, and judgment was rendered thereon. Error was prosecuted to this judgment in the court of appeals of Clark county, which court reversed the judgment of the common pleas court for error in the charge to the jury with reference to the validity of this contract and with reference to the question of co-operation of the plaintiff and her sister with the defendant in the control of the company's business, in that the trial court did not charge the jury, "in respect to the readiness and willingness of W. S. Thomas to declare dividends, that the same was communicated to the plaintiff, and that she declined to co-operate."

This proceeding in error is prosecuted in this court to reverse the judgment of the court of appeals reversing the judgment of the common pleas court.

Messrs. Paul C. Martin and J. E. Bowman, for plaintiff in error:

The contract is illegal.

West v. Camden, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838; *Flaherty v. Cary*, 62 App. Div. 116, 70 N. Y. Supp. 951, affirmed in 174 N. Y. 550, 67 N. E. 1082; *Teich v. Kaufman*, 174 Ill. App. 306; *Morel v. Hoge*, 130 Ga. 625, 16 L.R.A. (N.S.) 1136, 61 S. E. 487, 14 Ann. Cas. 935; *Sauerhering v. Rueping*, 137 Wis. 407, 119 N. W. 184; *Scripps v. Sweeney*, 160 Mich. 149, 125 N. W. 72; *Robison v. McCracken*, 52 Fed. 729; *Singers-Bigger v. Young*, 91 C. C. A. 510, 166 Fed. 85; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Forbes v. MacDonald*, 54 Cal. 98; *Woodruff v. Wentworth*, 133 Mass. 309; *Lum v. McEwen*, 56 Minn. 278, 57 N. W. 662; *Moody v. Newmark*, 121 Cal. 446, L.R.A.1917A.

53 Pac. 944; *Funkhouser v. Capps*, — Tex. Civ. App. —, 174 S. W. 897; *Field v. Lamson & G. Mfg. Co.* 162 Mass. 388, 27 L.R.A. 136, 38 N. E. 1126; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Hazeltine v. Belfast & M. L. R. Co.* 79 Me. 411, 1 Am. St. Rep. 330, 10 Atl. 328; *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209.

Where there is no warranty that any dividends will be earned, but only an assurance that the corporation will distribute its earnings in dividends, the measure of damages is not the amount of the stipulated dividend, if it be shown that the stockholder has been better served financially by the retention of such earnings.

Evrit v. Bancroft, 22 Ohio St. 172.

The character and quality of the earnings should have been considered and not mere quantity alone, otherwise the word "permit" in the contract was without effective meaning.

Belfast & M. L. R. Co. v. Belfast, 77 Me. 445, 1 Atl. 407; *Stevens v. United States Steel Corp.* 68 N. J. Eq. 373, 59 Atl. 905.

It was not necessary for defendant to prove that he notified plaintiff of his readiness to act with her and her sister in controlling the corporate action in the matter of dividends, and that she then refused to co-operate.

Raudabaugh v. Hart, 61 Ohio St. 73, 76 Am. St. Rep. 361, 55 N. E. 214.

Messrs. Lawrence Maxwell and A. N. Summers, for defendant in error:

The contract is not against public policy and is not void.

Moorehouse v. Crangle, 36 Ohio St. 130, 38 Am. Rep. 564; *Doan v. Rogan*, 79 Ohio St. 373, 87 N. E. 263; *Crook v. Scott*, 65 App. Div. 139, 72 N. Y. Supp. 516, affirmed in 174 N. Y. 520, 66 N. E. 1106; *Lorillard v. Clyde*, 86 N. Y. 384, 122 N. Y. 45, 19 Am. St. Rep. 470, 25 N. E. 292, 142 N. Y. 456, 24 L.R.A. 113, 37 N. E. 489; *Cook, Corp.* 4th ed. § 775; *Havemeyer v. Havemeyer*, 11 Jones N. S. 506; *Havemeyer v. Havemeyer*, 86 N. Y. 618; *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24, 3 Mor. Min. Rep. 551; *Pender v. Lushington*, L. R. 6 Ch. Div. 70, 46 L. J. Ch. N. S. 317, 57 L. T. N. S. 353; *North-West Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589, 50 L. J. P. C. N. S. 102, 57 L. T. N. S. 426, 36 Week. Rep. 647; *Greenwell v. Porter* [1902] 1 Ch. 530, 71 L. J. Ch. N. S. 243, 86 L. T. N. S. 220, 9 Manson, 85, 3 Clark & M. Priv. Corp. 2005; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48; *Burland v. Earle* [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times

L. R. 41, 9 Manson, 17; 10 Cyc. 574-576; Cook, Stock & Stockholders, §§ 273, 274; Leary v. United States, 224 U. S. 567, 575, 56 L. ed. 889, 891, 32 Sup. Ct. Rep. 599; Smith v. San Francisco & N. P. R. Co. 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; Brightman v. Bates, 175 Mass. 105, 55 N. E. 809; San Remo Copper Min. Co. v. Moneuse, 149 App. Div. 26, 133 N. Y. Supp. 509; Bensinger v. Kantzler, 112 Ill. App. 293.

The pendency of a suit for dissolution was no bar to a suit against William S. Thomas for the net earnings.

9 Cyc. 641-643; Loud v. Pomona Land & Water Co. 153 U. S. 564, 38 L. ed. 822, 14 Sup. Ct. Rep. 928; Gould v. Brown, 6 Ohio St. 538.

The court correctly charged that the measure of damages was the amount of profits that should have been declared in dividends.

Hadley v. Baxendale, 9 Exch. 341, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Lorillard v. Clyde, 86 N. Y. 384.

Donahue, J., delivered the opinion of the court:

If it be true, as pleaded in the petition, that W. S. Thomas entered into this agreement for the declaration and payment of dividends by the Thomas Manufacturing Company in consideration that he be released from personal liability, as executor of the estate of John H. Thomas, for money unlawfully loaned by him as executor to the Thomas Manufacturing Company, or for any other consideration personal to himself, then this agreement is against public policy and void. It is the settled law of this state that directors must manage the corporate business with a view solely to the common interest, and cannot, directly or indirectly, derive personal profit or advantage from their position which is not shared by all the stockholders. The maxim, *uberrima fides*, of the civil law applies without limitation or restriction to their relation to the corporate property and business. They occupy a strictly fiduciary relation to the stockholders, and are accountable to them on principles governing that relationship. Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493, 502, 5 L.R.A. 378, 15 Am. St. Rep. 644, 22 N. E. 293; Larwill v. Burke, 66 Ohio St. 683, 65 N. E. 1130, affirming 19 Ohio C. C. R. 449, 10 Ohio C. D. 605; Peter v. Union Mfg. Co. 56 Ohio St. 181, 46 N. E. 894; Greenville Gas Co. v. Reis, 54 Ohio St. 549, 558, 44 N. E. 271; Elliott, Priv. Corp. 4th ed. §§ 502, 503; 8 Thomp. Corp. 2d ed. §§ 1215, 1216; Warren v. Para Rubber Shoe Co. 166 Mass. L.R.A.1917A.

97, 104, 44 N. E. 112; and 1 Morawetz Priv. Corp. 2d ed. § 517.

This contract does not in terms release W. S. Thomas from liability for any funds loaned by him as executor to the Thomas Manufacturing Company. It does provide that the heirs of the John H. Thomas estate will give the executors of that estate receipts for their respective distributive shares as theretofore ordered distributed by the probate court of Clark county. That is the ordinary and natural thing to do where distribution is made to heirs under the order and directions of the court. The agreement to give such receipt is directly referable to the agreement to distribute.

The agreement on the part of the heirs to ratify the action of the executors in delivering to certain of the heirs assets intended for them is also a natural and proper thing to do, and that would seem to have no application other than to that part of the contract relating to the distribution of this estate. The agreement that no further accounting should be had in the probative court is an agreement of mutual value to all of the heirs as well as to the executors. The consideration for such a contract is the mutual agreement of the parties thereto.

In the absence of an action to reform this contract, it is the duty of the court to construe it in the terms in which it is written. An agreement will not be adjudged to be illegal when it is capable of a construction that will make it valid. Lorillard v. Clyde, 86 N. Y. 384.

This contract is dual in its nature. One part of it relates to the settlement of a controversy among the heirs of John H. Thomas, deceased, relative to the settlement and distribution of his estate. The other part relates to the management of the affairs of the Thomas Manufacturing Company, a corporation organized under the laws of Ohio, of which corporation the parties to this contract are stockholders in various amounts. Upon the face of the contract these different subject-matters have no necessary relation to each other. If they can be separated, then this would relieve this part of the contract from the infirmity of a consideration personal to W. S. Thomas. Ohio ex rel. Laskey v. Board of Education, 35 Ohio St. 519; Doty v. Knox County Bank, 16 Ohio St. 133; Wideoe v. Webb, 20 Ohio St. 431, 435, 5 Am. Rep. 664; Pollock, Contr. 8th ed. 390. On the other hand, if these considerations and agreements in relation to the settlement and distribution of the John H. Thomas estate are part of the considerations for the agreement of the parties in reference to the business of the Thomas Manufacturing Company, then this contract must fall; for the Thomas Manufacturing

Company cannot be made the shuttlecock of the dissensions of the Thomas heirs. If this part of the contract may be construed separately, then the only consideration for the promise of W. S. Thomas in relation to dividends is found in clause 7 thereof, which provides that during the six-year period neither Mrs. Summers nor Mrs. Matthews shall institute any legal proceedings to dissolve the Thomas Manufacturing Company if, in her opinion, the letter and spirit of this agreement has been faithfully kept by W. S. Thomas. This consideration is one moving directly to the Thomas Manufacturing Company and indirectly to W. S. Thomas as a large stockholder therein. There can be no objection to this because of the fact that he will profit, or expects to profit, as a stockholder in this corporation, by reason of the forbearance of the other contracting parties to bring this suit. The same benefits would accrue to all the stockholders alike. True, there is nothing definite as to the time of forbearance. That is a matter to be determined by this plaintiff or her sister; it is an agreement to delay bringing this suit for an indefinite time, and a sufficient consideration for a valid agreement on the part of W. S. Thomas, who was largely interested as a stockholder in the continuation and prosperity of the business of this corporation.

It is averred in the answer, and admitted by the plaintiff, that during the six-year period named in the contract, to wit, in March, 1909, this plaintiff and her sister began an action in the common pleas court of Clark county to dissolve the Thomas Manufacturing Company, and prosecuted that suit to final judgment. That suit was pending at the time of the commencement of this suit in December, 1912. Conceding for the present that this arrangement for the declaration and payment of dividends is a valid one, based upon the consideration that plaintiff and her sister would forbear to bring this suit for the dissolution of the company, —and this is the only consideration mentioned in the contract that is not personal to W. S. Thomas,—then the fact that this plaintiff elected to withdraw from the contract and bring the action undoubtedly released W. S. Thomas from the performance of the covenants and conditions in the contract on his part thereafter to be performed. The plaintiff cannot claim the benefits of the contract and reject its burdens. She could not have a dissolution of the corporation in 1909 and dividends declared according to the provisions of this contract in 1911. It could not possibly have been within the contemplation of the parties to this contract that this agreement on the part of W. S. Thomas with reference to dividends should

survive the bringing of a suit for the dissolution of the corporation that was to declare and pay these dividends. The fact that such a suit was pending would necessarily affect the judgment of the board of directors in determining not only the amount available for the payment of dividends, but also as to the advisability of declaring and paying any dividends. The directors of a corporation not only stand in the relation of trustees to the stockholders, but, where a corporation is insolvent or threatened with insolvency, or where a suit for dissolution is pending, they stand in the relation of trustees to the creditors, and they are not permitted to divert assets from the payment of its debts by distributing these assets to the stockholders as dividends; neither can they be permitted to anticipate the action of the court. It is their duty to conserve these assets until the final judgment of the court in the dissolution proceedings, and deliver the same to the receiver appointed by the court, if one should be appointed. Any distribution of its assets in dividends, or any application of its funds to other than corporate business, pending such an action, would be at their peril. *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95; *Elliott, Priv. Corp.* 4th ed. § 401; *Thomp. Corp.* 2d ed. §§ 1305, 5324; and 2 *Morawetz, Priv. Corp.* 2d ed. § 787.

Under such circumstances the directors cannot safely rely upon the values shown by the company's invoices. The value of a manufacturing plant as a going concern is always in excess of its value as an abandoned enterprise. Had this action of the plaintiff resulted in an order dissolving this corporation and appointing a receiver, its assets would necessarily have shrunk in value far below the value carried on its books, and possibly below the amount of its indebtedness. As shown by the report published by this court of that case, the petition filed for the dissolution of this corporation averred that in the fifteen years preceding the corporation had paid but three dividends, one of 6 per cent and two of 5 per cent each, and that during the eight years since the death of John H. Thomas the business had been carried on by the owners of a majority of the stock at a loss of more than \$43,000, that there had been a great depreciation in the value of the property, and that in the preceding seven years nothing had been charged off for depreciation. It further appears from the uncontradicted evidence in this case, that on October 1, 1910, the debts were \$426,961.56, that there was then cash on hand available for the payment of these debts \$55.06, and that on October 1, 1911, the indebtedness of the

company was \$417,998.54, with cash on hand \$145.37.

With such a petition confronting the board of directors, and with the knowledge of the enormous indebtedness of this corporation, the declaration and payment of dividends would not only have authorized, but would have been an invitation to, creditors to intervene to protect their rights by the immediate appointment of a receiver.

The averments of this petition to dissolve this corporation, if true,—and undoubtedly the plaintiff believed them to be true, not only when she filed the petition, but during the time she prosecuted this suit,—show beyond question that she had abandoned all hope of dividends from this corporation and had reached the conclusion that it was for the best interest of the stockholders to dissolve the corporation, pay its debts, and distribute the surplus of its assets, if any, to the stockholders. Whether she was right or wrong in this conclusion is unimportant. Her actions, none the less, evidence her mental attitude in reference to these matters. One of the best aids to a court in construing a contract is the construction the parties themselves have given it as shown by their conduct in relation to the subject matter thereof. Therefore, if there were any doubt as to the proper construction of this contract, the action of the plaintiff would resolve that doubt in favor of the construction that, having brought suit for the dissolution of the corporation in March, 1909, she cannot now rely upon the provisions of the contract for the declaration and payment of dividends in 1910 and 1911, with that suit pending at the same time in the courts of this state, or, for that matter, after the final disposition of that case, whether it resulted in an order dissolving this corporation or not.

It further appears from the sixth clause of this contract that the parties thereto contemplated that the plaintiff and her sister would join with W. S. Thomas in the control and management of this corporation, in order to make it possible for W. S. Thomas to perform the conditions on his part to be performed. At the time the contract was written the plaintiff and her sister were represented on the board of directors of this corporation. The provision of the contract that this condition should obtain after the six-year period necessarily implies that it was expected and intended by all the parties to the contract that it should also obtain during those six years. When this contract was written the parties thereto must have known and understood that W. S. Thomas, as one of the directors of this corporation, could not declare and pay any dividends, no matter how willing he might

be to do so. If this provision of the contract means anything, it means that he agreed to join with the directors representing the plaintiff and her sister in voting to declare such dividends. The further provisions of this contract fully justify this construction: yet in 1907 or 1908, this plaintiff and her sister withdrew their representatives from this board of directors, refused to have anything further to do with the corporation's affairs, and brought an action for its dissolution. This placed it beyond their power to furnish him any assistance whatever in carrying out this provision of the contract.

The court of appeals held that the trial judge erred in failing to charge the jury that it was the duty of W. S. Thomas to notify the plaintiff of his readiness and willingness to vote as a director to declare dividends, and to show by further evidence that she declined to co-operate. It is the settled law of this state that, before recovery can be had upon a contract, the plaintiff must show either that he substantially performed, or tendered performance of, the conditions on his part to be performed. *Raudabaugh v. Hart*, 61 Ohio St. 73, 76 Am. St. Rep. 361, 55 N. E. 214; and *Mowry v. Kirk*, 19 Ohio St. 375.

It is not the duty of the defendant in a suit for damages for breach of contract to demand performance on the part of the plaintiff, or to notify him of his readiness and willingness to perform. That duty is upon the party to the contract who seeks to recover for its breach. However, in this particular case, a notice on the part of W. S. Thomas to this plaintiff that he was ready and willing to comply with the terms of the contract would have been wholly useless: for she had already placed herself in a position that made it impossible for her to render him any assistance whatever in the declaration of these dividends. It would have been an indicium of fraud on his part to make a formal demand upon this plaintiff to do something that he knew she had not the power to do. She was not then a director, nor had she any representative on the board of directors; on the contrary, she was then in court demanding the dissolution of this corporation for the reasons stated in her petition, that the company was not only not earning any dividends, but was operating at a loss. A notice to her would necessarily have meant nothing except a palpable attempt on the part of W. S. Thomas to manufacture a defense to a possible suit upon this contract.

The second clause of this contract provides that "no such dividend need be paid in the present or in the next six years during which the company has unusual payments to make to the heirs of the J. H.

Thomas estate; the payment of any such dividends being postponed until after said last-mentioned payments are made."

It is averred in the first defense of the answer that, while the debts to this plaintiff and her sister were paid, yet they were paid largely with money borrowed for that purpose. The evidence is undisputed that nothing has been paid to W. S. Thomas or Findlay B. Thomas. Undoubtedly the parties to the contract expected that the earnings of this company would pay and discharge these debts within the six years next succeeding, but in this expectation they have been disappointed. The fact that money was borrowed to pay the plaintiff and her sister does not relieve the corporation from this debt. To the extent of the money borrowed it is still the same debt, although owing to a different creditor. The debt to the other heirs has not been paid even in part, either with earnings of the company or with borrowed money, and therefore the provision of the contract that the payment of dividends shall be postponed until after these debts to the Thomas heirs have been fully paid necessarily defeats the plaintiff's right of action; for, although the contract provided that dividends shall be paid in 1911, yet it further just as specifically provided that the payment of any such dividends shall be postponed until after payment to the John H. Thomas heirs has been made.

It is contended on the part of the plaintiff in error that the trial court erred in its charge to the jury as to the damages that might be recovered in this case. The court charged the jury that the plaintiff could recover from the defendant a sum equal to her share of the full amount of a dividend that would equal the net earnings of the company in these years. If this contract were a guaranty on the part of W. S. Thomas, made upon sufficient consideration, that the company would earn these dividends, then the charge of the court would be right. *Moorehouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564, and *Lorillard v. Clyde*, 86 N. Y. 384. But this contract is not a guaranty that these earnings would be made by the company. It is merely a promise that if the earnings are made they will be distributed in dividends. Where net earnings are not distributed in dividends no such rule obtains. These earnings must ultimately be distributed in dividends or expended in betterments to the property, and in either case they inure to the benefit of the stockholders. It is doubtful if any rule can be formulated by which the damages to a stockholder for failure to declare and pay dividends from net earnings could be estimated in dollars and cents. It is certain, however, that the rule given to the jury by the trial L.R.A.1917A.

court is not a correct one, and not applicable to the facts in this case. A judgment against this defendant for the full amount of the plaintiff's share of the net earnings of this corporation that is still in its treasury, or represented in betterments, merchandise, or credits, leaving her the full right to participate as a stockholder either in the increased value of her stock or in future dividends that would necessarily be based in part upon these earnings, would be grossly inequitable and wholly unfair to the defendant.

If it were conceded, however, that the consideration for this contract is valid, and that the defendant in error had fully performed all the conditions on her part to be performed, yet the record presents the further question of her right to recover damages for a breach of this provision of the contract in reference to the declaration and payment of dividends. This right to recover depends upon the legality of the promise or agreement on the part of a director and general manager of a corporation to declare and pay dividends for the six years next succeeding the date of the contract, and thereafter so long as he remains in the management of the affairs of the corporation, or, through his ownership of stock therein, is able, with the assistance of the other parties to the contract, to control the management.

It is insisted upon the part of the defendant in error that this is a contract fixing the policy of the company with reference to the distribution of profits not needed in the company's business, instead of creating and carrying a large and unnecessary surplus in the treasury, and that such a contract is valid. Yet counsel for the defendant in error, while contending that this is the proper construction of this contract, nevertheless insists that this contract requires that a dividend shall be declared each year equal to the entire net earnings of the company for that particular year. The language of the contract in that respect is as follows: "Whenever the net earnings of the company in any year will permit a dividend of at least 4 per cent, a dividend of the largest whole per cent permitted by the entire net earnings shall be declared and paid, unless otherwise agreed."

The authorities are uniform that the term "net earnings which will permit the payment of a dividend" are the surplus earnings that remain after defraying every expense, including loans falling due, as well as the interest on such loans. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915; *Scott v. Eagle Fire Co.* 7 Paige, 198; *Stevens v.*

United States Steel Corp. 68 N. J. Eq. 373, 59 Atl. 905; Cratty v. Peoria Law Library Assn. 219 Ill. 516, 76 N. E. 707; Elliott, Corp. §§ 400, 401; 5 Thomp. Corp. 2d ed. §§ 5311, 5312.

Authorities are also uniform in holding that it is the duty of the directors, in determining the amount of net earnings available for the payment of dividends, to take into account the needs of the company in its business and sums necessary in the operation of its business until the income from further operations is available, the amount of its debts, the necessity or advisability of paying its debts, or at least reducing them within the limits of the company's credit, the preservation of its capital stock as represented in the assets of the company as a fund for the protection of its creditors, and the character of its surplus assets, whether cash, credits, or merchandise.

It is true that the law permits a corporation to borrow money to pay dividends when the earnings are represented in credits; or merchandise readily reducible to cash, but if the company is then so largely indebted that it cannot borrow the money necessary for the payment of dividends upon its own credit, then the net earnings represented in credits and merchandise do not permit the payment of dividends; for it would hardly be contended that under any construction of this contract W. S. Thomas would be required to secure or furnish security for the repayment of money borrowed to pay dividends. This provision in the contract, that net earnings less than 4 per cent need not be distributed, contemplates the necessity of the corporation using some of its net earnings each year for betterments, for the reduction of its indebtedness, and the further development of its business.

The provision in this contract as to net earnings, that would permit the payment of dividends, must necessarily be given the same construction as uniformly given it by the courts in defining these terms. It may be said that, if this construction obtains, then the contract might as well not have been written, at least so far as this provision of it is concerned; for equity would afford the same protection to the stockholders. That thought undoubtedly was in the mind of the judge of this court writing the opinion in the case of *Summers v. Thomas Mfg. Co.* 82 Ohio St. 338, 92 N. E. 482, when he said that "it will be easier to assume than to demonstrate, that the agreement of the sisters is supported by any consideration whatever."

However, if such an agreement were made and assented to by all the stockholders and directors, it would amount to a contract fixing the policy of the company as to the L.R.A.1917A.

amount of surplus it would retain in its treasury, and would aid largely, in a proper suit, in determining whether the directors were guilty of an abuse of discretion in refusing to declare a dividend.

On the other hand, if this provision of the contract requires W. S. Thomas, as director, to vote for the declaration and payment of dividends in a sum equal to the net earnings of the company each year, after deducting operating expenses only, without regard to the losses, if any, in the preceding years, the debts, need of betterments, and requirements of the company in the operation of its business, and deprives or limits him in the exercise of a fair and honest discretion in the discharge of his official duty to the corporation and its stockholders, then such contract is against public policy and void. *Bliss v. Matteson*, 45 N. Y. 22; *Woodruff v. Wentworth*, 133 Mass. 309; *Guernsey v. Cook*, 120 Mass. 501; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 32 L. ed. 819, 9 Sup. Ct. Rep. 402; and *Wardell v. Union P. R. Co.* 103 U. S. 651, 26 L. ed. 509, 7 Mor. Min. Rep. 144.

"A director has no right to sell his influence in the management of the company, or to enter into any agreement by which his official action would be influenced or controlled. Such an agreement would be dishonest and illegal; it would be in agreement to commit a breach of trust." 1 Morawetz, *Priv. Corp.* 2d ed. § 519.

In the case of *West v. Camden*, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838, the trial court charged the jury that a contract the purpose and effect of which was to influence the defendant as a stockholder and officer of the company in the decision of a question affecting the private rights of others, and by which contract he was placed under direct and very powerful inducements to disregard his duties to other members of the corporation who had a right to demand his disinterested action, was against public policy and void. This charge was sustained by the Supreme Court of the United States.

In the case of *Singers-Bigger v. Young*, 91 C. C. A. 510, 166 Fed. 82, it was held that a contract by which a stockholder employed a director to look after his interest in a corporation was against public policy and void, in so far as it obligated the director to assist the plaintiff to control the corporate action of the company, regardless of his duty as a director to represent and act for all the stockholders alike.

A contract written in 1905 requiring a director of a corporation to declare and pay in dividends the entire net earnings of the company in the years 1910 and 1911, regardless of the financial condition of the company, its losses in previous years, and its

maturing debts and interest, could not be sustained upon any theory. In human affairs there is no such thing as certainty. No stockholder or director can know in 1905 what the financial condition of a corporation will be in 1911, or, for that matter, in any of the intervening years. Such a contract would prevent him from exercising a fair and unbiased judgment upon the facts and conditions presented for his consideration in 1911, and is necessarily void. Any other conclusion would be destructive of corporate interests, and would deprive the minority holders of stock of the protection afforded to them by the judgment of a board of directors, uninfluenced by personal consideration or private contract.

Counsel for defendant in error rely upon the case of *Moorehouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564. That was a contract guaranteeing that profits would be earned and paid by the corporation, made with the plaintiff as an inducement for him to subscribe for stock in the corporation. There was no agreement that dividends would be declared regardless of the needs of the company. The sole agreement relied upon was that profits would be earned and paid in the regular, ordinary, proper way. The court held that this was a personal contract of guaranty on the part of the defendant, and not a contract to answer for the debt, default, or miscarriage of another. Clearly that case has no application to the questions involved here.

The case of *Lorillard v. Clyde*, 86 N. Y. 384, involves the same principle decided in the case of *Moorehouse v. Crangle*, supra.

Neither has the case of *Doan v. Rogan*, 79 Ohio St. 372, 87 N. E. 263, any application to the questions presented by this contract. That was a contract among all the pro-

motors of a proposed corporation, by the terms of which Rogan was to furnish all of the capital, and Doan, Mahon, and Roth to give their personal services and attention to the business of the then existing partnership and of the proposed corporation, for a period of three years. As an inducement to Rogan to furnish this capital, it was agreed that, if either Doan, Mahon, or Roth should sever his connection with the temporary partnership or proposed corporation without the consent of Rogan, the person so offending was to pay to Rogan the sum of \$1,000 as liquidated damages. The action was brought against Doan under this clause of the contract, and the court held that there was nothing invalid or unlawful in this provision of the contract of the promoters for the protection of Rogan, who furnished all the capital; it appearing that the contract was made and entered into by all the persons interested or to become interested as stockholders in the proposed corporation.

On the other hand, the authorities are uniform that a director of a corporation cannot barter and sell his official discretion, nor enter into any contract whatever as to his actions in his official capacity that will in any way restrict or limit the free exercise of his judgment and discretion, or place him under any direct and powerful inducement to disregard his duty to the corporation and the stockholders in the management of the corporate affairs. Such a contract is against public policy and void.

Judgment of the Court of Appeals reversed, and judgment of the Common Pleas Court affirmed.

Nichols, Ch. J., and Johnson and Wanamaker, JJ., concur.

Annotation—Validity of individual contract of director to pay dividends.

THOMAS v. MATTHEWS, ante, 1068, is the only case found holding that a director may not contract with a stockholder that the corporation shall declare earned dividends, but the general principle is clear that a director cannot contract away his official discretion. It does not seem, however, that the court satisfactorily distinguishes the cases sustaining the contracts of a director in guaranteeing dividends. Such a guaranty would seem exactly opposed to the doctrine laid down in the closing paragraph of the opinion in THOMAS v. MATTHEWS, but it does not seem to have been claimed in any other case that the guaranty was illegal as contrary to the fiduciary character of the director.

Of the cases where there was a guar-

antee of dividends by a director, *Lorillard v. Clyde* (N. Y.) infra, is explainable as concerning throughout only the interests of the contracting parties, no one else being interested in the corporation, but other cases are not so restricted.

In *Lorillard v. Clyde* (1881) 86 N. Y. 384, cited in THOMAS v. MATTHEWS, it was held that there was nothing illegal in a contract whereby A and the firm of B. & Co., contributed equally the whole property of a corporation, B. & Co., to have the management of the business at a certain commission, in consideration of which they guaranteed A. a dividend of not less than seven per cent per annum for seven years.

In *Crook v. Scott* (1901) 65 App. Div.

139, 72 N. Y. Supp. 516, affirmed in (1903) 174 N. Y. 520, 66 N. E. 1106, the court enforced a contract by some of the directors of a corporation that if the plaintiff would buy certain of its stock from the corporation, the defendants, such directors, would pay her any part of eight per cent dividend not declared by the corporation in any year. It was held that the payment for the stock was a part consideration for the promise, and it does not seem to have been claimed that the contract was illegal, as contrary to the fiduciary character of the directors.

In *Moorehouse v. Crangle* (1880) 36 Ohio St. 130, 38 Am. Rep. 564, cited in *THOMAS v. MATTHEWS*, it was alleged that the president of a corporation being desirous of procuring an increase of its capital stock "for his own personal gain and profit, promised, agreed and guaranteed to and with the plaintiff, that if the plaintiff would subscribe and pay five hundred dollars to the capital stock of said company, he, the said plaintiff, should receive fifteen per centum on the amount so subscribed and paid by him, within one year there after," and it was held that the contract was not within the statute of frauds; but it does not appear to have been claimed that it was otherwise invalid.

In *Hornor v. McDonald* (1900) 52 La. Ann. 396, 27 So. 91, two persons reorganizing a corporation (or rather forming a new one in which they had the control) purchased the assets of the old corporation and in the act of purchase declared that they had taken cognizance of the act of sale and "for a valuable consideration, to them paid, they do hereby give their personal guarantee that, for ten years hereafter the said preferred stock, hereinbefore described, shall annually earn and pay a dividend of ten per cent, etc." And no question was raised as to any lack of right to make the contract.

(In the guaranty of dividends sustained in *Rogers v. Burr* (1898) 105 Ga. 432, 70 Am. St. Rep. 50, 31 S. E. 438, it seems probable that the defendant was a director of the corporation, as it appears from the further report of the case in *Rogers v. Chambers* (1900) 112 Ga. 258, 37 S. E. 429, that he was its secretary and treasurer.)

It may be noted that there was a clause as to the division of profits in the contract in *Doan v. Rogan*, 79 Ohio St. 372, 87 N. E. 263, cited in *THOMAS v. MATTHEWS*; but, as pointed out in that case, only the contracting parties were concerned in that corporation.

B. B. B.

OKLAHOMA SUPREME COURT.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY et al., Pliffs. in Err.,
v.

ROSA BELLE HAYS et al.

(— Okla. —, 156 Pac. 673.)

Insurance — inspection — demand.

1. In a case where only those clauses of the standard insurance policy relating to the time of payment of loss and the right to inspection and appraisal of the goods are under consideration, it is held that the right to appraisal and to inspection and reinspection of the goods must be demanded within a reasonable time from such date as the circumstances of each case may show to be the period at which the desirability or

necessity of appraisal or inspection of the goods first arises; such reasonable time in no event to be carried beyond the period of 60 days after the receipt of the proof of loss.

For other cases, see *Insurance*, VI. a, in *Dig.* 1-52 N. S.

Trial — jury — time for inspecting insured goods.

2. The question of what constitutes such reasonable time within the limits above defined is ordinarily one for the jury under proper instructions of the court.

For other cases, see *Trial*, II. c, 3, in *Dig.* 1-52 N. S.

Insurance — books — sufficiency.

3. The "book warranty" clause of the standard form of insurance policy in use in Oklahoma is complied with by the assured if the set of books kept by him are sufficient to enable a man of ordinary intelligence to ascertain from them, with reason-

Headnotes by BURFORD, C.

Note. — For time within which demand for arbitration, appraisal, inspection, or reinspection must be made, as condition of liability on insurance policy see annotation following this case, post, 1086.

Generally as to condition in fire policy as to keeping, producing, and preserving books L.R.A.1917A.

and papers, see note to *Connecticut F. Ins. Co. v. Jeary*, 51 L.R.A. 698; and see also note to *Ætna Ins. Co. v. Mount*, 15 L.R.A. (N.S.) 471, as to books and inventories that must be kept in a safe in order to comply with the requirements of the iron-safe clause.

able certainty, the amount and value of the goods destroyed.

For other cases, see Insurance, II. c, 1, d, in Dig. 1-52 N. S.

(March 21, 1916.)

ERROR to the District Court for Garvin County to review a judgment in plaintiffs' favor in consolidated actions brought to recover the amount alleged to be due on certain fire insurance policies. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Scothorn, Caldwell, & McRill for plaintiffs in error:

An insurance company may properly provide in the policy which it issues, for its protection against fraud and imposition in case of a loss.

Thornton v. Security Ins. Co. 117 Fed. 773; Oshkosh Match Works v. Manchester Fire Assur. Co. 92 Wis. 510, 66 N. W. 525; Providence Washington Ins. Co. v. Wolf, — Ind. App. —, 72 N. E. 607; Astrich v. German-American Ins. Co. 65 C. C. A. 251, 131 Fed. 13; Seattle Merchants Asso. v. Germanian F. Ins. Co. 64 Wash. 115, 116 Pac. 585; Farmers' Mercantile Co. v. Farmers' Ins. Co. 161 Iowa, 5, 141 N. W. 447; Randall v. American F. Ins. Co. 10 Mont. 340, 24 Am. St. Rep. 50, 25 Pac. 953; Richards, Ins. 3d ed. 401 et seq; 4 Cooley, Briefs on Ins. pp. 3076 et seq.

The insured failed to substantially comply with the "book warranty clause."

Shawnee F. Ins. Co. v. Thompson, 30 Okla. 466, 119 Pac. 985; Everett-Ridley-Ragan Co. v. Traders' Ins. Co. 121 Ga. 228, 104 Am. St. Rep. 99, 48 S. E. 918; Phoenix Ins. Co. v. Sherman, 110 Va. 435, 66 S. E. 81; Sullivan v. Mercantile Town Mut. Ins. Co. 20 Okla. 460, 129 Am. St. Rep. 761, 94 Pac. 676; Kingkade v. Continental Casualty Co. 35 Okla. 99, 128 Pac. 683; 19 Cyc. 708, 709; Ripley v. Aetna Ins. Co. 30 N. Y. 136, 86 Am. Dec. 362; Forbush v. Western Massachusetts Ins. Co. 4 Gray, 337; Trench v. Chenango County Mut. Ins. Co. 7 Hill, 122; Virginia F. & M. Ins. Co. v. Morgan, 90 Va. 290, 18 S. E. 191; L. Rosenthal Clothing & Dry Goods Co. v. Scottish Ins. Co. 55 W. Va. 238, 46 S. E. 1021; St. Laundry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. 114 La. 146, 38 So. 87, 3 Ann. Cas. 821; Dover Glass Works Co. v. American F. Ins. Co. 1 Marv. (Del.) 32, 65 Am. St. Rep. 264, 29 Atl. 1039; Mechanics' Ins. Co. v. Thompson, 57 Ark. 279, 21 S. W. 468; Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507; Deming Ins. Co. v. Shawnee F. Ins. Co. 16 Okla. 1, 4 L.R.A.(N.S.) 607, 83 Pac. 918; Eminent Household, C. W. L.R.A.1917A.

v. Prater, 24 Okla. 214, 23 L.R.A.(N.S.) 917, 103 Pac. 558, 20 Ann. Cas. 287; Owen v. United States Surety Co. 38 Okla. 123, 131 Pac. 1091; Miller v. Commercial Union Assur. Co. 69 Wash. 529, 125 Pac. 782; Shawnee F. Ins. Co. v. Thompson, 30 Okla. 466, 119 Pac. 985.

The burden was upon the insured to prove by competent evidence the actual cash value of the insured property at the time of the fire and the loss and damage thereto, and this they failed to do.

Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491; Cole v. Manchester F. Assur. Co. 188 Pa. 345, 41 Atl. 593; Newmark v. Liverpool & L. F. & L. Ins. Co. 30 Mo. 160, 77 Am. Dec. 608; Browne v. Clay F. & M. Ins. Co. 68 Mo. 133; Manchester F. Assur. Co. v. Feibelman, 118 Ala. 308, 23 So. 759; Howerton v. Iowa State Ins. Co. 105 Mo. App. 575, 80 S. W. 27; Hanover F. Ins. Co. v. Lewis, 23 Fla. 193, 1 So. 863.

The insured's evidence shows affirmatively that the policies sued upon were null and void, and therefore the company's demurrer to the evidence and their motion for a directed verdict should have been sustained.

2 Cooley, Briefs on Ins. 1330, 1337, 1338; Phoenix Ins. Co. v. Public Parks Amusement Co. 63 Ark. 187, 37 S. W. 959; Brown v. Commercial F. Ins. Co. 86 Ala. 189, 5 So. 500; Henning v. Western Assur. Co. 77 Iowa, 319, 42 N. W. 308; Rosenstock v. Mississippi Home Ins. Co. 82 Miss. 674, 35 So. 309; Ordway v. Chace, 57 N. J. Eq. 478, 42 Atl. 149; Matthie v. Globe F. Ins. Co. 68 App. Div. 239, 74 N. Y. Supp. 177; Weed v. London & L. F. Ins. Co. 116 N. Y. 106, 22 N. E. 229; Queen Ins. Co. v. Leonard, 9 Ohio C. C. 46, 6 Ohio C. D. 49, 2 Ohio Dec. 122; Overton v. American Cent. Ins. Co. 79 Mo. App. 1; Brooks v. Erie F. Ins. Co. 76 App. Div. 275, 78 N. Y. Supp. 748; Home Ins. Co. v. Smith, — Tex. Civ. App. —, 29 S. W. 204, 32 S. W. 240; Simonds v. Firemen's Fund Ins. Co. — Tex. Civ. App. —, 35 S. W. 300; Phoenix Ins. Co. v. Quinette, 36 Okla. 384, 128 Pac. 722; Matthews v. Capital F. Ins. Co. 115 Wis. 272, 91 N. W. 675; Arkansas Ins. Co. v. Cox, 21 Okla. 873, 20 L.R.A.(N.S.) 775, 129 Am. St. Rep. 808, 98 Pac. 552; Insurance Co. of N. A. v. Erickson, 50 Fla. 419, 2 L.R.A.(N.S.) 512, 111 Am. St. Rep. 121, 39 So. 495, 7 Ann. Cas. 495.

The insured's evidence shows affirmatively that the policies sued upon were rendered null and void by certain acts of fraud and false swearing on their part in violation of a provision of the policies.

Rovinsky v. Northern Assur. Co. 100 Me.

112, 60 Atl. 1025; Dolloff v. Phoenix Ins. Co. 82 Me. 286, 17 Am. St. Rep. 482, 10 Atl. 396; Lewis v. Council Bluffs Ins. Co. 63 Iowa, 193, 18 N. W. 888; German Ins. Co. v. Reed, 13 Ky. L. Rep. 207; Weide v. Germania Ins. Co. 1 Dill. 441, Fed. Cas. No. 17,358; Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922; Claffin v. Commonwealth Ins. Co. 110 U. S. 81, 28 L. ed. 76, 3 Sup. Ct. Rep. 507; Virginia F. & M. Ins. Co. v. Vaughan, 88 Va. 832, 14 S. E. 754, 102 Va. 541, 46 S. E. 692; Linscott v. Orient Ins. Co. 88 Me. 497, 51 Am. St. Rep. 435, 34 Atl. 405; Lion F. Ins. Co. v. Starr, 71 Tex. 733, 12 S. W. 45; Home Ins. Co. v. Winn, 42 Neb. 331, 60 N. W. 575; Knop v. National F. Ins. Co. 107 Mich. 323, 65 N. W. 228; F. Dohmen Co. v. Niagara F. Ins. Co. 96 Wis. 38, 71 N. W. 69; Gettelman v. Commercial Union Assur. Co. 97 Wis. 237, 72 N. W. 627; Hall v. Western Underwriters' Asso. 106 Mo. App. 476, 81 S. W. 227; Wunderlich v. Palatine F. Ins. Co. 104 Wis. 382, 80 N. W. 467; Meyer v. Home Ins. Co. 127 Wis. 293, 106 N. W. 1087; Pottle v. Liverpool & L. & G. Ins. Co. 108 Me. 401, 81 Atl. 481; Oshkosh Packing & Provision Co. v. Mercantile Ins. Co. 31 Fed. 200; West Coast Lumber Co. v. State Invest. & Ins. Co. 98 Cal. 502, 33 Pac. 258; Alfred Hiller Co. v. Insurance Co. of N. A. 125 La. 938, 32 L.R.A. (N.S.) 453, 52 So. 104.

Burford, C., filed the following opinion:

The defendants in error, Hays & Son, a copartnership composed of Rosa Belle Hays and Bert Chester Hays, brought seven separate actions in the district court of Garvin county, Oklahoma, on as many different policies of insurance, two of which were issued by the plaintiff in error Northwestern National Insurance Company, and one each by the other plaintiffs in error. Prior to trial the cases were, by agreement of the parties and proper order of court, all consolidated, and were thereafter proceeded with to final judgment as one case. The policies all contain the following condition, a breach whereof was pleaded in the answer as a defense:

"If fire occur, the insured shall give immediate notice of any loss thereby, in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quality and cost of each article, and the amount claimed thereon.

"The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described and submit to examination

under oath by any person named by this company, and subscribe the same.

"In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and the company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire and the award of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them and shall bear equally the expense of the appraisal and the umpire.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by requirement, act, or proceedings on its part relating to the appraisal or to any examination herein provided for, and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of loss hereinbefore required have been received by this company, including an award by appraisers when appraisal has been required.

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity, until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Evidence was introduced that within a reasonable time after the fire notice thereof was given to the insurer, and that some two weeks after the fire the agent of the insured went to Oklahoma City and saw the adjusters or representative of the Springfield Fire & Marine Insurance Com-

pany, Michigan Commercial Insurance Company, and the Northwestern National Insurance Company, and requested an adjustment of the loss; that thereafter various requests for an adjustment were made to the local agent of the various defendants; that losses of other parties arising from the same fire which consumed the goods covered by the policies in suit in this case were adjusted by these companies, but that nothing was done toward adjusting or attempting to adjust the loss incurred by these plaintiffs during a period of about fifty-three or fifty-four days after the fire. Plaintiffs then made out their formal proofs of loss and forwarded them to the various insurance companies. About 10 days after making the proofs of loss, nothing having still been done toward an adjustment of the loss by the insurance companies, after a wide advertisement, a public sale was had of portions of the salvage remaining after the fire. It is not shown that any notice of this sale was brought to the attention of any of the insurance companies, except possibly through the local agent.

Numerous errors are assigned, but the real questions in the case are two:

First, whether or not the action of the insured in selling a portion of the salvage within the time above stated caused such a breach of the policy, under the provisions thereof above set out, as avoided the liability of the insurers. In connection with this, it is specifically noted that the effect of the provisions of the policy giving the insurer a right to take over damaged goods was not pleaded as a special defense, and is not argued in the brief, and is not considered in this opinion.

The second question is whether or not the evidence showed a sufficient compliance with the book warranty and iron-safe clauses of the standard policy.

Referring to the first contention, it is insisted by the insurers that the provisions of the policy making the loss payable only after sixty days after "notice, ascertainment, estimate, and satisfactory proofs of loss hereinbefore required have been received by this company, including the award by the appraisers when appraisal has been required," gives to the insurer a right to demand an appraisal of the property, and an inspection and reinspection of the goods at any time within sixty days after the receipt of the proofs of loss. On the other hand, counsel for the insured insists that the policy requires the award of the appraisers, if appraisal has been demanded, to be included in the proof of loss, that the policy further requires such proof of loss to be filed within sixty days after the fire, and that therefore the insurer, if

he cares to exercise his right to the appraisal at all, must demand the same within such period that it can be had and the award made in time to allow the insured to file his proof of loss, and to include therein the award of the appraisers, within sixty days after the fire. Counsel for insured further contend that if this position be not upheld, the most that can be claimed is that the right to the appraisal should be exercised within a reasonable time. If the contention of the insurer be correct, there can be little doubt that the selling of the salvage without the consent of the insurer, thereby rendering an appraisal and inspection and reinspection impossible, would be such a breach of the policy as would avoid the liability of the insurer. *Hamilton v. Liverpool & L. & G. Ins. Co.* 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; *Astrich v. German-American Ins. Co. (C. C.)* 128 Fed. 477; *Thornton v. Security Ins. Co. (C. C.)* 117 Fed. 773; *Oshkosh Match Works v. Manchester F. Assur. Co.* 92 Wis. 510, 66 N. W. 525; 4 Cooley, Briefs on Ins. pp. 3076, 3077; and authorities cited. On the other hand, if the contention of the insured is correct, and there has been no demand within proper time by the insurance companies for an appraisal, there was no breach of the policy by reason of the sale of the salvage, and, having proved a substantial compliance with the terms thereof, the insured is entitled to recover.

In examining the decided cases upon the subject, which, in view of the number of policies litigated, are exceedingly few, it is apparent that the courts have differed widely upon the construction to be given to the terms of these policies. There are decided cases upholding each of the views contended for by the respective counsel, and others taking a middle ground, to which we will hereafter refer.

In *North British & Mercantile Ins. Co. v. Robinett*, 112 Va. 754, 72 S. E. 668, the court of appeals of Virginia, considering a policy practically the same form as the ones in question, said: "The policy provided that the defendants in error should have sixty days from date of the fire to make out and deliver the proof of loss, and that the loss should not become due until sixty days after the proof of loss had been delivered, including an award by appraisers, if an appraisal should be required. Equal rights were contemplated in the contract to each of the parties thereto, sixty days being given to furnish proof of loss on the part of the insured, and sixty days after the proof of loss had been furnished the insured could demand payment; and, clearly, during all of the last-mentioned sixty days.

the insurer was to have the right to investigate the amount of the loss and its liability therefor. It is equally as clear that the insurer was given the right, at any time within the sixty days after proof of loss was delivered, to demand an appraisal, which it did. May, Ins. 4th ed. § 479; Joyce, Ins. § 3182."

This is the only case which has been called to our attention which directly supports the view taken by the insurer. The difficulty with the case is that it assumes a proposition to be "equally as clear" without pointing out the provisions of the policy which make that conclusion apparent. It assumes a conclusion without giving a basis for it. It quotes, as authority for the proposition, May on Insurance and Joyce on Insurance; but an examination of the sections quoted from these works reveals that, although they support the first part of the proposition, they have no reference whatever to the time within which an appraisal may be demanded, which is the controlling point in the case at bar.

On the other hand, in support of the position assumed by the insured, the court of civil appeals of Texas, in *Lion F. Ins. Co. v. Heath*, 29 Tex. Civ. App. 203, 68 S. W. 305, said: "The fire, as already stated, occurred on the night of January 21, 1901. Plaintiff was required to file his proof of loss within sixty days from that time. This proof of loss was received by appellant on February 27, 1901. No objection was made to it, and no demand for appraisal was made until by letter of appellant, dated March 22d, and which reached appellees on March 25th. The court in its charge took the position that if no demand was made by appellant within sixty days from the date of the fire for an appraisal, and the proofs of loss were retained by appellant without objection until more than sixty days from such date, appellant was liable. The court's view was that the demand for appraisal, under the provisions of the policy, must have come within the sixty days. The construction of the contract was for the court. The policy required the insured to make proofs of loss within sixty days from the loss. Another of the clauses above copied provides that the 'loss shall not be payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of loss herein required have been received by the company, including an award by appraisers when an appraisal has been required.' Thus it appears that it was contemplated that the appraisal should be demanded within sixty days from the fire as the ultimate time, because it was to accompany the proof

of loss, which was required to be filed within that time."

The effect of this decision, however, is weakened by the case of *American Cent. Ins. Co. v. Heath*, 29 Tex. Civ. App. 445, 69 S. W. 235, which was a case arising apparently out of the same fire, and brought by the same parties involved in the case just cited. After referring with approval to the case just cited above, the court then said: "The plain implication from the terms of the contract is that the demand for appraisal should have been made within sixty days from the time *notice and proofs of loss* were received." (*Italics ours.*)

Of course, it becomes apparent at once that the notice and proof of loss are two entirely different things, which might be, and probably were, made out and sent in at entirely different times; but the court, after quoting from *Zimeriski v. Ohio Farmers' Ins. Co.* 91 Mich. 600, 52 N. W. 55, said: "We think this the correct doctrine, and that appellant, by failing to demand an appraisal within sixty days from the time it received proof, waived its right to an appraisal."

This language leaves it in doubt as to whether the court refers to the proof of loss or to the notice of the fire, and in any event confuses the doctrine of the former case, which clearly states that the appraisal must be demanded "within sixty days from the fire as the ultimate time."

Still another view is that taken in *Fireman's Fund Ins. Co. v. Caye*, 14 Ky. L. Rep. 810, where it is said: "Where the policy provides that the loss shall be payable within a certain time after the proofs of loss are received, the request for arbitration must be made within that time, and not only within that time, but early enough to permit arbitration to be had before the expiration of the time."

This view is also supported in *Zimeriski v. Ohio Farmers' Ins. Co.* supra. Our own view of the matter is that the provisions of policy for appraisal and for inspection and reinspection of the goods are largely for the benefit of the insurer, and are to enable the insurer, by inspection or reinspection, to determine the value of the goods, possibly something of the cause of fire, and from such inspection to determine the amount which it will offer in settlement of the loss, or whether it will exercise any of the options of the policy made for its benefit. The right to the appraisal and award is to be exercised where there is a disagreement between the insurer and the insured as to the amount due, and is designed to provide a quick and inexpensive way of arriving at an adjustment of the loss. By the language of the policy, in our

judgment, which provides that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required," it is not meant that the award of the appraisers must be included in the proof of loss, but, rather, that the loss shall not become payable until sixty days after the ascertainment of the loss and the receipt of proof of loss, or, in the event that appraisal has been required, until sixty days after the receipt of the award of the appraisers. That this is the logical construction of the contract appears to be clear, when we consider the fact that there may be no disagreement as to the amount to be paid until after proof of loss is made, and consequently no occasion to demand an appraisal. It is true that in practice generally there is a discussion between the insured and the insurer as to the amount demanded or to be paid, and that it is generally known, before the proof of loss is filed, whether or not appraisal will be necessary to adjust the differences between the parties, but there is no requirement in the policy of such a course of conduct. In many cases it may not be known to the insurer what amount will be demanded by the insured until the receipt of the proof of loss. In fact, the insured may make his proof of loss the next day after the fire, and to hold that the insurer is required to make a demand for appraisal before the filing of the proof of loss seems in such case absurd. In our judgment the true view is that, inasmuch as the time within which the appraisal shall be demanded is not definitely specified in the contract, a reasonable time shall be inferred. This view is supported by the consideration that the contract was written by the insurer, and, if the insurer desired sixty days within which to demand an appraisal after the receipt of the proof of loss, it should have said so definitely. It is true that this contract is adopted by law in this state, but it was originally largely the product of the insurance companies. Section 964, Harris-Day Code, provides: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

It is likewise the settled rule in this jurisdiction that provisions of an insurance

policy will be construed most strongly against the insurer. *Travelers' Ins. Co. v. McConkey*, 127 U. S. 666, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360; *Standard Acci. Ins. Co. v. Hite*, 37 Okla. 305, 46 L.R.A.(N.S.) 986, 132 Pac. 333; *Capital Fire Ins. Co. v. Carroll*, 26 Okla. 286, 109 Pac. 535. Section 967, Harris-Day Code, also provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed."

We therefore hold that, under those provisions of the standard form of insurance policy which have been heretofore quoted (it is specially noted that we have considered no others), the insurer must demand appraisal, if at all, within a reasonable time, to be determined by the jury under the circumstances of each case from the date which the circumstances of each case may show to be the period at which the desirability or necessity of appraisal or inspection of the goods first arises, such reasonable time in no event to be carried beyond the period of sixty days after the receipt of the proof of loss, since it is apparent that, if no demand be made within sixty days after the receipt of the proof of loss, the right to the payment of the amount due, if any, becomes absolute, and may not be changed by any subsequent act of the insurer.

This view is not unsupported by authority. In *Grand Rapids F. Ins. Co. v. Finn*, 60 Ohio St. 513, 50 L.R.A. 555, 71 Am. St. Rep. 736, 54 N. E. 545, the supreme court of Ohio said: "The demand for an appraisal must be made in good faith, within a reasonable time after the proof of loss has been furnished, in such direct and explicit terms that a person of ordinary intelligence may fairly understand that a submission to the appraisers for an ascertainment of the loss is requested."

In *Winchester v. North British & Mercantile Ins. Co.* 160 Cal. 1, 35 L.R.A.(N.S.) 404, 116 Pac. 63, the supreme court of California quotes with approval the language of that court in *Case v. Manufacturers' F. & M. Ins. Co.* 82 Cal. 266, 21 Pac. 843, 22 Pac. 1083, as follows: "We think it clear that if the formal proofs had stated a total loss of \$4,000 or over, and defendant had failed to demand arbitration within the sixty days at the expiration of which the loss was by the terms of the policy to become payable, this would have amounted to a waiver by the defendant of its right to make such demand, and the plaintiff would have been entitled, notwithstanding his refusal to arbitrate, to prove the whole amount of loss so stated. The necessity of an appraisal was not absolute upon any construction of the policy. It was not a con-

dition precedent to the right of action, unless demanded. The most that can be said is that either party could demand arbitration within a reasonable time; but if not so demanded, it was waived. It is not necessary to decide what would, under the circumstances of this case, have been a reasonable time within which to make the demand, if the amount of the loss had been correctly stated in the proofs. It is sufficient to say that a demand made for the first time after the expiration of the full period of sixty days, or, in other words, after the loss had become payable and the right of action had accrued, would have been too late."

It is true that this case goes into the question of waiver, which is not involved in the present case, by reason of the fact that it was not pleaded; but nevertheless the court adheres to the doctrine that the time within which the appraisal must be demanded is a reasonable time.

In *Hamilton v. Phoenix Ins. Co.* 9 C. C. A. 530, 22 U. S. App. 164, 61 Fed. 379, the circuit court of appeals for the sixth circuit was considering a case in which a joint demand had been made for an appraisal. It afterward became apparent that the joint appraisal could not be carried out by reason of the varying terms of the different policies. In a lengthy discussion, the court, speaking through Judge Taft, holds that the time within which the appraisal must be demanded is a reasonable time, and states: "The company demanded a separate appraisal in seventeen days after the joint letter was written, and within sixty days after proof of loss by the insured. Held, that the question whether the demand for a separate appraisal was made in a reasonable time was a question for the jury."

From this language it is apparent that the court could not have contemplated that the insurance company had sixty days after the proof of loss within which to demand appraisal, as, in the case under consideration there, the demand was made within sixty days after receipt of the proof of loss, and yet the court holds that whether or not the demand was made within a reasonable time was a question for the jury. In *Astrich v. German-American Ins. Co.* (C. C.) 128 Fed. 477, the court, speaking of a policy substantially the same as the one here in question, said: "The right to have the loss determined by appraisal, where no time is fixed for its exercise, must be demanded within a reasonable time. Where, therefore, goods are deteriorating or becoming rotten and unhealthy, a notice to the insured of the necessity for a prompt disposition of them would seem to meet the L.R.A.1917A.

difficulty, compelling an exercise of the right without abridging it."

This case was affirmed in the circuit court of appeals and a writ of certiorari denied by the Supreme Court of the United States, although the questions here involved were not directly considered by the appellate court.

In *Chainless Cycle Mfg. Co. v. Security Ins. Co.* 169 N. Y. 304, 62 N. E. 392, the court of appeals of New York said: "It is not the duty of a person whose property is insured by a standard policy, such as the one before us, to initiate an appraisal, for the contract makes an appraisal a condition precedent to recovery only when one 'has been required' by the insurer. Either party, however, has the right to require an appraisal when there is a disagreement as to the amount of the loss. *Silver v. Western Assur. Co.* 164 N. Y. 381, 58 N. E. 284. That right is not indefinite as to time, but must be exercised within a reasonable period, depending upon the facts of the particular case. Neither party can so use the right as to take undue advantage of the other, but both must act in good faith. *Uhrig v. Williamsburgh City F. Ins. Co.* 101 N. Y. 362, 4 N. E. 745; *Bishop v. Agricultural Ins. Co.* 130 N. Y. 488, 29 N. E. 844."

In the opinion the following language, which appears to us particularly applicable to the case at bar, is used (referring to the insurance company): "It waited for nearly a month after the fire, and for twelve days after it had received the proofs of loss, without suggesting an appraisal, although the plaintiff had offered to unite in one. When asked by Norden to 'authorize an appraisal or send special next Tuesday,' it did not authorize an appraisal, but sent its special on the day named. It made no demand until it knew that compliance was impossible. . . . The evidence warrants the inference that it did not desire an appraisal, and had no intention of requiring one until it thought it could take advantage of the plaintiff. Under these circumstances we cannot say, as a matter of law, that the demand of the defendant for an appraisal was reasonable; for it was bound to act in good faith, and not to remain silent when it was its duty to speak."

In view of the considerations above stated, and in view of the fact that the trial court fairly submitted to the jury the question as to whether or not the insured had substantially complied with the provisions of the policy, the jury having found for the plaintiffs, we are unwilling to hold, as a matter of law, that the defendants, after a lapse of more than sixty days after the fire,

and 10 days after proof of loss, were still within a reasonable time in demanding appraisalment, and that the act of the insured in selling the salvage at that time avoided the policy. The verdict of the jury carries with it a finding of the necessary facts to sustain the judgment; if there is any evidence upon which such finding could be based, it should be upheld. In this case we hold that there was evidence upon which the jury might have found that a reasonable time within which to demand appraisalment and inspection had elapsed at the time insured commenced to sell the salvage.

In regard to the iron-safe and book warranty clause of the policy, it appears that the insured kept a book according to the double-entry system, and for his day-book on credit sales made slips of paper upon which an entry was made at the time of the transaction, showing the article sold and the price received therefor, and that he did not preserve these slips of original entry, but at the close of each day's business he entered the amount on one book and destroyed the slips. It also appears that as to the cash sales no regular book was kept, and the cash received was put in the money drawer and totaled at the end of the day, and such total carried on the journal made at the end of each day. These books were all properly preserved, except the sales slips.

Without further discussion of the propositions involved in this case, it suffices to say that the decision of this court in Springfield F. & M. Ins. Co. v. Halsey, — Okla. —, 153 Pac. 145, sufficiently covers the question raised, and is conclusive against the contention of the appellants.

We have carefully examined the other assignments of error, and find nothing in them requiring an extended discussion, or a reversal of the case.

The opinion heretofore filed in this case is withdrawn, and the judgment of the District Court of Garvin County is affirmed.

A petition for rehearing having been filed, the following response was handed down on April 18, 1916:

It is insisted upon petition for rehearing in this case that the proposition involved in the first paragraph of the syllabus of our decision in this case is "based wholly upon the theory of waiver," which we held was not involved in the case because not pleaded. Not so. Waiver is based upon the failure to exercise a known and existing right, or upon conduct reasonably leading to a belief that such right is not intended to be exercised. In this case we tried to make it clear that, under the clauses of the standard insurance policy considered, the right to appraisalment and inspection only

existed during a reasonable time "from such date as the circumstances of each case may show to be the period at which the desirability or necessity of appraisalment or inspection of the goods first arises." The sale of the damaged goods by the defendants was no breach of the provisions of the policy above referred to, except as such sale prevented an appraisalment of inspection to which the insurer was entitled. Now if such right on the part of the company no longer existed when the goods were sold, there was no breach, and the other essentials, such as proof of loss, etc., being proved, there was a "substantial compliance" with the terms of the policy, and waiver is not involved. If the policy in express terms limited the right to inspection and appraisalment to a period of twenty days after notice of the fire, and that time had expired without a demand for inspection and appraisalment, and thereafter the damaged goods were sold, could it be contended that a plea of breach of the policy by reason of the sale of the damaged goods at such time must be met by an express plea of waiver? We think not. The right of the insurer had ceased to exist at the time of the sale. So in this case. The right to an inspection and appraisalment under the clauses considered ceased to exist at the end of a reasonable time, and the sale of the damaged goods after that time was no breach of the policy, and it was not necessary to plead a waiver of an alleged breach which was not, in fact, any violation of the rights of the insurer. A party cannot be said to be required to plead waiver against an asserted right which does not in fact exist at the time of the alleged breach of such right.

It is also insisted that we should say, as a matter of law, that a reasonable time to demand appraisalment and inspection had not expired after the receipt of the proof of loss. This argument is based upon the assumption that the time within which the appraisalment and inspection under these clauses of the policy must be demanded begins to run from the date of the receipt of the proofs of loss. We distinctly did not so hold. The language of the opinion is, "from such date as the circumstances of each case may show to be the period at which the desirability or necessity of appraisalment or inspection of goods first arises." This date may be that of the receipt of the proof of loss, if the disagreement over values or condition of the goods arises then for the first time. On the other hand, it may become apparent long before any proof of loss is filed that the parties cannot agree and that an appraisalment will be necessary. The contention

that the question of what constituted a reasonable time in this case should be decided as a matter of law is without merit.

It is further insisted that the trial court did not properly instruct upon certain propositions involved in the decision. It is the settled rule of this court that a party cannot complain of failure to in-

struct unless he has himself offered suitable instructions upon the omitted propositions.

The petition for rehearing is denied.

Per Curiam:

Adopted in whole.

Annotation—Insurance: time within which demand for arbitration, appraisal, inspection, or reinspection must be made.

For annotation on the general question of arbitration as a condition precedent to action on insurance policy, see *Graham v. German American Ins. Co.* 15 L.R.A.(N.S.) 1055, and *German American Ins. Co. v. Jerrils*, 28 L.R.A.(N.S.) 104.

This note does not cover the question of what delay or refusal to proceed with an arbitration or appraisal after a valid demand therefor has been made constitutes a waiver of the right to arbitrate.

Considerable conflict exists as to the time within which a demand for an arbitration or appraisal must be made. Some of the varying conclusions may be accounted for because of the difference in the provisions of the policies, but this is not true as to others.

The most common provisions in policies under which the question under annotation has arisen are those which read in substance that in case of disagreement as to the amount of loss the question shall be submitted to arbitration and that the loss shall not be payable until sixty days after proof of loss has been received, including an award by appraisers when appraisal has been required.

Under these provisions some courts hold that a demand for arbitration or appraisal must be made within a reasonable time under the circumstances of case, and some of the cases lay down the rule that the demand must be made within a reasonable time, and cannot be made after the expiration of sixty days after the filing of proof of loss. The view has been taken in other cases that the demand must not only be made within sixty days from the filing of proof of loss, but that it must be made so that the appraisal may be had before the expiration of the sixty days.

Another court has come to the conclusion that demand must be made within sixty days from the date of the fire, and still another that it may be made at any time within sixty days after receipt of proof of loss; and in one case a demand by the insured long after the

expiration of such sixty days was held valid.

Other cases arise under policies which provide for arbitration at the written request of either party and give the insurer the right to take the damaged property at the appraised value, and in these it is generally held that a demand for appraisal must be made within a reasonable time; and the same result has been reached in other cases, in which the policies involved merely provided that the amount of loss in case of disagreement should be submitted to arbitration, and that this should be a condition precedent to a right of action on the policy.

It will be noticed that the court in *SPRINGFIELD F. & M. INS. CO. v. HAYS*, ante, 1078, where the policy contained the common provisions mentioned at the beginning, reached the conclusion that a demand for appraisement should be made within a reasonable time from the date on which under the circumstances the desirability of an appraisement first arose, but that in no event should it be made later than sixty days after receipt of proof of loss, and declined to hold as a matter of law that the insurers' demand for appraisement, made after a lapse of more than sixty days from the fire and ten days after proof of loss, was made within a reasonable time.

In harmony with the decision in this case that the demand must be made within a reasonable time, in the following cases, where the policies contained provisions of the same kind, it was held that a demand for an appraisal must be made within a reasonable time after proof of loss, depending on the facts of the case: *Chainless Cycle Mfg. Co. v. Security Ins. Co.* (1901) 169 N. Y. 304, 62 N. E. 392; *Grand Rapids F. Ins. Co. v. Finn* (1899) 60 Ohio St. 513, 50 L.R.A. 555, 71 Am. St. Rep. 736, 54 N. E. 545.

The court in the first case said, "Neither party can so use the right as to take undue advantage of the other, but both must act in good faith. . . . It is not a weapon of attack, but of defense,

and a party who intends to use it must give reasonable notice of such intention, for its omission to do so will be evidence of waiver, more or less conclusive, according to the circumstances. The insurer, for instance, knowing that the insured desires a prompt appraisal or an adjustment, so that the property may not suffer further injury before it is sold, cannot postpone its demand for an appraisal until after the insured, misled by its act, has been placed in a position where one is impossible."

In this case it was held that it could not be said as a matter of law that the demand of the insurer was reasonable, where it waited for nearly a month after the fire and for twelve days after it received the proof of loss without suggesting an appraisal, although the insured had offered to unite in one, and did not make its demand until it knew that the property had been sold and that compliance was impossible.

This case was referred to in *Astrich v. German-American Ins. Co.* (1904) 128 Fed. 477, affirmed (1904) in 65 C. C. A. 251, 131 Fed. 13, where the provisions of the policy were the same, and the insured was held to have forfeited his rights under the policy by selling the damaged goods before making proof of loss, the court laying down the rule that, as no time was fixed in which an appraisal was to be asked for, it must be demanded within that which according to the circumstances is reasonable.

The decision in *Chainless Cycle Mfg. Co. v. Security Ins. Co.* (N. Y.) *supra*, was also relied upon in *Langner v. German Alliance Ins. Co.* (1910) 67 Misc. 411, 123 N. Y. Supp. 144, where the policy provided that the loss should be payable within sixty days after proof of loss was filed, unless an appraisal was had in the meantime, in which event it should become payable within sixty days after the determination of the appraisers. The court in this case held that, although it might be said, under the strict terms of the provisions, that the insurer might wait fifty-nine days before demanding an appraisal and need not then pay the loss until sixty days after the determination of the appraisers, yet such a construction would scarcely be a fair interpretation of the contract unless under exceptional circumstances, and that the true construction of the provisions was that the insurer had a reasonable period, depending upon the facts of the particular case, in which to demand an appraisal.

In this case, where the insurer made

no demand for an appraisal until fifty-five days after proofs of loss and seventy-two days after the fire, it was held that the court should have held the delay unreasonable, or at the very least should have submitted the question to the jury, under proper instructions, to determine whether the insurer had waived its right to an appraisal.

And in *Hamilton v. Phoenix Ins. Co.* (1894) 9 C. C. A. 530, 22 U. S. App. 164, 61 Fed. 379, where the policy contained provisions the same as those involved in the preceding cases, with the exception of the last, the question whether the insurer's demand for an appraisal was made within a reasonable time after the close of a joint correspondence by the several companies having policies on the property destroyed was held for the jury, it appearing that after the close of such joint correspondence the insured made a separate demand for an appraisal within seventeen days. The court said: "The provision of the policy was that the loss was to be paid sixty days after due notice and satisfactory proof of the same had been received at the office in accordance with the terms of the policy. The learned trial judge seems to have thought the effect of this clause to be that the company had sixty days within which to object to the proofs of loss. Was this a proper inference? Could the company wait until the fifty-ninth day after receiving proof, and then object to it, and postpone the time of payment for sixty days more? It seems to us clear that the company would have no right to do so. The sixty days is the period between the reception of the satisfactory proof and the time of payment, and not the period between the tendering of any proof and the acceptance of it as satisfactory. It is true that a delay of sixty days before rejecting a proof of loss would certainly be unreasonable, but it by no means follows that any time short of sixty days would be reasonable. The reasonableness of time depends on all the surrounding circumstances. In the opening of the negotiations, Hamilton had informed all the companies, including the defendant, that delay in the settlement so much interfered with his business as to cost him \$500 a day. The negotiations for a joint appraisal occupied from April 26th until May 7th, during which Hamilton was constantly pressing for an early settlement. When, then, on the 7th of May, the Phoenix Insurance Company assumed to submit a form of appraisal, it was certainly under an obligation to act with greater

celerity than at the beginning of the negotiation in April. If the company had the right to delay submission of an appraisal for seventeen days from May 7th, then it had the right to delay for a longer time the sale of the stock of goods, because appraisal and notice of sale must take place thereafter. These and many other circumstances might be relevant in considering the question of reasonable time. A case just like this has probably never occurred before. It is not quite clear what the delay was for. It might have been to investigate further the amount of the loss, or to secure the services of a proper appraiser. At all events, the circumstances are numerous enough to render the inference as to reasonable time from them not so certain as to make it a question of law."

And in harmony with this case and the view taken in *SPRINGFIELD F. & M. INS. CO. v. HAYS*, ante, 1078, the right to demand an appraisal was held waived in the following cases involving like provisions, where no demand for an appraisal was made by the insurer until after the expiration of sixty days from the filing of proof of loss. *Winchester v. North British Ins. Co.* (1911) 160 Cal. 1, 35 L.R.A.(N.S.) 404, 116 Pac. 63; *McIntyre v. National Ins. Co.* (1880) 5 Ont. App. Rep. 580.

And in *American F. Ins. Co. v. Stuart* (1896) — *Tex. Civ. App.* —, 38 S. W. 395, where the provisions were the same, it was held that the insurer waived the condition requiring an appraisement, where it received proofs of loss and retained them without objection for more than twenty days, and until after the sixty days within which the insurers were required to furnish them had expired.

And in *Hayes v. Milford Mut. F. Ins. Co.* (1898) 170 Mass. 492, 49 N. E. 754, where the policy provided, "in case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement . . . shall either pay the amount for which it shall be liable,—which amount, if not agreed upon, shall be ascertained by award of referees, as hereinafter provided," it was held that, as there was no dispute as to the amount until some time after the expiration of the sixty days, there was nothing to arbitrate, and that the insurer could be held to have waived the provision as to arbitration.

And in *Case v. Manufacturers' F. & M. Ins. Co.* (1889) 82 Cal. 263, 21 Pac. 843, where the policy provided, "the loss to be paid sixty days after due notice and proofs of the same shall have been made

by the assured and received at the office of the company in accordance with the terms and provisions of this policy. In case of differences touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties as to the amount of such loss or damage,"—the court stated that, assuming this provision to be valid, the most that could be said was that either party could demand arbitration within a reasonable time, but that it was not necessary for them to decide what was a reasonable time; it was sufficient to say that a demand for arbitration, made for the first time by the insurer after the expiration of sixty days from the furnishing of correct proofs of loss, would be too late.

In two cases the view has been adopted that a demand for an appraisal must not only be made within the sixty days after proof of loss, but must be made in such time that the appraisal may be had before the expiration of the sixty days, at which time the loss is made payable.

Thus, in *Zimeriski v. Ohio Farmers' Ins. Co.* (1892) 91 Mich. 600, 52 N. W. 55, where the policy provided that it should be optional with the company to take all or part of the articles at the appraised value, and to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice, within thirty days after the receipt of the proof of loss, and also contained a provision that within sixty days after the fire the insured should furnish proofs of loss, and that in the event of disagreement as to the amount of loss it should be ascertained by two competent and disinterested appraisers, and that the loss should become payable sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss required were received by the company, including an award by appraisers when appraisal had been required,—it was held that a demand by the insurer for appraisement was too late was made fifty-seven days after proofs of loss, to which no objection had been made, were furnished, and more than sixty days after the fire. The court said: "There is much force in the contention of plaintiff, which is that, inasmuch as the policy requires that the company shall determine whether it will elect to take the property at the appraised value within thirty days after the proofs of loss are received, it necessarily follows that the

appraisal intended must be made, or, at least, demanded, within this period. But, however this may be, the demand in the present case came too late. The company had given no notice that the proofs of loss were not satisfactory for fifty-seven days after the proofs had been furnished. It then served a notice, which comes too late for the plaintiff to make a selection of an appraiser, notify the company, and have the appraisal made, until after the period fixed for the payment of the loss, dating from the furnishing of proofs of loss, had expired. As the company names no appraiser, it would have been necessary for the plaintiff to have communicated again with the agent at Jackson, by letter or otherwise, and to have awaited the receipt of a letter in reply, and then again to have communicated with the company, naming his appraiser. It would then have become necessary for the appraisers to meet, and, in a contingency, name a third, and proceed with the appraisal and award. This could not have been accomplished until after the company became liable to pay. No such delay was within the contemplation of the parties. There is nothing on the record to excuse it."

And in *Fireman's Fund Ins. Co. v. Caye* (1893) 14 Ky. L. Rep. 810, where the policy provided that in case differences should arise concerning the amount of any loss by fire after proof thereof had been received by the company, the matter should at the written request of either party be submitted to arbitration, and that no suit should be brought on the policy until after an award should have been obtained fixing the amount of such claim in the manner provided, and also provided that the loss should be payable within sixty days after the proofs of loss were received, it was held that the request for arbitration must not only be made within that time, but also early enough to permit arbitration to be had before the expiration of such time, and a request for arbitration by the insurer fifty-nine days after proofs of loss were received was held too late.

A Texas case has come to the conclusion that a demand for an appraisal must be made within sixty days from the date of the fire.

In the case referred to, *Lion F. Ins. Co. v. Heath* (1902) 29 Tex. Civ. App. 203, 68 S. W. 305, where the policy required the insured to make proof of loss within sixty days from the fire, and provided that in case of disagreement as

to the amount of loss it should be ascertained by appraisers, and provided that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when an appraisal has been required," the court held that the policy contemplated that the appraisal should be demanded within sixty days from the date of the fire, as it was provided that it should accompany the proofs of loss which were required to be filed within that time; and where there were about three weeks left before the expiration of the sixty days after the parties had conferred with each other and failed to reach an agreement as to the amount of loss and the insurer made no demand for an appraisal until after the expiration of the sixty days, it was held that the demand came too late.

But in *American Cent. Ins. Co. v. Heath* (1902) 29 Tex. Civ. App. 445, 69 S. W. 235, where the exact provisions of the policy do not appear, the court stated that the plain implication from the terms of the contract was that the demand for appraisement should be made within sixty days from the time notice and proofs of loss were received, and held a demand for appraisal by the insurer made six months after a loss occurred too late, it appearing that notice of loss had been received by it about a month after the loss occurred, and that no objection had been made to it. The court in *SPRINGFIELD F. & M. Ins. Co. v. Hays*, ante, 1078, considers that this case weakens the decision in *Lion F. Ins. Co. v. Heath* (Tex.) supra, and this view is undoubtedly correct if the provisions in the two cases were identical.

A Virginia case involving a policy containing the usual provisions has reached the conclusion that demand for appraisal may be made at any time within sixty days after receipt of proofs of loss.

Thus, in *North British Mercantile Ins. Co. v. Robinett* (1911) 112 Va. 754, 72 S. E. 668, where the policy provided that in case of disagreement as to the amount of loss an appraisal should be had and that the loss should not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss had been received, including an award of appraisal when appraisal had been required, and that no suit should be maintainable until after compliance with all the requirements,

it was held that the insurer had the right at any time within the sixty days after the proof of loss was made to demand an appraisal, that a demand made within about forty-five days of the receipt of the proofs of loss was sufficient.

In one case, under the particular provisions and circumstances, a demand by the insured for arbitration long after the expiration of the sixty days after making proof of loss was held sufficient, the view being taken that the insurer had an equal right to demand an arbitration, and, having failed to do so, should not be allowed to object to the insured's delay.

Thus in *McNees v. Southern Ins. Co.* (1897) 69 Mo. App. 232, where the policy provided that proofs of loss should be furnished within sixty days after the fire and that the loss should be ascertained or estimated according to the actual cash value and should in no event exceed what it would cost to repair or replace, and provided "said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided; and the amount of loss or damage having been thus determined, the sum for which this company is liable . . . shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of loss have been received by this company in accordance with the terms of this policy," it was held that both parties had a right to demand an arbitration, and that a demand therefor by the insured nearly two years after a loss occurred was not too late, where an action on the policy by the insured had been pending during most of the time and the insurer had taken no steps to procure a submission to arbitration. The court said: "In the matter of proofs of loss, but one party, the insured, can act. It is an undertaking to be performed by him alone. In an arbitration under this policy either can set it on foot, and both must take part in it. Though it be true that the insured, in bringing suit, thereby holding the affirmative and the onus of showing himself entitled to sue, must act if the other does not, yet the company may very well, if it so desires, take the initiative, on a difference arising, and demand an arbitration. If the company, knowing there is a disagreement as to the amount of the loss and of its right to have an arbitration, omits to call for such arbitration, it ought not to be heard to complain of plaintiff's mere

delay in making the offer. Of course, since in the event of the parties disagreeing plaintiff's cause of action depends on an arbitration for support, he takes upon himself the chance or peril which may happen from the delay. If a demand for appraisal should be made by the insured so late that defendant should refuse it, then if he could show by answer and proof that it refused for the reason that plaintiff had so delayed that it was impossible, or impractical, to arbitrate, it would deprive plaintiff of the benefit of the arbitration."

In *Phoenix Ins. Co. v. Lorton* (1903) 109 Ill. App. 63, where the policy provided that in case of disagreement as to the amount of loss it should be ascertained by appraisers, and that "the loss shall not become payable until sixty days after the notice, ascertainment, and satisfactory proof of loss herein required have been received by this company, including an award by appraisers when appraisal has been required," and provided that no action should be sustainable until after full compliance by the insured with the requirement, it was held that the delay and quibbling over proofs of loss by the insurer—for what length of time does not appear—did not constitute a waiver of its right to insist upon an appraisal as a condition precedent to the maintaining of an action on the policy, the court taking the view that in the case of a disagreement no duty rested upon the insurer to take the initiative in the selection of appraisers, but that it might await the demand of the insured for an appraisement.

And in *Chippewa Lumber Co. v. Phenix Ins. Co.* (1890) 80 Mich. 116, 44 N. W. 1055, where the policy provided "the amount of loss or damage . . . to be paid sixty days after the proofs of the same required by the company shall have been made by the assured, . . . and the loss shall have been ascertained by the arbitrators appointed, and proved in accordance with the terms and provisions of this policy. . . . Failing to agree, the same [the amount of loss] shall then be submitted to competent and impartial arbitrators. . . . And until such proofs . . . are produced, . . . and arbitrations permitted and had, the loss shall not be payable. . . . It is furthermore . . . agreed that no suit or action . . . for the recovery of any claim . . . shall be sustainable in any court . . . until after an award shall have been obtained fixing the amount of such claim, in the manner above provided,

which is agreed to be a condition precedent," the insurer was held to be in the position of a debtor; and it was held that a debtor waives no right by his silence when he is not called upon to act, and that a letter by the insurer stating that it disputed the amount of the loss and demanded an estimate under the contract could not be considered a waiver, and that there was no waiver of the right to arbitration by the insurer's silence after writing such letter; the period over which the silence extended however, does not appear. The case of *Nurney v. Fireman's Fund Ins. Co.* (Mich.) *infra*, was distinguished on the ground that the policy in the *Nurney* Case made the right to arbitration conditional upon a written request by either party, while the policy in the *Chippewa* Case provided that the amount of loss "shall be submitted to arbitration."

In *Nurney v. Fireman's Fund Ins. Co.* (1896) 63 Mich. 633, 6 Am. St. Rep. 338, 30 N. W. 350, just referred to, where the policy provided that in case of differences concerning the amount of any loss after proof had been received, the matter should at the written request of either party be submitted to the judgment of arbitrators, and that no action against the insurer should be sustainable until after an award had been obtained in the manner provided, it was held that where a difference as to the amount of the loss had existed for more than five months after the fire occurred, and neither party had claimed the right in writing to have the difference settled by arbitration and never expressed such desire as provided by the policy up to the time the case was decided, the parties must be deemed to have waived the right to demand an arbitration.

A number of cases involving provisions of the kind just mentioned, i. e., for arbitration at the written request of either party, and in addition also giving the insurer the right to take the property at its appraised value, have considered the question of the timeliness of demands for arbitration.

In these cases the view is generally adopted that a demand for arbitration must be made by the parties within a reasonable time.

Thus in *Dun v. Germania F. Ins. Co.* (1891) 10 Ohio S. & C. P. Dec. 667, where the policy provided that in case of differences as to the amount of loss the matter should at the written request of either party be submitted to appraisers, and reserved to the company the right to repair, rebuild, or take the whole, or any

part, of the articles at their appraised value, it was held that the right to an appraisal must be exercised within a reasonable time after the right to demand it arose; that neither party could be required to await indefinitely the pleasure of the other in making a demand; that the insured could not be required to wait unnecessarily and hold the property in the condition it was left by the fire, thereby causing him serious expense and loss; and that a written demand by the insurer, made about four months after a loss, was not sufficient to entitle it to an appraisement.

And under a policy containing like provisions, and also making arbitration precedent to suit, a demand for appraisal by the insured four years after a loss, and after he has sold and scattered the property, is invalid. *Hamilton v. Royal Ins. Co.* (1893) 4 Ohio S. & C. P. Dec. 437.

And in *Morley v. Liverpool & L. & G. Ins. Co.* (1891) 85 Mich. 210, 48 N. W. 502, where the policy contained provisions like those in the preceding case, and it appeared that the parties had entered into an agreement for arbitration, but that the insured had revoked the agreement and by such action lost his right to sue on the policy, it was held that this right could only be regained by a reasonable offer to submit to arbitration, and that an offer made by him about five months after the revocation and after he had disposed of the goods was too late.

But under provisions the same as those involved in the two preceding cases, separate demands for appraisal according to the terms of the policy by the several insurers interested in a loss are not unreasonably delayed, where they are made less than a month after the fire, and about a week after the termination of joint correspondence by the insurers with the insured, in which the insurers sought to impose conditions for appraisal other than those contained in the policies. *Hamilton v. Liverpool & L. & G. Ins. Co.* (1889) 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; *Hamilton v. Royal Ins. Co.* (1893) 4 Ohio S. & C. P. Dec. 437; *Hamilton v. Fireman's Ins. Co.* (1896) 4 Ohio S. & C. P. Dec. 407.

See also *McIntyre v. National Ins. Co.* (1880) 5 Ont. App. Rep. 580, and *Case v. Manufacturers' F. & M. Ins. Co.* (1889) 82 Cal. 263, 21 Pac. 843, where the policies provided for arbitration at the written request of either party.

Some cases involving the question of

the time within which appraisal must be demanded have arisen under policies which merely provided that in case of disagreement as to the amount of loss the question should be submitted to arbitration, and that the award should be a condition precedent to an action on the policy.

Thus, in *Johnson v. Phoenix Ins. Co.* (1896) 69 Mo. App. 226, where the policy provided that in case of disagreement as to the amount of loss it should be settled by arbitrators, and that no action should be brought on the policy until sixty days after proofs of loss, examinations, and award of arbitrators, it was held that the insured's request to arbitrate was not delayed beyond a reasonable time, although it was not made until about ten months after the loss occurred, there being nothing to show that the insurer was prejudiced by the delay.

In *Smith v. California Ins. Co.* (1895) 87 Me. 190, 32 Atl. 872, where the policy provided, "In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third to be selected by the two so chosen, the award in writing of a majority of the referees to be conclusive and final as to the amount of loss or damage; and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss," it was held that the insurers' failure for nine months to demand a settlement under the arbitration clause could not be construed, as a matter of law, as a waiver of their rights to arbitration, and the question of waiver was held to have been properly submitted to the jury. The court said: "It was as much the duty of one party as of the other to initiate the proceeding, unless it may have possibly been more the duty of the plaintiff as the affirmative party. The company might be led to suppose that the insured would not press his claim in the face of accusation of fraud alleged against him, and especially if, as is stated, the plaintiff commenced an action on the policy in Massachusetts court immediately after proof of loss, and shortly afterwards abandoned it. The plaintiff himself took no step indicating waiver by him, until the bringing of his action, nine months later than the notice by the defendants insisting upon an arbitration." L.R.A.1917A.

And in *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.* (1898) 171 Mass. 433, 50 N. E. 943, where the policy contained provisions like those in the preceding case, it was held that the question of waiver by the insurer of its right to arbitration should have been submitted to the jury, where there was evidence of certain correspondence and interviews between the parties extending over about a year, which indicated that the insurer was investigating the amount of the loss and that it had no intention to admit its liability, and which did not suggest that the loss should be submitted to arbitration.

The policy in *Tilley v. Connecticut F. Ins. Co.* (1890) 86 Va. 811, 11 S. E. 120, provided that no suit should be sustainable until after an award had been obtained, and also provided that unless suit should be brought within a year the right of recovery under the policy should be barred. It was held that the insurer, by making no demand for an award until the year had nearly elapsed, waived the provision for an award, the court stating that it would be an unreasonable construction of the policy to consider that the award might be asked for just before the expiration of the year and thus defeat all recovery.

And in *Davis v. Imperial Ins. Co.* (1896) 16 Wash. 241, 47 Pac. 439, where one appraisal was had which was not in conformity with the provisions of the policy and was invalid, and the insurer failed to demand a new appraisal until nearly a year after the fire and until after the commencement of suit upon the policy, this delay was held to constitute a waiver of the conditions in respect to arbitration and award, the exact phraseology of which does not appear.

Neither do the exact provisions of the policy appear in *Stephens v. Union Assur. Soc.* (1897) 16 Utah, 22, 67 Am. St. Rep. 595, 50 Pac. 626; but in that case, where the insurer denied liability under the policy, but made no demand for an appraisal until after suit was brought, which was about five months after the loss occurred, it was held precluded from relying upon the provisions requiring arbitration.

In *Fidelity Phenix Fire Ins. Co. v. Abilene Dry Goods Co.* (1913) — Tex. Civ. App. —, 159 S. W. 172, provisions of a tornado policy that the insured should separate the damaged from the undamaged goods, and should, as often as required, exhibit to any person designated by the insurer all that remained of the property, were held to mean no more

than that the insured should separate the damaged goods from the undamaged and give the insurers a reasonable opportunity to examine the stock; and where the insured endeavored for ten days after a loss occurred to have the insurers' adjusters inspect the property, but they refused to do so, and the insured at the end of that time placed the damaged goods back among those that were not damaged and began a sale of the stock, after which the insurers demanded that the insured reparate the goods, take an inventory, and exhibit them to the adjusters, it was held that a reasonable opportunity had been given

for inspection and that the insured had done all that was required under the provisions of the policy.

And in *Phoenix Assur. Co. v. Stenson* (1904) 34 Tex. Civ. App. 471, 79 S. W. 866, where the provisions were the same as those in the preceding case, they were held to have been waived by the insurer where, in the absence of a showing of unusual condition, the insured kept the damaged property for inspection for three days, when he turned it over to his creditors, and the insurers made no attempt to inspect the property during the three days, but remained silent during that time. J. T. W.

WASHINGTON SUPREME COURT.
(Department No. 2.)

MARY RIDPATH ANKENY, Exrx., etc., of
W. M. Ridpath, Deceased, Appt.,
v.
CITY OF SPOKANE, Resp't.
(92 Wash. 549, 159 Pac. 806.)

Public improvement — street lighting — special assessment.

1. The furnishing of electrical energy for street lighting purposes for a limited term is a local improvement within the meaning of a constitutional provision permitting the making of such improvements by special taxation of property benefited.

For other cases, see Public Improvements, III. b, in Dig. 1-52 N. S.

Same — ornament — effect on assessment.

2. The inclusion in a street lighting system of ornamental features does not prevent the assessment of the added cost thereby caused upon the property benefited if ordinary construction is not so far departed from as to warrant the court in saying that the municipality exceeded its legitimate powers.

For other cases, see Public Improvements, III. b, in Dig. 1-52 N. S.

(August 21, 1916.)

APPEAL by protestant from a judgment of the Superior Court for Spokane County overruling her objections to, and confirming an assessment roll, in a proceeding for a local improvement. Affirmed.

The facts are stated in the opinion.

Messrs. D. W. Henley and J. M. Geraghty, for appellant:

The furnishing of electrical energy for street lighting purposes is not a local im-

provement within the meaning of that term as used in the Constitutions and statutes of the various states.

22 Cyc. 5, 6; *Vaughan v. Cravens*, 1 Head, 108, 73 Am. Dec. 163; *Abbott, Mun. Corp.* pp. 792-803; *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *Austin v. Seattle*, 2 Wash. 670, 27 Pac. 557; *Re Westlake Ave.* 40 Wash. 144, 82 Pac. 279; *Re 3d, 4th, & 5th Avenues*, 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862; *Chicago v. Blair*, 149 Ill. 310, 24 L.R.A. 412, 36 N. E. 829; *Crane v. West Chicago Park*, 153 Ill. 348, 26 L.R.A. 311, 38 N. E. 943; *White v. People*, 94 Ill. 604; *New York L. Ins. Co. v. Prest*, 71 Fed. 815; *Wright v. Chicago*, 20 Ill. 252; *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855; *Bloomington v. Latham*, 142 Ill. 462, 18 L.R.A. 487, 32 N. E. 506; *Ewart v. Western Springs*, 180 Ill. 318, 54 N. E. 479.

Messrs. H. M. Stephens, Ernest E. Sargeant, Dale D. Drain, and A. H. Kenyon, for respondent:

Defendant had the power to levy special assessments to pay for street lighting.

Windsor v. Des Moines, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476; *Jonas v. Cincinnati*, 18 Ohio, 318.

The improvement was local in character.

Smith v. Seattle, 25 Wash. 300, 65 Pac. 612; *Vreeland v. Tacoma*, 48 Wash. 625, 94 Pac. 192; *State ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97; *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955; *Fisher v. Chicago*, 213 Ill. 268, 72 N. E. 680; *Ewart v. Western Springs*, 180 Ill. 318, 54 N. E. 478; *Merchants Loan & T. Co. v. Chicago*, 264 Ill. 76, 105 N. E. 726.

The action of the city council in determining that property has been benefited by an improvement will not be reviewed by the courts in the absence of any showing of fraud or arbitrary action.

Note. — For street lighting as a local improvement assessable against property benefited, see annotation following this case, post, 1068.
L.R.A.1917A.

Powell v. Walla Walla, 64 Wash. 582, 117 Pac. 389; Great Northern R. Co. v. Seattle, 73 Wash. 576, 132 Pac. 234; Spokane v. Fonnell, 75 Wash. 417, 135 Pac. 211.

Fullerton, J., delivered the opinion of the court:

Section 6 of chapter 98 of the Laws of 1911, relating to local improvements in cities and towns, as amended by chap. 131 of the Laws of 1913 (omitting parts not essential to the questions in controversy here), reads as follows:

"Sec. 6. Whenever the public interest or convenience may require, the council or other legislative authority of any such city or town, is hereby authorized to order the whole or any part of the streets . . . within . . . such city or town to be . . . improved, and to order . . . street lighting systems, together with the costs and expense of furnishing electrical energy to said street lighting systems, . . . to be constructed, . . . therein, . . . and to levy and collect special assessments to pay the whole or any part of the cost and expense of any such improvement. . . . Any local improvement payable, in whole or in part, by special assessments, which shall include a charge for the cost and expense of furnishing electrical energy to any system of street lighting shall be initiated only upon petition signed by the owners of two thirds of the lineal frontage upon the improvement to be made and two thirds of the area within the limits of the proposed improvement district."

Acting under and in pursuance of this section of the statute, and in pursuance of a petition of the requisite number of property owners, the legislative authority of the city of Spokane passed an ordinance ordering the improvement of a part of the First avenue in that city, "by installing, operating, and maintaining for a period of ten years after installation, an ornamental street lighting system therein," according to specifications adopted by the ordinance. The ordinance provided that the cost of installing, operating, and maintaining the system for the time specified, including all the necessary and incidental expenses, should be borne by and assessed against the property included within the district therein created, except 25 per centum of the cost, which it was provided should be borne by the city from its general fund. Subsequently a contract was let for the construction and maintenance of the system. The contract price was for a lump sum of \$66,429, payable in ten equal annual instalments without interest, save on deferred payments. While the contract covered three distinct and several items, namely, the construction

of the lighting plant proper, the maintenance of the plant for a period of 10 years, and the supplying of it with electrical energy for the same period, the cost of the individual items is not set forth therein. Their relative proportions to the whole can be gathered, however, from the preliminary estimates of the city engineer. That officer estimated the total cost of the three items mentioned at \$63,624, allowing for the first item \$17,600, for the second \$10,824, and for the third \$35,200; thus showing that the cost of furnishing the electrical energy for the 10-year periods exceeds the cost of the plant plus the cost of its maintenance for a like period.

One W. M. Ridpath owned property situated in the improvement district, and on the initiation of the improvement proceedings filed a protest against the same. Between the initiation of the proceedings and the return of the assessment roll Ridpath died, and his widow, the appellant in the present proceeding, was appointed administratrix of his estate. As such administratrix she filed objections to the assessment roll, which were disallowed by the city, and the roll confirmed. She appealed therefrom to the superior court of Spokane county, when again her objections were overruled, and a judgment entered confirming the roll in all respects. From the last-mentioned judgment she appeals to this court.

The appellant makes no question as to the regularity of the proceedings, nor does she question the sufficiency of the statutory grant of authority to the city to create the improvement, apart from the constitutional power in the legislature to make the grant. Her principal contention is that the statute itself is unconstitutional, because not within the grant of power conferred by § 9 of art. 7 of the Constitution, which provides that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited;" the precise contention being that the furnishing of electrical energy for street lighting purposes is not a "local improvement," within the meaning of that term as used in the Constitution. Certain minor contentions will be stated later.

All of the authorities agree that a local improvement, to be chargeable upon private property as such, must possess at least two essential elements: (1) The improvement must be of a public nature, as contradistinguished from one purely private, that is, it must be an improvement of such a nature as the municipality would be justified in constructing and maintaining by general taxation; and (2) it must confer a special benefit on the property sought to be special-

ly charged with its creation and maintenance, over and above that conferred generally upon property within the municipality. To these some of the courts have added a third element, namely, that of permanency, denying the power of local assessment in those instances where the improvement is of an evanescent nature or type. It is on this principle the appellant bases her contention that the statute authorizing a local assessment for the cost of furnishing electrical energy to a street lighting plant is unconstitutional. She argues that the phrase "local improvement" necessarily presupposes permanent physical addition to the streets, and that electrical energy is not a permanent physical addition, but is of an evanescent nature, vanishing as soon as the mechanical operation which creates it ceases.

The idea that permanency of the improvement is an essential to the charging of the expense thereof as a local improvement to property benefited is peculiarly the doctrine of the courts of Illinois. A case frequently cited is *Chicago v. Blair*, 149 Ill. 310, 24 L.R.A. 412, 36 N. E. 820, where it was held that the sprinkling of streets is not a local improvement, subject to be made a charge upon abutting or adjacent property. The power to sprinkle the street at the expense of the general taxpayer was not denied, but it was held that such work was not of a character that the cost of the same could be charged to the abutting property as a local improvement. In the course of the opinion it was said: "A local improvement within the meaning of the statute is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality. The only basis upon which either special assessment or special taxation can be sustained is that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burthen imposed. . . . If, therefore, from an inspection of the ordinance authorizing the making of the improvement, it appears from the nature of the work proposed that the market value of abutting or adjacent property would not be increased thereby, as a matter of law it would not be a local improvement within the meaning of the statute, and no declaration of the corporate authorities could make it so. . . . But the term 'local improvement,' prior to the adoption of the Constitution and passage of the act in question, had, by common usage, a well-defined meaning, and it will be presumed to have been employed in the sense thus attributed to it. It was understood, as applied to a street.

as signifying the improvement of the street, as such, and for the purposes for which it was designed, made in a particular locality, by reason of which the real property abutting or adjacent was specially benefited in its market value. . . . Further citation will be unnecessary. Used as it is, in connection with special assessments, which are necessarily based upon the idea of equivalent benefits to the property owner, the idea of permanency in the improvement is necessarily involved; that is, the benefit must flow from the actual or presumptive betterment of the street, and must be of such character as to enhance the market value of the property. . . . It cannot, we think, in any just sense be said that street sprinkling is an improvement, within the contemplation of art. 9 of the Cities and Villages Act. In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled."

The same principle was announced in *Kansas City v. O'Connor*, 82 Mo. App. 655; in *New York L. Ins. Co. v. Prest* (C. C.) 71 Fed. 815; and in *Stevens v. Port Huron*, 149 Mich. 536, 113 N. W. 291, 12 Ann. Cas. 603, likewise street sprinkling cases.

In *State ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97, also a street sprinkling case, a different view of the question was taken. In the opinion is the following: "The relator's main contention, however, is that street sprinkling is not an 'improvement,' within the meaning of this section of the Constitution, because it lacks the element of permanence; that its results are transient; that to constitute an improvement, there must be some work or structure, such as a pavement, sidewalk, or the like, that will remain after the labor is performed, and permanently enhance the value of the property. But if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays, and has to be rebuilt, every few years. When a pavement or sidewalk has worn out, the future value of the property is not enhanced by it, any more than it is by street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which

has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts, and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a 'local improvement' are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city. If it does this,—rendering the property more attractive and comfortable, and hence more valuable for use,—then it is an improvement. That the regular and systematic sprinkling of a street has this effect upon the property fronting on it is a matter of common knowledge. This construction is fully warranted by the definitions of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of anything is increased, its excellence enhanced, or the like,' or 'an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.'

The view taken by the Minnesota case was followed in *Sears v. Boston*, 173 Mass. 71, 43 L.R.A. 834, 53 N. E. 138. In that case it was said: "It is a grave question whether the benefit that comes to abutting property from the watering of the street in front of it is such an improvement to the property that it can be made the subject of an assessment upon it. There must be a real, substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. The watering of streets produces only transitory effects, and makes no permanent change in the condition of the property. It greatly promotes the health and comfort of the people generally, who use the streets from time to time, but its greatest benefit is to the abutting estates as places for residence or the transaction of business. Indeed, so much more important to the occupants than to the general public have been the benefits from watering streets that until lately the expense of the work in this commonwealth has usually been borne by the abutters, who have procured the watering to be done by private contractors. If a special benefit, accruing from day to day, which very materially increases the rental value of real estate by reason of the proximity of the property to the place where the beneficial work is done, can be treated as an improvement within the L.R.A.1917A.

reason of the rule which permits special assessments, then such assessments may be made to pay the expense of watering streets. With some hesitation, we hold that there is an improvement of private property, when this work is done by a city regularly from day to day, which may warrant an assessment upon the abutters."

But whatever doubts may then have existed in the mind of the court, the principle has become settled law in Massachusetts. *Sears v. Street Comrs.* 173 Mass. 350, 53 N. E. 876; *Phillips Academy v. Andover*, 175 Mass. 118, 48 L.R.A. 550, 55 N. E. 841; *Stark v. Boston*, 180 Mass. 293, 62 N. E. 375; *Hodgdon v. Haverhill*, 193 Mass. 327, 79 N. E. 818. To the same effect is *Roswell v. Bateman*, 20 N. M. 77, L.R.A.—, 146 Pac. 950, although the court does not specially discuss the idea of permanency of the improvement as affecting the power.

In *Reinken v. Fuehring*, 130 Ind. 382, 15 L.R.A. 624, 30 Am. St. Rep. 247, 30 N. E. 414, it was held that the cost of sweeping the streets could be made a charge on the abutting property as a local improvement. In the opinion it is said: "It is matter of common observation, of which we must take notice, that property located upon well-improved streets, kept clean, is more desirable than property on unimproved streets, where mud and filth are permitted to accumulate and obstruct their use. It is safe to assert, we think, that keeping a street clean adds to the rental, if not to the permanent, value of property located thereon; and for this reason, among others, the abutting property owner has a special interest in such cleaning not enjoyed by the general community. For the reason that the public in general has an interest in keeping the streets free from filth, the city may, in exercising the police power conferred upon it by the state, order them swept; and for the further reason that the abutting property owner derives a benefit from such sweeping not enjoyed by the general public, he may be required, by assessments, to pay the expenses incident to such sweeping. It follows from what we have said that the assessments provided for by the act under consideration do not amount to a taking of private property without compensation and without due process of law. Assessments of the kind we are now considering are made upon the principle that the person assessed is benefited in the increased value of his property, either rental or permanent, over and above the benefits received by the public, in a sum equal to the amount he is required to pay. It is upon this theory alone that they can be sustained."

In none of our own cases have we been called upon to meet the question. The near-

est approach to it, perhaps, is the case of *Northern P. R. Co. v. Adams County*, 78 Wash. 53, 51 L.R.A.(N.S.) 274, 138 Pac. 307, where we held constitutional the statute imposing upon abutting property the duty of destroying noxious weeds growing upon the public highways. The case was rested upon the police power. This language, however, was used in the opinion: "Their [the noxious weeds] destruction is a benefit principally to the property owners, because, if the property owners are required to destroy the noxious weeds upon their lands, and such weeds are permitted to grow in the highways, the destruction of the weeds upon their lands is of no practical benefit. It is necessary that the weeds upon the highways be destroyed, as well as those upon the adjoining lands. It is reasonable, we think, that the owners of lands may be required to destroy noxious weeds to the center of the highways abutting thereon as a special benefit to their own lands."

In *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612, we quoted with approval the definition of a local improvement found in the case of *State ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97. We also quoted with approval from *Cooley on Taxation*, to the effect that the maintenance of water mains "and the supplying of water are necessarily a continuing expense, and for these reasons the assessment of the cost upon adjacent property is within the general principle of local assessments." Neither of these cases called for a determination of the question whether permanency is an essential to a local improvement, but it is inferable from the reasons given to sustain the rulings made that the court was inclined to the doctrine of the court of Minnesota rather than that of the court of Illinois.

All of the cases where the question has been raised seem to agree that the expense of erecting the lamp-posts, the conduits for the wires, and the cost of the wires and lamps necessary for an electric street lighting system may be charged to the property benefited as a local improvement. No case has been called to our attention, however, where it has been determined that the electric energy necessary to light the plant may be treated as a part of the plant and the cost thereof charged to the property benefited as a local improvement.

Following the rule of the courts which do not require permanency as an essential element of a local improvement, we see no reason why it may not be so charged. It is from the electric current that the light is derived, and it is the light that furnishes the entire benefit to the property. The lamp-posts, the conduits, wires, and lamps, are but the means of carrying the current and

diffusing the light at the proper places. Of themselves they are of no benefit to property abutting upon the streets in which they are constructed. On the contrary, standing alone, they would be obstructions in the streets, narrowing and hindering its use as such, of no possible benefit to the public at large, and rendering abutting property of less, rather than of greater, value. No rule of law would justify their erection and maintenance in a street, were they not the necessary means to a desired end. It is difficult to understand, therefore, why the cost of this mechanical part of the improvement can be charged to abutting property specially benefited by the lighting of the street, while the cost of the electric energy, without which there can be no completed improvement, cannot be so charged. We think there is no room for such a distinction, that the mechanical contrivances and the electrical energy are but parts of a complete whole, and that it is the whole, and not one of the parts, that confers the benefits. As such, it seems to us clear that the cost of the whole may be charged as a local improvement in so far as private property is benefited thereby.

But it is said there is a difference between the construction of a local improvement and its operation, that while the one may be of such a local benefit as to justify a local assessment for its cost, the cost of operation cannot be so charged, because that is a general municipal duty, rather than the duty of any particular locality. But we can conceive of no reason for this distinction. There are, of course, many public improvements, from which private property receives an incidental advantage, which are held to justify only general taxation. The rule has been especially applied to public thoroughfares which have been improved at the expense of local property, and which have by use become out of repair, it being held that the local property could not be charged with the cost of keeping the street in repair. But the improvement of a street usually causes an increase of travel thereon by the general public, and consequently an increase of wear over normal conditions. It is not just that the abutting property owners should be charged with the expense caused by this increase of travel, and the courts generally hold that the burden cannot be placed on them. But the situation with reference to an electric lighting system is in no way analogous. The system may have a local situs, benefiting only that part of the city wherein it is situated. It is of such a nature that increased use of the street by the public does not impair its efficiency, or add to the cost if its maintenance or operation. When, therefore, the system

does not extend over the city at large, but is confined to a part of the city only, it is manifest that it may be almost wholly of local benefit, rendering it unjust to the general taxpayers of the city to be charged with the entire cost of its maintenance and operation. Such is the situation here. This plant is local with relation to its situs. While it may benefit the city at large in some degree, its greatest benefit is to the locality wherein it is situated, and we see no reason why its cost of operation, as well as the cost of construction and maintenance, may not be charged to the local property to the extent of the benefits.

A further contention is that the assessment is void because the improvement contained features of purely ornamental nature, thus greatly increasing the cost of the plant and the consequent assessments beyond the necessities of the case. But the character of the plant which may be installed must rest largely in the discretion of the municipal officers having the authority to direct its installation. It may be that this discretion could be so far abused as to require the courts to hold void any attempt to levy a local assessment to meet its cost, but the ordinary remedy would be to allow an assessment up to the value of a proper plant.

In the instant case we think that, if any remedy could be afforded, it would be the latter. Here, however, the evidence does not justify even this modification. The nature of the improvement is shown only in the plans and specifications for the work. These show a system of underground conduits carrying wires to the several lamp posts, which are of cast iron fastened to a concrete base, carrying at the top a lamp of the type known as the "inverted, ornamental, luminous arc lamp." The scheme does away with overhead wires, with their accompanying wooden poles in common use. The system in its general scheme is clearly within the powers of the municipality, and the posts, which are the only part of the plant designed for ornament, do not so far depart from ordinary construction as to warrant the court in saying as a matter of law that the proportional part of the cost which the city assessed to the property benefited was in excess of its legitimate powers.

The judgment below should be affirmed; and it is so ordered.

Mount, Main, Parker, and Holcomb, JJ., concur.

Annotation—Street lighting as a local improvement assessable against property benefited.

As to power of municipal corporation to own and operate electric light plant, see notes to *Crawfordsville v. Braden*, 14 L.R.A. 268, and *Posey v. North Birmingham*, 15 L.R.A. (N.S.) 711.

As to the power to make special assessments for purchase or construction of water plant, see note in 61 L.R.A. 53.

That street lighting is a local improvement seems to be settled, but as to how much and what part of a lighting system is a local improvement, there appears to be a divergence of opinion.

Thus, it was held in *Ewart v. Western Springs* (1899) 180 Ill. 318, 54 N. E. 478, that so much of an electric light system as related to the placing, erection, and construction of poles, electric conductors, and lamps was a local improvement, but that the power house and generator engine were improvements of general character. The decision in this case was based upon similar holdings in waterworks cases, as appears from the following quotation from the opinion: "These cases draw a distinction, so far as the construction of systems of waterworks are concerned, between the standpipe, pumping works,

and buildings, which are of general utility, and the pipes, which convey the water along particular streets. The former must be paid for by general taxation, but the latter are held to be local improvements, which may be paid for by special assessment. If the water mains and hydrants of a system of waterworks which extend along the streets of a city are of local improvement, we see no reason why the poles, wires, and lamps in an electric light system are not also a local improvement. So far as the plant for lighting the streets by electricity includes the power house and electric generator engine, the latter may be regarded as improvements of general utility, and as not coming within the legal definition of local improvements. But the poles, wires, and lamps in an electric light system are the means of furnishing the necessary light for the protection of the property of the citizens, just as the water mains and hydrants of a system of waterworks are the means of furnishing needed water for fire protection and other uses of the citizens. It cannot be said that property upon a street lighted with electric

light is not more valuable than property upon a street where there is no such electric light. Property is, in fact, specially benefited by electric or other adequate lighting along the street on which it is situated, quite as much as it is benefited by water mains. It follows that, if water mains are local improvements, poles and wires in an electric light system are also local improvements. The former are conduits for water the latter for electricity. So, also, it must be said that, if hydrants attached to the water mains are a local improvement, lamps attached to the wires in an electric lighting system are local improvements, because the latter are the means of using the electricity, as the former are the means of using the water. The test whether an improvement is local or not depends upon the question whether or not it specially benefits the property assessed. The improvement which consists in the erection of poles, wires, and lamps in an electric light system is certainly as much a permanent improvement as the water mains and hydrants in a system of waterworks."

And in *ANKENY v. SPOKANE*, ante, 1093, the furnishing of electrical energy for street lighting purposes for a limited term was held to be a local improvement, it being held that permanency was not an essential element of a local improvement. It was further held that the fact that the lamp-posts were ornamented did not prevent the assessment of the added cost thereby caused upon the property benefited, because ordinary construction was not so far departed from as to warrant the court in saying that the municipality exceeded its legitimate powers. The assessments upheld in this case included the cost of the construction and maintenance of the lighting plant.

In *Crane v. Siloam Springs* (1899) 67 Ark. 30, 55 S. W. 955, in which it appeared that on the same day a city council passed two ordinances, one for the construction and maintenance of a waterworks system, the other for the erection and maintenance of electric lights, the court, by reasoning equally applicable to the lighting, reached the conclusion that the waterworks was a local improvement, although the improvement district embraced the entire city.

In *Putnam v. Grand Rapids* (1885) 58 Mich. 416, 25 N. W. 330, holding that a municipal contract with an electric light company, to have a number of

towers put up and electric lights furnished for a term of years, violated a section of the charter providing that it should not be lawful for the common council to authorize the creation of any liability in any one year exceeding in the aggregate the amount which by the charter might be raised by tax for such year, but that nothing contained in the charter should be construed to prohibit the common council from making assessments and levying and collecting taxes for the purpose of local improvements, the court said: "This system of towers cannot, in our opinion, be included under the head of 'local improvements,' for which there is an enlarged power of taxing and assessing. We must consider that phrase in connection with the rest of the charter. These towers are only means of using the electric light, and whatever might have been the case had the city set up its own engines and power, these towers by themselves are of no use, unless furnished with light, and are no more local improvements than lamp-posts and other fixtures."

The power to assess upon the property benefited the cost of local improvements is purely statutory, and the extent of the power is limited to that expressly conferred.

Thus, it was held in *Wilt v. Bueter* (1916) — Ind. —, 111 N. E. 926, that a statute conferring express authority on the board of public works of a city to cause any street to be supplied with lamp-posts, and to assess the cost thereof against the property benefited, authorized the assessment upon the abutting property of the cost of lamp-posts only, and not the cost of extending the lighting system to such posts by means of conduits and cables, because no authority to assess the cost of constructing and installing any part of the distributing system of an electric light plant could be derived from such statute without resorting to inferences and implications.

In *Parker v. Wallace* (1913) 80 Misc. 425, 142 N. Y. Supp. 523, it was held that the provision of a city charter empowering the common council, "in its discretion, to create and alter a lighting district or districts within such city as it may fix and determine, with full power to order such construction and installation of lighting or additional lighting as it may prescribe, the cost of which shall be fixed, apportioned, assessed, and collected in the manner and at the time as may be designated by the common council," authorized the assessment of the cost of a lighting system against

the property benefited. It was further held that such charter provision did not violate a section of the state Constitution reading: "It shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations;" and that the omission in such charter provision to provide in detail the methods which might be adopted by the common council for the assessment and collection of the cost of the lighting district did not render it void upon the ground that it constituted the taking of property without due process of law.

In *Jonas v. Cincinnati* (1849) 18 Ohio, 318, a suit to enjoin the collection of a special tax levied upon the complainant's property to pay the expense of lighting the street in front of his property with gas, the point was made by the complainant that the lighting of the city was a general and public utility and its expense should be defrayed by a tax generally assessed, and that special taxes

for that purpose violated the Bill of Rights. The court did not pass on this point, but there is apparently no doubt that the city had the power to assess the property benefited, as its charter provided for the levying of a special tax for lighting the city, on the real estate bounding on the section lighted.

In *Windsor v. Des Moines* (1900) 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476, where a contract for the construction and maintenance of an electric light plant, and the tax levied to meet the obligations imposed thereby, were held invalid upon the ground that the constitutional debt limit was exceeded, it was stated that there was no statute authorizing a special assessment to pay for the construction of such a plant, and the cost thereof could only be paid out of the general funds; and it was further stated that, granting that the city had the right to make a special assessment for the expense of maintaining and operating an electric light plant, it did not follow that it could anticipate its future general revenues for the purpose of erecting such a plant.

G. V. I.

CALIFORNIA SUPREME COURT. (Department No. 2.)

HARRY F. FISCHER et al., Resp'ts.,
v.

F. W. CAREY et al., Appts.

(— Cal. —, 159 Pac. 577.)

Partnership — ownership of ship.

1. The part owners of a ship are not partners in its management in the absence of special agreement making them such.

For other cases, see *Partnership*, I. in *Dig.* 1-52 N. S.

Courts — jurisdiction of sale of ship.

2. Admiralty has exclusive jurisdiction over proceedings to sell a ship because of disagreement between its owners, and a state legislature therefore cannot give state courts jurisdiction of such a proceeding so as to enable them to take possession of the ship by a receiver and proceed to sell it.

For other cases, see *Courts*, IV. d, 1, in *Dig.* 1-52 N. S.

(July 27, 1916.)

APPEAL by defendants from an order of the Superior Court for the City and

Note. — As to jurisdiction and determination of suits for adjustment of rights between part owners of ship, see annotation following this case, post, 1108.
L.R.A.1917A.

County of San Francisco, appointing a receiver in a proceeding for the partition sale of a ship. Reversed.

The facts are stated in the opinion.

Mr. William M. Madden, for appellants:

Part owners in ships hold their interests as tenants in common, and not partners.

Freeman, *Cotenancy*, § 379; *The New Orleans* (Clark v. Weeks) 106 U. S. 13, 27 L. ed. 96, 1 Sup. Ct. Rep. 90; *The Daniel Kaine*, 35 Fed. 785; *Scull v. Raymond*, 18 Fed. 547; *Spedden v. Koenig*, 24 C. C. A. 189, 42 U. S. App. 267, 78 Fed. 504; *Hyer v. Caro*, 17 Fla. 332; *Gould v. Stanton*, 16 Conn. 12; *Davis v. The Seneca*, Gilpin, 10, Fed. Cas. No. 3,650; *Freeman, Cotenancy*, 2d ed. § 382; *Willings v. Blight*, 2 Pet. Adm. 238, Fed. Cas. No. 17,765.

The majority in interest of the part owners control and may employ the ship as they see fit, subject to the right of a dissentient minority part owner to compel the giving of a bond by the majority so desiring to employ the vessel, by which they bind themselves to effect its safe return, or in case of loss to reimburse the minority for the loss of their shares.

Jouanneau v. Shannon, 4 La. Ann. 330; *Williams v. Kelly*, 2 Conn. 218, note; *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No.

12,670; *Tunno v. The Betsina*, Fed. Cas. No. 14,236; *MacLachlan, Merchant Shipping*, 4th ed. 89, 102; *The Vindobola*, L. R. 15 Prob. Div. 50, 58 L. J. Prob. N. S. 51, 60 L. T. N. S. 657, 37 Week. Rep. 409, 6 Asp. Mar. L. Cas. 376, 24 Eng. Rul. Cas. 236; *The Margaret*, 2 Hagg. Adm. 275; *Card v. Hope*, 2 Barn. & C. 661, 107 Eng. Reprint, 529, 4 Dowl. & R. 164, 2 L. J. K. B. O. S. 96, 26 Revised Rep. 503, 24 Eng. Rul. Cas. 246; *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72; *Hyer v. Caro*, 17 Fla. 332; *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842; *Williams v. Haya*, 143 N. Y. 442, 26 L.R.A. 153, 42 Am. St. Rep. 743, 38 N. E. 449; *Ward v. Ruckman*, 36 N. Y. 20, 93 Am. Dec. 479; *Gould v. Stanton*, 16 Conn. 12; *The William Bagaley*, 5 Wall. 377, 18 L. ed. 583; *Hastings v. Allen*, 14 Ohio, 58, 45 Am. Dec. 523; *The Orleans v. Phoebe*, 11 Pet. 175, 9 L. ed. 677; *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420; *Bragdon v. The Kitty Simpson*, Fed. Cas. No. 1,798; *Fox v. Paine, Crabbe*, 271, Fed. Cas. No. 5,014; *The Ocean Belle*, 6 Ben. 253, Fed. Cas. No. 10,402; *Abbott, Shipping*, p. 125; *Stedman v. Feidler*, 25 Barb. 606; *Freeman, Cotenancy*, 2d ed. § 389.

The court has power to order the giving of security for the safe return of the vessel on application by a minority, and to restrain the employment of the vessel by the other part owners until they have executed a bond protecting the shares of the dissenting co-owners.

Williams v. Kelly, 2 Conn. 218, note; *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72; *Hyer v. Caro*, 17 Fla. 332; *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842; *Jouanneau v. Shannon*, 4 La. Ann. 330; *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420; *Bragdon v. The Kitty Simpson*, Fed. Cas. No. 1,798; *Coverdale v. The North American, Crabbe*, 420, Fed. Cas. No. 3,289; *The Marengo*, 1 Sprague, 506, Fed. Cas. No. 9,066; *Tunno v. The Betsina*, Fed. Cas. No. 14,236; *Williams v. Blight*, 2 Pet. Adm. 288, Fed. Cas. No. 17,765; *The Apollo*, 1 Hagg. Adm. 306; *The England*, L. R. 12 Prob. Div. 32, 56 L. J. Prob. N. S. 115, 56 L. T. N. S. 896, 35 Week. Rep. 367; 6 Asp. Mar. L. Cas. 140; *The Talca*, L. R. 5 Prob. Div. 169, 42 L. T. N. S. 61, 29 Week. Rep. 123, 4 Asp. Mar. L. Cas. 226; *Freeman, Cotenancy*, 2d ed. § 390.

If, for any reason, the minority of the part owners is about to sail the vessel on a voyage against the will of the majority, the latter may require the minority to give security for the vessel's safe return and for indemnification in case of its loss.

Gould v. Stanton, 16 Conn. 12; *Lewis v. L.R.A.* 1917A.

Kinney, 5 Dill. 159, Fed. Cas. No. 8,325; *Tunno v. The Betsina*, Fed. Cas. No. 14,236; *Hyer v. Caro*, 17 Fla. 332; *Scull v. Raymond*, 18 Fed. 547; *The Marengo*, 1 Low. Dec. 52, Fed. Cas. No. 9,065; *Coyne v. Caples*, 7 Sawy. 360, 8 Fed. 638; *Williams v. Blight*, 2 Pet. Adm. 288, Fed. Cas. No. 17,765.

The partition and sale of a ship cannot be enforced on the part of minority owners.

Freeman, Cotenancy, § 391; *The Orleans v. Phoebe*, 11 Pet. 175, 9 L. ed. 677; *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420; *Coyne v. Caples*, 7 Sawy. 360, 8 Fed. 638; *Burr v. The St. Thomas*, Fed. Cas. No. 2,194A, Fed. Cas. No. 2,195; *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670; *Lewis v. Kinney*, 5 Dill. 159, Fed. Cas. No. 8,325; *The Ocean Belle*, 6 Ben. 253, Fed. Cas. No. 10,402; *Tunno v. The Betsina*, Fed. Cas. No. 145,236; *Hyer v. Caro*, 17 Fla. 332; *Skrine v. The Hope*, Bee, 2, Fed. Cas. No. 12,927; *Stevens v. The Sandwich*, 1 Pet. Adm. 233, Fed. Cas. No. 13,409; *Story, Partn.* 435, 436.

Mr. H. W. Hutton for respondents.

Henshaw, J., delivered the opinion of the court:

Plaintiffs, minority owners of the schooner *Hugh Hogan*, began this action in equity in the superior court of the state. The defendants are the owners of a majority interest in the schooner. The difference between the owners arises out of that situation so frequently presented to an admiralty court where the minority owners are dissatisfied with the employment by the majority owners of the vessel. It is charged that the vessel is being operated at an undue expense, is taken into shallow harbors which she cannot enter or leave with her full load, and is subjected to the danger of becoming a total loss if allowed to continue on these voyages. It is further charged that she is being operated in the interest of the defendant *Oregon & California Lumber Corporation* and the *Hurd Lumber & Navigation Company*, and employed in the carrying of lumber cargoes from coast points to San Francisco. The plaintiffs prayed for an accounting, for the appointment of a receiver, and for an order decreeing the sale of the vessel and a division of the proceeds ratably amongst the part owners. The court appointed a receiver to take possession of the schooner and "to operate said vessel if it appears in the judgment of said receiver such operation can be done at a profit, and to preserve the said vessel, her earnings, and appurtenances until the further order of the court." From this order certain of the defendants have appealed.

The appellants urge that plaintiffs' action is cognizable in admiralty in the district court of the United States alone, and that the state court is wholly without jurisdiction to proceed in the matter.

The respondents, in support of the jurisdiction of the state court, announce the unquestioned principle that the adjustment of partnership matters and accounts is in equity alone, and not in the admiralty court. They next declare that these parties plaintiff and defendant are partners. But this is not the fact. No partnership is averred in the pleading. The relationship of partners does not arise between part owners of ships merely by virtue of their ownership. It arises only by special contract. As part owners, they are tenants in common in the ship, and not partners. *Freeman, Cotenancy*, § 379; *The New Orleans*, (Clark v. Weeks) 106 U. S. 13, 27 L. ed. 96, 1 Sup. Ct. Rep. 90. In *Hendy v. March*, 75 Cal. 569, 17 Pac. 702, relied upon by respondents as establishing a partnership in this case, this court said: "Here is a distinct agreement to share in the profits and loss arising from the use of the vessel, and such an agreement constitutes a partnership. . . . It is not necessary to say that the partnership extended to the ship itself as contradistinguished from its use. 'Part owners of a ship do not, by simply using it in a joint enterprise, become partners to the ship.' Civ. Code, § 2396."

And in this case it is made to appear by the pleadings that, so far from being partners, the plaintiffs, objecting in a court of admiralty to the use which the majority owners were making of the ship, compelled them to give a bond for the safe return of the ship upon each voyage thereof. By virtue of these proceedings and of this bond the plaintiffs relieved themselves from liability for loss upon the voyage, and at the same time deprived themselves of the right to share in the ship's profit,—a situation absolutely repugnant to any conception of a partnership. *Coyne v. Caples*, (D. C.) 7 Sawy. 360, 8 Fed. 638; *Freeman, Cotenancy*, 2d ed. § 390.

The question presented, therefore, is whether minority owners, under the indicated circumstances, may resort to the state courts for the appointment of a receiver who takes the control of a ship away from the majority owners for the purpose of operating and selling it. Respondents base their right to maintain this action upon a section of our Code and upon certain state adjudications. Section 964 of our Civil Code declares that, "If a ship belongs to several persons, not partners, and they differ as to its use or re-

pair, the controversy may be determined by any court of competent jurisdiction."

Conceding that this language is comprehensive enough to embrace within it the action here brought, neither this nor any other state statute can have the effect of diminishing the admiralty jurisdiction of the Federal courts. *Aurora Shipping Co. v. Boyce*, 112 C. C. A. 372, 191 Fed. 960; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; *The Orleans v. Phoebe*, 11 Pet. 175, 9 L. ed. 677. Our Code section, therefore, will of necessity be held to apply to such cases as do not encroach upon admiralty jurisdiction. Have the admiralty courts any jurisdiction at all over this controversy? If they have, is their jurisdiction exclusive, or concurrent merely with that of the state? One phase may be spoken of only to be eliminated. An action for an accounting, as such, is of course equitable, and jurisdiction over it is in the state courts. Admiralty has and takes no jurisdiction over such actions. The utmost limit to which it goes is that, where a sale of the ship has been had under decree, it will take an accounting as a necessary incident for the purpose of making a just distribution of the proceeds of the sale. But manifestly the accounting in this case is incidental to the principal relief sought. That relief is the taking over by a state court in equity, acting through its receiver, of the rem, and a sale of that rem at the instance of the minority owners, who, disagreeing with the majority owners over the latter's management of the ship, plead a loss of the earning capacity of the ship, a depreciation of the value of their shares, and ask a sale of the vessel in consequence.

It is from this latter aspect that this case should be, and will be, treated. It is now well settled that the jurisdictional power of the district courts over "all cases of admiralty and maritime jurisdiction" (U. S. Const. art. 3, § 2) is not limited to admiralty jurisdiction as it existed in England, where it was in bitter conflict with the common law, but that reference may be had to all Codes of maritime law, to all the decisions of the Mediterranean consular courts, and to the customs and practices of all civilized maritime countries. *De Lovio v. Boit*, 2 Gall. 398, Fed. Cas. No. 3,776. Touching the reservation to suitors of "a common-law remedy where the common law is competent to give it" as provided in the Federal Judiciary Act, *Benedict* says: "The Judiciary Act, which established the United States courts and defined their jurisdiction, confirmed the existing right of the common-law courts, by providing that the Federal district

courts shall have exclusive jurisdiction of 'all cases of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.' The common-law remedy here mentioned is the right of a plaintiff to proceed in personam against a defendant, which remedy the common law is competent to give. Therefore, when a direct suit against a shipowner is brought, e. g., to recover seamen's wages, or damages for collision, and jurisdiction of the person of the defendant can be secured, such a suit may be brought either in admiralty or at common law, the two courts having in this respect concurrent jurisdiction. But the right to proceed in rem is distinctly an admiralty remedy, and hence exclusively within the control of the United States courts; no state can confer jurisdiction upon its courts to proceed in rem. Nor could Congress give such power to a state, since it would be contrary to the Federal grant in the Constitution. So liens given by the laws of a state for matters which are subjects of admiralty jurisdiction are enforceable against the thing only in the Federal courts, though the debt on which the lien is founded may be sued on in personam in the state court. This right to proceed in rem, according to the methods of the maritime law, is the 'exclusive' jurisdiction of all civil causes of admiralty and maritime jurisdiction conferred upon the district courts by § 563 of the Revised Statutes, subdiv. 8." [Admiralty, 4th, § 128.]

The foregoing sufficiently for our purposes outlines the principle which we conceive must govern this determination. To say when and under what circumstances a vessel shall be sold, is certainly a part of the civil law of lictation, which law forms to so great an extent the foundation of admiralty jurisdiction that it is so declared in the laws of Oleron, to which courts of admiralty make so frequent reference. Thus, the third provision of those laws is, "Touching the engaging (sale or hypothecating) of ships or goods in case of necessity." And Benedict, in his learned work, after discussing the principles governing admiralty jurisdiction in the matter of disputes between part owners, declares: "Cases of lictation or sale for the purpose of partition are also within the power of the American admiralty, as they are of the European maritime court." Benedict, Admiralty, § 187.

Hughes, however (Hughes, Admiralty, § 158), declares: "Although admiralty does not have jurisdiction to decree a sale of a vessel for mere purpose of partition, where the interests in the vessel are un-

equal, for in that case the majority can rule, yet if the interests are equal and the equal interests disagree . . . admiralty has jurisdiction to decree a sale of the vessel."

Also it is said that in certain instances, not necessary here to specify, admiralty may order a sale of the vessel at the instance of the majority owners. In the phraseology of the last quotation is found the difficulty attending this consideration. Is it true that admiralty does not have jurisdiction to decree a sale at the instance of the minority owners or is it that, having jurisdiction, it will not, by reason of the dominance of the principle that the majority owners have the right to the use and control of the vessel, decree a sale at the instance of the minority owners? As this question is answered, so must go the decision of this case. For if it be true that admiralty has not this jurisdiction in the true sense and meaning of the word, then manifestly the state court is not trespassing upon any of the reserved Federal admiralty and maritime powers. But if, upon the other hand, the true holding is, as above indicated, that admiralty has the jurisdiction and power, but for reasons sufficient unto itself will not exercise that power in favor of minority owners, then the matter still remains one exclusively of Federal cognizance, and the effort of the plaintiffs in this case is to accomplish in the state courts the doing of that which admiralty, with jurisdiction over the matter, would refuse to do. The manifest effect of this, then, would be an encroachment upon and a usurpation of the legitimate powers of the district courts in admiralty.

The respondents take the view first outlined, and they support it, as has been said, with decisions from state courts and with language found in some of the Federal decisions. Thus the learned Justice Story, in *The Orleans v. Phoebus*, supra, is relied on. He speaks in the following language: "The jurisdiction of courts of admiralty in cases of part owners having unequal interests and shares is not, and never has been, applied to direct a sale upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages. . . . The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship."

So also in *The Ocean Belle Case*, 6 Ben. 253, Fed. Cas. No. 10,402. In an action in the Federal district court it is declared: "The court has no power to order a sale of this vessel, on the facts set out in the libel to pay the debts and distribute the

residue of the proceeds, on the demand of the owners of five sixteenths of her, and against the will of the owners of the rest. . . . Such power of sale has never been established in this country."

And so in the well-considered case of *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670, where the dispute was between two equal owners, the exercise of the powers in admiralty was reviewed, and it is declared that "if the majority refuse to employ the vessel, though they cannot be compelled to it by the minority, neither can their refusal keep the vessel idle, to the injury of the minority, or to the public detriment; and since in such a case the minority can neither employ her themselves nor force the majority to do so, the vessel may be valued and sold."

And, finally, in *Tunno v. Betsina*, Fed. Cas. No. 14,236, after a lengthy and learned discussion of the rights of majority owners to employ the vessel against the wish of the minority owners, and the circumstances and conditions under which admiralty will decree a sale, and in declaring finally that it will not decree a sale at the instance of minority owners dissatisfied merely with the use, the learned circuit judge uses this language: "If not within the jurisdiction of the admiralty, a court of equity will be found adequate to the occasion, proper for the exercise of its authority. I consider that the power to sell, as exercised by Judge Washington, in the case of *The Seneca*, supra, was carried as far as the best authorities in the maritime law will warrant. Nor is it easy to comprehend for what useful purpose the power could be exercised in any other cases than such as I have referred to, in which a disagreement between part owners cannot be determined by the operation of principles applicable to associated ownership, or such as are specially provided for an ownership in vessels. Of what use would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution would be for the majority to render unquestioning accord to the wishes of the minority, no matter how small that minority, or unreasonable its exactions. In this case, the libellant is not the owner of a half of the vessel. He represents a minority in value. And the examination now made satisfies me that he is not entitled to a decree for a sale on the ground of disagreement with the other part owners as to the best mode of employing the vessel owned by them in common."

The interpretation put by certain of the L.R.A.1917A.

state courts upon these cases, which interpretation is of course relied upon by respondents here, is that the admiralty court is without jurisdiction. In other words, that it has no power to decree a sale at the instance of the disaffected minority owners. Yet in every one of these Federal cases it is to be noted that the court entertains jurisdiction of the subject matter of the action, and, regardless of the language employed, the judgments in each case were judgments upon the merits, denying the particular remedy sought. And it must at once strike one as strange, if the courts of admiralty did not possess jurisdiction to do the thing which was sought, that they would not promptly have sent the cases out of court upon that specific ground. The fact that in every instance the district court did retain the cases, did hear them, and did decide on the merits, against the positions of the minority owners, is most persuasive to the effect that by their language those judges did not mean to say that their courts had no jurisdiction, but that, having jurisdiction, they would not exercise it to grant the remedy or relief prayed for.

Certain of the state courts, as has been said, have taken the contrary view, and it is proper now to consider those decisions. *Andrews v. Betts*, 8 Hun, 322, was an action very similar to the one at bar. The vessel was owned in unequal proportions by different persons. They could not agree upon a sale, or upon the employment of it. One of these minority owners brought his action in equity to procure the appointment of a receiver, a sale of the vessel, and a division of the proceeds of the sale in proportion to the respective ownerships. The supreme court of New York entertained the action first, upon the ground that admiralty had no jurisdiction to act in such a case at the instance of a minority owner, and Boardman, J., delivering the opinion of the court, said: "I can see no reason why admiralty courts ought not to possess and exercise jurisdiction to order a sale in case of disagreement between owners, irrespective of their shares. Such a power, exercised in the discretion of the court, could scarcely fail to subserve the interests of the well disposed owners, and defeat the malice or stupidity of the evil disposed owners."

For a second ground the court took the view that even though admiralty had jurisdiction, there was still concurrent jurisdiction in the state court, owing to the saving clause of the Judiciary Act. (U. S. Rev. Stat. § 563, subdiv. 8), which saves "to suitors in all cases the right of a common-law remedy, where the common law is

competent to give it." Benedict, in the passage from his learned work on admiralty above quoted, with the support of numerous Federal decisions, points out that this reservation is, as it expresses, a saving of a right to a common-law remedy, which, of course, is essentially a distinct relief from an equitable remedy, and in especial the saving clause had reference to the common-law remedies in actions in personam as distinct from admiralty procedure, where, in so many instances, the vessel itself is personified and libel brought against the vessel, without regard to its ownership; and therein he further points out that no state can confer jurisdiction upon its courts to proceed in rem, nor to enforce in the state courts any liens which come within admiralty jurisdiction. Of course the New York action, no more than this, sought to exercise a common-law remedy. To the contrary, the common law afforded no relief to tenants in common in disputes and disagreements such as here presented. This is most lucidly pointed out by Mr. Freeman (*Cotenancy*, 2d ed. §§ 389 et seq.), where, after discussing the refusal of the common law to aid tenants in common in their efforts to recover possession or to partition chattels, he declares, speaking now of the distinction between chattels in ordinary and ships: "They [shipowners] may disagree either in reference to what employment is most advantageous, or in reference to the advisability of seeking any employment whatever. In either case, the law has provided remedies calculated to preserve the rights and promote the interests of all the owners, and also to minister to the general interests and promote the general welfare of the public. These remedies are not, however, to be found in the courts of the common law, nor in the tribunals charged with the administration of the principles of equity jurisprudence. *Parsons*, Partn. 558; *Castelli v. Cook*, 7 Hare, 89, 68 Eng. Reprint, 36, 18 L. J. Ch. N. S. 148, 13 Jur. 675. They must be sought in the courts of admiralty."

Hence, if this view be correct, a court of equity, though competent, is not empowered to give relief when such a disagreement amongst the owners shall arise. These equitable remedies are not those which are saved to suitors by virtue of the Federal Judiciary Act. Indeed, it is well understood why this is so, since the controversy was wholly between the judges of common-law courts and of the admiralty courts, and took the form of a very active effort upon the part of the latter to destroy entirely by the writ of prohibition the jurisdiction of the admiralty courts. Nor, as the learned expound, was this done

out of any jealous regard for the rights of the people, nor for the superiority of the common-law system over admiralty jurisprudence, which latter was based upon the more liberal doctrines of the civil law. But it did have its origin and it owed its existence to a very much more unworthy motive, which was the desire of the common-law judges to increase the emoluments of their offices by fees, fines, and forfeitures, which were withheld from them under the admiralty jurisdiction. Therefore we must conclude, so far as the New York case is concerned, that if sound at all it is sound as being based upon the proposition that the district courts in admiralty are without jurisdiction of such a controversy. The next case is *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414, where the owner of one third of a steamboat sued in the state court for an accounting, being apprehensive of loss from the nature of the majority owners' use of the boat, and in his accounting sought a receiver and a sale of the vessel. There the court fairly faced and fairly decided the question whether or not the remedy sought was one of the reserved common-law remedies saying: "The defendant is unquestionably right in his position that this saving is of a common-law remedy, and not merely of a remedy in a common-law court (*The Moses Taylor*, 4 Wall. 411, 18 L. ed. 397; *Spear*, Federal Judiciary, 81), and that the remedies sought in this action are not common-law remedies."

But it reasoned to its satisfaction that since "the remedies sought in this action are not afforded in admiralty, then the subject matter of the action is not within admiralty jurisdiction." The third of these cases is *Reynolds v. Nielson*, 116 Wis. 483, 96 Am. St. Rep. 1000, 93 N. W. 455. That case rests for its authority upon *Andrews v. Betts*, supra, which has here been considered, and upon the text of *Knapp*, Partition, p. 491. That author, conceding that "proceedings for partition of personal property are unknown at common law," proceeds to say that it is doubtful whether admiralty courts can exercise jurisdiction to decree a sale in a case where a vessel is owned in unequal proportions by several persons, but if the admiralty courts have such jurisdiction in cases where there are unequal interests, it is not an exclusive jurisdiction to that court, but concurrent with that of the common-law courts. The court of equity has jurisdiction over an action, brought to secure a partition of personal property between tenants in common thereof. It matters not whether such property is a vessel to be used upon the high sea, or other personal property; so

long as there is a cotenancy, and a failure to agree upon the part of the cotenants, a court of equity has jurisdiction over the partition of the property, or a sale thereof and a division of the proceeds." This learned author bases his text upon the cases of *Andrew v. Betts*, supra; and *Smith v. Smith*, 4 Rand. (Va.) 95, the latter being simply a case of partition in equity between tenants in common owning negro slaves; and *Tripp v. Riley*, 15 Barb. 333, where partition in equity was decreed in the case of grain owned by tenants in common; and *Fobes v. Shattuck*, 22 Barb. 568, which was a case of identical nature touching the partition of grain. But of course upon such a question the weight to be given to the text is no more than is justified by the decisions cited in its support, and it is manifest that these decisions, excepting the first, have not the slightest bearing upon the particular question here before us. For the reasons pointed out, the state decisions are far from being satisfactory, much less determinative. Nor, so far as investigation goes, are those cases elsewhere given any force as authority. Indeed, we may find in the early volumes of our own reports a declaration equally unsatisfactory and unsound, to the effect that "the judicial power of the courts of the United States in admiralty and maritime cases is not exclusive, and the states have the power to confer that jurisdiction to its fullest extent upon their own courts." *Taylor v. The Columbia*, 5 Cal. 268.

The *Alcalde* (D. C.) 132 Fed. 577, is the only other Federal case which respondents call to their aid upon this proposition. In that case differences had arisen between the owners, and an action was brought in the state court, and a receiver was appointed. Another phrase of the litigation was brought in the district court in admiralty,—a libel in rem for money advanced. Incidentally there arose a consideration of the action of the state court, and upon this the learned Federal judge declared: "Whether the receiver had lawful authority to take the vessel out of the captain's custody is a serious question, which I will avoid by assuming that Captain White [still] continued to be master."

With this review we may return again to the main consideration. The jealousy of the English common-law courts and their attacks upon the jurisdiction of the admiralty courts have been referred to. That jealousy took the form of denying to admiralty the power to decree any sale. Thus, in *Ousten v. Hebden* (1745) 1 Wils. 101, 95 Eng. Reprint, 515, Chief Justice Lee, of the court of kings bench, declared: "Indeed, the admiralty has no jurisdiction

to compel a sale, and if they should do that, you might have a prohibition after sentence; or we may grant a prohibition against selling, or compelling the party to sell or to buy the shares of the others."

Here was an express denial by the common-law courts of this admiralty jurisdiction, accompanied by a threat of the use of prohibition, even in a case where it did not appear that admiralty proposed to order a sale. But, as has been said, the jurisdiction of the American courts in admiralty is not limited to the jurisdiction of the English admiralty courts, and even in England complete jurisdiction over the matter of sale has been conferred upon the admiralty court by Stat. 3 and 4 Vict. chap. 65, § 4, and by the Admiralty Court Act of 1861, the jurisdiction of the court of admiralty being transferred to the high court of justice.

I take it to be unquestioned that our greatest authority upon American admiralty and maritime law is Justice Joseph Story, whose learned opinions when on the supreme bench of the United States did so much to elucidate, clarify, and settle the disputes. Upon this question he thus speaks, and his words are worthy of quotation in extenso: "Malyne evidently supposes that the general maritime law authorizes a sale to be made by the proper court of admiralty in all cases where by reason of the disagreement of the part owners the ship cannot be employed, whether there be an equality in the dissenting interests or not. Molloy adopts the same opinion; and it has apparently the support of others of the old English maritime writers, as a generally recognized practical rule. The *Consolato del Mare* seems to uphold the doctrine that, at least after the first voyage of a ship, which is owned by the master and other persons, the part owners may compel a sale of the ship, in case of a disagreement between them. The law of Scotland gives a right, as it should seem, in all cases to the dissenting partners, to offer their shares for sale to the other owners at a particular price; and if this offer is not accepted, then to require a judicial sale to be made of the ship, and the proceeds to be divided among them."

"It has also been generally supposed that, according to the common law of England, in no case whatsoever of a disagreement of the part owners as to the employment of the ship upon any particular voyage does there exist any jurisdiction in the court of admiralty (and, if that court has it not, no other court has), to order a sale thereof, whether the ship be owned in equal or in unequal shares. It is true that the terms of the commissions granted to the

judges of that court include jurisdiction of all matters which concern owners and proprietors of ships as such. But this jurisdiction of the courts of admiralty, has been exercised for the last two centuries in England, if one may say so, in vinculis, in consequence of the severe penalties imposed upon the judges by statute if they should happen unintentionally to exceed their true jurisdiction, and the open hostility and prohibitory interference of the courts of common law. The commissions have thus become practically much narrowed in the import of their terms by the construction of these latter courts. It was positively, although incidentally, asserted by Lord Chief Justice Lee, in a case in the king's bench, in the reign of George the Second, that the court of admiralty has no authority to compel a sale in any case of disagreement whatever between part owners. If this doctrine be in reality established in the common law of England, it is a reproach both to its equity and its justice, for it leaves the part owners of ships without any remedy whatsoever, in cases where irreparable injuries may arise from an equality of division in interests and opinions, without any fault or wrong on either side. Upon what ground it has been asserted it is difficult to perceive. It certainly has no support in the positive maritime law of other countries, or in the ancient principles of maritime jurisprudence. All these point the other way. The admiralty courts of England have never of themselves adopted any such limited doctrine, but have always contended for the exercise of the full jurisdiction as rightful, although they have been practically compelled to surrender it under the imposing authority of the courts of common law. . . . The right to order a sale of property, subjected to its jurisdiction, is clearly a matter within the competency of a court of admiralty, and, indeed, is familiar in practice, in order to prevent irreparable mischiefs or impending losses. Analogy, therefore, is clearly in its favor; and unless some limitation or exception can be asserted to exist, either in the origin, or Constitution, or practice of the court itself, it will not be a very satisfactory mode of disposing of the question, for a court of common law to assert upon its own mere dictum, without any reasoning in support of it, that the court of admiralty has a right, in cases of disputes between part owners of ships, to take a stipulation, but not to order a sale. Such language would seem more like an edict than a judgment, and promulgate an arbitrary distinction, rather than a rational interpretation of the jurisdiction of another court." Story, Partn. pp. 611 et seq. L.R.A.1917A.

This concludes a review of the subject matter, necessarily hasty and imperfect; but from it it would seem that but one conclusion can be drawn, and that is that, unhampered by the restriction which the common-law courts placed upon English admiralty jurisdiction, the jurisdiction of the courts of the United States in admiralty is full and complete touching the matter of sale under the circumstances here indicated,—that is to say, where dissentient owners are at strife over the use to be made of the ship,—for it must, from the nature of admiralty jurisdiction, be a fundamental part of that jurisdiction to exercise control over the rem, the ship itself. Admiralty draws and may draw as well upon equitable principles as upon state statutes for the administration of its jurisdiction. But it does so as those principles and statutes appeal to it, and not by force of any compulsion other than the authority vested in Congress to make laws upon the subject matter. Admiralty, then, has jurisdiction to decree a sale of a vessel under all circumstances like those here presented. If admiralty refuses to decree the sale it is not because of a lack of power so to do, but because the sale under the indicated circumstances would be contrary to another paramount principle of admiralty jurisdiction,—the right of control in the majority. We have endeavored to be careful to limit this discussion to the facts of the case, and of course everything that has been said has been said in reference to those facts exclusively. No question here arises over the jurisdiction of equity, for example, to enforce a contract for sale or to decree an accounting as such. But we hold that the power of a state court does not go to the length here exercised, of appointing a receiver and decreeing a sale because of the differences over the management of the vessel which have sprung up between the legal owners of that vessel. The state court is entitled to retain jurisdiction of the action in so far as it addresses itself to the equitable consideration of settling accounts. But further than that it may not go. If, however, we are mistaken in our conclusion, we are happy in the thought that now, at length, either suitor may have this question determined with finality by the Federal courts, where its determination properly belongs.

The order appointing a receiver is therefore reversed.

We concur: Lorigan, J.; Melvin, J.

Petition for rehearing denied August 25, 1916.

Annotation—Jurisdiction and determination of suits for adjustment of rights between part owners of ship.

Generally as to admiralty jurisdiction of contracts, see extensive annotation to *Baltimore Steam Packet Co. v. Patterson*, 66 L.R.A. 193.

Scope.

It is the intention of the annotator in the following treatment to deal primarily with the question of jurisdiction of suits for adjustment of rights between part owners of ships; but, as indicated in the title, it is not confined strictly to cases involving a technical question of jurisdiction, but includes a number of cases in which the decisions probably have been upon the merits. The latter class of cases includes those which have been brought in admiralty courts and which have generally involved the possession or sale of a vessel. These cases often are decided in such a way that it is difficult, if not impossible, to determine whether the court had it in mind to deny relief on the ground of an inherent lack of jurisdiction or on the merits, the language used often indicating a decision upon the question of jurisdiction rather than upon the merits. However, it has been judicially pointed out (*FISCHER v. CAREY*, ante, 1100) that admiralty courts which formally deny jurisdiction in such cases do so upon the theory that the merits do not warrant an assumption and exercise thereof, rather than that the court has no power to assume same. This reasoning is in a sense logical; but, because of the existence of a conflict of authority as to whether admiralty courts ever have jurisdiction of suits between part owners which involve the sale or possession of a vessel,—some authorities maintaining that such courts never have jurisdiction of such actions, and others, like the California court in the cases above referred to, taking the view that admiralty courts have jurisdiction in all such cases but in some instances refuse upon the merits to exercise it,—cases of the character above referred to have been included herein, but have not been segregated from those which clearly involve a pure question of jurisdiction.

In general.

Jurisdiction of contests between inter se part owners of a vessel employed in maritime service is primarily in the admiralty courts, but such jurisdiction does not extend to all cases. It depends in the main upon constitutional and legis-

lative grants and the interpretation given same by the courts, which, in the United States and contrary to the early English cases, is generally in favor of rather than against the jurisdiction in cases of doubt. In England the statutes now in force as hereinafter shown¹ are sufficiently broad to enable courts of admiralty to assume jurisdiction of practically any contest arising between part owners. But in the United States, admiralty jurisdiction, while not so limited as was the case in England before the legislative enlargement, is not so broad as that now exercised in that country. The Constitution of the United States (art. 3, § 2, cl. 1) expressly provides that the judicial power of the United States shall extend to "all cases of admiralty and maritime jurisdiction;" and the Federal Judiciary Act, while it gives to the Federal courts exclusive original cognizance over civil cases of admiralty and maritime jurisdiction, saves to suitors the right of a common-law remedy in all cases where the common law is competent to give it. It is under these provisions that the question arises as to whether the state and Federal courts have concurrent, or individual and exclusive, jurisdiction in suits for adjustment of rights between part owners of ships. But few cases, however, which fall within the scope of this annotation have involved the question of concurrent or exclusive jurisdiction, and they are somewhat conflicting. Thus in New York² and Wisconsin³ the courts have laid down the rule that, even assuming that admiralty courts possessed jurisdiction and power to order a sale of a vessel in case of disagreement between owners, irrespective of their shares, such jurisdiction is not exclusive, but is saved by the provision of the Judiciary Act respecting common-law remedies, and that a state court having equity powers may entertain jurisdiction for the partition and distribution of the proceeds of a vessel at the suit of owners of un-

¹ See *infra*, text, and notes 17 and 69 et seq.

² *Andrews v. Betts* (1876) 8 Hun (N. Y.) 322 (set out at some length and discussed in *FISCHER v. CAREY*, ante, 1100).

³ *Reynolds v. Nielson* (1903) 116 Wis. 483, 96 Am. St. Rep. 1000, 93 N. W. 455 (set out and discussed in the *FISCHER CASE*).

equal portions.^{3a} And in Louisiana⁴ it has been held that it does not follow as a necessary consequence from the fact that admiralty courts have in some instances assumed jurisdiction of libels for the sale and partition of interests in ships as between part owners that the admiralty jurisdiction is exclusive, or that state courts are without jurisdiction to entertain a suit for a partition of interest by a sale or licitation of a vessel of which the petitioner is a part owner. And upon the theory that an action by the owner of a minority in interest of a vessel for an accounting, appointment of a receiver, and sale of the vessel is not one in which admiralty will afford relief, not being within its jurisdiction, because neither a civil "case" within the meaning of the Federal Constitution, nor a civil "cause" within the meaning of the Judiciary Act, but rather strictly one for equitable relief, it has been held that such an equitable action may be maintained in a state court.⁵ But, as has recently been pointed out in a California case,⁶ and with much force of reasoning, admiralty has jurisdiction to decree the sale of a vessel even at the instance of minority owners, but will not do so because of the dominance of the principle that majority owners have the right to the use and control of a vessel; and such jurisdiction must be regarded as exclusive, so as to prevent other courts from doing that which it, with jurisdiction over the matter, would refuse to do.

But there seems to be no question that admiralty jurisdiction, which is exclu-

sively vested in the Federal courts, being conferred by the Constitution, can neither be restricted or extended by state legislation,⁷ nor conferred by the consent of the parties.⁸ However, admiralty courts of the United States may doubtless enforce a right maritime in its nature which has been created by a local law, according to their own rules of procedure.⁹

The great majority of cases which involve the question of jurisdiction of a contest between part owners of a vessel fall into one of three classes; namely, suits for an accounting, contests involving possession and employment of the vessel, and suits wherein a sale of the vessel is demanded, the question generally resolving itself into a contest as to whether or not the particular case is one of admiralty jurisdiction, or one in which admiralty will exercise jurisdiction. These classes will be taken up in the order mentioned.

Accounts between part owners.

The most prolific class of contests between part owners of vessels is that which embraces cases involving an accounting between the part owners.

In this connection it is ruled that, since courts of admiralty have no general jurisdiction to administer relief as courts of equity,¹⁰ being courts which merely apply the principles of equity to the subjects within their jurisdiction,¹¹ they cannot assume jurisdiction in matters of naked account between part owners,¹² or of an action for a settlement under a contract of partnership in earn-

^{3a} Generally as to jurisdiction where a sale is sought, see *infra*, "Sale of vessel."

⁴ *State v. Watts* (1834) 7 La. 440, 26 Am. Dec. 507. And see *Francis v. Lavine* (1874) 28 La. Ann. 311.

⁵ *Swain v. Knapp* (1884) 32 Minn. 429, 21 N. W. 414.

⁶ *FISCHER v. CAREY*, ante, 1100, holding that a state court of equity has no jurisdiction to take possession of a ship by a receiver and proceed to sell it at the suit of minority owners instituted because of differences which have arisen over its management.

⁷ *The H. E. Willard* (1891) 53 Fed. 599, affirmed in (1892) 52 Fed. 387, holding that a state statute which gave a right not of a maritime nature did not confer jurisdiction upon a Federal court sitting in admiralty; *FISCHER v. CAREY*, holding that a state statute which provided that "if a ship belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any court of competent jurisdiction," applied only to such cases as did not encroach upon admiralty jurisdiction, and therefore did L.R.A.1917A.

not give jurisdiction to a state court to decree an accounting between part owners, appointment of a receiver, and sale of the vessel, such action being held one exclusively for admiralty jurisdiction, which could not be diminished by state legislative enactment.

⁸ See *The Martha Washington* (1860) 3 Ware, 245, Fed. Cas. No. 9,148.

⁹ *The H. E. Willard* (1892) 52 Fed. 387, affirming (1891) 53 Fed. 599.

¹⁰ *The Brothers* (1881) 5 Hughes, 282, 7 Fed. 878; *Kellum v. Emerson* (1854) 2 Curt. C. C. 79, Fed. Cas. No. 7,669.

¹¹ *Kellum v. Emerson* (Fed.) supra.

¹² *The Orleans v. Phœbus* (1837) 11 Pet. (U. S.) 175, 9 L. ed. 677 (opinion by Mr. Justice Story); *Ward v. Thompson* (1859) 22 How. (U. S.) 330, 16 L. ed. 249; *Daily v. Doe* (1880) 3 Fed. 903 (dictum); *The Brothers* (1881) 5 Hughes, 282, 7 Fed. 878 (suit by a ship-building firm against owners of a ship for repairs, a member of the firm being one of the owners of the ship); *The John E. Mulford* (1883) 18 Fed. 456; *The H. E. Willard* (1892) 52 Fed. 387 affirming

ings of a vessel,¹³ or of accounts of a partnership owning a vessel,¹⁴ especially where unattended by any other ground of jurisdiction;¹⁵ unless upon the basis of an adjusted and recognized liability, in which case the cause is in fact not one for an accounting;¹⁶ or in the case of statutory provision granting jurisdiction, as in England, where, by the express provision of the Admiralty Act of 1861 (24 Vict. chap. 10, §§ 8 & 35), the high court of admiralty has jurisdiction either by proceedings in rem or by proceedings in personam to decide all questions arising between co-owners touching the ownership, employment, or

earnings of any ship registered in England or Wales, and to settle all accounts in relation thereto between the parties;¹⁷ or in Canada, where the jurisdiction conferred upon the high court of admiralty in England by the Admiralty Act to take an accounting in an action between co-owners of a ship is extended to the Canadian exchequer court by Colonial Courts of Admiralty Act 1890, § 2, subsec. 2, which provides that a colonial court of admiralty may exercise admiralty jurisdiction in like manner and to as full an extent as the high court in England.¹⁸ And it does not change the nature of the case that the libellant

(1891) 53 Fed. 599 (suit for supplies furnished ship by part of the owners); The Emma B. (1906) 140 Fed. 771; The Zillah May (1915) 221 Fed. 1016; Bradshaw v. The Sylph (1841) Fed. Cas. No. 1,791; Dodge v. Leary (1857) Fed. Cas. No. 3,952b; Hall v. Hudson (1863) 2 Sprague, 65, Fed. Cas. No. 5,935 (libel for supplies which constituted a portion of the accounts of the part owners); Kellum v. Emerson (1854) 2 Curt. C. C. 79, Fed. Cas. No. 7,669; The Larch (1855) 2 Curt. C. C. 427, Fed. Cas. No. 8,085 reversing on other grounds (1855) 3 Ware, 28, Fed. Cas. No. 8,086; The Marenco (1866) 1 Low. Dec. 52, Fed. Cas. No. 9,056; Martin v. Walker (1850) Abb. Adm. 579, Fed. Cas. No. 9,170; The Ocean Belle (1872) 6 Ben. 253, Fed. Cas. No. 10,402 (dictum); Pettit v. The Chas. Hemje (1882) 5 Hughes, 359, Fed. Cas. No. 11,047a; The Susan E. Voorhis (1879) 10 Ben. 380, Fed. Cas. No. 13,633; Tunno v. The Betsina (1857) Fed. Cas. No. 14,236; United States v. The Isaac Hammett (1862) Fed. Cas. No. 15,446, holding that in a case of forfeiture a claim for an alleged balance due by a part owner cannot be entertained; FISCHER v. CAREY, ante, 1100, (dictum); State v. Watts (1834) 7 La. 440, 26 Am. Dec. 507; Swain v. Knapp (1884) 32 Minn. 429, 21 N. W. 414 (dictum). And See Grant v. Poillon (1857) 20 How. (U. S.) 162, 15 L. ed. 871, which affirmed (1856) Fed. Cas. No. 5,700 and The Eclipse (1889) 135 U. S. 599, 34 L. ed. 269, 10 Sup. Ct. Rep. 873.

¹³ Ward v. Thompson (1859) 22 How. (U. S.) 330, 16 L. ed. 249.

¹⁴ United States v. The Isaac Hammett (1862) Fed. Cas. No. 15,446.

¹⁵ The John E. Mulford (1883) 18 Fed. 455; The Emma B. (1906) 140 Fed. 771; The Zillah May (1915) 221 Fed. 1016, holding that a court of admiralty is without jurisdiction of a suit for an accounting between part owners of a vessel where any maritime questions arising in the controversy would be purely incidental to the accounting, rather than such accounting incidental to any maritime controversy which might develop; Kellum v. Emerson (1854) 2 Curt. C. C. 79, Fed. Cas. No. 7,669.

¹⁶ Bradshaw v. The Sylph (1841) Fed. Cas. No. 1,791; Dexter v. Munroe (1861) L.R.A.1917A.

2 Sprague, 39, Fed. Cas. No. 3,863, holding that a master and co-owner was entitled to recover in admiralty the amount of his share of the proceeds of a voyage where such amount had been ascertained and was in the hands of the other owners; Foster v. The Pilot No. 2 (1853) Newberry, Adm. 215, Fed. Cas. No. 4,980, holding that the fact that a seaman was a part owner did not preclude him from recovering his wages in admiralty.

¹⁷ The Meggie (1866) L. R. 1 Adm. & Eccl. (Eng.) 77; The Lady of the Lake (1870) L. R. 3 Adm. & Eccl. (Eng.) 29, 39 L. J. Prob. N. S. 40, 21 L. T. N. S. 683, 18 Week. Rep. 528, holding that a suit in admiralty can be maintained although plaintiff had sold his interest in the ship prior to the commencement of the action for an accounting; The Amphill (1880) L. R. 5 Prob. Div. (Eng.) 224, holding that in proper cases a receiver will be appointed to collect and render accounts; The Idas (1863) Brown & L. (Eng.) 65, holding that the act is retroactive so as to permit an accounting as to matters which took place before the act went into effect, that it permitted an accounting where the ship was lost before the suit was brought, and that it gave jurisdiction in a suit for "an account only;" The Albion (1862) 6 L. T. N. S. (Eng.) 165; The Ceylon (1868) 18 L. T. N. S. (Eng.) 417; The Eider (1879) 40 L. T. N. S. (Eng.) 463, 4 Asp. Mar. L. Cas. 104, holding that the accounting must be confined to items for which the defendant was accountable at the time of the suit; The Robinsons (1884) 51 L. T. N. S. (Eng.) 905, 5 Asp. Mar. L. Cas. 338, holding that the act did not apply to a vessel not registered in England or Wales; The Bonnie Kate (1887) 57 L. T. N. S. (Eng.) 203, 6 Asp. Mar. L. Cas. 149, holding that the act probably applies only to suits between "registered" co-owners; The Mt. Vernon (1891) 64 L. T. N. S. (Eng.) 148, 7 Asp. Mar. L. Cas. 32, holding that the court will only exercise its jurisdiction where the accounts have not been made up within a reasonable time. And see The Charles Jackson (1885) 52 L. T. N. S. (Eng.) 631, 5 Asp. Mar. L. Cas. 399.

¹⁸ Cope v. The Raven (1905) 11 B. C.

is a mariner,¹⁹ or that the admiralty has jurisdiction of all the items in the account.²⁰ It has been held, however, that a part owner who has furnished material and labor for repairs is entitled to a maritime lien therefor notwithstanding his relationship to the vessel, and is entitled to an accounting as incidental thereto;²¹ but this is upon the theory that he is not in court as a part owner, but as a materialman, and therefore is entitled to a lien,—which theory is perhaps not sanctioned by the weight of authority.²²

But in some instances it has been ruled that where admiralty has assumed jurisdiction of a maritime cause of action it may as an incident to the main relief decree an accounting;²³ or, in other words, that the mere fact of an accounting being incidentally involved is not sufficient to defeat admiralty jurisdiction.²⁴ Thus where admiralty has assumed jurisdiction for the purpose of selling a vessel and distributing the proceeds among her part owners, and an accounting of the earnings is demanded

of one of such owners as an incident to the just distribution of the proceeds of the vessel sold, such an accounting may and ought to be allowed.²⁵ So, where a vessel has been libeled and sold to satisfy decrees against her, and several part owners file petitions under the prescribed rules of practice in admiralty for part or the whole of the remnants or surplus in court of the proceeds, and the managing owner asks that the whole be paid over to him, admiralty, having taken jurisdiction, will continue the exercise of the same until the remnants are appropriated, the accounting of the parties not being so complicated as to disable the admiralty judge from passing thereon.²⁶ And an accounting may be had in admiralty as incidental to a lien for repairs, etc., given a part owner.²⁷ But the accounting must be incidental, and not wholly foreign, to the main cause, jurisdiction of which has been assumed by admiralty, as that court cannot take an accounting in the latter case.²⁸

From the fact that admiralty, except

486, 9 Can. Exch. 404, holding that in an action between co-owners for an account the ship may be arrested in an action in rem; *Hall v. The Seaward* (1892) 3 Can. Exch. 268, holding that the exchequer court has jurisdiction to take an accounting between co-owners of a ship.

¹⁹ *Kellum v. Emerson* (1854) 2 Curt. C. C. 79, Fed. Cas. No. 7,669; *The Larch* (1855) 2 Curt. C. C. 427, Fed. Cas. No. 8,085, reversing on other grounds (1855) 3 Ware, 28, Fed. Cas. No. 8,086.

²⁰ *The Larch* (1855) 3 Ware, 28, Fed. Cas. No. 8,086 reversed on other grounds in (1855) 2 Curt. C. C. 427, Fed. Cas. No. 8,085.

²¹ *Pettit v. The Chas. Hemje* (1882) 5 Hughes, 359, Fed. Cas. No. 11,047a.

²² Many courts so hold, but the point is not within the scope of this annotation, and is referred to simply in explanation of the assumption of jurisdiction for purposes of an accounting.

²³ *The John E. Mulford* (1883) 18 Fed. 455; *The Emma B.* (1906) 140 Fed. 771; *Kellum v. Emerson* (1854) 2 Curt. C. C. 79, Fed. Cas. No. 7,669; *The Larch* (1855) 3 Ware, 28, Fed. Cas. No. 8,086 reversed on other grounds in (1855) 2 Curt. C. C. 427, Fed. Cas. No. 8,085, holding that it is a matter of sound discretion where the accounts arise incidentally; *The L. B. Goldsmith* (1856) Newberry, Adm. 123, Fed. Cas. No. 8,152; *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236; *Fischer v. Carey*, ante, 1100 (dictum); *Swain v. Knapp* (1884) 32 Minn. 429, 21 N. W. 414 (dictum).

²⁴ *Pettit v. The Chas. Hemje* (1882) 5 Hughes, 359, Fed. Cas. No. 11,047a.

²⁵ *The John E. Mulford* (1883) 18 Fed. 455; *The Emma B.* (1906) 140 Fed. 771. L.R.A.1917A.

And see *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236.

In this connection the court in *The Emma B.* (Fed.) supra, said: "If the vessel were sold, and the proceeds of sale distributed, without an accounting, great injustice might and probably would be done—injustice, too, which might have been avoided, and could only have been avoided, by an accounting. An accounting at some later date, and in some other court and proceeding, might be utterly inefficacious to do justice between the parties; for once the funds were distributed, they might not again be brought within the control of the court, or, being expended, the mulcted party might not be able to respond to the decree of the court. Justice therefore seems to demand that an accounting should be had between the parties in this proceeding."

²⁶ *The L. B. Goldsmith* (1856) Newberry, Adm. 123, Fed. Cas. No. 8,152. The court said that in such a case it would be unjust to pay the entire surplus over to the managing owner and relegate the other petitioners to a bill in chancery for recovery of their interest, and that it would be oppressive for it to retain the moneys until the matter was settled in equity.

²⁷ *Pettit v. The Chas. Hemje* (Fed.) supra. It would seem that the court in this case erroneously held the part owner entitled to a lien, but this does not affect the force of the decision upon the point set out in the text.

²⁸ *The Susan E. Voorhis* (1870) 10 Ben. 380, Fed. Cas. No. 13,633, holding that an accounting was foreign to a libel to recover on a stipulation given for the safe return of a vessel, and, therefore, that admiralty would not take jurisdiction to decree same.

in the special cases above noted, will not assume jurisdiction of an action for an accounting between part owners of a vessel, it follows that the remedy of a part owner of a ship who seeks an adjustment of accounts with his co-owners,²⁹ or an accounting as to the earnings of a ship under a contract of partnership therein,³⁰ is in a court of chancery, unless a settlement has been made or an account stated so as to render unnecessary an adjustment of the debits and credits.³¹ But a bill for an accounting is insufficient where it merely alleges that defendant part owners have had sole possession of the vessel, no right to an accounting being established where there is no showing that defendants have received earnings, or have refused to account, or are unable to respond in damages.³² In some jurisdictions a form of proceeding known as "an action of account" is preserved and recognized, although now largely in disuse.³³ In Maine, jurisdiction in equity is expressly conferred upon certain courts in cases of part owners of vessels for adjustment of their interests in the property and accounts respecting them.³⁴

And the general rule would seem to be that an action of assumpsit to recover a share of the expenses incurred or a portion of the earnings cannot be maintained by a part owner unless a

settlement has been made, balances ascertained and agreed upon, and it appears that a judgment rendered for it would close the transaction.³⁵ It has been held, however, that each part owner of a vessel may maintain an action in assumpsit against the shipowner's husband, another part owner, for his share of the earnings,³⁶ or for contribution toward expenses of repair.³⁷

Possession and employment of vessel.

The right to the possession of, and to determine the nature and extent of the employment of, a vessel is of course primarily a maritime question, and, therefore, is usually conceded to be one exclusive of admiralty jurisdiction, the contest generally being as to whether or not admiralty will afford relief in the given case. However, as subsequently shown, it has been held that equity has jurisdiction in some instances.

And in this class of cases the controversy is usually between owners of unequal interests, and the particular question generally is as to how and by whom relief will or may be afforded. Taking up this phase of the question, it may be said without fear of contradiction, and, in fact, it is universally recognized, that the majority in interest of the owners of a vessel generally have the right to control same as they see fit. The reason usually assigned for this

²⁹ *Kellum v. Emerson* (1854) 2 Curt. C. 79, Fed. Cas. No. 7,660; *The Marengo* (1866) 1 Low. Dec. 52, Fed. Cas. No. 9,065; *Fischer v. Carey*, ante, 1100 (dictum); *Southworth v. Smith* (1858) 27 Conn. 355, 71 Am. Dec. 72; *Hyer v. Caro* (1879) 17 Fla. 332; *State v. Watts* (1834) 7 La. 440, 26 Am. Dec. 507; *Maguire v. Pingree* (1849) 30 Me. 508; *Knowlton v. Reed* (1854) 38 Me. 246; *Hill v. Crocker* (1895) 87 Me. 208, 47 Am. St. Rep. 321, 32 Atl. 878 (action for contribution for repairs, etc.); *Milburn v. Guyther* (1849) 8 Gill (Md.) 92, 50 Am. Dec. 681; *Terry v. Brightman* (1882) 132 Mass. 318; *Smith v. Butler* (1895) 164 Mass. 37, 41 N. E. 60, holding that the only remedy was in equity; *Whiton v. Spring* (1878) 74 N. Y. 169; *Castelli v. Cook* (1849) 7 Hare, 89, 68 Eng. Reprint, 36, 18 L. J. Ch. N. S. 148, 13 Jur. 675.

³⁰ *Ward v. Thompson* (1850) 22 How. (U. S.) 330, 16 L. ed. 249; *The H. E. Willard* (1892) 52 Fed. 387 affirming (1891) 53 Fed. 599; *Endsor v. Simpson* (1878) 12 Phila. (Pa.) 392. And see *Vanner v. Frost* (1870) 39 L. J. Ch. N. S. (Eng.) 626.

³¹ See *Ripley v. Crocker* (1860) 47 Me. 370, 74 Am. Dec. 491; *Gray v. Buck* (1886) 78 Me. 477, 7 Atl. 16, holding that an action could be maintained by one co-owner against another who had received insur-

ance money on a policy insuring the interest of both owners; *Blood v. White* (1849) 3 Cush. (Mass.) 416, holding that where the amount was liquidated the remedy was by an action at law; *McLauthlin v. Smith* (1896) 166 Mass. 131, 44 N. E. 125, holding that an action at law may be maintained where accounts have been settled and a balance struck. And see *infra*, text and notes 35, 36, 37.

³² *Southworth v. Smith* (1858) 27 Conn. 355, 71 Am. Dec. 72.

³³ See *Jarvis v. Noyes* (1858) 45 Me. 106.

³⁴ *Mustard v. Robinson* (1862) 52 Me. 54, holding that an accounting could be had in equity, although it was alleged and proven that a portion of the funds in question were received by defendant as part owner and a portion as agent and master.

³⁵ It was so held in *Sturdivant v. Smith* (1849) 29 Me. 387; *Maguire v. Pingree* (1849) 30 Me. 508; *Hardy v. Sprowl* (1851) 33 Me. 508; *Dodge v. Hooper* (1853) 35 Me. 536; *Knowlton v. Reed* (1854) 38 Me. 246, citing earlier Maine cases; *Jarvis v. Noyes* (1858) 45 Me. 106, and *Milburn v. Guyther* (1849) 8 Gill (Md.) 92, 50 Am. Dec. 681.

³⁶ *Magruder v. Bowie* (1825) 2 Cranch, C. C. 577, Fed. Cas. No. 8,964.

³⁷ *Sheehan v. Dalrymple* (1860) 19 Mich. 239.

rule is that the free use and circulation of commercial property may be promoted³⁸ and public interest thereby protected, a vessel, although the subject of private ownership, being regarded also as a matter of public interest.³⁹

But it has been said that the rules of admiralty regarding possession of vessels as between part owners have been adopted only for the purpose of providing that the ship should not be kept idle but employed, where it is so desired by any of the owners, notwithstanding the other owners may object, and that it is only for the purpose of carrying that object into effect that admiralty will interfere;⁴⁰ from which it would seem to logically follow that admiralty would not take jurisdiction to transfer the possession of a vessel from the minority owner or owners to the majority owners, where the former desire to actively employ the vessel, and the latter merely wish possession so that the vessel may remain idle. However, this is probably due to a custom or policy, rather than any inherent lack of jurisdictional power in the admiralty courts.

It has been expressly declared that admiralty will decree possession to the majority owners at their suit;⁴¹ and, on the other hand, that courts of admiralty have no power to take a vessel

out of the possession of the majority owners and put her in possession of the minority owners,⁴² unless, perhaps, when the majority owners refuse to employ her.⁴³

And it has been expressly decided that admiralty has jurisdiction to entertain a petition by the majority owners of a vessel to fit out and expedite the vessel on a voyage after giving a stipulation for the value of a recusant owner's share.⁴⁴ But the owner of a minority share of a vessel who disapproves of a voyage or employment sanctioned or desired to be undertaken by the majority owners may maintain a libel in admiralty to compel such owners to give security in an amount equal to the libellant's share for the return of the vessel,⁴⁵ the execution of such a stipulation being a matter of right, rather than a privilege resting in the discretion of the court.⁴⁶ And this is the now well-settled rule in England⁴⁷ and Ireland,⁴⁸ although in these jurisdictions it has been declared that the rule is otherwise where the amount of the shares of the dissenting owners are not ascertained,⁴⁹ in which case the chancery court will exercise jurisdiction by injunction to restrain the sailing of the ship until the share of the complaining party has been determined and security given to

³⁸ See *The Marengo* (1866) 1 Low. Dec. 52, Fed. Cas. No. 9,065.

³⁹ See *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236.

⁴⁰ *Southworth v. Smith* (1858) 27 Conn. 355, 71 Am. Dec. 72.

⁴¹ *The John of London* (1825) 1 Hagg. Adm. (Eng.) 342.

⁴² *The Ocean Belle* (1872) 6 Ben. 253, Fed. Cas. No. 10,402.

⁴³ See *Southworth v. Smith* (Conn.) supra, and *Hyer v. Caro* (1879) 17 Fla. 332.

⁴⁴ *Willings v. Blight* (1800) 2 Pet. Adm. 288, Fed. Cas. No. 17,765. In this connection the court, after stating that it was clearly of opinion that the cause was one of admiralty jurisdiction, continued as follows: ("It is a principle discernible in all maritime codes, that every encouragement and assistance should be afforded to those who are ready to give to their ships constant employment; and this not only for the particular profit of owners, but for the general interests and prosperity of commerce. . . . A privation of freight, the fruit and crop of shipping, seems therefore to be an appropriate mulct on indolent, perverse, or negligent part owners. The drones ought not to share in the stores acquired and accumulated by the labor, activity, foresight, and management of the bees. Although the hive may be common property, it is destructively useless to all, if not furnished with means of profit and sup-

port by industry and exertion; which should be jointly applied by all, before they participate in beneficial results. Nor should the idle and incompetent be permitted to hold it vacant and useless, to the injury and ruin of the industrious and active."

And see *Southworth v. Smith* (Conn.) and *Hyer v. Caro* (Fla.) supra.

⁴⁵ See *Fox v. Paine* (1839) Crabbe, 271, Fed. Cas. No. 5,014; *The Marengo* (1866) 1 Low. Dec. 52, Fed. Cas. No. 9,065; *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236, and *Hyer v. Caro* (1879) 17 Fla. 332.

⁴⁶ See *Tunno v. The Betsina* (Fed.) supra.

⁴⁷ It was so held in the following cases: *Lambert v. Acretree* (1697) 1 Ld. Raym. 223, 91 Eng. Reprint, 1045; *Blacket v. Anstey* (1697) 1 Ld. Raym. 235, 91 Eng. Reprint, 1053; *Degrave v. Hedges* (1707) 2 Ld. Raym. 1285, 92 Eng. Reprint, 343, Holt, 470; *Ouston v. Hebden* (1745) 1 Wils. 101, 95 Eng. Reprint, 515; *Haly v. Goodson* (1816) 2 Meriv. 77, 35 Eng. Reprint, 870, 16 Revised Rep. 145; *The Apollo* (1824) 1 Hagg. Adm. (Eng.) 306; *Castelli v. Cook* (1849) 7 Hare, 89, 68 Eng. Reprint, 36, 18 L. J. Ch. N. S. 148, 13 Jur. 675.

⁴⁸ *Hallaran v. Donal* (1846) Ir. Rep. 9 Eq. 217.

⁴⁹ *Haly v. Goodson* (1816) 2 Meriv. 77, 35 Eng. Reprint, 870, 16 Revised Rep. 145; *Hallaran v. Donal* (Ir.) supra.

the amount of it.⁵⁰ But chancery will not assume jurisdiction to restrain the sailing of a vessel until a stipulation for her safe return is given, on the ground that she has jurisdiction to take an accounting between the owners as to past earnings, as such reliefs are totally independent, rather than incidental to and dependent upon each other.⁵¹ And it is not now doubted that, in both the United States and England, upon a failure of a vessel to return as stipulated, the libellant may proceed in admiralty by libel and recover upon the stipulation,⁵² although in the latter jurisdiction it was at one time doubtful whether a court of admiralty had jurisdiction to enforce payment of such a stipulation.⁵³ However, admiralty has no jurisdiction to require the owners of a majority interest in a vessel to give bond to the owners of the minority interest, to cover past indebtedness of the vessel to the latter, or to indemnify them against future loss in the employment of the vessel.⁵⁴

Where there is merely a contract between the co-owners involved, equity has jurisdiction. Thus it has been held that equity has undoubted jurisdiction to enforce the rights of co-owners with reference to the possession of the certificate of registry and management of the vessel where such rights are the subject of a contract between all the owners.⁵⁵

Sale of vessel.

Controversies between part owners of vessels involving a sale thereof usually

arise, like cases of possession and employment, between owners of unequal interests, and the question of jurisdiction or the exercise thereof generally turns upon this element.

Taking up the rights of owners of a minority interest, they being the ones usually aggrieved, it is generally ruled that the jurisdiction of courts of admiralty cannot be applied to direct a sale at the instance of such minority upon any dispute between owners as to the trade and navigation of a ship engaged in maritime voyages,⁵⁶ the theory being that the majority of the owners have a right to employ the ship in such voyages as they may please by giving a stipulation to the dissenting owners for the safe return of the ship where the latter upon a proper libel filed in admiralty have required it, and that admiralty will not interfere out of regard for the public interest in commerce and navigation.⁵⁷ It has been intimated, however, that this rule is not absolute, and that special circumstances may arise which would warrant a court of admiralty in decreeing the sale of the vessel at the instance of the minority owners. Thus it has been said that a case of this kind would arise where the minority do not wish to employ a vessel, but the majority, who do wish to employ it, cannot give a sufficient stipulation, a sale being necessary in such a case to prevent a destruction of property.⁵⁸ Moreover, it has recently been expressly held in a well-reasoned California case,⁵⁹ that admiralty courts have jurisdiction, and

⁵⁰ *Haly v. Goodson* (Eng.) supra.

⁵¹ *Castelli v. Cook* (1849) 7 Hare, 89, 68 Eng. Reprint, 36, 18 L. J. Ch. N. S. 148, 13 Jur. 675.

⁵² *The Susan E. Voorhis* (1879) 10 Ben. 380, Fed. Cas. No. 13,633; *Lambert v. Aere-tree* (1897) 1 Ld. Raym. 223, 91 Eng. Reprint, 1045; *Blacket v. Anstey* (1897) 1 Ld. Raym. 235, 91 Eng. Reprint, 1053; *De-graves v. Hedges* (1707) 2 Ld. Raym. 1285, 92 Eng. Reprint, 343, Holt. 470; *The Apollo* (1824) 1 Hagg. Adm. (Eng.) 306; *The Margaret* (1829) 2 Hagg. Adm. (Eng.) 275, holding that a suit to forfeit the bond is premature where the vessel has merely been carried into a foreign port under distress, where she is under arrest for salvage and wages.

⁵³ *Justice v. Brown* (1667-8) Hardr. 473, 145 Eng. Reprint, 554, denying the jurisdiction to enforce the stipulation although the court had ordered that same be given; *King v. Perry* (1649) 3 Salk. 23, 91 Eng. Reprint, 669, holding same as preceding case.

⁵⁴ *The Ocean Belle* (1872) 6 Ben. 253, Fed. Cas. No. 10,402.

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⁵⁵ *Darby v. Baines* (1851) 9 Hare, 369, 68 Eng. Reprint, 550, 21 L. J. Ch. N. S. 801, 24 Eng. Rul. Cas. 225.

⁵⁶ *The Orleans v. Phœbus* (1837) 11 Pet. (U. S.) 175, 9 L. ed. 677 (dictum by Mr. Justice Story in libel by owner of one sixth of vessel for sale of same); *Lewis v. Kinney* (1879) 5 Dill. 159, Fed. Cas. No. 8,325 (libellant owned one third of vessel); *The Ocean Belle* (Fed.) quoted in *FISCHER v. CAREY*, ante, 1100 (libellant owned five sixteenths of vessel); *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236 (see case as discussed and quoted in *FISCHER v. CAREY*); *Swain v. Knapp* (1884) 32 Minn. 429, 21 N. W. 414.

⁵⁷ *The Orleans v. Phœbus* (1837) 11 Pet. (U. S.) 175, 9 L. ed. 677; *Lewis v. Kinney* (1879) 5 Dill. 159, Fed. Cas. No. 8,325; *The Ocean Belle* (1872) 6 Ben. 253, Fed. Cas. No. 10,402; *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236; *Swain v. Knapp* (1884) 32 Minn. 429, 21 N. W. 414 (dictum).

⁵⁸ *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236.

⁵⁹ *FISCHER v. CAREY*, ante, 1100.

exclusive jurisdiction, of all actions for the sale of a vessel brought by minority owners because of differences as to its management, but that for reasons of their own,—the dominance of the principle that majority owners have the right to the use and control of the vessel,—they refuse to exercise it in such a case. And it has been said that no substantial reason is given for admiralty declining the jurisdiction, while every argument suggested by analogy and convenience is in favor of it.⁶⁰

But where the equal part owners of a vessel disagree as to the nature of her employment a court of admiralty has jurisdiction upon the application of either party to decree a sale of the vessel and a division of the proceeds if in its discretion the facts warrant such a disposition.⁶¹ The disagreement between the part owners, however, must not be upon the question of employment or no employment, for in such case those who desire to employ shall prevail, but rather must be a disagreement as to the manner in which a vessel shall be employed.⁶² The principle upon which the jurisdiction is usually exercised is that the use of the property of an equal owner cannot, upon any consideration of legal equity or right, upon the mere fact of a common and equal ownership be taken

from him and be placed entirely under the control of his co-owner.⁶³ But the rule that courts of admiralty have jurisdiction to decree the sale of a vessel at the suit of the owner of one moiety thereof has not been universally adhered to, it having been held in a few early cases⁶⁴ that no such jurisdiction exists.

A few cases have involved the question of the right of a state court to decree a sale of a vessel in an action between part owners. Thus in New York and Wisconsin it has been ruled that a state court, as between unequal owners of a vessel who have disagreed as to its management, may appoint a receiver and order the vessel to be sold and the proceeds distributed among the owners upon either of two theories: first, that admiralty has no jurisdiction in such a case, and second, that, assuming jurisdiction in courts of admiralty, such jurisdiction is not exclusive, but rather concurrent with that of equity.⁶⁵ And in Louisiana it has been ruled that state courts have a right to decree the sale of a ship as a necessary incident to an accounting and a partition of the interests of various part owners, the theory being that such jurisdiction is saved by the reservation by the Judiciary Act of all common-law remedies.⁶⁶ So in a later case in that state, it was

⁶⁰ *Coyne v. Caples* (1861) 7 Sawy. 360, 8 Fed. 638.

⁶¹ (Fed.) *Ibid*; *The Emma B.* (1906) 140 Fed. 771; *The Annie H. Smith* (1878) 10 Ben. 110, Fed. Cas. No. 420; *Burr v. The St. Thomas* (1851) Fed. Cas. No. 2,194a; *Burr v. The St. Thomas* (1851) Fed. Cas. No. 2,195; *The Ocean Belle* (1872) 6 Ben. 253, Fed. Cas. No. 10,402 (dictum); *The Seneca* (1829) 3 Wall. Jr. 395, Fed. Cas. No. 12,670 reversing (1828) *Gilpin*, 10, Fed. Cas. No. 3,650 (a well-reasoned and leading case, in which the early history of the law on the question is traced); *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236; *The Vincennes* (1858) Fed. Cas. No. 16,944; *Swain v. Knapp* (1884) 32 Minn. 429, 21 N. W. 414 (dictum). And in *The John E. Mulford* (1883) 18 Fed. 455, as in *Skrine v. The Hope* (1793) Bee, 2, Fed. Cas. No. 12,927, admiralty, without discussion of the question of right, assumed jurisdiction of and sold a vessel in libel filed to obtain a sale and partition thereof between equal half owners.

⁶² *Tunno v. The Betsina* (1857) Fed. Cas. No. 14,236.

⁶³ *Burr v. The St. Thomas* (1851) Fed. Cas. No. 2,195.

⁶⁴ It was so held in *Bradshaw v. The Sylph* (1841) Fed. Cas. No. 1,791; and *Davis v. The Seneca* (1828) *Gilpin*, 10, Fed. Cas. No. 3,650 reversed in (1829) 3 Wall. Jr. 395, Fed. Cas. No. 12,670. In *L.R.A.* 1917A.

Bradshaw v. The Sylph (Fed.) *supra*, the court based its conclusion upon the dictum of Mr. Justice Story in *The Orleans v. Phœbus* (1837) 11 Pet. (U. S.) 175, 9 L. ed. 677, to the effect that "the jurisdiction of courts of admiralty in cases of part owners, having unequal interests and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called," pointing out that the rule was so laid down as to include both majority and minority owners and as to exclude the powers of the court to decree a sale at the suit of either.

⁶⁵ *Andrews v. Bett.* (1876) 8 Hun (N. Y.) 322, set out, quoted, and discussed in *FISCHER v. CAREY*, ante, 1100; *Reynolds v. Nielson* (1903) 116 Wis. 483, 96 Am. St. Rep. 1000; 93 N. W. 455, also set out and discussed in the *FISCHER CASE*. In the *Reynolds Case* the court in discussing the first theory said that the circumstances, if such it was, that the Federal court could not in the exercise of admiralty and maritime jurisdiction decree the sale of a vessel and the distribution of the proceeds as against a majority owner, suggests jurisdiction by the state court rather than want of jurisdiction, and in any case did not militate against there being a state jurisdiction.

⁶⁶ *State v. Watts* (1834) 7 La. 440, 26 Am. Dec. 507.

held that a suit to settle the affairs of a pilotage partnership and for damages for breach of the partnership contract, demand being made that a pilot boat, the property of the partnership, be sold and the proceeds divided, was not a suit in admiralty, and that a state court could assume jurisdiction and, among other relief, decree a sale of the boat and a division of the proceeds.⁶⁷ And in Minnesota, although admitting that a suit by a minority owner for an accounting, appointment of a receiver, and sale of a vessel is not a common-law but rather is an equitable suit, of which an admiralty court will not take jurisdiction, it has been held that a state court of equity may decree the sale of the vessel and an accounting.⁶⁸

In England it is expressly provided by the Admiralty Act of 1861 (24 Vict. chap. 10, §§ 8 & 35) that the high court

of admiralty shall have jurisdiction either by proceedings in rem or by proceedings in personam to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship, or any share thereof, to be sold, and may make any such order in the case as is deemed fit.⁶⁹ Under this enactment admiralty courts have power to decree the sale of a vessel at the suit either of the majority owners⁷⁰ or the minority owners,⁷¹ although in the latter case it is very reluctant to do so.⁷² But the act does not apply to a vessel not registered either in England or Wales.⁷³

⁶⁷ Francis v. Lavine (1874) 26 La. Ann. 311.

⁶⁸ Swain v. Knapp (1884) 32 Minn. 429, 21 N. W. 414.

⁶⁹ This act and its relation to the sale in admiralty of a vessel was involved in the following cases: The Albion (1862) 6 L. T. N. S. (Eng.) 105; The Ceylon (1868) 18 L. T. N. S. (Eng.) 417; The Nelly Schneider (1878) L. R. 3 Prob. Div. (Eng.) 152, 39 L. T. N. S. 360, 27 Week. Rep. 308, 4 Asp. Mar. L. Cas. 54; The Marion (1884) L. R. 10 Prob. Div. 4, 54 L. J. Prob. N. S. 8, 51 L. T. N. S. 906, 33 Week. Rep. 432, 5 Asp. Mar. L. Cas. 339, 24 Eng. Rul. Cas. 244; The Robinsons (1884) 51 L. T. N. S. (Eng.) 905, 5 Asp. Mar. L. Cas. 338; The Hereward, L. R. [1895] P. (Eng.) 284, 64 L. J. Prob. N. S. 87, 11 Reports, 798, 72 L. T. N. S.

903, 44 Week. Rep. 288, 8 Asp. Mar. L. Cas. 22. And see The Horlock (1877) L. R. 2 Prob. Div. (Eng.) 243, 47 L. J. Prob. N. S. 5, 36 L. T. N. S. 622, 3 Asp. Mar. L. Cas. 421.

⁷⁰ The Ceylon (1868) 18 L. T. N. S. (Eng.) 417.

⁷¹ The Albion; The Nelly Schneider; The Marion; and The Hereward (Eng.) supra.

⁷² The Nelly Schneider and The Marion (Eng.) supra, holding that a complete disagreement between the parties did not constitute sufficient reason for the court to order a sale of the ship; The Hereward (Eng.) supra, holding that before decreeing a sale the court should be satisfied that such decree would be to the interests of all.

⁷³ The Robinsons (1884) 51 L. T. N. S. (Eng.) 905, 5 Asp. Mar. L. Cas. 338.

G. J. C.

NEBRASKA SUPREME COURT.

NICK ARRIGO

v.

GUS A. HYERS, Sheriff, Appt.

(98 Neb. 134, 152 N. W. 319.)

Definition —by legislature.

1. The legislature may define words used in a statute so that their meaning is extended.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Headnotes by LETTON, J.

Note.—The question, what constitutes misbranding within the pure food and drugs laws, is discussed in the annotation following Seven Cases v. United States, L.R.A. 1916D, 169; see especially page 179 of that note as to packages containing premiums or coupons. L.R.A.1917A.

Statute — definition — construction.

2. A legislative definition or an interpretative provision in a statute designed to extend a particular word so as to include more than its usual meaning should be construed reasonably and in accordance with the intent and purpose of the whole act.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Food — misbranding — police power.

3. It is within the police power of the state to provide that certain food products sold in package form shall be deemed "misbranded" if there be contained in the package any gifts, premiums, or prizes.

For other cases, see Constitutional Law, II c, 4, d, in Dig. 1-52 N. S.

The subject of state regulations as affected by the Federal pure food law is discussed in the note to McDermott v. State, 47 L.R.A.(N.S.) 985; and see later case, State v. Armour & Co. L.R.A.1916E, 380.

Commerce — food — power of state.

4. The fact that Congress has declared when a package of food shall be deemed misbranded does not prevent a state from making other requirements, not inconsistent with the act of Congress, respecting the sale of food products in package form. For other cases, see *Commerce*, IV. b, in *Dig* 1-52 N. S.

(Barnes, J., dissents.)

(April 3, 1915.)

APPPEAL by the sheriff from a judgment of the District Court for Lancaster County discharging relator from custody, to which he had been committed for violation of the Pure Food Law, in a habeas corpus proceeding to obtain his release. Reversed.

The facts are stated in the opinion.

Messrs. Grant G. Martin, Attorney General, and Frank E. Edgerton, Assistant Attorney General, for appellant:

Misbranding is carefully defined in the statute, and under that definition of misbranding relator is guilty and the writ of habeas corpus should have been denied.

United States v. 65 Casks Liquid Extracts, 170 Fed. 449, 99 C. C. A. 667, 175 Fed. 1022.

Mr. J. B. Strode also for appellant.

Mr. T. S. Allen, for appellee:

Relator's business cannot be outlawed because the legislature has defined misbranding to be something that is not misbranding.

Edward's Appeal, 108 Pa. 282; Weston v. Arnold, L. R. 8 Ch. 1089, 43 L. J. Ch. N. S. 123, 22 Week. Rep. 284; State ex rel. Richey v. McGrath, 95 Mo. 193, 8 S. W. 425; Com. v. Moorhead, 7 Pa. Co. Ct. 518; Perry v. Keene, 56 N. H. 514; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 604, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Denver v. Frueauff, 30 Colo. 20, 7 L.R.A. (N.S.) 1131, 88 Pac. 389, 12 Ann. Cas. 521; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A.(N.S.) 1123, 144 N. W. 796; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Iler v. Ross, 64 Neb. 720, 57 L.R.A. 895, 97 Am. St. Rep. 676, 90 N. W. 869; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351.

The Pure Food Law is not within the police power of the state.

Ex parte Dietrich, 149 Cal. 104, 5 L.R.A. (N.S.) 873, 84 Pac. 770; People use of State Bd. of Health v. Wilson, 249 Ill. 195, 35 L.R.A.(N.S.) 1074, 94 N. E. 141; Tilford v. Belknap, 126 Ky. 244, 11 L.R.A.(N.S.) 708, 103 S. W. 289; People v. Ringe, 125 L.R.A.1917A.

App. Div. 592, 110 N. Y. Supp. 74; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A.(N.S.) 1123, 144 N. W. 795; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; Young v. Com. 101 Va. 853, 45 S. E. 327; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Ex parte Hutchinson, 137 Fed. 949; State v. Caspare, 115 Md. 7, 80 Atl. 606; Opinion of Justices, 208 Mass. 607, 94 N. E. 848; State v. Ramseyer, 73 N. H. 31, 58 Atl. 558, 6 Ann. Cas. 445; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Low v. Rees Printing Co. 41 Neb. 127, 24 L.R.A. 702, 43 Am. St. Rep. 670, 59 N. W. 362; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071; People v. Biesecker, 169 N. Y. 53, 57 L.R.A. 178, 88 Am. St. Rep. 534; Re Case, 20 Idaho, 128, 116 Pac. 1037; State v. Santee, 111 Iowa, 1, 53 L.R.A. 763, 82 Am. St. Rep. 489, 82 N. W. 445; State v. Butterfield Livestock Co. 17 Idaho, 441, 26 L.R.A.(N.S.) 1224, 134 Am. St. Rep. 263, 106 Pac. 455; Ex parte Quarq, 149 Cal. 79, 5 L.R.A.(N.S.) 183, 117 Am. St. Rep. 115, 84 Pac. 766, 9 Ann. Cas. 747; People v. Ringe, 197 N. Y. 143, 27 L.R.A.(N.S.) 528, 90 N. E. 451, 18 Ann. Cas. 474; People ex rel. Duryea v. Wilber, 198 N. Y. 1, 27 L.R.A.(N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626; Bacon v. Locke, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; State v. Miksicek, 225 Mo. 561, 135 Am. St. Rep. 597, 125 S. W. 507; McDermott v. Wisconsin, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; Louisville & N. R. Co. v. Hughes, 201 Fed. 727.

Mr. E. G. Maggi also for appellee.

Letton, J., delivered the opinion of the court:

A criminal complaint was filed against the relator, charging that on the 9th day of October, 1913, he unlawfully sold one package of "Souvenir Checkers Popcorn Confection" to one E. L. Redfern, in which package was unlawfully contained a certain gift, premium, and prize, to wit, one toy tin butterfly with pin affixed. He was found guilty and required to pay a fine of \$10 and costs. Having failed to pay his fine, he was committed to jail until discharged. He brought these proceedings in habeas corpus to obtain his release. A hearing was held and relator discharged. The sheriff has prosecuted an appeal.

The question presented is whether the relator was guilty of a violation of the Pure Food Act. Rev. Stat. 1913, chap. 24,

§§ 2526-2552. He asserts that since there was no food product in the package, but popcorn confection, and this was plainly marked upon the outside thereof, the package was not misbranded, and that subdivision 6, § 2537, relating to food products in package form, is not within the police power of the state. The state asserts that, since the package sold contained an object in the nature of "a gift, premium, or prize," to sell it was a violation of the law.

Section 2537 provides that the term "misbranded" shall apply to drugs, liquors, and articles of food under certain conditions. It also provides: "For the purpose of this chapter an article shall also be deemed to be misbranded: . . . Sixth. In case of food products if there be contained in the package any gifts, premiums, or prizes."

The act in question, while commonly known as the "Pure Food Law" is entitled: "An Act to Create and Maintain a Food, Drug, Dairy and Oil Commission for the State of Nebraska; to Define Its Powers and Duties, to Provide for the Inspection of Foods, Drugs, Dairy Products and Oils, to Regulate the Manufacture and Sale of Drugs, Food Products, Dairy Products, Petroleum Products and Oils," etc. Laws 1913, chap. 109.

The general purpose of the act is to protect the public from the adulteration of food products, the unsanitary operation of creameries, dairies, cheese factories, or other places where food products are manufactured or offered for sale, the prevention of fraud upon the public in the sale of food products put up in packages as to quality and weight, by requiring a correct statement clearly printed on the outside of the main label of the contents, and also of the net weight of the contents exclusive of the container. Many provisions, regulations, and restrictions are contained in the act in order to carry out these general purposes. Among these is found the clause upon which this prosecution is based, declaring a package of food products misbranded if there be contained in the package any gifts, premiums, or prizes. The evident purpose of the provision as to misbranding is to protect the public by requiring a full disclosure of the contents of each package, and to promote fair and honest competition in the sale of food products, by eliminating any act or element designed to conceal the true nature or value of the article packed. These general objects are clearly within the police power of the state. The legislation relates to one of the most essential functions of the government. It treats of the public health, pure foods, and honest

weights and measures, which are all matters pertaining to the general welfare and for the protection of the public. For the purpose of enforcing the law, provision is made for a food commission and for inspectors.

The principal arguments of relator are that unless there is a false statement upon the label a package is not misbranded and the legislature has no power to declare it so; "that appellee's business cannot be outlawed because the legislature has defined misbranding to be something that is not misbranding." A number of decisions are cited to the effect that it cannot "make that a party wall which is not a party wall," nor a child born out of lawful wedlock into "a lawfully begotten" one, nor make that a lottery which is not a lottery. We agree in the main with this contention, and also with relator's contention that statutes enacted in the exercise of the police power must have relation to a proper public purpose, and must not arbitrarily invade rights guaranteed by the Constitution. Has the legislature power to declare a package so marked "misbranded"? It is an elementary principle of statutory interpretation that, where the legislature expressly states the meaning which is to be given to a term used in an act, it is the duty of the courts to give it such meaning, and thus carry out the evident intent and purpose of the legislature.

The enforcement of some of the most important provisions of the Pure Food Act depends upon the definition given in the act to many of the words used therein. Unless the words, "person," "drug," "adulteration," "misbranded," "blend," and other words therein defined, are interpreted to mean that which the legislature declares, the force of the act is practically nullified. Several of these words as used in the act contain ideas not quite within their ordinary meaning. Take the word "drug" as an instance. Many substances may be embraced within the statutory definition which are not ordinarily termed drugs. Also in the statutory definition of "adulteration" a drug is deemed to be adulterated "if its strength or purity fall below the professed standard or quality under which it is sold" (Rev. Stat. § 2536, subdiv. II.), even though no other substances be added to it. Ice cream is deemed "adulterated" if it does not contain at least 14 per cent butter fat, and fruit cream if it contains less than 12 per cent butter fat; and yet pure milk varies widely in its content of butter fat, and until this act took effect ice cream in which pure milk and cream were used could not be said to be adulterated merely be-

cause its fat content fell below this standard.

The concept which a word conveys is that which custom has accorded it. There is no reason why a legislature may not expand the definition of a word to a reasonable degree, and include within the circle of its definition, for the purpose of an act, ideas which are related to that concept, but not ordinarily included therein. A definition in a statute is as effective and forceful as any other part of the act. This court has so held in *Herold v. State*, 21 Neb. 50, 31 N. W. 258, speaking of a legislative definition of "fraudulent transfer of property": "This definition is furnished by the act itself, and the definition is as much a part of the act as any other portion. The right of the legislature to prescribe the legal definitions of its own language must be conceded." *State v. American Surety Co.* 91 Neb. 22, 135 N. W. 365, Ann. Cas. 1913B, 973; *Farmers' Bank v. Hale*, 59 N. Y. 62.

This is the general rule. "Any provision in a statute which declares its meaning or purpose is authoritative. Whether it relates to the object of a whole act, or of a single section, or of a word, it is a declaration having the force of law. It is binding on the courts, though otherwise they would have understood the language to mean something different." 2 Lewis's *Sutherland*, Stat. Constr. 2d ed. § 576. See also cases cited in note to § 358. "The court is sometimes obliged by the legislature to put an interpretation on a word which it does not ordinarily bear, when it has been enacted that something 'shall be deemed' to be something else." *Brooks v. Baker* [1906] 1 K. B. 11, 15, 75 L. J. K. B. N. S. 41, 70 J. P. 24, 54 Week. Rep. 195, 94 L. T. N. S. 97, 22 Times L. R. 36, 4 L. G. R. 111, 1 Smith Reg. 465; *McElhone v. Philadelphia Quartette Club*, 53 Pa. Super. Ct. 262; *Com. v. Crowl*, 245 Pa. 554, 91 Atl. 922; *State v. Standard Oil Co.* 61 Or. 438, 123 Pac. 40, Ann. Cas. 1914B, 179; *State ex rel. Michener v. Harrison*, 116 Ind. 300, 19 N. E. 146; *Chicago & E. I. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924; *State ex rel. Exchange Bank v. Allison*, 155 Mo. 325, 56 S. W. 467; *People v. William Henning Co.* 49 L.R.A.(N.S.) 1206, and note (260 Ill. 554, 103 N. E. 530); *Beale*, Cardinal Rules of Legal Interpretation, 2d ed. 301.

The legislature evidently intended to prevent the label upon such a package from doing otherwise than speaking the exact truth. A package may with reason be said to be misbranded if the label does not accurately describe its contents. It is rea-

sonable to presume that it believed it to be a wise provision for the public welfare to enact that packages of food offered for sale should not contain tin butterflies, toy savings banks, or printed coupons offered as prizes. The act contemplates the inspection of dairies, packing houses, and other sources of food supplies, to the end that cleanliness and sanitary conditions shall prevail; but there is no provision for the inspection of places where prizes and gifts are made or handled, however dirty or unsanitary they may be. If this provision is not in effect, these articles, brought from whatever germ-laden source, may be placed in contact with the food. Another evident purpose was the regulation of the weight of the food contents, so as to prevent fraud, and so that the purchaser should know the quantity of food he was buying. The law requires the weight of the "contents" to be stated on the label. Among the contents in this case was a tin butterfly; in another case it was a toy savings bank. The net weight of the contents is stated, but it is left uncertain how much is food. The weight of the article within the package may be greater than that of the food product. It may be of less value, pound for pound, and thus defraud. The purchaser is left in the dark as to the weight of the food he is buying.

It is also argued that since, under the terms of the statute of the United States, this package is not misbranded, that law controls, and the state act cannot be held to apply. A similar question was raised in *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715, with respect to the statute of Indiana. It was held that the intent to supersede the police power of the state is not to be implied, unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state. We find no such conflict here, and both acts may stand and be enforced.

The act is a beneficent one. It is continually exposed to the assaults of those endeavoring to cut down its provisions, and by a process of elimination to fritter away its value to the public. This should not be done, unless the legislature has failed to speak so that, with the aid afforded by its own definitions, its purpose can be understood. It is a sound rule that, where the intent of the legislature and the object and purpose of a law are obvious, and such manifest purpose and intent are not inconsistent with or outside the terms of the law, it is not allowable to permit the intent and purpose to be defeated merely because not defined and declared in the most complete and accurate language. *Black*,

Constr. & Interpretation of Laws, 2d ed. § 151.

We are of opinion the District Court erred in discharging the relator, and its judgment is therefore reversed.

Barnes, J., dissents.

Petition for rehearing denied June 5, 1915.

Dismissed by the Supreme Court of the United States, October 21, 1915, 239 U. S. 653, 60 L. ed. 487, 36 Sup. Ct. Rep. 665.

WASHINGTON SUPREME COURT.
(Department No. 1.)

J. D. VAN BUREN et al., Appts.,
v.

E. C. TRUMBULL et al., Respts.

(92 Wash. 691, 159 Pac. 891.)

Highway — vacation — effect on private right.

The rights in streets shown on a plat, of those who buy lots in reliance on the plat, are not affected by a statute vacating roads which remain unopened for public use for a specified period of years.

For other cases, see *Highways*, V. a, 2, in Dig. 1-52 N. S.

(August 30, 1916.)

APPEAL by plaintiffs from a judgment of the Superior Court for Yakima County in defendants' favor in an action brought to quiet title to certain land. Affirmed.

The facts are stated in the opinion.

Messrs. Williamson & Luhman for appellants.

Mr. H. J. Snively, for respondents:

The purchaser of a city lot according to the plat showing the street bounding the lot cannot acquire title to a portion of the street by adverse possession, being estopped by the reference to the plat in the deed.

Moore v. Walla Walla, 2 Wash. Terr. 184, 2 Pac. 187; Kenyon v. Knipe, 2 Wash. 394, 13 L.R.A. 142, 27 Pac. 227; Smith v. King County, 80 Wash. 277, 141 Pac. 695; Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982; George v. Columbia & P. S. R. Co. 38 Wash. 480, 80 Pac. 767; Kline v. Stein, 30 Wash. 189, 70 Pac. 235; Yesler v. Holmes, 39 Wash. 34, 80 Pac. 851; Richardson v. Davis, 91 Md. 390, 46 Atl. 964; Almy v. Church, 18 R. I. 182, 26 Atl. 58; 14 Cyc. 1177.

Chadwick, J., delivered the opinion of the court:

Many years ago A laid out an addition to the city of North Yakima known as the

Note. — For vacation of, or refusal by public to accept, platted street or highway as affecting private easements of abutting owners, see annotation following this case, post, 1123.
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St. Paul acre lots. The plat was filed in May, 1888, and shows a street through the center of the tract known as Clark street. Appellants and their predecessors in interest bought on one side of Clark street. Respondents bought on the other side of the street. All parties bought with reference to the plat. At the time respondents bought their land and went into possession, plaintiffs or their predecessors had fenced all that part of Clark street abutting their property. Since respondents settled upon their land, the question of title to Clark street had been the subject of some negotiation among the parties. For a time respondents found a way out to the established streets over the property now owned by one of the appellants. Differences arose. Feeling finally became so acute that it led to open warfare. Appellants, on whose land respondents had been accustomed to travel, closed and locked the gate, and finally brought this action to quiet title to the land abutting their lots, and lying within the bounds of Clark street as extended on the plat. They rely upon the Statute of Limitations, contending that Clark street was never opened or improved by the public, and became, in virtue of the act of 1890, which this court held to apply to city streets (Murphy v. King County, 45 Wash. 587, 88 Pac. 1115), as against the public, subject to the private right of any party who may have taken possession of it and held it for the statutory period.

Appellants rely primarily upon Smith v. King County, 80 Wash. 273, 141 Pac. 695, and Norfolk v. Nottingham, 96 Va. 34, 30 S. E. 444. They insist the reasoning of the latter case was adopted in the former. In our own cases the sole question considered was whether the public had any interest in streets that had been theretofore dedicated, but not opened or worked by the public for a period of five years. The question of rights between abutting owners or those who had purchased with reference to the plat was not passed upon. Indeed, it would seem that the writer of the opinion in the Smith Case had the question in mind, and by apt expression reserved it. It is said: "The purchasers are not parties to this litigation, and their rights cannot be affected by the result. Their rights, if any, depend upon the

doctrine of estoppel. Moreover, they or their successors in title may have since compromised or lost the right so acquired. These questions we are not called upon to consider or decide. The estoppel, if any, operates only in favor of those who have been misled to their injury, and they alone can set it up"—citing the Virginia case: "The purchasers of lots are not parties to this litigation, and their rights can in no respect be affected by its results. It may be that the dedication was complete as to those who purchased lots prior to the public sale on the 21st of September, 1870, or as to those who purchased on that day before the announcement was made by the auctioneer, to which we have referred. It may be that the owners of lots so purchased, though they acquired a complete right to the use of the streets as designated upon the maps at the time their respective purchases were made, have since compromised or lost the right so acquired. We are not called upon to consider or to decide any of these questions. We are only concerned with the rights of the parties before us."

With the right of the public eliminated, we have the reserved question squarely before us.

No cases going to the exact state of facts with which we have to deal have been cited by counsel, nor have we, after considerable search, been able to find any. Resort must be had to fundamental principles. One who plats property upon which streets have been laid out, and who sells property with reference thereto, cannot, by an act of his own, defeat the right of his vendee to use the platted streets for the purposes intended. He is estopped to deny or impeach rights thus acquired. *Elliott, Roads & Streets*, § 1191; *Herman, Estoppel*, §§ 1145-1147; *Cincinnati v. White*, 6 Pet. 431, 8 L. ed. 452; *Weisbrod v. Chicago & N. W. R. Co.* 18 Wis. 40, 86 Am. Dec. 743; *Boise City v. Hon.* 14 Idaho, 272, 94 Pac. 167. "The doctrine has for its object the suppression of fraud and the enforcement of honesty and fair dealing. Where, therefore, lots have been offered for sale, and have been purchased in accordance with a map or plat upon which streets are made to appear, it is presumed that the purchase was induced, and the price of the lots enhanced thereby, and the seller is estopped to deny the right which has been thus acquired. To permit him to sell the lots under such circumstances, and then to close the streets, would be to permit him to perpetrate a fraud upon his vendees." *Norfolk v. Nottingham*, supra.

The court continues; and this is the expression upon which appellants hang their hopes: "Such an estoppel, however, operates only in favor of him who has been mis-

led to his injury, and he alone can set it up. This proposition would seem to flow as a logical sequence from the principle upon which estoppel rests, and is abundantly sustained by authority. See *Ketchum v. Duncan*, 96 U. S. 659, 24 L. ed. 868."

This we shall consider later in this opinion.

Now it would seem, if the vendor or dedicator of land could not, by any act of his own, deny to his vendee a right to at least an easement in the property theretofore dedicated as a street, that one claiming by, through, or under him could not do so. As between the grantees of a common grantor who had platted and sold land, rights are to be primarily determined by reference to the right of the grantor. That is to say, if the common grantor could not deny the full effect of his deed and the right of ingress and egress, his grantee could not do so.

The statute vacating streets that had not been opened to the public reads as follows: "Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time." Bal. Code, § 3803.

It makes no mention of private rights, and cannot be held to, in any way, affect them. Having failed to take account of situations where lots had been, or might thereafter be, sold in platted additions, the logical assumption must be that the legislature intended no more than to waive the interest of the public in so far as it was represented by the municipality. This belief finds some support when we consider that, at the time the statute vacating unopened highways was passed, we had upon the statute books, and have now, a law making the vacation of platted property a matter entirely discretionary with the county commissioners, to be granted only upon such conditions and restrictions as they might deem reasonable and for the public good, and, we may add, the statute implies, without doing violence to private rights. Rem. & Bal. Code, §§ 7844-7846.

It may be seriously questioned whether it was within the power of the legislature to so legislate as to take away a right of easement acquired by deed from the owner of platted property. A right of private easement may exist although the public right of easement be destroyed or extinguished. Without resorting to the constitutional question, but keeping close to the statute, having in mind its letter and its spirit, we may, however, hold that private

rights of easement were not affected by the act, and that they remain as if the act had not been passed. Such is the fair implication of the act, and it is not inconsistent with its letter to so hold. The rule governing before the adoption of the statute of 1890 is clearly stated in *Angel on Highways*, § 326, note: "Until the time arrives when a street is required for actual public use and when the public authorities may properly be called upon to open it for such use, no mere nonuser, however long continued, will operate as an abandonment of it, and all persons in possession of it will be presumed to hold subject to the paramount right of the public."

If we eliminate the public right, the rule would read, Subject to the mutual rights of the various grantees who trace their title to the common grantor, who is ever restrained by the bar of estoppel from denying the right of easement to his grantees.

The rights of parties owning land abutting a vacated highway or street are well stated in *Holloway v. Southmayd*, 139 N. Y. 390-404, 34 N. E. 1049. The court, in discussing a case where no formal dedication had been made (the principle is the same as where a street has been vacated), said: "The fact in that case was that the owner of the tract made conveyances of portions, bounding them upon intended streets not yet laid out by legal authority, but treating them as located if the map of the public authorities had been extended. The decision of the referee was upheld, as being supported by the authorities, that these conveyances, although not amounting to a dedication of the lands embraced in the supposed streets to the use of the public, or constituting them public highways, created an easement in favor of the grantees of the lots abutting thereon; which, as between them and their grantor, and those deriving title under him, entitled them to have the lands described in the conveyances as streets and avenues left open as such for the benefit of their lots"—and, in discussion of the particular case: "If, by act of law, the public right, or easement in the highway, has ceased, there is no reason for saying that, as against the grantor of the abutting land, any right to the continuance of private easements has been lost to the grantee. At least, the principal argument for the other view is that the possible discontinuance of the highway was a contingency which the parties must, or should, have considered. But is that quite just? Had the grantee not the right to assume that, with the fee of the highway in the grantor, in conveying lands with boundaries given upon the highway, together with all the appurtenances, easements, advantages, and privileges, he

intended to and did, impliedly if not in express terms, warrant to his grantee, as far as he was concerned, the continuance of the open space in front of the land for all the beneficial purposes which it could subserve, even if the public easement should cease? When it is said that the land of a highway, which has been discontinued, reverts to primary conditions of ownership, obviously, it is to be understood that such ownership is not thereby relieved of burdens created by the original owner."

So, in *Portland v. Whittle*, 3 Or. 126-128, it is said: "When a man or company of men own land, and lay it off into blocks and streets, and sell lots abutting on a street so laid off, so that the street is a convenience to the purchasers of the lots, those acts amount to a dedication of the land so laid off into streets, and the persons so laying it off cannot recall it or in any manner prevent its being used as streets. Such persons are barred or estopped by their acts, and all persons or corporations subsequently claiming under them are equally bound."

Referring again to the *Smith Case*, counsel say that respondents cannot claim an estoppel as against appellants unless they have been misled to their injury. This argument presupposes a right in the appellants that, as we view the case, does not exist, but if there be a technical right as against the public, it vanishes under the peculiar facts in this case. Respondents and their grantors were misled to their injury. They bought with reference to the plat. They no doubt paid more for their lots than they would have paid but for the platted street—if indeed they would have bought at all. In *Bayard v. Hargrove*, 45 Ga. 342, 350, 353, will be found a complete argument against the contention of the appellants:

"But there is a clear distinction by the authorities, and in the nature of the case, between a mere right of way seized by the public or dedicated to the public and the case made by this record. Here is a contract. The owner of the land proposes to lay out a town. He makes up a map, with the lots, streets, lanes, etc., marked upon it, and he not only agrees to dedicate the streets to the public, but he sells the lots abutting upon the streets. The public accepts the streets, the lot owners buy the lots under these representations, and the owner of the soil gets a consideration for his dedication in the increased price of his lots.

"In this case there are three parties to the transaction,—the owner of the land, the public, and the purchasers of the lots. And the whole affair is a matter of contract, for a valuable consideration. Especially is it true that there are more parties at interest

than the public and the dedicator. The purchasers of the lots acquired a contract right in the street. They acquired the right to use it themselves and the right to have the street open to all others whom they may desire to use it. This title is gone from the owner, except with the consent of the public and the lot owners. If the public were to forfeit or abandon it, this would not affect the rights of the lot owners. The owner of the land has parted with his right ever to assert his right to the soil to the injury of the easement. . . . In cases like this, of a sale of lots upon a street dedicated by the vendor of the lots, there is an element that does not

exist in the cases referred to by the counsel for the defendant in error. . . . That element is that this street was one of the inducements of the vendees to buy. The price of the land to the vendor was increased by his dedication of the street. Its precise width and the precise uses to which it shall be put are material to the owner of the abutting lands, and not to the original proprietor."

We find no error, and the judgment is affirmed.

Morris, Ch. J., and Mount, Fullerton, and Ellis, JJ., concur.

Annotation—Vacation of, or refusal by public to accept, platted street or highway as affecting private easements of abutting owners.

In general.

The scope of this note is limited to the question of the rights acquired by an individual who buys property with reference to a plat or holds under one who so purchased, to an easement in the streets shown on the plat, after the street has been vacated by the public authorities, or after a formal refusal by the public to accept the dedication of the street. The fact that there has been a dedication of the streets is presupposed, and a formal refusal to accept is regarded as the equivalent of a vacation; hence, the note does not include cases that turn upon the fact that there has been no dedication. (Various phases of the question of dedication by selling with reference to plats are discussed in notes referred to in Index to L.R.A. Notes, subject "Dedication.") It must be here assumed that the purchaser of the abutting property has acquired as a member of the public by virtue of the dedication the right to use the street. He also acquires an easement, implied covenant, or estoppel against the grantor that gives him the use of the streets. (See note to *Talbert v. Mason*, 14 L.R.A. (N.S.) 878, and other notes referred to in Index to L.R.A. Notes, subject "Easements.") The question here is whether these two rights or easements are separate and distinct, so that the loss of the one by the vacation of the street by the public authorities has no effect upon the other, or whether they merge into one easement so that the private easement cannot survive the destruction of the public right to use the street.

Of course the question presupposes the right of the public authorities to vacate the streets, and that there has L.R.A.1917A.

been a legal vacation or its equivalent, so that cases turning upon the authority to vacate or the legality of the vacation are not included.

Generally as to rights of abutting owner upon vacation of street, see note to *German Evangelical Lutheran St. Lucas Congregation v. Baltimore*, 52 L.R.A. (N.S.) 889, and notes there referred to.

The court in *VAN BUREN v. TRUMBULL*, ante, 1120, in holding that the private easement is distinct from and will survive the destruction of the public easement, is in harmony with the decided weight of authority as well as with the principles that appear to work the more equitable conclusion in most cases. The two cases cited, *infra*, in which the courts reached the opposite conclusion are early cases and were decided under exceptional circumstances.

The merger theory.

It has been held that one buying by reference to a recorded plat does not take by the deed a private right over the streets designated on the plat, distinct from, and independent of, the public right of way, hence a vacation of a street by the corporate authorities extinguishes all his easements in the streets. *Kimball v. Kenosha* (1855) 4 Wis. 321. This case has often been cited as authority for the doctrine that the private easement is merged into the greater easement of the public, so that the lesser cannot survive the destruction of the greater. But it is questionable whether the decision will bear that general construction. There was a statute in force when the land was bought vesting title, to the land designated as

streets, in the municipality in trust for the public to use as streets. By the vacation the city was held to have abandoned its trust, and title reverted to the original grantor, who then conveyed to the city free from the trust, and the suit was to compel the city to remove its obstructions from the street. The case is cited by the court in *Bailey v. Culver* (1884) 84 Mo. 531, where the doctrine of merger is more clearly defined and supported. These two cases are the only authorities that support that doctrine; and it will be seen, *infra*, that most courts adopt the better theory, i. e., that the purchaser's easement based upon his deed as a contract is independent of and will survive the public right of way. See *VAN BUREN v. TRUMBULL*.

Against the merger theory.

Even under a statute that vests absolute title in fee to the streets in the city upon the owner's recording the plat, but reverts it in the owner on the city's vacating the street, the purchaser of a lot by reference to the plat acquires an easement by his deed that entitles him to the use of the street for ingress and egress to his lot after the vacation, provided he has not waived his rights. *Gebhardt v. Reeves* (1874) 75 Ill. 301. In this case it was held that the purchaser had waived his right to the easement by signing the petition that authorized the city to vacate the street.

In *Nicklas v. Keller* (1896) 9 App. Div. 216, 41 N. Y. Supp. 172, the court said: "The plaintiff contends that by the action of the commissioners in rejecting this strip of Mott street from the limits of One Hundred and Forty-eighth street the title to the strip reverted unencumbered to the owners of the soil. We think this position cannot be sustained. In the case of a public highway it is doubtless true that when the highway is closed by proper authority the abutting owners do not continue to possess a private easement over the highway as a right of way. It was so held in *Wheeler v. Clark* (1874) 58 N. Y. 267, and in *Kings County F. Ins. Co. v. Stevens* (1886) 101 N. Y. 411, 5 N. E. 353. But the present case differs from those cited. The rights of the purchasers of lots fronting on Mott street were not the rights that abutters have in a public highway, but private easements, created by laying out the street and by the sale of lots thereon." And the headnote of this case reads as follows: "The rule that, when a public highway is closed by proper authority,

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the abutting owners do not continue to possess a private easement of passage over the land theretofore used as a highway, has no application to a case in which owners of lots, abutting upon a piece of land delineated as a street upon a way made by the owner, by whom all the lots were sold, acquire by reason of such map and the conveyance to them an easement or right of way over the land so delineated as a street."

In *White's Bank v. Nichols* (1876) 64 N. Y. 65, where the city had narrowed the street thus vacating the part over which an abutting owner claimed the easement, the court held that "the only other question presented by the record is as to the claim of the defendant to an easement in the premises in question. The general rule is, that where the owner of land in a city lays out a street through it and sells lots on each side of the street, the public have an easement of way or right of passage, although it may not become a public highway in the ordinary sense of that term until the dedication is accepted and the street adopted by the corporation, and the grantees of the lots are entitled as purchasers to have the interval or space of ground left open forever as a street, and to the right of using the way for every purpose that may be usual and reasonable for the accommodation of the granted premises. Neither the corporation of the city, nor the state authorities, nor the grantor can do any act to impair this right or restrict the grantees in the enjoyment of it." To the same effect is *Smith v. Smith* (1907) 120 App. Div. 278, 104 N. Y. Supp. 1106, affirmed in (1908) 193 N. Y. 667, 87 N. E. 1127.

In *Carroll v. Asbury* (1905) 28 Pa. Super. Ct. 354, the court said: "Asbury had laid out and opened the street upon his own land, and his deed to Carroll, in addition to the covenants necessarily implied as between the parties and those claiming under them respectively, incidentally involved a tender to the public of an easement for the street as a public highway, with the right to make laws and ordinances as to the manner in which this public street should be used; but Carroll was a purchaser for himself and his grantees, by implied covenant from his grantor, of the private right to have the street left open forever as a way appurtenant to his lot. The public might reject or accept, or having accepted might renounce, the public right involved in the transaction, but the action of the public could not change the

private rights of the parties created by their own contract, as between themselves and those claiming under them. *Re 17th Street* (1828) 1 *Wend. (N. Y.)* 262; *Re Lewis Street* (1829) 2 *Wend. (N. Y.)* 472; *Livingston v. New York* (1831) 8 *Wend. (N. Y.)* 85, 22 *Am. Dec.* 622; *Alden v. Murdock* (1816) 13 *Mass.* 256; *Moale v. Baltimore* (1854) 5 *Md.* 314, 61 *Am. Dec.* 276; *Tinges v. Baltimore* (1879) 51 *Md.* 600; *Parker v. Framingham* (1844) 8 *Met. (Mass.)* 260; *New Orleans v. United States* (1836) 10 *Pet. (U. S.)* 662-720, 9 *L. ed.* 573-595; *Re Melon Street* (1897) 182 *Pa.* 397, 38 *L.R.A.* 275, 38 *Atl.* 482; *Quicksall v. Philadelphia* (1896) 177 *Pa.* 301, 35 *Atl.* 609; *Wickham v. Twaddell* (1904) 25 *Pa. Super. Ct.* 188; *Dovaston v. Payne*, 2 *Smith, Lead. Cas.* 8th ed. 142, note; *Grand Surrey Canal Co. v. Hall* (1840) 1 *Mann. & G.* 392, 133 *Eng. Reprint*, 386, 1 *Scott, N. R.* 264, 9 *L. J. C. P. N. S.* 329; *Brownlow v. Tomlinson* (1840) 1 *Mann. & G.* 484, 133 *Eng. Reprint*, 423, 1 *Scott, N. R.* 426, 8 *Dowl. P. C.* 827."

In *Dobson v. Hohenadel* (1892) 148 *Pa.* 367, 23 *Atl.* 1128, the city had formally abandoned a strip of land used for a street, between the abutting properties and a railroad that took up part of the street; and it was held that the purchaser of an abutting lot retained at least an easement over the vacated land as against another lot owner who had derived title from a grantor common to both owners, and who had platted the land and sold the lots with reference to the plat.

In *O'Donnell v. Pittsburgh* (1912) 234 *Pa.* 401, 83 *Atl.* 314, the street had been vacated by ordinance, and it was held that purchasers from a common grantor with reference to a plat had no right as against each other to close the street as shown upon the recorded plat. The court said: "If there is anything settled by judicial decision in this state, it is that a sale of lots according to a plan which shows them to be on a street implies a grant, or covenant to the purchaser, that the street shall be forever open to the use of the public, and operates as a dedication of it to public use; and that the owner of any lot in the general plan may assert the public character of any street and the right of the public to use it. The rights in dedicated streets acquired by a purchaser of lots by a deed referring to a plat are private contract rights, and are not affected by the failure of the municipality to act upon the dedication. 3 *Dill. Mun. Corp.* 5th ed. § 1083."

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In *Bond v. Barrett* (1912) 50 *Pa. Super. Ct.* 307, the court said: "The proposition upon which he stands is that when John Rumberger sold and conveyed his lots according to a plan, he thereby conveyed to each lot purchaser an easement to have all of the streets and alleys therein shown kept open for the use of himself and of other purchasers, and that such right may be enforced against any purchaser of a lot in the same plan without any regard to the action or nonaction of any municipality of which the lots embraced in the plan might afterwards become a part. The soundness of this proposition has been repeatedly asserted in a number of cases, of which the most recent are: *Carroll v. Asbury* (1905) 28 *Pa. Super. Ct.* 354; *Garvey v. Harbison-Walker Refractories Co.* (1906) 213 *Pac.* 177, 62 *Atl.* 778; *People's Nat. Bank v. Liquid Carbonic Co.* (1910) 226 *Pa.* 503, 75 *Atl.* 677, and *O'Donnell v. Pittsburgh (Pa.) supra.*

In *Shetter v. Welzel* (1913) 242 *Pa.* 355, 89 *Atl.* 455, there was some dispute as to the relative time of vacation in reference to the time when the common grantor conveyed, it was held that the point was not material, as in either case one purchaser could not close the street against another. The court said: "So that it comes to this: In considering the question of the right of these plaintiffs to the free and unobstructed use of Swatara street, it is a matter of no consequence when the rights of the city in the street were relinquished by vacation. If the vacation was effected by act of assembly, prior to the time when Calder conveyed to Tippet, Calder was chargeable with knowledge of such fact, and by describing the lot conveyed as bounded by Swatara street according to a plan of lots made by himself, he impliedly covenanted with his grantee that such streets should be kept open. 'Of course an owner may dedicate his ground to public use as streets by dividing his land into lots and streets upon the plan made for the purpose, and sell the lots in accordance therewith. But in such case, the acts done are his own acts, and because they are his they justify the inference of dedication.' *Re Brooklyn Street* (1888) 118 *Pa.* 640, 4 *Am. St. Rep.* 618, 12 *Atl.* 664. If the vacation was effected by the city ordinances subsequent to the deed from Calder to Tippet, while Calder would in such case not be liable on any implied covenant to keep and maintain Swatara street

open, yet, having by his deed conveyed a lot bounding on Swatara street, he would be estopped from doing what would be inconsistent with good faith in the way of obstructing the enjoyment of that which he had granted. These defendants have no other rights in what was Swatara street than those derived through James Calder; whatever limitations rested on Calder now rest on them, and these operate to restrain them from obstructing plaintiff's free access to the street. It follows that the injunction was properly issued."

In *Sowadski v. Salt Lake County* (1909) 36 *Utah*, 127, 104 *Pac.* 111, the court approved the doctrine that the private easement will survive the destruction of the public easement by non-user under a statute somewhat similar to the one involved in *VAN BUREN v. TRUMBULL*, ante, 1120, but apparently held that the doctrine does not apply where the plaintiff acquired title after the vacation of the road. An additional ground for refusing the injunction was that plaintiff had abandoned his easement before bringing suit. Perhaps this was the real ground for refusal of the injunction, since it is a sound reason, while the fact that the purchase was made after the vacation is not a valid reason for refusing an injunction. See *Shetter v. Welzel* (Pa.) *supra*.

Indecisive cases.

In *Atty. Gen. ex rel. Stickle v. Morris & E. R. Co.* (1869) 19 *N. J. Eq.* 386, the court said: "Whether, after an acceptance by the proper authorities, or by public use, if the street should be vacated by legal proceedings for that purpose, and thus discharged from the public burthen, the owners of lots fronting upon the part so vacated would retain the easement of a right of way, so far as to have a right of passage from and to the lots purchased, is perhaps not settled by direct adjudication. The intimation in the opinion of Justice Vredenburg in *State, Snedeker, Prosecutor, v. Snedeker* (1862) 30 *N. J. L.* 84, and the doctrine maintained by Chancellor Walworth in *Watertown v. Cowen* (1834) 4 *Paige* (N. Y.) 510, and by the supreme court of New York in *Re 29th Street* (1841) 1 *Hill* (N. Y.) 189, and in *Bissell v. New York C. R. Co.* (1858) 26 *Barb.* (N. Y.) 632, would seem to point to a conclusion founded on correct principles; which is, that the purchaser of a lot upon a street so dedicated acquires a perpetual and indefeasible right of access to his lot over the same, i. R. A. 1917A.

or at least over so much as leads from his lot to the next adjoining public street on each side, whether the same be accepted and adopted by the public as a highway or not, and retains it, if after acceptance the same be abandoned by the public as a public highway. But it is not necessary to decide this question here; the public have not abandoned or vacated the part of this street on which the new track is proposed to be laid." And in *Dodge v. Pennsylvania R. Co.* (1887) 43 *N. J. Eq.* 351, 11 *Atl.* 751, the court, after taking the position that the question is not settled in New Jersey, said: "There are several adjudications made by courts distinguished for the ability and learning of their judges, which hold that when the public right attaches, the preceding private right is thereby extinguished, and that if the public right is subsequently surrendered, the adjacent owner takes the land to the middle of the street, discharged of all right of way. *Mercer v. Pittsburgh, Ft. W. & C. R. Co.* (1859) 36 *Pa.* 99; *Kings County F. Ins. Co. v. Stevens* (1886) 101 *N. Y.* 411, 5 *N. E.* 353; *Kimball v. Kenosha* (1855) 4 *Wis.* 321, and *Bailey v. Culver* (1884) 84 *Mo.* 531, are cases of this class. The adjudications standing in conflict with this view are perhaps more numerous than those supporting it, but which of the two conflicting doctrines is most consonant with right reason and sound public policy, this court has no authority to decide. That question, like all other questions of legal title, falls within the exclusive jurisdiction of another tribunal." It should be observed here that some of the cases cited by the court do not support the proposition as stated. The case in 101 *N. Y.* 411, is not in point, as the city owned the fee in the highway and sold it to the defendant, who closed it, and the limitations in plaintiff's deed made it clear that no private way was intended to be conveyed. See *Nicklas v. Keller* (1896) 9 *App. Div.* 216, 41 *N. Y. Supp.* 172, for another New York case to the contrary, in which the court distinguished the *Stevens* Case from the one before it. And in *Mercer v. Pittsburgh, Ft. W. & C. R. Co.* (1859) 36 *Pa.* 99, the court was passing upon the power of the legislature to permit against the will of abutting lot owners the construction of a railroad upon a street that had been dedicated to public use by selling with reference to a plat. And see *Pennsylvania cases*, cited *supra*, to the contrary. The *Kimball*

Case and the Bailey Case are the two cases discussed, supra, in support of the proposition that the private easement is extinguished by the vacation of the public way.

Miscellaneous cases.

The cases here cited tend to refute the merger theory, but the facts were such that the court cannot be said to have passed directly upon the point. Of course the note is not exhaustive of this class of cases.

In *Bayard v. Hargrove* (1872) 45 Ga. 342, the dedication of the street had been accepted, and the obstruction was by one who claimed to have derived title from the city, and the action was ejectment by an abutting owner for possession, claiming that the city had abandoned the street and title thereto reverted to him. The court holds that if the public had abandoned the street, plaintiff had no title that would sustain an ejectment, but had an easement that would enable him to compel a removal of the obstructions so that he could use it for street purposes only according to the purport of his deed. But the court thought that the city had not, under the facts, abandoned it. Even if it had, ejectment is the wrong form of the action. See quotation from this case in *VAN BUREN v. TRUMBULL*, ante, 1120.

In *Leffler v. Burlington* (1865) 18 Iowa, 361, the court, in speaking of a piece of ground dedicated by the United States government as a market place for the city, said: "What, then, is the nature of the defendant's interest in the land? Simply the use of it as an easement, which is a privilege distinct from the ownership of the soil, derived not from the plaintiff, but from the government, the owner of the soil, and which alone could dedicate it to public use. And having done so, and sold lots to various purchasers with reference to a plat of the town on which said land is dedicated to the public use by a given and prescribed designation, as other public squares, streets, and avenues are, all such purchasers acquire, as appurtenant thereto, a vested right in and to the use of the same, from which they cannot be divested by the owner making the dedication, nor by the town in its corporate capacity, was it disposed so to do. (*Cincinnati v. White* (1832) 6 Pet. (U. S.) 431, 8 L. ed. 452; *Barclay v. Howell* (1832) 6 Pet. (U. S.) 498, 8 L. ed. 477; *Dubuque v. Maloney* (1859) L.R.A.1917A.

9 Iowa, 450, 74 Am. Dec. 358, and various authorities there cited."

In *Franklin County v. Lathrop* (1872) 9 Kan. 453, it was held that a municipality holding title in fee, by virtue of the former owner's recorded plat, to an open space or park, cannot change the use to which the land shall be put, to the detriment of those who have purchased adjoining property with reference to the plat and built improvements thereon, and the legislature has no power to enable it to do so. The act of the city in attempting to dispose of the land, and its procuring the passage of the enabling statute, might be considered a vacation of the dedication, yet it is held that the purchaser of adjoining property may enjoin the proposed disposal of the property.

In *Hoskins v. J. B. Wathen Bro. Co.* (1898) 20 Ky. L. Rep. 814, 47 S. W. 595, the ordinance vacating the street was passed after suit to compel the removal of an expensive building had been commenced, and the court considered the case as if the dedication had not been accepted. It was held that the purchaser of a lot abutting on the street was estopped by his silence, knowing that the building was being erected in the street, from compelling its removal, but that he might recover damages for the inconvenience caused him by the partial obstruction of the street by another grantee of the one who had platted the land. The right to use the land was treated as a contract right, and not as a right arising out of the dedication.

In *Plumer v. Johnston* (1886) 63 Mich. 165, 29 N. W. 687, the street had been vacated, which the court treated as a refusal to accept the dedication. It enunciated the principle that the purchaser's right to an easement in no way depends upon the right of the public to use the street, but the real question before it was on the ownership of the fee in the soil.

In *Foster v. Buffalo* (1882) 64 How. Pr. (N. Y.) 127, the court seems to have treated an attempt by the city to use dedicated land for a city police department building much the same as a vacation of the dedication, and it was held that the city could not deprive the abutting owners of their easement in any way except by condemnation with compensation.

In *Wheeler v. Clark* (1874) 58 N. Y. 267, there was a clause in the deeds that conveyed the fee in the soil of the road to the middle thereof subject to

the right of the public while the public had the right to travel over it. The clause was construed so as not to perpetuate the grantee's private right after the vacation of the public road.

And in the case of describing land as bounding upon highways, if the language is such as to convey "all the easements appurtenant thereto," even though grantee does not take title to the fee in the soil of the highway, his easements

therein will, as against the grantor and his assigns, survive the destruction of the public's right to travel the road, and if the road is vacated the easements survive. *Holloway v. Southmayd* (1893) 139 N. Y. 390, 34 N. E. 1047. This note is not exhaustive of cases in which the easement was claimed merely by virtue of the fact that the land is bounded by a highway as described in the deed.

J. W. M.

WEST VIRGINIA SUPREME COURT OF APPEALS.

B. O. SWOPE, Admr., etc., of Clarence Broyles, Deceased,
v.

KEYSTONE COAL & COKE COMPANY,
Plff. in Err.,

(— W. Va. —, 89 S. E. 284.)

Death — child — recovery by father.

1. For the death of a boy under fourteen years old, in consequence of his employment in a coal mine, in violation of statute, with the consent of the father, express or implied, there is no right of recovery by the administrator for the benefit of the father.

For other cases, see Death, IV. in Dig. 1-52 N. S.

Same — negligence of mother — effect.

2. A father's abandonment of his wife and children, sufferance of the procurement of decree of divorce, alimony, and custody of the children by the wife, and avoidance of payment of the alimony by flight from the state, constitute the wife his agent for the care and custody of the children, and her exposure of one of them to danger result-

ing in his death is the negligence of the father, and precludes right of recovery of damages for his benefit.

For other cases, see Death, IV. in Dig. 1-52 N. S.

Same — next of kin.

3. On the preclusion of the father from right of recovery in such case, the mother, brothers, and sisters, standing next to him in order of benefit under the statute, cannot be substituted for him as beneficiaries, so as to allow a recovery by the administrator for their benefit.

For other cases, see Death, IV. in Dig. 1-52 N. S.

Master and servant — employment of child — precociousness — effect.

4. Superior intelligence, precociousness, and experience on the part of a boy employed in violation of a statute and killed in such employment, does not bar right of recovery, in the absence of other circumstances precluding such right, but proof thereof is admissible as a circumstance tending to prove contributory negligence on the part of the boy, if such defense is interposed.

For other cases, see Master and Servant, II. a, 1; II. c. 1, in Dig. 1-52 N. S.

Death — instantaneous — bar of recovery.

5. That a death by wrongful act was in-

Headnotes by POFFENBARGER, J.

Note. — The respective rights of the parents to recover for the negligent killing of a child abandoned by the father where the mother is a pecuniary loser by the death of the child is considered in a note in L.R.A. 1916E, 122, and a note in 1 L.R.A.(N.S.) 1161. In this connection it is to be noted that the statute construed in *Swope v. Keystone Coal & Coke Co.* differs from many of the statutes authorizing a recovery for a negligent injury resulting in death, in that the damages recoverable are not limited to the pecuniary injury resulting to the beneficiaries of the injured person, but are expressly specified to be such damages as the jury shall deem to be fair and just. This distinction is pointed out in the note in L.R.A.1916E, 142, as affecting the necessity of showing a pecuniary loss to the beneficiary. In *Swope v. Keystone Coal & Coke Co.*, however, the question of pecuniary loss to the father, who had aban-

doned the deceased child, was not of importance in view of the holding that the mother of the child was guilty of such contributory negligence as to bar any right of recovery in her behalf; and that, even conceding a right to recover in the father, the negligence of the mother would be imputed to him, barring his right to recover. Upon the question of the effect of contributory negligence of a parent to defeat a recovery for the negligent killing of a child, see notes in 18 L.R.A.(N.S.) 328, and 38 L.R.A.(N.S.) 754.

And as to the imputing of negligence of custodian of child to parent to defeat recovery by or in behalf of the latter for the negligent killing of his child, see note in 32 L.R.A.(N.S.) 410.

See also *Darbrinsky v. Pennsylvania Co.* L.R.A.1915E, 781, and references in footnote.

stantaneous does not preclude right of recovery therefor.

For other cases, see Death, IV. in Dig. 1-52 N. S.

(June 1, 1916.)

ERROR to the Circuit Court for McDowell County to review a judgment in plaintiff's favor in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligent and wrongful conduct. Reversed.

The facts are stated in the opinion.

Messrs. Anderson, Strother, Hughes, & Curd, for plaintiff in error:

The statute deals with criminal rather than civil liability, and to fix civil liability the violation of the statute must be the proximate cause of the injury.

Norman v. Virginia-Pocahontas Coal Co. 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857; Burke v. Big Sandy Coal & Coke Co. 68 W. Va. 421, 69 S. E. 992; Dickinson v. Stuart Colliery Co. 71 W. Va. 325, 43 L.R.A.(N.S.) 335, 76 S. E. 654.

To make the violation of the statute the proximate cause of any injury, it must be the natural, probable, and anticipated consequence of the nonobservance of the statute.

Norman v. Virginia-Pocahontas Coal Co. 68 W. Va. 405, 31 L.R.A.(N.S.) 504, 69 S. E. 857.

The forfeited rights of the father to claim compensation on account of the death of a minor child naturally accrue to the mother.

Ft. Worth & D. C. R. Co. v. Floyd, — Tex. Civ. App. —, 21 S. W. 544; 8 Am. & Eng. Enc. Law, 898; Thompson v. Chicago, M. & St. P. R. Co. 104 Fed. 845; 17 Am. & Eng. Enc. Law, 397; Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 115; Wilson v. Banner Lumber Co. 108 Ia. 590, 32 So. 460; Schleiger v. Northern Terminal Co. 43 Or. 4, 72 Pac. 324, 14 Am. Neg. Rep. 193; Clark v. Northern P. R. Co. 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; 13 Cyc. 333; 6 Thomp. Neg. § 7050; Swift & Co. v. Johnson, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867; Riggs v. Palmer, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; Yost v. Grand Trunk R. Co. 163 Mich. 564, 31 L.R.A.(N.S.) 519, 128 N. W. 784, Ann. Cas. 1912A, 988.

If it be contended that the West Virginia statute gives an action for the benefit of deceased's estate, then the death of deceased being instantaneous, nothing can be recovered.

Kellow v. Central Iowa R. Co. 68 Iowa, 470, 56 Am. Rep. 858, 23 N. W. 740, 27 N. W. 406; Kearney v. Boston & Worcester R. Corp. 9 Cush. 108; Riley v. Connecticut L.R.A.1917A.

River R. Co. 135 Mass. 292; Mulchahey v. Washburn, 145 Mass. 281, 1 Am. St. Rep. 458, 14 N. E. 106.

Broyles, by desertion, abandonment, and otherwise, intrusted the child to the mother; she had its care and custody, and was a party to, and consented to, his illegal and wrongful employment, and the administrator cannot recover in this case, either for Broyles or the mother, whichever may be sole beneficiary.

Richmond, F. & P. R. Co. v. Martin, 102 Va. 201, 45 S. E. 894; Pratt Coal & I. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555; Gunn v. Ohio River R. Co. 42 W. Va. 686, 36 L.R.A. 575, 26 S. E. 546; Atlanta & C. Air-Line R. Co. v. Gravitt, 93 Ga. 369, 26 L.R.A. 553, 44 Am. St. Rep. 145, 20 S. E. 550; Toner v. South Covington & C. Street R. Co. 109 Ky. 41, 58 S. W. 439; Vinnette v. Northern P. R. Co. 47 Wash. 320, 18 L.R.A.(N.S.) 328, 91 Pac. 975; St. Louis, I. M. & S. R. Co. v. Freeman, 36 Ark. 41; Baltimore & O. S. W. R. Co. v. Pletz, 61 Ill. App. 161; Mills v. Cavanaugh, 29 Ky. L. Rep. 685, 94 S. W. 651; Harrington v. Butte, A. & P. R. Co. 37 Mont. 169, 16 L.R.A.(N.S.) 395, 95 Pac. 8; Westerberg v. Kinzua Creek & K. R. Co. 142 Pa. 471, 24 Am. St. Rep. 510, 21 Atl. 878; Williams v. Texas & P. R. Co. 60 Tex. 205.

When there is employment of a minor over fourteen years old, it is presumed he has the requisite capacity, and incapacity must be proved by the one who asserts it; if under fourteen incapacity is presumed, and the burden is upon him who asserts capacity.

Bare v. Crane Creek Coal & Coke Co. 61 W. Va. 28, 8 L.R.A.(N.S.) 284, 128 Am. St. Rep. 966, 55 S. E. 907; Wilkinson v. Kana-wha & H. Coal & Coke Co. 64 W. Va. 98, 20 L.R.A.(N.S.) 331, 61 S. E. 875; Hairston v. United States Coal & Coke Co. 66 W. Va. 324, 66 S. E. 473; Blankenship v. Ethel Coal Co. 69 W. Va. 74, 70 S. E. 863; Sprinkle v. Big Sandy Coal & Coke Co. 72 W. Va. 358, 78 S. E. 971.

Messrs. Sanders & Crockett and Russell S. Ritz also for plaintiff in error.

Messrs. G. W. Howard and Cook, Idtz, & Harman for defendant in error.

Poffenbarger, J., delivered the opinion of the court:

The administrator of the estate of a boy, aged eleven and one half years, killed in the defendant's mine, while working therein as an employee, in violation of the statute inhibiting the employment by coal mine operators, of boys under fourteen years of age, recovered a judgment in this action for the sum of \$7,000, as damages for injury

occasioned by the alleged negligence and wrongful conduct of the defendant. The administrator was appointed and the action brought at the instance of the father of the deceased boy, from whom the mother had obtained an absolute divorce on the 16th day of March, 1911, as well as the award of the care and custody of their four children, including the boy subsequently killed. About two years later, February, 1913, this boy, with the consent of his mother, was employed by the defendant as a trapper, and his death was occasioned in July or August, 1913, by a fall of slate while he was riding on a coal car which, for some reason, struck and knocked down a prop, in consequence of which the slate fell. The father and mother had been separated for about four years prior to his death, and divorced for a little more than two years. Although the decree of divorce required the father to pay \$25 per month as alimony, he left the state after the decree and contributed nothing to the support of the wife or the children. The principal defense to the action was a compromise agreement made by the mother and the guardian of two of the children with the defendant, on the theory of lack of right in the father to recover anything, because of his misconduct, by which the defendant agreed to pay them \$3,000. Contributory negligence on the part of the father was also relied upon as a bar to the action.

The special plea setting up the compromise, as a bar to the action, proceeds upon the theory that the statute, properly construed, denies to the father any right of recovery through the personal representative, on account of his conduct, abandonment of the boy, refusal of the fatherly care and protection to which he was entitled, and establishment of a relation between them, rendering highly improbable any pecuniary benefit to him from the boy's life, had he lived, and substitution of the mother and the sisters to the benefits conferred by the statute. In other words, the interpretation claimed would eliminate the father as effectually as if he were dead, and pass the benefit of the statute over to the mother and sisters. Whether this is the true construction of the statute or not, the plea was bad and the court properly struck it out. The alleged compromise did not include all the beneficiaries. Only the mother and the guardian of two of the children were parties to it. There was a third sister, as the plea itself shows on its face, who was not averred to have been a party to the compromise. If they are entitled to stand in the father's place, the administrator could sue for the benefit of the third and omitted sister.

L.R.A.1917A.

But the ruling of the trial court is not based upon this defect in the plea. Following the strict letter of the statute, the court held that the father might recover indirectly through the personal representative, notwithstanding his conduct, and also that, he being alive and first in order of benefit under the statute, the mother and sisters could not be substituted or recognized as beneficiaries. Under this view of the meaning of the statute, it not only rejected the plea, but also excluded evidence offered to prove the conduct on the part of the father, relied upon to bar his right. An important inquiry in the case, therefore, is the ascertainment of the meaning of the statute.

The material portions of the statute read and provide as follows: "Every such action shall be brought by and in the name of the personal representative of such . . . person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate." Code (ser. § 4410) § 6, chap. 103.

Under the general Statute of Distributions, the personal estate goes first to the children of the decedent and their descendants. If there be none such, then to his father. And, if there be no father, then to his mother, brothers, and sisters, and their descendants. Sections 1 and 9 of chapter 78 of the Code (ser. §§ 3901 and 3909).

"Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof: then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued shall be liable to an action for damages." Sec. 5, chap. 103 (§ 4409). "In every such action the jury may give such damages as they shall deem fair and just, not exceeding \$10,000." Code (§ 4410) § 6, chap. 103.

The terms of the statute are general, recognizing no exception on any ground. Like the statute of descents and distributions, it gives the benefit of the recovery to such persons as stand in certain relations to the decedent. Indeed, for the purpose of distribution of the funds, when recovered, it adopts the provisions of that statute. The right of action is given in every case in which the deceased would have had a right of action for the injury, if death had not ensued. If, in the case of any injury, death does not ensue, the injured person's right of action is not barred by the negligence of any person except himself. Negligence of a third person is not his, and does not amount to contributory negligence. Nevertheless, in

the case of the death of a child by wrongful act, the negligence of the father or other person standing in loco parentis, contributing to his death, bars the right of action, if the father or other persons standing in such relation and guilty of such negligence is the sole beneficiary. *Dickinson v. Stuart Colliery Co.* 71 W. Va. 325, 43 L.R.A. (N.S.) 335, 76 S. E. 654. Obviously, a construction working out this result is a departure from the letter of the statute. *Tiffany, Death by Wrongful Act*, § 69. Though a departure, it is sustained by the great weight of authority throughout the country. Many of the statutes of the several states, giving rights of action for death by wrongful act, differ in their terms from ours, but allowance of the defense of contributory negligence on the part of the beneficiary is always violative of their strict letter. It is accomplished by adherence to the spirit and intent of the statute, falling short of the strict letter thereof, and the interpolation of an exception by implication.

No warrant for the further exception claimed here is found in any of the authorities. On the contrary, there is some authority against it. Under the Nebraska statute, the father having precluded himself from right of recovery, by emancipation of his deceased son, before his death, the right of the mother to sue was denied on the ground that she could not be next of kin while the father lived. *Thompson v. Chicago, M. & St. P. R. Co.* (C. C.) 104 Fed. 845. The court, however, entered upon no extensive inquiry as to her right. Only this conclusion was announced in the following terms: "It is doubtless true that in a case like this the mother ought to receive the damages which would, but for the desertion and emancipation upon the part of the father, entitle him to recover, yet the court cannot extend the provisions of the statute which limits the recovery to the pecuniary loss sustained by the next of kin only. The father being the only next of kin, and having sustained no loss, the motion for a new trial is overruled."

Many decisions deny right of action to all persons except those designated by the statute. *Sparks v. Kansas City, S. & M. R. Co.* 31 Mo. App. 111; *Western U. Teleg. Co. v. McGill*, 21 L.R.A. 818, 6 C. C. A. 521, 12 U. S. App. 651, 57 Fed. 699; *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733; *Louisville & N. R. Co. v. Jones*, 45 Fla. 407, 34 So. 246; *Eureka v. Merrifield*, 53 Kan. 794, 37 Pac. 113; *Clark v. Kansas City, St. L. & C. R. Co.* 219 Mo. 525, 118 S. W. 40; *Harshman v. Northern P. R. Co.* 14 N. D. 69, 103 N. W. 412; *Haughy v. Pittsburg R. Co.* 210 Pa. 367, 59 Atl. 1112; *Vaughn v. Bunker Hill & S. Min. & Concentrating L.R.A.* 1917A.

Co. (C. C.) 126 Fed. 895; *Choctaw, O. & G. R. Co. v. Jackson* (C. C.) 182 Fed. 342. None of these cases deal with the question here raised. Most of them involved only matters of pleading and practice. Under our statute, the personal representative acts for all the beneficiaries, and nobody else can sue, wherefore such questions as are disposed of in the greater number of the cases just cited never arise in our practice.

The statute under consideration differs from that of descents and distributions in subject matter, origin, purpose, and effect. The latter merely regulates and modifies a common-law right. It deals with property, not a mere right of action. In effect it passes the property of deceased persons to their nearest relatives in succession. At the common law, there was no right of action for damages for injury occasioned by the death of a person by a wrongful act. The right was first given by an English statute known as Lord Campbell's Act. It created only rights of action in certain persons. The recovery in such an action did not become a part of the estate of the deceased person. The express purpose was compensation to such persons as were pecuniarily injured by death inflicted or caused by wrongful acts. Our first statute on the subject, passed November 9, 1863 (*Laws 1863, chap. 98*), was the same in general purpose and effect as the English statute. It provided that the amount recovered in every such action should be for the exclusive benefit of the widow and next of kin, and required the jury to give such damages as they should deem fair and just, not exceeding \$5,000, with reference to the pecuniary injury resulting from such death to the wife and next of kin. As amended and re-enacted, in part, by chapter 105 of Acts 1882, it still gives mere rights of action. The recovery is not subject to any debt or liability of the deceased, and goes to his next of kin, not by virtue of the Statute of Descents and Distributions, but by force of the act giving the right of action. The other statute is adopted only as a means of ascertaining the beneficiaries.

By the amendment made in 1882, the following provisions or language of the original statute were struck out: "Shall be for the exclusive benefit of the widow and next of kin, . . . distributed to such widow and next of kin, . . . with reference to the pecuniary injury resulting from such death to the wife and next of kin to such deceased person."

The phrase, "not exceeding \$5,000," was amended so as to read "not exceeding \$10,000." And the following was added: "And the amount so recovered shall not be sub-

ject to any debts or liabilities of the deceased."

Distribution was directed to be made "to the parties and in the proportions" provided by the Statute of Distributions of Personal Estate. Everything found in the present statute, except the enlargement as to beneficiaries, the limitation as to the amount of the recovery, and the exoneration of the recovery from debts and liabilities of the decedent, was in the old one. As originally passed, it adopted the Statute of Descents and Distributions as a means of ascertaining the next of kin, and required the jury to give such damages as they should deem fair and just. The elimination of the phrase relating to the widow and next of kin and direction of distribution to the parties and in the proportions provided in relation to the distribution of personal estate, enlarge it in respect of the beneficiaries, so as to let in the husband in case of the death of the wife. In this way, more adequate provision was made for the family of the deceased. Read in its general outlines, the statute, in its original form, had for its principal purpose the support and maintenance of the family of the deceased person. The admission of the husband as a beneficiary was an additional provision for the family. Going to the father, in case of the death of a child, and to the husband and children in case of the death of the wife, the recovery became available for family purposes in general; and, on the death of the father or husband, it would go to the children by inheritance. The wife and children are admitted to the benefit of the statute, in this indirect way, when the recovery is for the death of a child without issue, the father living. If the father is dead, they are direct beneficiaries. When he is the direct beneficiary, they are indirect beneficiaries. This incidental benefit is the only element that can be regarded as bringing them within the spirit of the act and making them direct beneficiaries when he is precluded by his conduct.

But to substitute them, under such circumstances, in furtherance of the spirit of the statute and in disregard of its letter, would be inconsistent with the theory upon which he is precluded, since he would then be an indirect beneficiary and might still profit by his own wrong. In case of the death of any of his children so admitted to the benefit of the statute, he would inherit from them such estate as they might leave, including the money so recovered. It would give a right of recovery in almost every case of the wrongful death of an infant, even though his natural guardian should have caused it deliberately and with purpose to

provide for other members of the family temporarily and for himself ultimately.

Again, while the family relation is included in the purpose of the statute and to some extent made the basis of its provisions, it is not by any means the sole or dominating consideration. It goes far beyond that relation, and applies when neither it nor one of dependency exists. However unworthy or undeserving the father may be, he takes the benefit of the statute, unless he has been guilty of conduct contributing to the cause of the death. That he is dissipated, profligate, and indifferent to his family obligations to such an extent as utterly to preclude any hope of incidental benefit to the wife and children would not prevent a recovery by the personal representative for his benefit, nor substitute them for him as beneficiaries. Moreover, the recovery may go to a relative that is not a member of the family of the decedent nor a dependent upon the value of his life. A wealthy man may recover for the death of a brother, son, or other relative.

The expressed intention of the legislature is to give the recovery to the persons who would have taken it under the Statute of Distributions, as if it had been obtained by the injured person in his lifetime and made a part of his estate, with the single exception of exoneration from liability for debts. To make the substitution here suggested would extend, not limit, the statute, by construction. Implied exceptions by way of limitation are not infrequent in the interpretation of statutes. Implied extensions of the scope of legislative enactments are rare, because of lack of any firm basis upon which to found them. Ordinarily, such an extension could rest upon nothing more than a surmise or conjecture. Implications are based upon presumptions, and, to warrant an addition to the terms of a statute or a contract by way of implication, the presumption of intention to make the instrument operate as it does with the added terms must be so strong that the contrary thereof cannot reasonably be supposed. The addition suggested here would not necessarily have a basis in the spirit or scheme of the state, for reasons stated. In some respects, it would be a departure therefrom. The gift to the father impliedly excludes all others. To substitute others by implication would make one implication overthrow another. It would be inconsistent with the theory of the father's exclusion also. In view of these results, the presumption upon which the addition would have to stand cannot be regarded as having the requisite strength.

As the father of the decedent was his natural guardian, he was under a legal, as

well as a moral, duty not only to support him, but also to protect him from danger. Though he did not actually place him at dangerous work, in violation of law, his conduct, if such as the offered evidence tends to prove, necessarily brought about that result. He may consistently be regarded as having committed the care of his children to their mother. Presumptively, he gave her cause for a divorce and custody of the children, and afterward refused to contribute anything for their support, even under a decree of the court. He at least permitted her to take his place as custodian of the children, wherefore her negligence in the care of them is imputable to him. She placed her son at dangerous work, as a means of obtaining the sustenance he refused to provide, in disregard of his legal duty. It is not perceived that the method by which he committed the children to her care or his motive in so doing is important. Omission of duty often constitutes negligence, and an agency may arise out of conduct. He caused her to take his place and act for the children in his stead. That relation makes her negligence his and bars his right under the statute. *Richmond, F. & R. Co. v. Martin*, 102 Va. 201, 45 S. E. 804; *Bellefontaine R. Co. v. Snyder*, 24 Ohio St. 670; *Beach, Contrib. Neg.* § 131.

In our opinion, the evidence excluded by the court should have been admitted.

That the death was instantaneous does not preclude right of recovery. Under such circumstances, it has been allowed in numerous instances.

The boy's superior intelligence, precocious-

ness, and experience would not deny right of recovery, if established. His employment in violation of the statute was an act of negligence which alone warrants recovery, if the conduct of the sole beneficiary of the statute has not barred right of recovery and the decedent was not himself guilty of contributory negligence. The construction put upon the statute in *Norman v. Virginia-Pocahontas Coal Co.* 68 W. Va. 405, 31 L.R.A. (N.S.) 504, 69 S. E. 857, permits such defense in cases of this kind. As tending to prove contributory negligence on the part of the boy, not to avoid the legal consequence of the violation of the statute, the evidence of his capacity to appreciate and avoid the danger of the employment is admissible.

In the absence of such contributory negligence, the causal relation between the violation of the statute and the injury is clear and distinct. Employment in disobedience of the statute is negligence and prima facie the proximate cause of the injury, however superior the boy may have been. He did not assume the ordinary risks of the employment, not even that of injury by the negligence of fellow servants.

As the evidence will be entirely different on the new trial, if one shall take place, review of the rulings on the instructions is deemed unnecessary. They were governed by the erroneous theory of the case, adopted by the court, and, of course, are wrong in almost every instance.

For the reasons here stated the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

E. P. BROWN et al., Plffs. in Err.,
v.

UNITED STATES.

(233 Fed. 353.)

Witness — competency — conviction in other jurisdictions.

Conviction in a state court of an infamous crime does not render one incompetent as a witness in a Federal court sitting in the same state.

For other cases, see *Witnesses, I. a*, in *Dig.* 1-52 N. S.

(May 12, 1916.)

ERROR to the District Court of the United States for the Middle District

Note. — For conviction in another jurisdiction as affecting competency of witness, see annotation following this case, post, 1138.
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of Tennessee (McCall, District Judge) convicting defendants of crime. Affirmed.

The facts are stated in the opinion.

Argued before Warrington and Knappen, Circuit Judges, and Killits, District Judge.

Mr. Lewis Tillman for plaintiffs in error.

Messrs. Lee Douglas and Morton B. Adams, for defendant in error:

The crime for which the witness, Johnson, was sentenced in the state court was not known to the common law, but is purely statutory, and hence in 1789, the date of the passage of the Judiciary Act, the witness would not have been infamous or incompetent to testify in any court.

6 Cyc. 172, 203, 242; May, *Crim. Law*, 3d ed. pp. 250, 251; 2 Bishop, *Crim. Law*, 2d ed. §§ 107, 862; *State v. Dozier*, 73 N. C. 117; *Allen v. State*, 12 Lea, 424; *United States v. Sims*, 161 Fed. 1008.

Assuming, for the sake of argument, that the witness, Johnson, was convicted and

sentenced in the then courts of North Carolina for an infamous crime under the common law as it existed in 1789, this cannot have any effect upon the disqualification of his testimony in a court of the United States.

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588; Moore v. Illinois, 14 How. 17, 14 L. ed. 307; Fox v. Ohio, 5 How. 432, 12 L. ed. 222; United States v. Barnhart, 22 Fed. 291; Tennessee v. Davis, 100 U. S. 257, 25 L. ed. 648; North Carolina v. Kirkpatrick, 42 Fed. 692; Re Neagle, 5 L.R.A. 78, 14 Sawy. 232, 39 Fed. 833; Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; The Antelope, 10 Wheat. 122, 6 L. ed. 281; Gwin v. Breedlove, 2 How. 29, 11 L. ed. 167; Huntington v. Attrill, 146 U. S. 673, 36 L. ed. 1123, 3 Sup. Ct. Rep. 224; Flash v. Conn, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; Com. v. Green, 17 Mass. 515; Dickson v. Dickson, 1 Yerg. 110, 24 Am. Dec. 444; United States v. Sims, 161 Fed. 1008; 1 Greenl. Ev. 15th ed. § 375; 1 Whart. Crim. Ev. 10th ed. § 363; Underhill, Crim. Ev. 2d ed. §§ 206, 208, 209; Wilcox v. State, 3 Heisk. 110; Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; Earthman v. Jones, 2 Yerg. 486; State v. Landrum, 127 Mo. App. 653, 106 S. W. 1111; Sims v. Sims, 75 N. Y. 466; National Trust Co. v. Gleason, 77 N. Y. 400, 33 Am. Rep. 632; Samuels v. Com. 110 Va. 901, 66 S. E. 222, 19 Ann. Cas. 380.

It appears that Johnson was either pardoned, or served his term of imprisonment, which, under the common law as it existed in 1789, amounted to, and was, a pardon, and therefore he was, all other considerations aside, a competent witness.

United States v. Sims, 161 Fed. 1008; Benson v. United States, 146 U. S. 336, 36 L. ed. 996, 13 Sup. Ct. Rep. 60; 1 Greenl. Ev. 15th ed. § 326, chap. 2.

Killits, District Judge, delivered the opinion of the court:

Plaintiffs in error, E. P. Brown and J. R. Harrell, were convicted after trial upon an indictment in four counts, three of which charged assault and battery in various forms of allegation upon one Clifford Johnson, committed on the grounds pertaining to the postoffice building at Nashville, Tennessee, and over which the United States had exclusive jurisdiction. The fourth count charged that defendant "unlawfully did knowingly and wilfully obstruct and retard one Clifford Johnson, . . . a regularly employed driver of a regular mail wagon, . . . while the said L.R.A.1917A.

Clifford Johnson was then and there engaged in transferring and delivering the United States mail from a mail wagon to the postoffice of the United States at Nashville aforesaid." The only alleged error presented for the consideration of this court is that predicated upon the admission of the testimony of Johnson himself. It is conceded that Johnson's evidence is indispensable to conviction, and that, if he were not a competent witness, the case must fail.

It appears from the record that in 1905 Johnson was convicted in a state court at Nashville upon an indictment reading as follows: "The grand jurors for the state of Tennessee duly elected, impaneled, sworn, and charged to inquire for the body of the county of Davidson, and state aforesaid, upon their oath aforesaid, present: That Clifford Johnson, of said county heretofore, to wit, on the ——— day of June, 1905, with force of arms, in the county aforesaid, unlawfully, feloniously, and violently, did break and enter in the daytime the dwelling house of W. M. Frank, with the unlawful and felonious intent then and there and therein to commit a felony, to wit, larceny, and did then and there and therein steal, take, carry away one ring of the value of \$6, the property of W. M. Frank, of said county, then and there being found, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state."

Upon his conviction the following judgment was imposed: "It is therefore considered by the court that defendant for his said offense shall be confined in the state penitentiary for a period of five (5) years, commencing on the day of his delivery to the keeper thereof, subject to the rules and regulations of said institution, that he be rendered infamous, incompetent as a witness in any court of justice in the state, incapable of exercising the election franchise, or of holding any office of honor, profit, or trust in the state."

It is urged in behalf of plaintiffs in error that this record rendered Johnson wholly incompetent as a witness for the government, because of the rule that the competency of witnesses in criminal cases is to be determined by the law of the state in which the Federal court is sitting, as the state law was when the Judiciary Act of 1789 was passed (Act Sept. 24, 1789, chap. 20, 1 Stat. 73). United States v. Hall (D. C.) 53 Fed. 352; United States v. Reid, 12 How. 361, 13 L. ed. 1023; Logan v. United States, 144 U. S. 263-302, 36 L. ed. 429-442, 12 Sup. Ct. Rep. 617.

It is conceded in this case that the common law is the rule of decision. North

Caroline had adopted the common law prior to the Revolution, and, when the Judiciary Act was passed, the country now comprising the state of Tennessee was a part of North Carolina. By common law petit larceny was a felony, but house breaking in the daytime was not even a crime. Judgment upon conviction of a felony made the convict infamous, with the result that he was incompetent as a witness until he was relieved from the burden of infamy in some approved way.

A question was raised whether the indictment charged a crime conviction of which rendered the convict infamous at common law, but the government insists upon Johnson's competency upon a broader ground than that of a technical insufficiency of pleading. This is that the testimonial disqualification is operative only within the jurisdiction of the sovereign whose court pronounced the judgment culminating in the conviction of an infamous crime; in other words, that only a judgment upon conviction in a Federal court of a crime infamous at common law works incompetency in the Federal courts.

Greenleaf, Evidence, vol. 1, § 375, thus speaks of the rule settled in his day, and yet unweakened by criticism: "We have already remarked that no person is deemed infamous in law until he has been legally found guilty of an infamous crime. But the mere verdict of the jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify. And it must appear that the judgment was rendered by a court of competent jurisdiction."

This results from the distinction between disqualification arising from deficiencies of mind or maturity or voluntarily assumed, as in coverture or because of views on religious questions, and that imposed by positive law, the latter not being regarded established until a solemn judicial determination is had. Chamberlayne, Ev. § 3664, and cases cited. Greenleaf further says (Ev. § 376): "Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness in the courts of this country, is a question upon which jurists are not entirely agreed. But the weight of modern opinion seems to be that personal disqualifications not arising from the law of nature, but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country." L.R.A.1917A.

try other than that in which they originated."

This doctrine is supported by reasoning so cogent and conclusive, offered by the supreme judicial court of Massachusetts though Chief Justice Parker (Com. v. Green, 17 Mass. 515, 539-548) that any other seems of little weight. At any rate, it is but the application of the principle, universally adhered to, that the penalties adjudged by one jurisdiction will not be enforced by another. This, as elsewhere, was early the rule in Tennessee (Dickson v. Dickson, 1 Yerg. 110, 24 Am. Dec. 444), and, as a general proposition, is, of course, the rule in Federal courts.

The principle that, until Federal legislation is had to modify the practice, "the rules of evidence in criminal cases" in the Federal courts "are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed," is reasoned out by Chief Justice Taney (12 How. 364, 365, 13 L. ed. 1024, 1025) in this language: "But neither of these acts make any express provision concerning the mode of conducting the trial after the jury are sworn. They do not prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined. Yet, as the courts of the United States were then organized, and clothed with jurisdictions in criminal cases, it is obvious that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States. And it is equally obvious that it must have been the intention of Congress to refer them to some known and established rule, which was supposed to be so familiar and well understood in the trial by jury that legislation upon the subject would be deemed superfluous. This is necessarily to be implied from what these acts of Congress omit, as well as from what they contain. . . . And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts."

As to states whose territories were not within the boundaries of the Union as they were in 1789, the rule is that the law of the state when it was admitted governs. Logan v. United States, 144 U. S. 263-303, 36 L. ed. 429-443, 12 Sup. Ct. Rep. 617.

The language above quoted from the decision in Reid's Case carries no stronger suggestion than that a rule of decision, simply, is established; it is not potent to

impose upon trial courts an obligation to adopt the results reached by state courts in any specific instance, through the application of the local rule of practice which the local Federal court should, in instances before it, make its own. The effect of the doctrine, summarized by professor Greenleaf, that it is nothing less than the judgment of conviction making infamy, which is effective to disqualify, part of the penalty, is such that, if we hold that a court of another sovereignty than that of the tribunal rendering the judgment, must also, ipso facto, regard the convict as disqualified, we are not simply applying a rule of decision, but are enforcing a penal judgment.

Federal practice enforces the principle that a judgment of infamy has, at the best, no extraterritorial applicability. In *Logan v. United States*, supra, it was held that one convicted of perjury in North Carolina, and thereby incompetent as a witness in that state, was not incompetent in the Federal court of another state, although therein the common-law rule of incompetency because of conviction for an infamous crime also prevailed when the latter state was admitted to the Union.

In this *Logan Case*, tried in the northern district of Texas, two convicts of the crime of perjury were held competent as witnesses notwithstanding the common law in force when Texas was admitted,—one, Martin, because to exclude him would be to give extraterritorial effect to a penalty adjudged by the courts of North Carolina; the other, Spear, because (144 U. S. 303, 36 L. ed. 443, 12 Sup. Ct. Rep. 617) his disability had been removed by the pardon of the governor of Texas, in a court of which state he was convicted. Nothing in this decision militates against the contention of the government in the instant case that the rule of exclusion applies in Federal courts to Federal convicts only. The point was not before the court. For Spear's competency the court manifestly did not look beyond the fact of his pardon, which, the court had already held (*Boyd v. United States*, 142 U. S. 450, 35 L. ed. 1077, 12 Sup. Ct. Rep. 292), was sufficient to remove the disability.

As it appears from the above quotation the principle of *United States v. Reid* was not announced by Chief Justice Taney in language which affects the government's contention, and the question is therefore without adjudication so far as the Federal courts are concerned, and turns wholly upon the consideration whether state and Federal courts, sitting in the same state, and having the same territorial jurisdiction,

are foreign to each other in the sense that the courts of two states are foreign.

The essential distinction between the government of the United States and that of any state, as two independent political identities, has been frequently pointed out in the decisions of the Supreme Court. *Fox v. Ohio*, 5 How. 432, 12 L. ed. 222; *Moore v. Illinois*, 14 How. 17, 14 L. ed. 307; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717. The last exposition of the subject is found in *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14. The rule arises most frequently, as in cases just cited, where there is an apparent conflict of law between a state and the Federal government touching crimes. The absolute separation of the two sovereignties, with independent jurisdictions unburdened with responsibilities one to the other, save as occasionally the paramount authority of the Federal power is called into operation, is certainly emphasized by the fact that, upon the same state of facts, a wrongdoer may be called upon to answer to both governments. A similar line of cases exists asserting the independence of the Federal judiciary in its jurisdiction of civil causes of action. We need not cite other than Supreme Court cases (*Stanton v. Embury*, 93 U. S. 548, 23 L. ed. 983; *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. ed. 383, and *Hunt v. New York Cotton Exch.* 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529), all to the point that the pendency of a prior suit in a state court is not the ground of abatement of an action on the same state of facts between the same parties in the Federal court, or vice versa. The decisions turning on the principle that the two courts are foreign as the creatures of different governments. The language of these decisions leaves no room for the feeling that any interdependence exists between a state and the Federal government which affects the identification of either as a sovereignty entirely apart from the other. Whenever a decision seems to bridge this distinction it will be found that its aim and effect is either to adopt a rule of decision, or, without affecting the principle of distinct and independent sovereignties, to harmonize matters of practice with the practice of local state courts as far as possible under Federal legislation.

The state courts have already begun to assert their independence of Federal courts within their own territorial jurisdictions on precisely the point now under consideration by us; that is, it has already been decided that, although the state withholds testimonial capacity from one convicted of

an infamous crime in its own court, it will not to that end give effect to a judgment of a local Federal court. This was the decision of the supreme court of appeals of Virginia in *Samuels v. Com.* 110 Va. 901, 66 S. E. 222, 19 Ann. Cas. 380. In this case, the court held that one offered as a witness who had been adjudged guilty of perjury by a Federal court sitting in Virginia was not disqualified thereby as a witness in the state court, although by statute, as well as by common law within Virginia, one convicted of perjury was incompetent to testify, the court holding that very clearly neither the state statute nor the Federal statute contemplates imposing or could impose the punishment prescribed by the other, and that the courts of neither can take cognizance or punish violations of the statutes of the other, citing *Re Loney*, 134 U. S. 372, 33 L. ed. 940, 10 Sup. Ct. Rep. 384.

It doubtless has never been thought that a court of one sovereignty within the state might entertain jurisdiction to try an offense against the other sovereignty, but in *Re Loney*, supra, the distinction was carried further, for there it was held that the courts of a state have no jurisdiction of a complaint for perjury in a contested election case involving a seat in the Congress of the United States, although the false swearing was before a notary public of the state, the court holding that the "power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had."

The foregoing and other decisions illustrate how consistently Federal courts are applying, in various states of fact, the rule of the Supreme Court announced by Justice Johnson in *Houston v. Moore*, 5 Wheat. 1-69, 5 L. ed. 19-35, that: "In a government formed like ours, where there is a division of sovereignty, and of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule that each government should be left to enforce its own penal laws, in its own tribunals."

In *Ex parte Wilson*, 114 U. S. 417, 20 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283, where the question was whether one imprisoned after conviction upon information was suffering the penalty of an infamous crime and, consequently, under the Fifth Amendment, could not have been held to answer without presentment or indictment by a grand jury, the court, discussing the incidents of a conviction for an infamous crime, said (114 U. S. page 423): "Whether a convict shall be permitted to

testify is not governed by a regard to his rights or to his protection, but by the consideration whether the law deems his testimony worthy of credit upon the trial of the rights of others."

The consideration, therefore, whether a Federal court should permit any witness to testify is to be referred only to principles interesting that court in its effort to administer justice. It would seem that its freedom in this respect should not be controlled by the judgment of any court other than one within the Federal jurisdiction as to any question not governed by established principles or legislative enactment.

Obviously the courts of one state in the Union are regarded as "foreign" to the courts of another, not because of geographical separation, but because they are instrumentalities of independent sovereignties. A district court of the United States sitting in one state cannot be said to be geographically "foreign" to the state courts of another state, for the reason that the sovereignty of which it is a part has geographical extension over the territory of the other state. It is limited, to be sure, to a territorial jurisdiction which may not include the situs of a state court, but it is nevertheless an integral part of a judicial system which extends over the situs of every state court. It is therefore "foreign" to the court of a state beyond its territorial limitations only because its jurisdiction depends upon the question of sovereignty, and it obtains its authority from a sovereign distinct from and independent of that creating the state court. For that reason, for instance in the case cited above, a Federal and a state court of the same state are free, each independent of the other, to punish as an offense against their respective sovereignties, the same act which serves as the predicate of a crime within the definition of the laws of the two sovereignties, respectively, wherefore, technically, at least, the actor may be liable to double punishment.

Therefore, recurring to the case of *Logan v. United States*, supra, we see no reason whatever to doubt, had the question been raised before it, that the Supreme Court would have ruled that, although Logan was being tried in a Texas Federal court, Spear, as a convict of an infamous crime by the judgment of a local state court, was as competent to testify as was Martin, a convict of an infamous crime by the consideration of a court in another state. For the Federal court of Texas to have enforced the penalty of Spear's conviction by the state court of Texas, had the pardon not intervened, in our judgment, would not have been the application of any different

principle than would have been employed had it refused Martin's testimony because of his conviction in another state. That the Texas Federal court had the same geographical or territorial jurisdiction enjoyed by the state court of Texas brought the former into no closer association with the latter, so far as the question now before this court is concerned, than the Federal court of Texas enjoyed with the state court of North Carolina.

It seems to us that, to the doctrine that a judgment of conviction, not mere proof of guilt, is indispensable to disqualification, there is the necessary corollary that the application of the disqualification is left only to the tribunals of the jurisdiction which created it.

The question made by the government in this case is, as we have suggested, one not concluded by specific adjudication; an answer to it favorable to the government's contention comports with the dignity and independence of the Federal courts, and is in line with the general principle that courts of one jurisdiction will not enforce the penalties of those of another. The tendency of the courts, wherever possible, is "to enlarge the domain of competency and to submit to the jury for their considera-

tion as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion." *Benson v. United States*, 146 U. S. 325, 336, 337, 36 L. ed. 991, 996, 13 Sup. Ct. Rep. 60, 64. "This change," says the Supreme Court in this case, "has been wrought partially by legislation and partially by judicial construction. . . . The spirit of this legislation has controlled the decisions of the courts, and steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed."

Not simply to follow this tendency, but because the considerations above referred to seem compelling, we conclude that the rule of the *Reid Case*, announced by Chief Justice Taney, applies only to an instance where the witness tendered is under the conviction of a crime against the United States of that character which at common law as established in 1789 rendered infamous one adjudged guilty, and that the rule does not disqualify a witness who is under but the judgment of a state court.

For this reason, without passing on other questions raised, the judgment of the District Court is affirmed, and the petition in error dismissed.

Annotation—Witnesses: conviction in another jurisdiction as affecting competency of witnesses.

As to conviction or commission of crime or misconduct by attorney in another state as ground for disbarment, see annotation to *State v. Ebbs*, 19 L.R.A.(N.S.) 892.

Introduction.

With respect to the question whether a conviction of a crime in one state which renders the person convicted incompetent as a witness in that state precludes him from testifying in another state, a conflict exists. By the weight of authority it is held that such a conviction will not render the person incompetent in the second state, and this result has been reached in both civil and criminal cases. The decisions reaching this conclusion are based mainly on the reasoning that the penal laws of one jurisdiction will not be enforced in another, and that one state with respect to another is a foreign jurisdiction. The view was also taken in the leading case, reaching this conclusion, that the full faith and credit clause of the Federal Constitution does not apply to criminal cases. Some courts, however, have held that a conviction in one state which renders the convict incom-

petent as a witness in that state will also render him incompetent in another state if a conviction of a like offense in the latter state would have such an effect. These cases reason that it is the crime which renders the person incompetent, and not the conviction, and that the use of the judgment to prove the crime does not give effect to the penal laws of another jurisdiction.

The rule that a conviction in one jurisdiction will not render the person convicted incompetent in another jurisdiction has been applied in the Federal courts, where in criminal cases conviction in a state court has been held not to render the person convicted incompetent in the Federal courts; and this has been held although the conviction was in the same state in which the Federal court was sitting. The question of competency in civil cases in the Federal courts, however, is regulated by statute. In some of the states statutes have been passed which govern the question under consideration.

Conviction in one state as affecting competency in another state.

The leading case holding that a con-

viction of a crime in one state does not render the party convicted incompetent as a witness in another state is *Com. v. Green* (1822) 17 *Mass.* 515. Several reasons are given by the court in this case in justification of their conclusion. The first of these is that the objection to the witness on account of infamy must be supported by a record of the judgments of the other state and the difficulty of settling this in the course of a trial, and also in connection with this the court mentioned the diversity of ideas as to criminal conduct in different states. With reference to these grounds the court said: "If New York is to be considered on the footing of a foreign state, the difficulty of giving such effect to a conviction seems insuperable. The objection to the witness on account of infamy must be supported by a record of the judgment. What is a record of a foreign state, and how it shall be authenticated, are questions of delicacy and difficulty, which it would be almost impossible to settle in the course of a trial, which must always proceed with as little interruption and delay as possible. Whether the facts which would be here deemed an infamous crime are the same which constitute the like offense in the country from which the record comes, the court would have no means of knowing with certainty. The crime of treason is known to be different in different countries; what is felony, also, in one country, may not be felony in another; and it is competent to the legislature of every nation to attach disabilities to the commission of offenses; which, by the laws of other nations, may be wholly without such consequences. Thus, one state may enact that the detention of another's property after demand by the owner shall be deemed and taken to be larceny, and punished as such; and that a general description of the offense in the indictment should be sufficient; so that a foreign court could never know, by inspection of a copy of a record, what were the ingredients of the crime which had been punished. So, also, the non-payment of a debt may be branded with infamy by the laws of any country, and designated by some term usually denoting the crimen falsi; and this class of crimes may be enlarged so as to comprehend transactions which in other countries are considered venial, or, at least, not criminal. If the common law were unchangeable, the courts of countries which adopt it as part of their code might know with certainty the nature

and character of crimes; but while every country has its legislature, which has a right to alter or repeal the common law, such certainty cannot be attained. Treason, by the common law, renders the convict infamous; but many acts are made treason by positive enactments in one country, which would not be so in another."

As a further reason for their holding, the court in this case stated that the penal laws of a country do not reach beyond the jurisdiction where they are established, and that to hold a person incompetent on account of a conviction in another state would give effect to the conviction and enforce the punishment, and thus the penal laws of one country would reach into others, contrary to the principles stated. The court said: "It would seem to be consistent with sound principles, also, that wherever there is a crime or punishment remaining in force, there should be a power of pardon, but the act of pardon cannot operate upon an offense committed under another jurisdiction, nor can it extend beyond the jurisdiction of the offended sovereign, so that one who has once exposed himself to a punishment which renders him infamous in the country where the offense was committed must be perpetually stigmatized if he removed into another country. This is sufficient to show the reasonableness of limiting the penal effects of crime to the country whose laws have been violated."

The court here further held that the full faith and credit clause of the Federal Constitution had no effect whatever on judgments in criminal suits, and that the judgments of one state in a criminal case would not be given effect in another, and said: "We do not think that this follows from any principles yet established; for there is a manifest distinction between the judgments of another state in civil actions affecting property only, and judgments on criminal prosecutions; and there is reason to believe that the provision in the Constitution had respect to the former only. It must be supposed that, when the people declared in the Constitution that full faith and credit should be given to the judgments of each state respectively, they must have intended such judgments as could, by the aid of courts of states, other than those in which they were rendered, be carried into execution and effect; as may be done with respect to judgments in all civil actions. But it is manifest that a judgment on a crim-

inal prosecution cannot be carried into effect beyond the jurisdiction of the state within which the offense was committed; or, if this might be done by virtue of any act of Congress, founded upon such a construction of the constitutional provision, it is clear that such power has never been challenged; and it is hardly possible to conceive that such a construction will ever be adopted, so long as any portion of sovereignty remains with the states. For the right and duty of punishing offenses must necessarily be limited to the authorities against which the offenses have been committed. Indeed, the provision in the 2d section of the 4th article of the Constitution of the United States is wholly inconsistent with the supposition of such a power. That section provides that 'a person charged in any state with treason, felony, or other crime who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.' This is a perfect recognition of the independent sovereignty of the states, in regard to crimes committed within their territory, as well as of the local nature of crimes and punishments. If the faith and credit to be given to judicial proceedings relates to criminal as well as civil judgments; and that faith and credit, according to the act of Congress, as construed by the Supreme Court of the United States, means that the judgment shall have the same effect in the state in which it is produced as in that in which it was rendered, it would follow that an unexecuted sentence in one state might be executed in another; which never was intended. On the contrary, the Constitution has merely made that obligatory between the states which between nations entirely foreign to each other was done from comity, viz., the delivering up of criminals who have fled from justice. I think this proves satisfactorily that the clause in the Constitution of the United States relating to the faith and credit to be given to judgments has no effect whatever on judgments upon criminal suits; and that in this respect the relation of the states to each other is left wholly unaffected by the Constitution."

And in conclusion the court said: "For the foregoing reasons and others which it would require too much time to enumerate, we have come to the opinion that there is no difference in the effect of a conviction in regard to the competency

of a witness between any state in this Union and any foreign state, and that in neither case is the witness to be excluded on account of such conviction."

And in *Sims v. Sims* (1878) 75 N. Y. 466, which was an action of contract, it was held that the conviction of a person in Ohio of an offense which rendered him incompetent as a witness there did not render him incompetent in New York. The court relied upon the reasoning in *Com. v. Green* (Mass.) supra, and the statement in *Greenleaf on Evidence*, that the weight of modern opinion is that personal disqualifications arising not from the laws of nature, but from positive law, especially such as are of a penal nature, are strictly territorial, and cannot be enforced in another country, and said: "I think this doctrine applicable to the question now in hand, and that there is nothing in the Constitution of the United States which prevents such application, or requires that the personal disabilities, such as incompetency to testify or to vote, which may be imposed upon a person convicted of crime in one state should follow him and be enforced in all the others. If such were the operation of the constitutional provision, the qualifications of witnesses called in our courts and of voters at our elections might be made to depend upon the laws of other states, instead of our own."

In this case in answer to the contention by the New Hampshire and North Carolina courts, that it was the crime, and not the judgment, which incapacitated the witness; and that the incapacity was not prescribed as a punishment for the crime, but because by the commission of it the criminal had shown himself a person unfit to be trusted, and that the judgment was required only for the purpose of establishing the fact of the crime by conclusive evidence, the court said: "Assuming that this constitutional provision applies to convictions for crimes (which is denied in the Massachusetts case) the answer to the position stated is twofold. First, that whatever reason may lie at the foundation of the law, the law is that the sentence, and not merely the commission of the crime, disqualifies the witness. The crime may be admitted or proved ever so conclusively, even by record, without having that effect. A judgment rendered in a civil action to which plaintiff, defendant, and witness were all parties, finding the witness guilty of forgery, grand larceny, or any other felony,

would not disqualify. Such a record might exist, as in cases of justification of libel, actions to cancel forged instruments, etc. The disability to testify can only follow conviction and sentence in a prosecution for the crime. Secondly, a record of conviction for a crime is not conclusive evidence in a civil action, of the facts upon which it was based. There is a great weight of authority against its being admissible at all, except as evidence of the fact of conviction, where that fact is material. To give to a foreign record of conviction the effect of conclusive evidence in a civil action, of the fact that the party convicted committed the crime, would be to give it greater credit than the judgment of one of our own courts would be entitled to. Greenleaf states it as a general rule that a record of conviction of a crime is not admissible in evidence in a civil action, to prove the fact on which it was rendered."

The decision in this case was held controlling in *National Trust Co. v. Gleason* (1879) 77 N. Y. 400, 33 Am. Rep. 632, where in an action for money had and received it was held that a conviction of felony in Massachusetts did not render the person convicted incompetent as a witness in New York. The court stated that they did not think that the circumstance that at the time the person was examined as a witness the term of his sentence had not expired distinguished the case from that of *Sims v. Sims* (N. Y.) supra, where apparently the witness's term had expired.

In *Langdon v. Evans* (1883) 3 Mackey (D. C.) 1, the conviction of one for attempting to induce another to commit perjury in New York was held not to render him incompetent to testify as a witness in the District of Columbia, as New York was considered as a foreign jurisdiction. This was an action of replevin. The court stated that it did not appear whether the offense charged against the witness was a felony in the state where the conviction was had, but that they did not see any reason to doubt that the same rule would apply if it were only a misdemeanor.

A statute of the state where the conviction was had was read in this case, which declared that a person convicted of a crime or misdemeanor in that state was, notwithstanding, a competent witness in a civil or criminal action; and the court said that it would be a questionable exercise of judicial power to hold a person incompetent to testify because of his conviction in a jurisdiction

where that conviction would not be held to disqualify him as a witness.

In *Goldstein v. State* (1914) 75 Tex. Crim. Rep. 390, 171 S. W. 709, the court stated that the question whether a conviction for a felony in another state would render a person incompetent as a witness in Texas was governed by their statutes; but that if they had no statutes on the question, such a conviction would not render the person convicted incompetent as a witness in Texas, and cited as authority, *Com. v. Green* (1822) 17 Mass. 515; *National Trust Co. v. Gleason* (N. Y.) supra; and *Logan v. United States* (1892) 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617, infra.

The leading case taking a contrary view to that laid down in *Com. v. Green* (Mass.) supra, is *Chase v. Blodgett* (1838) 10 N. H. 22, where in an action of assumpsit it was held that a conviction in Massachusetts of a crime infamous by the laws of that state and equally so by the laws of New Hampshire rendered the person convicted incompetent to testify in the latter state in the same manner as it would if the conviction had taken place in that state. The court here stated that the principal argument in *Com. v. Green* against admitting the records of another state to exclude the witness was that a disparagement of character and incompetency to testify were a part of the punishment of the crime, and that to hold a person incompetent on account of such conviction was to give effect to it and enforce the punishment, and that by doing this the penal laws of the other state were given effect; and that it was stated in that case that if the penalty did not extend beyond the jurisdiction against which the crime was committed, then incompetency which was the effect and consequence of the crime and part of the penalty could not reach beyond the limits of the state whose laws had been violated. The court said: "The inquiry arises at once, whether the rejection of a witness because he has been convicted of an infamous crime is, in truth, any part of the punishment of the crime. The punishment of the crime is prescribed by the law, and is inflicted in pursuance of the sentence. The judgment of the law, as made up in the record of the sentence, shows the penalty and punishment. But incapacity as a witness, where the incapacity results from the common law, forms no part of the sentence. It is not a penalty prescribed for the punishment of the crime, and is not adverted to in the

judgment, or found in the record. A rejection, when offered as a witness, may, it is very true, cause greater mental suffering to the party than all the punishment denounced in the statute or ordered in the judgment; but this suffering is incidental. It is not inflicted as the judgment of the court in which the conviction was had, or of that which rejects the witness. The witness is excluded, not to punish him for the crime he has committed, but because, by the commission of it, he has shown himself a person unfit to be trusted to give testimony affecting the rights of others (2 Starkie, Ev. 714); and the exclusion, it seems to us, is no more to be regarded as a punishment of the individual, than the exclusion of a person on account of his disbelief in the existence of a Supreme Being is to be regarded as a punishment of his atheism. The rejection is for the protection of the rights of the party against whom he is called to testify. On this view, if faith and credit is given to the matter appearing by the judgment, and it is there shown that the witness has been convicted, in another state, of a crime infamous by the laws of that state, and one which, if committed here, would have excluded him from testifying,—it may well be asked, How much more fit is he to be heard, than he would have been had the conviction been in our own courts? How much greater is the probability that his statements will bear the impress of truth? How much safer are the rights of the party?"

In response to the suggestion in *Com. v. Green*, that the full faith and credit clause of the Constitution must have intended such judgments as could, by the aid of the courts of other states, be carried into execution and effect, and had no relation to criminal proceedings, the court said: "It is perhaps unimportant to the settlement of this case; but we are of opinion that this would be too narrow a construction. It was doubtless not intended to require the courts of one state to enforce the sentences of those of another against criminals. The punishment of crime is to be inflicted in the jurisdiction in which it is committed; and the judgment of a court of one state, against an offender, cannot have such faith and credit as to form the basis of a new indictment, in another state, or of an order for carrying the judgment into effect there. But the criminal proceedings in one state may, in many instances, form the only justification for acts

which would otherwise be trespasses of an aggravated character; and when so offered, in the courts of another state, they are entitled to as much faith and credit, and are as much within the Constitution and the act of Congress, as any other judicial proceedings. And so of any other cases where such proceedings may lawfully be offered in evidence in a foreign government or another state. There is nothing in the terms of the Constitution or law to lead us to a different conclusion."

It was also argued in this case against the admission of the conviction to exclude the witness, that where there is a crime or punishment remaining in force there should be a power of pardon; but in answer to this the court stated that the power of pardon existed in the government where the crime was committed, and that evidence of reformation could be offered to the executive there in all cases and the party restored to his competency; that although it might not be as convenient to secure a pardon as if he had remained within the jurisdiction where the judgment was rendered, yet there should be no well-founded apprehension of a refusal because he had removed from the state; and the court said that, on the other hand, if a party thus convicted might relieve himself from the disability by emigration to another state, he had an encouragement to change his domicile although he might not have a disposition to change his habits.

And in *State v. Candler* (1824) 10 N. C. (3 Hawks) 393, in a criminal case, a witness who had been convicted of forgery in another state was held incompetent to testify. The court here took the view that under the full faith and credit clause of the Constitution the judgment of the other state was conclusive evidence that the person offered as a witness had committed a crime which rendered him incompetent, and stated that the fallacy of the reasoning in the cases holding a contrary rule was that they supposed it was the conviction which disqualified, when in fact it was the crime which had that effect, and said: "In doing this we are not enforcing the penal laws of other states, nor the penal laws of our own state, for this is inflicting no punishment on the witness; but are simply carrying our own laws into execution, which declare that persons who have been guilty of the *crimen falsi* are entirely unworthy of belief; and we take as evidence of such fact the judicial proceedings of

our sister state, which the Constitution of the United States declares shall have full faith and credit in each state. If the exclusion of men convicted of such acts from giving evidence were a punishment, then he ought to have been received, for truly he has not offended against the laws of this state, and we have, therefore, no right to punish him. But it is a duty which we owe to those who are to be affected by the judgments of our courts, that the courts should be kept clear of such depravity, and that no proceedings should be founded upon it. It is asked, What if the governor, or proper authority of Tennessee, should have pardoned him? That question has not arisen in this case; but as we trust to the judicial proceedings of Tennessee to fix the fact of his guilt, perhaps we should also trust to the proper authority in doing it away for some proper cause; for that there was a proper cause is a legal presumption which cannot be controverted either here or there. It is farther said that no such precedent can be found in the English decisions. It is admitted, for they do not give full faith and credit to the proceedings of any courts but those of their own country; both the laws and proceedings of other countries are tried as facts by the jury. The question, therefore, cannot be brought before the court; and even if the witness should admit his guilt in England, or his conviction in a foreign country, the admission is not conclusive evidence of the facts. It does not import verity; it may be false, and the court cannot try it. The testimony must, therefore, go to the jury, who will appreciate it as they think proper. The fallacy of the opposite reasoning, I think, is that it is supposed that it is the conviction which disqualifies, whereas it is the crime. The conviction establishes the fact of criminality in such a manner that it cannot be controverted; and if it cannot be controverted the witness is not to be heard. And a conviction being the only method by which the fact of criminality can be so fixed that it cannot be denied, and facts which cannot be controverted being at once submitted to the court in order that the legal inferences may be drawn (for why send a fact which the law will not permit to be controverted to triers of facts, who will be bound to return it in the same state to the court, entirely unchanged); this, I say, has given rise to the opinion that it is the conviction which disqualifies a witness, whereas it only incontrovertibly establishes the fact

of criminality, and it is the criminality which excludes him."

And relying on the decisions in *New Hampshire and North Carolina, in State v. Foley* (1880) 15 Nev. 64, 37 Am. Rep. 458, a criminal case, it was held that a person convicted of an infamous crime in another state was thereby rendered incompetent to testify. The court here said that the argument to which most weight seemed to be attached by cases holding the contrary rule was that a state would not enforce the penalty of a crime committed beyond its jurisdiction, and that the denial to a convict of the right to testify was a part of his punishment, but stated that this argument had been satisfactorily met by the *New Hampshire and North Carolina* cases.

In *Campbell v. State* (1853) 23 Ala. 44, the conviction of a witness in another state for publishing a libel was held not to disqualify him, on the ground that a conviction for libel does not disqualify a witness; and the question whether a conviction of an infamous offense in another state would render the witness incompetent was not touched upon.

Conviction in state court as affecting competency in Federal court, and vice versa.

Federal and state courts are considered as foreign to each other, and a conviction of a crime in one, which renders the person convicted incompetent as a witness in that one, will not be given such effect in the other.

It will be noted that the conclusion was reached in *BROWN v. UNITED STATES*, ante, 1133, that a conviction in a state court of an infamous crime did not render one incompetent as a witness in a Federal court sitting in the same state.

In *Logan v. United States* (1892) 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617, where the question was involved in a criminal case whether a conviction in a state court rendered the person convicted incompetent as a witness in a Federal court sitting in another state, it was held that § 858 of the Revised Statutes, Comp. Stat. 1913, § 1464, providing that the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the court of the United States in trials at common law, had no application to criminal trials, and that, therefore, the competency of witnesses in criminal trials in courts of the United States held within the state of Texas was not governed by a statute of that

state enacted after the state's admission to the Union, which provided that all persons who had been or might be convicted of felony in Texas or in any other jurisdiction should be incompetent to testify in criminal cases, but it was held that, except so far as Congress had made specific provisions upon the question of competency, the subject was governed by the common law, which was the law of Texas before such statute was passed and at the time the state was admitted to the Union; and it was held that by the common law the conviction in the state court would not disqualify the person convicted as a witness in a Federal court. The court said: "At common law and on general principles of jurisprudence when not controlled by express statutes giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect by way of penalty or of personal disability or disqualified beyond the limits of the state in which the judgment is rendered."

The decision in *Logan v. United States* (U. S.) supra, was followed in *United States v. Hall* (1892) 53 Fed. 352, the court in that case holding that § 858 of the Revised Statutes was inapplicable to criminal cases, and that in the criminal trials in the United States courts in Pennsylvania the law of that state as it existed at the passage of the Judiciary Act of 1789 in reference to the admission of evidence governed, and that a state statute passed subsequently to that time would not affect the competency of one convicted of a crime in the state court as a witness in the Federal court.

In *Wise v. Williams* (1908) 162 Fed. 161, it was held that the United States Revised Statutes, providing that a person guilty of perjury should be punished by a fine and be incapable of giving testimony in any court of the United States, excluded a witness convicted of perjury under the laws of the United States from giving evidence in any United States court, whatever the law of the state where the trial was had might be; but under the Act of July 6, 1862, providing that "the laws of the state in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law," it was held that the competency of witnesses convicted of crimes other than perjury was to be determined by the law of the state where the trial was had; and held that one convicted of mak-

ing a false report, which was a misdemeanor, by a district court in New York, was not incompetent as a witness in a Federal civil case in that district, as by the law of New York he was competent notwithstanding such conviction.

In *Samuels v. Com.* (1909) 110 Va. 901, 66 S. E. 222, 19 Ann. Cas. 380, a provision of the United States statute defining what constituted perjury and how the offense should be punished, and further providing: "And shall moreover thereafter be incapable of giving testimony in any court of the United States,"—was held to have the effect only to disqualify persons convicted of perjury in the Federal courts to testify as witnesses in the Federal courts, and not to disqualify those so convicted from testifying in the state courts.

And a provision of the Virginia statute providing as one of the penalties in case of a conviction of perjury that the convicted person should be incapable of giving evidence as a witness, and further providing that a person convicted of perjury should not be a witness, although pardoned or punished, was held to have the effect only to disqualify persons convicted of perjury in a state court to thereafter testify as a witness in the courts of that state; and it was held that neither of the statutes involved rendered one convicted of perjury in a Federal court in Virginia incompetent to testify in a state court of that state. And the decision in *Samuels v. Com.* (Va.) supra, was held controlling in *Kain v. Angle* (1910) 111 Va. 415, 69 S. E. 355, where the same conclusion was reached; the court remarking that the Federal statute expressly limited the disqualification to giving testimony in any court of the United States, and that the Virginia statute was intended only to disqualify persons convicted of perjury in a court of that state.

Conviction in one country as affecting competency in another country.

Apparently the question of the effect of a conviction in one country upon the competency of the person convicted to testify in the courts of another country has seldom been passed upon.

In an early Maryland case, *State v. Ridgely* (1785) 2 Har. & McH. (Md.) 120, 1 Am. Dec. 372, on a trial for murder, it was held that parol evidence was admissible to prove that a man offered as a witness was a convict transported from Great Britain, and that a convict

could not be restored as a competent witness without actual service during seven years.

And in *Clarke v. Hall* (1789) 2 Har. & McH. (Md.) 378, parol evidence was held admissible that a subscribing witness to a will was a convict and had been transmitted to Maryland from Great Britain in accordance with a statute providing for the transportation of felons; but as it appeared that there were offenses not amounting to felonies or rendering those convicted thereof infamous for which offenders might be transported, it was held incumbent on the party raising the objection to the witness's competency to prove that he was transported for some offense which was a felony or an infamous crime.

In *Cole v. Cole* (1805) 1 Harr. & J. (Md.) 572, where it was sought to render a witness incompetent because of his conviction of a felony in London and transportation to this country to serve seven years, it was held that the party objecting to his competency must prove that he had not served his seven years; that the presumption was that he had, and, if such was the case, he became a competent witness.

Regulation by statute.

In some jurisdictions the competency of one convicted of a crime in another jurisdiction has been regulated by statute.

Thus, in Texas it is provided by statute that "all persons who have been, or may be, convicted of a felony in this state or in any other jurisdiction unless such conviction has been legally set aside or unless the convict has been legally pardoned for the crime of which he was convicted," are incompetent to testify as a witness in a criminal action; and it has been held that the words, "or in any other jurisdiction," include convictions had in other states of the Union. *Goldstein v. State* (1914) 75 Tex. Crim. Rep. 360, 171 S. W. 709; *Pitner v. State* (1887) 23 Tex. App. 366, 5 S. W. 210.

Under this statute a judgment of conviction for a felony in a foreign state will render a person an incompetent witness in a criminal action in Texas, when it is shown that the person has been finally convicted of an offense in a foreign state, and that the offense of which he was convicted was a felony under the laws of the state in which he was convicted, and that such an offense would be a felony under the laws of Texas if committed within that state. L.R.A.1917A.

Pitner v. State and *Goldstein v. State* (Tex.) supra.

But where the evidence does not show, nor tend to show, of what offense the person offered as a witness was convicted in the other state, nor whether or not the offense of which he was convicted was a felony under the laws of that state, he is not shown to be incompetent to testify. *Goldstein v. State* (Tex.) supra.

And where the judgment of conviction of the foreign state shows upon its face that it would not be a valid judgment if rendered in Texas, it devolves upon the party seeking to introduce it in order to render a witness incompetent, to show that it was valid under the law of the state where it was entered, and until this is shown it is inadmissible. *Pitner v. State* (Tex.) supra.

By the provisions of this statute its application is confined to criminal cases, and in a civil case a conviction for a felony in another state will not render the person convicted an incompetent witness in Texas. *Missouri, K. & T. R. Co. v. De Bord* (1899) 21 Tex. Civ. App. 691, 53 S. W. 587.

In *State v. Landrum* (1908) 127 Mo. App. 653, 106 S. W. 1111, a statute providing that every person who should be convicted of arson, burglary, robbery, or larceny in any degree as provided in a specified chapter, or should be sentenced to imprisonment in the penitentiary for any other crime punishable under the provisions of a certain chapter of the statute, should be incompetent to be sworn as a witness or serve as a juror, and should be forever disqualified from voting at any election, was held to apply only to convictions for offenses committed against the criminal laws of Missouri, and not to those committed in other states of the Union or in foreign countries; and it was held that a witness convicted of a crime in another state was not thereby rendered incompetent as a witness in Missouri.

And it was held that if it had been made to appear that a similar statute existed in the other state at the time the witness was convicted and sentenced, such statute should not be given effect beyond the territorial limits of that state, as the penal statutes of such state could not operate extraterritorially. *Ibid.*

In *Sims v. Sims* (1878) 75 N. Y. 466, which was an action of contract, a section of the Revised Statutes contained

in the part relating to crimes and their punishment, which provided that no person sentenced upon a conviction for felony should be competent to testify in any case, was held not to apply to a conviction in another state, but to have

reference alone to convictions in the state of New York.

See also statutes involved in cases under heading, "Conviction in state court as affecting competency in Federal court, and vice versa." J. T. W.

COLORADO SUPREME COURT.

O. W. McCARTNEY, Impleaded, etc., Plff.
in Err.,
v.

NICHOLAS BADOVINAC.

(— Colo. —, 160 Pac. 190.)

Contracts — to perform to satisfaction of employer — fulfilment.

A contract to establish whether or not a certain diamond was stolen and who stole it, to the satisfaction of the employer, is performed when evidence is furnished sufficient to satisfy any reasonable man, acting reasonably, and the promisor cannot avoid payment by merely stating that he is not satisfied.

For other cases, see Contracts, IV. c, 2, in Dig. 1-52 N. S.

(October 2, 1916.)

ERROR to the District Court for Pueblo County to review a judgment in plaintiff's favor in an action brought to recover of defendant Chambers a certain amount held by him subject to the result of an agreement between plaintiff and the interpleading defendant for the satisfactory determination of certain questions in regard to a theft. **Affirmed.**

The facts are stated in the opinion.

Messrs. Robert Cowles, John W. Davidson, and Fred A. Sabin, for plaintiff in error:

In a contract involving "satisfactory services," the person to be satisfied under the contract, and he alone, can say whether he is actually satisfied.

Bush v. Koll, 2 Colo. App. 48, 29 Pac. 919, 6 Colo. App. 294, 40 Pac. 579; *Zaleski v. Clark*, 44 Conn. 223, 26 Am. Rep. 446; *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463; *Kendall v. West*, 196 Ill. 221, 89

Am. St. Rep. 317, 63 N. E. 683; *Singerly v. Thayer*, 108 Pa. 291, 56 Am. Rep. 207, 2 Atl. 230; *Gwynne v. Hitchner*, 66 N. J. L. 97, 48 Atl. 571; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *McCrimmon v. Murray*, 43 Mont. 457, 117 Pac. 73.

Plaintiff, not having a license to carry on the business of a "detective," cannot recover.

Hittson v. Browne, 3 Colo. 304; *Richardson v. Brix*, 94 Iowa, 626, 63 N. W. 325; *Adams v. Hackett*, 27 N. H. 289, 59 Am. Dec. 376; *Johnston v. Dahlgren*, 166 N. Y. 354, 59 N. E. 987; *School Dist. v. Johnson*, 26 Colo. App. 433, 143 Pac. 264; *Hall v. Bishop*, 3 Daly, 109; *Singer Mfg. Co. v. Draper*, 103 Tenn. 262, 52 S. W. 879; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230.

Mr. F. R. McAlinney, for defendant in error:

Defendant could not arbitrarily say that he was dissatisfied with the services of the plaintiff, and assign no reason or cause for his dissatisfaction.

Miesell v. Globe Mut. L. Ins. Co. 76 N. Y. 119; *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 782, 121 Eng. Reprint, 904, 31 L. J. Q. B. N. S. 17, 8 Jur. N. S. 506, 5 L. T. N. S. 550; *Folliard v. Wallace*, 2 Johns. 395; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709, 4 N. E. 749; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Dennis v. Massachusetts Ben. Asso.* 120 N. Y. 496, 9 L.R.A. 189, 17 Am. St. Rep. 660, 24 N. E. 843; *Moore v. Woolsey*, 4 El. & Bl. 243, 119 Eng. Reprint, 93, 3 C. L. R. 207, 24 L. J. Q. B. N. S. 40, 1 Jur. N. S. 468, 3 Week. Rep. 66; *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232, 24 L. ed. 433; *Buffalo Loan, Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; *Traiser v. Commercial Travellers' Eastern Acci. Asso.*

Note.—The correctness of the decision in *McCARTNEY v. BADOVINAC* seems beyond doubt on principle, but it is the only case which investigation has disclosed construing a contract to establish guilt to "satisfaction" of other party. The import of that term in contracts of employment is discussed in the notes to *Schmand v. Jandorf*, 44 L.R.A.(N.S.) 680, and *American Music Store v. Kussel*, L.R.A.1916F, 882.

While without the scope of the subject, it may be noted in this connection that, in L.R.A.1917A.

an action for a reward "for the discovery of all or any of the parties concerned in" a certain murder, it was observed by the court: "That the plaintiffs had 'discovered' the murderers might have been proved without evidence of a conviction, and even against evidence of a failure to convict, since that might result from causes entirely independent of the fact that the actual murderers were discovered and tried." *Cunningham v. Fiske*, 13 N. M. 331, 83 Pac. 789.

202 Mass. 292, 88 N. E. 901; Noyes v. Commercial Travelers' Eastern Acci. Asso. 190 Mass. 171, 76 N. E. 665; C. W. Hunt Co. v. Boston Elev. R. Co. 199 Mass. 220, 85 N. E. 446; Cashman v. Proctor, 200 Mass. 272, 86 N. E. 284; Van Houten v. Pine, 38 N. J. Eq. 72; Campbell Printing Press Co. v. Thorp, 1 L.R.A. 645, 36 Fed. 414; Empson Packing Co. v. Clawson, 43 Colo. 188, 95 Pac. 546; Mackenzie v. Minis, 132 Ga. 323, 23 L.R.A.(N.S.) 1003, 63 S. E. 900, 16 Ann. Cas. 723.

It has not been shown that plaintiff was "carrying on" the detective business. To carry on a business means to make a practice of it, and the performing of a single act is not the "carrying on" of a business.

Parkhurst v. Brock, 72 Vt. 355, 47 Atl. 1068; Hoagland v. Segur, 38 N. J. L. 230; Hunter W. Finch & Co. v. Zenith Furnace Co. 245 Ill. 586, 92 N. E. 521; Sterne v. State, 20 Ala. 43.

Scott, J., delivered the opinion of the court:

This is an action growing out of a written contract as follows:

Whereas, Dr. Ragsdale, of La Junta, Colorado, has accused Mrs. O. W. McCartney of the theft of a certain diamond, and O. W. McCartney is desirous of learning the facts concerning the said affair, and Nicholas Badovinac is a detective engaged in the business of detecting crime.

It is hereby agreed by and between the said O. W. McCartney and Nicholas Badovinac that the said Badovinac will undertake to discover who actually took the said diamond, if the same was stolen, or whether or not the same was stolen. And the said O. W. McCartney has this day deposited the check of Crooks and Campbell for the sum of \$500 with E. F. Chambers, to be by him turned over to the said Badovinac in the event he shall determine the above questions to the satisfaction of the said McCartney; otherwise the said check to be returned to the said O. W. McCartney.

Dated Pueblo, January 10, 1911. Said check is made for \$500, payable to Nicholas Badovinac.

Nicholas Badovinac.
O. W. McCartney.
F. A. Campbell.

Witness:

E. F. Chambers.

It appears that the check for \$500, mentioned in the contract, was caused to be cashed by Mr. Chambers, who held the money subject to the result of the agreement. Each of the parties demanded the money, and this suit was to determine the rights of the principal parties in the premises. L.R.A.1917A.

ises. The suit was instituted by Badovinac as against Chambers, and McCartney was interpleaded. The trial was to the court without a jury. The court found for the plaintiff, Badovinac, and judgment was rendered accordingly. The findings of fact and conclusions of law by the court were as follows:

"But as to the facts presented by this record as to the theft of the diamond and the connection of the wife of the interpleader therewith, the court is compelled to say that we have met few contentions with so little want of merit and apparent lack of good faith. A more complete and perfect case of larceny could not well be conceived of. It contains the proof of every element thereof beyond all reasonable doubt: (1) Its taking away by stealth; (2) the opportunity limited to the accused; (3) her possession of it and mission to Pueblo; (4) her disposition of it for gain; (5) her similar act with reference to interpleader's own diamond; (6) her identifications as to the transactions; (7) the establishment of the ownership of the diamond and adjudication thereof; (8) her confession of the theft; (9) her flight from the state and absence ever since; (10) interpleader's participation therein as accessory after the fact.

"Evidence much more abundant to establish guilt than ordinarily adduced; so that, if the interpleader is not satisfied from this record of her guilt of the offense charged to her, he is perhaps the only intelligent person to whom it could be presented who would conscientiously entertain any reasonable doubt. It even passes the point of reasonable doubt and reaches the plane of certainty, as certain as anything in human knowledge can be. Categorically he answered his counsel that he was not satisfied on either of the questions mentioned in the contract, either that Mrs. McCartney stole the diamond ring, or even that it was stolen at all, without assigning any reasons for his pretended disbelief. In the face of this record it is too apparent for argument that the answers are a mere subterfuge and pretext, without reason or sincerity. He even intimates a belief that Mrs. Ragsdale might have stolen her own ring and pawned it in order to charge Mrs. McCartney with the theft. An examination of his entire testimony would justify either jury or court in finding that his categorical answers are not true, and that he was in fact satisfied with the determination of both of the questions as shown by the proof at hand.

"The plaintiff undertook to discover whether or not the diamond was stolen, and, if stolen, who was the thief. He per-

formed his undertaking by proof in hand sufficient to satisfy any reasonable man, acting reasonably, and in good faith, and sufficient to warrant a conviction of the accused had she not been spirited out of the state by the interpleader, and should have been permitted to stand trial.

"The court, therefore, sitting as a jury, find all issues of fact in favor of the plaintiff and against the intervener, and that he has fully complied with the terms of the contract in letter and spirit. This finding disposes of all questions of law which might possibly arise upon a finding that, while plaintiff had fully complied with his undertaking, yet that it was not done 'to the satisfaction of the said McCartney.' Hence the court will not undertake to review the authorities cited by respective counsel. The finding of fact settles the law questions.

"However, as to such cases the court will say that in such contracts, where a party simply says he is not satisfied, and stands upon that, without more, we must not overlook the element of 'good faith' in such expressed dissatisfaction. A capricious, unreasonable, invalid, designed, feigned, arbitrary, dishonest, insincere, pretended, mercenary expression of dissatisfaction will not be regarded by the courts to defeat the payment of a just claim. When one party to a contract has performed his part of it, the court will say to the other party: 'That which in reason you ought to be satisfied with the law will say you are satisfied with.' To permit such a defense to prevail could not be on the ground of a bona fide dissatisfaction, but would amount to fraud and to clothe it with dignity of a legal defense."

The findings of fact appear to be fully justified by the evidence, and will not be disturbed. The sole question to be considered is as to the court's conclusions of law under the state of facts presented.

It seems to be the contention of plaintiff in error that, under the contract, McCartney was the person to be satisfied, and that he alone may determine as to whether or not he was satisfied, regardless of the question of his good faith in that regard. Counsel urge that this contention is fully sustained by *Bush v. Koll*, 2 Colo. App. 48, 29 Pac. 919, and 6 Colo. App. 294, 40 Pac. 579. To this we cannot agree. Koll was employed by Bush & Morse as a chef under an agreement providing for a monthly salary of \$130 per month for the term of one year, with the provision that "the said party of the second part agrees to give his entire attention to the business for which he is employed, and to render good and satisfactory service."

The court held that the jury did not fol-

low the instruction of the court as to the law in such case, and that it disregarded the evidence, which clearly established that Koll's services were unsatisfactory. It is true that there were some things said in the opinion which tend to support the contention of plaintiff in error. But Judge Bissell, in his dissenting opinion, asserted the rule applicable in such cases to be: "In cases of this sort the true rule is: That which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709, 4 N. E. 749; *Clark v. Rice*, 46 Mich. 308, 9 N. W. 427; *Daggett v. Johnson*, 49 Vt. 345; *Roy v. Goings*, 96 Ill. 361, 36 Am. Rep. 151; *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 783, 121 Eng. Reprint, 904, 31 L. J. Q. B. N. S. 17, 8 Jur. N. S. 506, 5 L. T. N. S. 550.

The case was again before that court in 6 Colo. App. 294, 40 Pac. 579, where by an undivided court it was said:

"The instruction which was claimed to have been erroneous appears to be the correct construction warranted by the wording of the document, and well sustained by authority. It was: 'The court instructs you that, under the contract in evidence in this case, the plaintiff contracted to render satisfactory service to defendants, and the defendants had the right to discharge the plaintiff at any time when the service of the plaintiff was not satisfactory to them: but to entitle defendants to discharge plaintiff on that ground the claim made by them that such services were not satisfactory must be made in good faith: that is, the defendants must have been really dissatisfied with the service of the plaintiff to authorize his discharge upon that ground. And if you believe from the evidence that the defendants discharged the plaintiff because they were really dissatisfied with the services in the line of his employment, then you must find for the defendants, and it is not necessary that the defendants should have any cause for such dissatisfaction: but if you believe from the evidence that defendants were not really dissatisfied with the service of the plaintiff in the line of his employment, and that such claim is not made in good faith, then defendants were not authorized to discharge the plaintiff on that ground.'

"It appears to have been entirely disregarded by the jury; for, taking all the testimony, that of both plaintiff and defendant, and it establishes the fact that, under the existing circumstances, and as they had for some time existed, the performance of the duties and services could not be satis-

factory to either party by reason of continued jarring and friction, while the proper prosecution of the business of defendants was so intimately dependent upon the chief cook and his subordinates, employed by him, that any want of harmony or laxity of discipline was of necessity destructive of business."

The rule stated in this instruction, so adopted and approved in that case, was followed by the trial court in this case, and upon that authority, as well as upon sound reason and justice, must be sustained. Here the trial judge found as a fact that the claim of McCartney to the effect that the proof furnished by Badovinac was not satisfactory to him was not made in good faith, but was made in such bad faith as, if permitted to prevail, would amount to a fraud.

It is true that courts have been somewhat confused and divided in opinion upon the question under consideration, but a careful review of the authorities discloses that, where a contrary view has been adopted to that announced by the Colorado court of appeals, it is generally in cases which, as stated by Judge Bisell, relate to busts, clothes, and cases of the description which relate to the satisfaction of the persons for whom they are to be constructed, or in cases where work is to be done to the satisfaction of a party clothed with a discretionary and quasi judicial power to determine the character of what has been performed. But seemingly in all other well-considered cases it has been held that contracts may not be so construed as to give to either party the right, at his whim and caprice, to reject that for which he has contracted, or to refuse to pay the price of what has been supplied under the agreement that he shall be satisfied.

In this case the plaintiff undertook by his agreement to discover who actually took the diamond, if the same was stolen, or whether or not the same was stolen. Under the finding of the court this agreement was fully and completely performed. No impartial person could hold otherwise. The question then is: Shall the plaintiff in error, because of his own selfish interest, by reason of his own will, at his own ipse dixit, and in bad faith, deprive the defendant in error of the full and completely earned compensation under the agreement? To so hold would be to countenance and approve a palpable fraud.

The agreement in this case was to furnish proof of a fact, and the same principle is to be applied as in the vast number of cases involving the satisfaction to insurance companies of an agreement to furnish

proof of injuries, of death, of condition of health in cases of reinstatement, etc.

In the English case of *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 783, 121 Eng. Reprint, 904, it was provided "that before payment of the sum insured by any policy proof satisfactory to the directors of the company should be furnished by the claimant of the death or accident;" and it was there held that the company might require only such proof as was reasonable and necessary to establish the fact, and could not defeat the claim for reasons chimerical, capricious, or unjust, and that the term "to the satisfaction of the directors" must be understood to mean to their reasonable satisfaction. And in *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709, 4 N. E. 749, the condition of payment was that "when the defendants were satisfied that the boilers so changed were a success." It was said by the court: "Performance must, of course, accord with the terms of the contract; but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered remuneration shall be paid, but here the parties have so agreed."

In *Dennis v. Massachusetts Ben. Asso.* 120 N. Y. 496, 9 L.R.A.189, 17 Am. St. Rep. 660, 24 N. E. 843, the court said: "The provision in such policy that the member might be relieved from the effect of forfeiture for nonpayment of an assessment on giving a 'valid' excuse to the officers of the association does not vest in the officers the exclusive right to determine the validity of an excuse. Their determination is reviewable in the courts." "The word 'valid,' as here used, is equivalent to 'good,' 'sufficient,' or 'satisfactory.'"

The words "satisfactory proof" entitled the association to demand that the fact of death should be shown with reasonable definiteness and certainty. *Buffalo Loan & Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942. And in *Traiser v. Commercial Travellers' Eastern Acqi. Asso.* 202 Mass. 292, 88 N. E. 901, the court said: "The proofs to be furnished by the plaintiff were, by the terms of the policy, to be satisfactory to the defendant's board of directors. This, to be sure, does not mean that the judgment of the defendant's board necessarily was to be final on the

matter, but only that the proofs must be such as ought to be satisfactory to reasonable men, acting reasonably. Accordingly it ordinarily will be for the jury, looking at the proof actually furnished, to say whether it was such as reasonably should have satisfied the directors. *Noyes v. Commercial Travelers' Eastern Acci. Asso.* 190 Mass. 171, 182, 76 N. E. 665, and cases cited; *C. W. Hunt Co. v. Boston Elev. R. Co.* 199 Mass. 220, 85 N. E. 446; *Cashman v. Proctor*, 200 Mass. 272, 86 N. E. 284."

In *Hartford Sorghum Mfg. Co. v. Brush*, 43 Vt. 528, involving a sugar evaporator sold, "to be satisfactory to the purchaser," it was said: "The trial upon which the defendant took the evaporator was to be had for the purpose of ascertaining whether the defendant liked it or not, and not for the purpose of ascertaining whether it was equal to the plaintiff's recommendations of it or not. The trial was to be had solely with reference to the defendant's wishes in respect to the machine for such uses as he might find he could make of it, and not with any reference to any usefulness of it for other persons. To this trial the defendant was bound to bring honesty of purpose; anything short of that would not determine his wishes fairly, but only his wilful caprice or his dishonorable design."

In *Mackenzie v. Minis*, 132 Ga. 323, 23 L.R.A.(N.S.) 1003, 63 S. E. 900, 16 Ann. Cas. 723, the court stated the rule to be: "The promisor, whose satisfaction is thus made the test, must act honestly and in good faith. His dissatisfaction must be real, not merely pretended. Thus, if a suit of clothes were agreed to be made to the satisfaction of the purchaser at a fixed price, if they were in fact satisfactory to him, he could not feign dissatisfaction in order to get out of the contract, merely because another similar suit was offered to

him at a less price. This would not be dissatisfaction; it would be fraud."

It has been generally held that "to be dissatisfied" is a fact, and must be a verity, and not a pretext. It is not, "I will not accept it, will not have it," but it is, "It is not satisfactory," or "I am really and honestly dissatisfied with it." *Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co.* 66 Wis. 226, 57 Am. Rep. 257, 28 N. W. 343; *Pierce v. Cooley*, 56 Mich. 552, 23 N. W. 310; *Southern v. Cunningham*, 11 Rich. L. 533; *Hallidie v. Sutter Street R. Co.* 63 Cal. 575; *Dubinsky v. Wells Bros.* Co. 218 Mass. 232, 105 N. E. 1004; *Hawken v. Daley*, 85 Conn. 16, 81 Atl. 1053; *Schwartz v. Cohn*, 129 N. Y. Supp. 464; *Morgan v. Gamble*, 230 Pa. 165, 79 Atl. 410; *Tobin v. Kells*, 207 Mass. 304, 93 N. E. 596.

The case at bar does not come within any well-defined exception to the general rule thus announced. Indeed, it has been held by this court that, even in a case where the question was to be submitted to a third party, his conclusion and determination is binding only when made in good faith.

In *Empson Packing Co. v. Clawson*, 43 Colo. 188, 95 Pac. 546, we said: "In other words, the rule of law is that, where parties to a contract designate a party who is authorized to determine questions relating to its execution, and stipulate that his determination shall be final and conclusive both parties are conclusively bound by his determination of those matters which he is authorized to determine, except in case of fraud, or such gross mistake upon his part as would necessarily imply bad faith, or a failure to exercise an honest judgment."

The judgment is affirmed.

White and Garrigues, JJ., concur.

KENTUCKY COURT OF APPEALS.

J. W. HUSBAND et al., Appts.,
v.

RICHARD COTTON.

(171 Ky. 177, 188 S. W. 380.)

Highway — right to retain to enforce payment for labor.

1. One who performs labor under con-

Note. — For obstruction in highway preventing access to property except by a circuitous route as a special injury entitling owner to maintain action for damages or for abatement of the nuisance, see annotation following this case, post, 1155.
L.R.A.1017A.

tract with a turnpike company to fit for travel a strip of land dedicated by him for highway purposes has not, after the title to the highway is vested in the county, the right to retain possession of the strip to enforce payment of the contract price, although the turnpike company is without funds and has quit business.

For other cases, see *Dedication*, II. in Dig. 1-52 N. S.

Parties — action to remove obstruction from highway.

2. Owners of property on a highway, who are required to take a circuitous route to reach such property because of the act of one who contracted to construct a portion of it in closing such portion to enforce payment of the contract price, may maintain an action to compel him to remove the ob-

struction, and the action need not be brought by the county.

For other cases, see Nuisances, II. a, in Dig. 1-58 N. S.

(September 26, 1916.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Spencer County in defendant's favor, in an action brought to enforce a contract dedicating a right of way over private lands for the construction of a turnpike, and for an injunction requiring defendant to open the portion of the turnpike which had been constructed through his land. Reversed.

The facts are stated in the opinion.

Mr. Samuel K. Baird, for appellants:

Plaintiffs have rights which they may enforce in a court of equity for specific performance.

Rose v. Nolen, 166 Ky. 336, 179 S. W. 229.

Messrs. Willis, Todd, & Bond, for appellee:

The appellants have no cause of action, but, if any, the same is in the county.

Lawrence County v. Chattaroi R. Co. 81 Ky. 225; Montgomery County v. Menefee County Ct. 93 Ky. 33, 18 S. W. 1021; Louisville & N. R. Co. v. Whitley County Ct. 95 Ky. 215, 44 Am. St. Rep. 220, 24 S. W. 604.

Miller, Ch. J., delivered the opinion of the court:

Early in 1905 the plaintiff J. W. Husband and fifteen other landowners in Spencer county signed the following agreement: "We, the undersigned, do hereby agree to give the right of way 30 feet wide over our lands for the construction of the Little Mt. and Van Buren turnpike, without any consideration; and we further agree that said turnpike company may use the rock on our lands for the construction of said pike free of any charge; said rock to be moved at season of the year when it will do least damage to our premises."

For the purpose of constructing the proposed turnpike, McGee, Husband, and Goodwin, three of the landowners who had signed the agreement above set forth, organized the Little Mount & Van Buren Turnpike Road Company on July 6, 1905, by executing articles of incorporation, in the usual way. The capital stock of the corporation was fixed at \$4,000, represented by 160 shares of \$25 each; and the third article recited that the business to be transacted by the corporation should be the construction of a turnpike road between designated points, and by a specified route.

The fifth article set forth the names of thirty-three stockholders and their re-

spective stock subscriptions. Many of these subscribers for stock, but not all of them, had signed the original landowners' agreement, donating the right of way.

The sixth article provided that the corporation should commence business on September 1, 1905, and continue for five years.

The seventh clause provided for the officers usual in such cases; the eighth limited the company's indebtedness to \$2,000; and the ninth exempted the private property of the stockholders from liability for corporate debts.

The appellee, Richard Cotton, signed the landowners' agreement donating the right of way; and subscribed for four shares of stock in the corporation. By a written contract made on November 2, 1907, the Little Mount & Van Buren Turnpike Company employed Cotton to construct certain designated portions of the proposed turnpike, at the rate of \$1,000 per mile, to be paid by the company. The county had agreed to contribute to the expense of constructing the turnpike to the extent of \$500 per mile; and the turnpike company's contract with Cotton provided that 75 per cent of its liability to Cotton should be paid as the county received each one-quarter mile of constructed road, and the remainder was to be paid when the contract should be completed and the road received by the county. Under this contract Cotton constructed 226 rods of the road, for which he was entitled to receive \$707.67. The county paid Cotton \$377.82, which was all, or more than all, of the county's proportion of the debt. This sum paid by the county, when added to the sums paid by the turnpike company, and charging Cotton with his stock subscription of \$100, made a total credit of \$512.33, leaving a balance of \$195.34 due Cotton. Other contractors built the remaining portions of the road, which was about 6 miles long. About one third of the 226 rods of road constructed by Cotton was upon the right of way donated by Cotton; the remaining two thirds was on the land of other farmers. The county accepted Cotton's work and paid him in full for its share thereof, as above stated; but the turnpike company refused to accept the work as having been completed according to the specifications of the contract, claiming that the work was defective in some six or seven minor respects. Upon the failure of Cotton and the turnpike company to effect a settlement, Cotton inclosed that portion of the road which he had constructed upon his own land,—about 58 rods in length—by putting gates across either end thereof; and it has so remained closed and in Cotton's possession for the past seven years.

On August 2, 1914, the appellant J. W. Husband and ten of the signers of the land-owners' right of way agreement brought this action against Cotton, seeking the enforcement of said contract, and praying for a mandatory injunction, requiring Cotton to open that portion of the turnpike which had been constructed over his land. To this petition Cotton demurred specially, upon the ground that the Spencer circuit court was without jurisdiction of the matter set up in the petition; and he also filed a general demurrer to the petition. The court overruled both demurrers, whereupon Cotton filed an answer, which is substantially a traverse of the allegations of the petition, admitting, however, that he retained possession and control of that portion of the road which had been constructed upon his land, and declaring that he proposed to retain control of it until he had been paid \$195.34, the balance due him. Upon a trial, the court dismissed the petition, and the plaintiffs appealed.

Cotton insisted that the appellants have no cause of action, and that if any cause of action exists, it is in the county, and not in the appellants, who are suing as individuals. In support of this contention counsel for Cotton state in their brief that he filed a special demurrer upon the ground that the plaintiffs had no right to sue. In this, however, counsel are mistaken, since the special demurrer raised only the question of the jurisdiction of the Spencer circuit court, which is an entirely different ground of special demurrer. See Civ. Code, § 92, subssecs. 1, 2. The only question raised by the special demurrer was the jurisdiction of the court over the subject of the action; and, as that court clearly had jurisdiction of the subject-matter, the special demurrer was properly overruled.

The disposition of the general demurrer and the case upon the merits presents a question of more difficulty. The pleadings and the proof show without contradiction, that the road was constructed according to specifications provided by the county; that the county contributed to its cost in consideration of the agreement of the turnpike company that the road should be surrendered to the county as and for a public highway, upon its completion; that the county has paid Cotton all it owed him; and that the entire road has been accepted by the county and treated as a public highway, by allotting hands to work it, since 1908. It had not, however, been able to take possession of the 58 rods in controversy, or work that portion of the road, on account of Cotton's hostile attitude. The turnpike company is not claiming any interest in the road, and manifests no concern

over this controversy. The right of way agreement was not only a valid contract, but it is now an executed contract. By its terms, the contract dedicated the 58 rods of the road in question to the public use as a highway, and the dedication has been accepted by the construction of the contemplated road, in accordance with the intention and purpose of all the interested parties. The title to the right of way has passed from all the owners of the land. Cotton has no greater interest in the 58 rods of road located upon his farm than he has in a like proportion of the road located upon the land of some other donor of the right of way. He has as much right to hold any other portion of the road constructed by him as he has to hold this 58 rods. His debt of \$195.34 is the unsecured obligation of the turnpike company, and is collectible like other simple debts.

The claim urgently pressed in the proof, but not relied upon in the answer, to the effect that the turnpike company paid all the other contractors, is without funds, and has quit business, is wholly irrelevant.

In "holding the road for his money," to use his own language, Cotton is obstructing a public highway; and his defense to this action to abate the obstruction is that the county only can complain. We do not so understand the law. The fact that the county, as the owner of the highway, may complain, does not necessarily prevent the appellants from also complaining. As a general rule, a private person can bring an action to abate the unlawful obstruction of a public way only when he has sustained special damage thereby, different not merely in degree, but in kind, from that suffered by the community at large. 37 Cyc. 260.

The record shows that the defendant Cotton has obstructed this highway in such a way as to require the plaintiffs, who are landowners in the immediate vicinity, to travel by a circuitous route. It is not made to appear how near the lands of these plaintiffs lie to the obstructed portion of the road, although it does appear that in their ordinary travel the plaintiffs are required to go by a circuitous route and over an inconvenient and hilly dirt road, while they could travel upon the turnpike through Cotton's land except for his unlawful obstruction thereof. This state of facts presents several interesting legal propositions.

The first question that presents itself is. Does the fact that one is prevented by an unlawful obstruction from using a highway cause him a special damage which will sustain an action by him against the wrong-

doer? Usually a traveler upon a highway does not suffer special damage sufficient to support a private action by reason of an obstruction in the highway which merely causes delay in his journey, or compels him to take a more circuitous route, or deprives him of his journey altogether, the injury being to all who attempt to use the highway. *Schall v. Nusbaum*, 56 Md. 512; *Baier v. Schermerhorn*, 96 Wis. 372, 71 N. W. 600.

And it has been held that an obstruction of a road, not upon or adjoining plaintiff's land, but between his land and places to and from which he wishes to travel over his road, which prevented his using the same, does not occasion him such special injury that would authorize him to maintain an action to abate the obstruction. *San José Ranch Co. v. Brooks*, 74 Cal. 463, 16 Pac. 250; *Atwood v. Partree*, 56 Conn. 80, 14 Atl. 85; *Storm v. Barger*, 43 Ill. App. 173.

The special injury which an individual must suffer in order to allow him to maintain an action for obstructing a highway must be different, not merely in degree, but in kind, from that suffered by the public generally; and the fact that one who has very frequent occasion to use a highway is obliged to use a longer route because of an obstruction does not constitute such special damage. *Crook v. Pitcher*, 61 Md. 510; *Hartshorn v. South Reading*, 3 Allen, 501; *Jacksonville, T. & K. W. R. Co. v. Thompson*, 34 Fla. 346, 26 L.R.A. 410, 16 So. 282; *Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813.

It is not always easy to ascertain whether an obstruction constitutes a purely public nuisance, or whether there is a special injury inflicted. In many cases a slight addition in the way of trouble or expense, when taken in connection with a mere deviation of the route, has been held to be an injury special to the person experiencing the trouble and expense.

Thus, in *Piercé v. Dart*, 7 Cow. 609, it was held that delay and time spent in removing an obstruction from a road constituted such a sufficient special damage and injury as would support a private action; and in *Anne Arundel County v. Watts*, 112 Md. 353, 76 Atl. 82, a contractor was held to have suffered special damage where the defendant's failure to repair a bridge on the highway prevents its use, and compelled the plaintiff to transport by hand cars on a railroad, at large expense, materials to be used for construction work; there being no other highway between the points.

Again, in *Sholin v. Skamania Boom Co.* 56 Wash. 305, 28 L.R.A.(N.S.) 1053, 105 Pac. 632, it was held that one having a contract with the Federal government to L.R.A.1917A.

carry mail over a certain route six times a week, who is compelled to take a circuitous route because of the negligent destruction of a bridge, suffered such a special injury and damage as would give him a right of action against the one through whose negligence the bridge was destroyed.

And it has been held that the obstruction of a public road which afforded the only approach to property thereon, used for business or other purposes, constituted a special injury to the owner, which he could abate by action. *Cushing-Wetmore Co. v. Gray*, 152 Cal. 118, 125 Am. St. Rep. 47, 92 Pac. 70; *Stricker v. Hillis*, 15 Idaho. 709, 99 Pac. 831; *Brown v. Toronto & N. R. Co.* 26 U. C. C. P. 206; *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96; *Miller v. Schenck*, 78 Iowa, 372, 43 N. W. 225; *Hayden v. Stewart*, 71 Kan. 11, 80 Pac. 43; *Gardner v. Stroever*, 89 Cal. 26, 26 Pac. 618; *Ross v. Thompson*, 78 Ind. 90.

Furthermore, the rule requiring a special injury in order for the individual to maintain an action is satisfied where the obstruction in the highway prevents access to property, except by a circuitous route.

Thus, in *Sloss-Sheffield Steel & I. Co. v. Johnson*, 147 Ala. 384, 8 L.R.A.(N.S.) 226, 119 Am. St. Rep. 89, 41 So. 907, 11 Ann. Cas. 285, it was held that an obstruction of the direct route between one's property and a neighboring city, so as to compel him to take a circuitous route to reach it, was such a special injury as to entitle him to maintain a suit to abate the nuisance, an action at law for damages being inadequate.

The weight of authority is in accord with the rule announced in *Sloss-Sheffield Steel & I. Co. v. Johnson*, supra. In cases of that character the property owner suffers a special or peculiar injury different from that suffered by the general public, sufficient to entitle him to maintain an action against the person causing or maintaining the obstruction, either for damages or for an injunction to abate the nuisance.

The courts of Iowa, New York, Missouri, Tennessee, Indiana, Maine, Pennsylvania, New Jersey, Maryland, and of England sustain the view taken by the Alabama supreme court. See *Young v. Rothrock*, 121 Iowa, 588, 96 N. W. 1105; *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; *Hill v. Hoffman*, — Tenn. —, 58 S. W. 929; *O'Brien v. Central Iron & Steel Co.* 158 Ind. 218, 57 L.R.A. 508, 92 Am. St. Rep. 305, 63 N. E. 302; *Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482; *Knowles v. Pennsylvania R. Co.* 175 Pa. 623, 52 Am. St. Rep. 860, 34 Atl. 974; *Ryerson v. Morris Canal & Bkg. Co.* 69 N.

J. L. 505, 55 Atl. 98; *Bembe v. Anne Arundel County*, 94 Md. 321, 57 L.R.A. 279, 51 Atl. 179; *Spencer v. London & B. R. Co.* 8 Sim. 198, 59 Eng. Reprint, 77, 7 L. J. Ch. N. S. 281.

On the other hand, in Nebraska, Illinois, Massachusetts, Minnesota, Kansas, and Wisconsin, it has been held that neither an action for damages nor one for an injunction to abate the nuisance would lie at the suit of a private citizen for such an obstruction of a public highway. *George v. Peekham*, 73 Neb. 794, 103 N. W. 664; *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305; *Willard v. Cambridge*, 3 Allen, 574; *Shero v. Carey*, 35 Minn. 423, 29 N. W. 58; *Borton v. Mangus*, 93 Kan. 719, L.R.A. 1915D, 142, 145 Pac. 835; *Zettel v. West Bend*, 79 Wis. 316, 24 Am. St. Rep. 715, 48 N. W. 379.

The majority rule above announced, permitting the property owner to sue when the highway or street leading to his property has been obstructed, has repeatedly been recognized by this court. *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497; *Transylvania University v. Lexington*, 3 B. Mon. 27, 38 Am. Dec. 173; *Gargan v. Louisville, N. A. & C. R. Co.* 89 Ky. 212, 6 L.R.A. 340, 12 S. W. 259; *Bannon v. Murphy*, 18 Ky. L. Rep. 989, 38 S. W. 889; *Bourbon Stock Yard Co. v. Wooley*, 25 Ky. L. Rep. 477, 76 S. W. 28; *Bohne v. Blankenship*, 25 Ky. L. Rep. 1645, 77 S. W. 919; *Salmon v. Martin*, 156 Ky. 312, 160 S. W. 1058. And this rule is especially applicable where the entire highway or street has been appropriated, as in this case. *Louisville & N. R. Co. v. Sonne*, 21 Ky. L. Rep. 848, 53 S. W. 274.

In the *Transylvania University Case*, 3 B. Mon. 25, 38 Am. Dec. 173, the court said: "Every owner of ground on any street in Lexington has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services and a convenient outlet to other streets. And of this right the legislature cannot deprive him without his consent or a just compensation in money. The extent of this appurtenant right, depending on circumstances, may not, in a particular case, be easily definable with mathematical precision. As far as it exists, however, it partakes of the character of private property, and is therefore protected by the fundamental law as property. But it cannot, as to each proprietor of ground, be coextensive with all the streets and alleys of the city. As a private right, it must, like that of vicinage, be limited by own nature and end; that is, chiefly by the

necessity of convenient access to, and outlet from, the ground of each proprietor."

The language just quoted was cited with approval in the *Gargan Case*, 89 Ky. 212, 6 L.R.A. 340, 12 S. W. 259, the court adding this comment: "This right, therefore, is not to be determined by the mere fact as to whether the property affected by the obstruction borders immediately on that part of the street obstructed, but has the owner been deprived of convenient access to and outlet from his ground? and, 'beyond such general limit, as to each proprietor of ground in the city, the streets are altogether public highways, and subject like other public roads, to alteration,' etc."

In *Bannon v. Murphy*, 18 Ky. L. Rep. 989, 38 S. W. 889, it was held that the owner of property abutting on a street or alley suffers an injury peculiar to himself by the closing of one end thereof, so that egress from that direction over his property to other streets was cut off (notwithstanding it was a public nuisance), and entitled him to redress by action. In that case, *Bannon* and *Mrs. Murphy* owned adjoining lots which fronted upon an alley running through the middle of the block, and *Bannon* built an obstruction across the alley which prevented *Mrs. Murphy's* exit southwardly, but left her with an easy exit northwardly. In sustaining *Mrs. Murphy's* judgment for damages, the court said: "But it is contended that, inasmuch as appellee has an outlet from the rear of her property northward by way of the connecting alley and the 20 foot alley running between Thirteenth and Fourteenth streets, and, further, as the appellee did not live on the property, and suffered no personal inconvenience from the obstruction to the alley, the court should have instructed the jury that the measure of damages, if any had been suffered, was the diminution of the rental value during the period of the obstruction. It is further objected that the petition sets forth no specific damage which resulted to appellee; but, in the case of *Gargan v. Louisville, N. A. & C. R. Co.* supra, it was held that the stopping up of one end of a street or alley gave to the owner of property bordering thereon a right of action for damages, greater or less, according to the circumstances of the case. We are of opinion that the owner of land abutting upon a street or alley, one end of which is obstructed so that he cannot have egress from his property to other streets in that direction, has suffered an injury peculiar to himself, by reason of the public nuisance, and is entitled to nominal damages upon that fact alone being made evident to the jury."

In the *Wooley Case*, *Wooley* owned

several lots lying on and adjacent to Bickel avenue between Main and Market streets, in Louisville. The Stock Yards Company wrongfully erected buildings and other obstructions across Bickel avenue, at Market street, whereupon Wooley brought this action for damages and for an injunction, to compel the company to remove the obstruction. For its principal defense, the company contended that Wooley had not been especially damaged; that his property was injured no more than the public generally was injured, and for that reason it denied his right to maintain the action, which, if it existed at all, it contended was in the city. In fact, it appeared that the city had brought an action to remove the obstruction, and that action was pleaded in bar of Wooley's right to maintain his action. In answer to this contention by the appellant, the court said: "We are of the opinion that the proof shows that the appellee was specially and peculiarly interfered with and damaged by reason of the nuisance and obstruction referred to, and, under the law, he clearly had the right to maintain this action for the removal thereof, independently of the action of the city."

The court recognized the general rule which requires an individual seeking relief against a public nuisance to show an injury distinct from that suffered by the general public, and cited *Dulaney v. Louisville & N. R. Co.* 100 Ky. 628, 38 S. W. 1050, and *Cosby Case*, 10 Bush, 291, in support of that doctrine. But it further quoted the following language from *Louisville & N. R. Co. v. Sonne*, supra: "It is, however, distinctly held in those cases that when the street is sought to be wholly appropriated, and that, too, without municipal or other authority, private individuals may maintain their action. In this case we think either the city, or these property owners, or both, might bring the suit to prevent the exclusive appropriation complained of."

In *Bohne v. Blankenship*, 25 Ky. L. Rep. 1645, 77 S. W. 919, the court said: "We are of opinion that after land has been dedicated by the owner to the use of the public as a highway, and the dedication has been accepted by or on behalf of the public, as has been done in this case, the right of the public to use it without hindrance from the owner of the burthened estate is

complete. It will not do to say that, if the public authorities fail to keep a road in proper repair, the owner of the adjacent premises may appropriate it to his private use, even temporarily. The public lose none of their rights, once acquired, to use a highway, merely because some public servant has omitted to do his duty in keeping the way in repair. It is also claimed that appellants, owners of an adjacent property, had no such particular interest as warranted their suit for relief against the maintenance of a public nuisance by injunction. But appellants have an interest in the free and unobstructed use of the pass way beyond that of the public generally. The way in question was dedicated by the former owner when he divided the original tract of land into lots for sale, intending thereby clearly to afford a way of outlet from appellants' lot. Their use of the pass way is in the nature of an appurtenant to their lot, the obstruction of which gives them a right of action for relief by injunction."

Salmon v. Martin, 156 Ky. 312, 160 S. W. 1058, is to the same effect.

It will thus be seen that while this court recognizes the general rule that a mere traveler must show some injury greater than a mere inconvenience suffered by being required to take a more circuitous route before he can abate a public nuisance, it also recognizes the rule established by the weight of authority that where a property owner, by reason of an obstruction in a public street or highway, is compelled to take a circuitous route in order to reach his property, he suffers a special or peculiar injury different from that suffered by the general public, and may maintain his action to have the obstruction removed. The facts of this case bring it squarely within the rule. Some of the plaintiffs, and probably all of them, own property abutting upon the highway which Cotton has obstructed; all of them are compelled to take circuitous routes to reach their properties; and, under the rule above announced, they may maintain an action requiring him to remove the obstruction.

Judgment reversed, with instructions to the chancellor to set aside the judgment dismissing the action, and to grant the prayer of the petition.

Annotation—Obstruction in highway preventing access to property except by a circuitous route as a special injury entitling owner to maintain action for damages or for abatement of the nuisance.

This is a continuation of the notes to *Sloss-Sheffield Steel & I. Co. v. Johnson*, L.R.A.1917A.

8 L.R.A.(N.S.) 226, and *Stoutemyer v. Sharp*, 21 L.R.A.(N.S.) 74.

The question whether one who is prevented by an unlawful obstruction from using a highway suffers a special damage which will sustain an action by him against the wrongdoer independently of damage to his property is discussed in the notes to *Sholin v. Skamania Boom Co.* 28 L.R.A.(N.S.) 1053, and *Borton v. Mangus*, L.R.A.1915D, 142.

As to right of property owner whose access from one direction is shut off or interfered with by closing of adjoining street or portion of street on which he is situated, see notes to *Hyde v. Fall River*, 2 L.R.A.(N.S.) 269, *Newark v. Hatt*, 30 L.R.A.(N.S.) 637, and *German Evangelical Lutheran St. Lucas Congregation v. Baltimore*, 52 L.R.A.(N.S.) 889.

As to injunction as a proper remedy to protect right of ingress and egress from street to abutting property, see note to *Crawford v. Marion*, 35 L.R.A.(N.S.) 193.

HUSBAND v. COTTON, ante, 1150, and the majority of the recent cases, sustain the rule set out in the earlier notes that a property owner who, by reason of an obstruction in a street or highway, is compelled to take a more circuitous route to and from his property, suffers an injury different from that of the public at large, which will entitle him to redress.

Thus, one who uses twice a day a highway leading directly from his residence to a distant tract of land which he owns and is farming sustains a special injury by the obstruction of the highway, where, owing to the obstruction, he is compelled to travel about twice the distance on making each trip. *Ingalls v. Eastman* (1910) 61 Wash. 289, 112 Pac. 372.

The obstruction by a public nuisance of two adjacent and parallel streets leading from one's property, which fronts on both streets, to the business center of the city, so as to compel him to take a circuitous route to reach it, is such special injury as to entitle him to maintain a suit to abate the nuisance. *Sloss-Sheffield Steel & I. Co. v. McLaughlin* (1911) 173 Ala. 76, 55 So. 522.

The obstruction at its juncture with the highway of a cul-de-sac which furnishes a short route from an abutter's land to the town entails a special injury upon him, although other roads touch his farm. *Patton v. Forgey* (1913) 171 Mo. App. 1, 153 S. W. 575.

Where, by the obstruction of a street, all direct communication is cut off from one's property with a portion of the city, as well as from the railroad station, except by a circuitous route through a L.R.A.1917A.

neighborhood in bad repute, or by going a long distance in the opposite direction, to a street parallel to the one obstructed, he may maintain an action to abate the nuisance, although he does not abut on the obstructed portion of the street. *Alabama G. S. R. Co. v. Barclay* (1912) 178 Ala. 124, 59 So. 169.

And likewise it is held in *South & North Ala. R. Co. v. Schauffler* (1914) 189 Ala. 58, 66 So. 502, that such an action may be brought by one not abutting on the obstructed portion of a street, who is compelled by the changing of the grade of a railroad track, where it crosses the street, to take a more circuitous route to and from portions of the city.

Where an abutter's access from one direction is cut off by a railroad excavation about half a block away, across the highway, he suffers an injury that is not experienced by the public at large, although he can reach his property from the opposite direction. *Sandstrom v. Oregon-Washington R. & Nav. Co.* (1915) 75 Or. 159, 146 Pac. 803.

In *O'Neil v. Harper* (1913) 28 Ont. L. Rep. 635, 13 D. L. R. 649, where, on account of the obstruction of a road, an abutter could not reach a public highway except in another direction, by a considerable expenditure of money, it was held that he suffered that peculiar damage which entitled him to bring an action for an injunction. The judge made the following quotation from *Laws of England (Halsbury)* as to what constitutes sufficient damage to an individual from the obstruction of a highway to entitle him to maintain an action: "Substantial pecuniary loss occasioned to an individual by the fact that he or his servants cannot carry on his business, or can only do so by a circuitous or more costly journey, may be sufficient."

An abutting owner is specially injured, although the obstruction of the highway leaves a pass way of 9 feet in width. *Salmon v. Martin* (1913) 156 Ky. 309, 160 S. W. 1058.

Or even one of 20 feet. *Harvey v. British Columbia Boat & Engine Co.* (1908) 14 B. C. 121.

A special, peculiar, and substantial injury to the complainant is stated in a complaint which alleges that he owns a lot upon which a hotel business is conducted, that a railroad runs through the center of the street on which the lot abuts, that the half of the street on the lot side, extending from the lot to the passenger depot, is obstructed so as to prevent direct passage along such street

from the hotel to the depot, except by crossing the railroad track twice, and that to reach the depot in any other way it is necessary to take a more circuitous route, resulting in irreparable damage to the hotel business and decreasing the value of the property. *Brown v. Florida Chautauqua Asso.* (1910) 59 Fla. 447, 52 So. 802.

But in *Canady v. Cœur D'Alene Lumber Co.* (1911) 21 Idaho, 77, 120 Pac. 830, it was held that the fact that one whose property did not abut on the part of a street discontinued and obstructed had to travel further and by a more circuitous route to reach the business portion of the city did not, of itself, give him a right of action, and that such an owner could not recover damages, although such discontinuance might tend to lessen the value of his land.

And in *Re Goldman* (1911) 132 N. Y. Supp. 607, it was held that a property owner had no remedy against the city for damages because of the closing of a street, where his property did not abut thereupon, and was accessible from all directions over public streets, although the closing of such street made it necessary to approach one of the public streets by a somewhat circuitous route.

In *Curtis v. Charlevoix Golf Asso.* (1913) 178 Mich. 50, 144 N. W. 818, where the closing of a street which ran into the street upon which the complainant's property abutted, opposite to his premises, necessitated a jog of 100 feet in either direction to reach the same places to which the closed street led, it was held that such inconvenience was common in kind to all who went that way, differing only in degree, according to the extent use was made of the highway. But, there being some evidence that the closing of the street depreciated the value of the property, the court said that such damage, when clearly established, might with some force be urged as differing in kind from that to the general public.

The mere fact that owners of land abutting on a highway will be compelled to go a block to right or left to pass the obstruction in case a section of the highway not adjoining their property is discontinued does not give them a standing to contest eminent domain proceedings seeking to acquire the fee of that section for the purpose of closing it and devoting the land to other uses. *Board of Education v. Gilleland* (1916) — Mich. —, L.R.A.1916E, 468, 157 N. W. 609.

The cutting off, by the closing of a street on which plaintiff's property does L.R.A.1917A.

not abut, of his most convenient route to the river, does not cause special injury to his property, where the nearest route is by way of the street upon which his property abuts. *Lowe v. Lawrenceburg* (1912) 177 Ind. 629, 98 N. E. 637.

Where the obstruction of the road upon which a store is located is so remote therefrom as not to affect the permanent or rental value of the property, and its owner is merely driven to a circuitous route in going to and from his home and in delivering goods to customers, he suffers no peculiar injury. *Walls v. Smith* (1910) 167 Ala. 138, 140 Am. St. Rep. 24, 52 So. 320.

In *Baltimore & O. R. Co. v. Gilmor* (1915) 125 Md. 610, 94 Atl. 200, it was held that the court would not interpose by injunction to prevent the obstruction of a highway where there was no appropriation of the plaintiff's property, and no destruction of access thereto, but at most there was an apprehended injury to his business, and he was compelled to take a circuitous route in driving to different parts of the town.

In *Painter v. Gunderson* (1913) 123 Minn. 323, 143 N. W. 910, one who was accustomed to go to a lake, over a highway extending from another highway to the lake, and by boat in summer and on the ice in winter, to a village across the lake, and to other places, and who was accustomed to use the highway in hauling water from the lake for use on his farm, and ice in the winter for storage, and in getting water from the lake for use in a threshing engine which he operated,—was held not entitled to maintain an action to abate an obstruction of the road as a nuisance. The plaintiff was obliged to adopt a more circuitous route, and was unable to make use of water and ice from the lake, as formerly. The plaintiff also alleged that his farm, which was in the neighborhood, was depreciated in value on account of the obstruction of the road. G. V. I.

NEW MEXICO SUPREME COURT.

G. S. CULP et al.

v.

JESUS M. SANDOVAL, Appt.

(— N. M. —, 159 Pac. 956.)

Sale — f. o. b. — duty to furnish cars.
1. Where a person has agreed to perform an act, whatever is necessary to the perform-

Headnotes by ROBERTS, Ch. J.

ance of the act is a part of the agreement, and it is implied that he must furnish the means of accomplishing the act; hence, when a vendor has contracted to sell goods f. o. b. cars, he must procure the cars and load the goods thereon.

For other cases, see Sale, III. a, in Dig. 1-52 N. S.

Same — notice of delivery.

2. Where, under a contract, the vendor reserves unto himself the option of delivering the goods sold to the vendee, on board a vessel or the cars of a railroad company, upon any one of five days or any one of fifteen days, assuming that it is the duty of the vendee to furnish the vessel or cars, the vendor is obligated to notify the vendee at what time he proposes to deliver the goods. *For other cases, see Sale, III. a, in Dig. 1-52 N. S.*

Appeal — payment of judgment — effect.

3. Where a party appealed from a judgment adverse to him in the district court and executed a supersedeas bond which stayed and suspended all proceedings under such judgment, and preserved the status quo pending the determination of the appeal and prior to a final determination of the appeal, such party voluntarily pays and satisfies such judgment; such payment amounts to a voluntary acquiescence in and recognition of the validity of such judgment, and estops appellant from further prosecuting his appeal.

For other cases, see Appeal and Error, VI. b, in Dig. 1-52 N. S.

(May 1, 1916.)

APPEAL by defendant from a judgment of the District Court for Bernalillo County in plaintiffs' favor in an action brought to recover damages for breach of a contract to sell and deliver certain animals f. o. b. cars. Affirmed.

The facts are stated in the opinion.

Mr. Neill B. Field for appellant:

If the delivery by the vendor is to take place upon the doing of certain acts by the purchaser, the vendor is not in default for nondelivery until notice from the purchaser of the performance of the acts on which the delivery is to take place.

Benjamin, Sales, 7th ed. 679; 35 Cyc. 166; Pinkham v. Haynes, 103 Me. 112, 68 Atl. 642; Walton v. Black, 5 Houst. (Del.) 149; Christy v. Stafford, 22 Ill. App. 430, affirmed in 123 Ill. 464, 14 N. E. 680.

In the absence of a subsequent agreement between the parties, construing their own contract, the vendee must furnish the cars, or designate the vessel upon which the goods are to be shipped.

Note. — As to which party is to furnish cars under a contract to ship goods f. o. b., see annotation following this case, post, 1163.

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Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co. 62 L.R.A. 797, note; Graham v. United States, 110 C. C. A. 465, 188 Fed. 651; 35 Cyc. 197; Consolidated Coal Co. v. Schneider, 163 Ill. 393, 45 N. E. 126; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Evanston Elevator & Coal Co. v. Castner, 133 Fed. 409; Baltimore & L. R. Co. v. Steel Rail Supply Co. 59 C. C. A. 419, 123 Fed. 655; Kunkle v. Mitchell, 56 Pa. 100; Armitage v. Insole, 14 Q. B. 728, 117 Eng. Reprint, 280, 14 Jur. 619, 19 L. J. Q. B. N. S. 202; Sutherland v. Allhusen, 14 L. T. N. S. 666; Marshall v. Jamieson, 42 U. C. Q. B. 115; Dwight v. Eckert, 117 Pa. 490, 12 Atl. 32; Wackerbarth v. Masson, 3 Campb. 270; Boyington v. Sweeney, 77 Wis. 55, 45 N. W. 938; John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 468, 94 N. W. 337; Hughes v. Knott, 138 N. C. 105, 50 S. E. 586, 3 Ann. Cas. 903; Ketcham v. Hiller, 48 Barb. 596; Pinkham v. Haynes, 103 Me. 112, 68 Atl. 642.

Messrs. Mann & Venable for appellees.

Roberts, Ch. J., delivered the opinion of the court:

On the 23d day of November, 1910, a complaint in two counts was filed by the appellees against the appellant, alleging in the first count that the appellant, Sandoval, agreed to sell and deliver to the said appellees, f. o. b. cars at Albuquerque, between the 5th day of November, 1910, and the 10th day of November, 1910, 1,800 lambs at agreed prices, which lambs were to be in good condition, free from scab, and to pass government and territorial inspection. A copy of this contract was attached as an exhibit to the complaint. It was further alleged that the appellant, Sandoval, refused to deliver the lambs at the time and place agreed upon, and that thereby the appellees suffered certain damages. They further alleged that they advanced and paid to the appellant as an advance payment \$500, and they asked damages for the alleged breach of the contract upon the first cause of action in the sum of \$1,328. The second cause of action alleged the breach of a contract entered into on the 20th day of October, A. D. 1910, between the same parties, whereby the appellant agreed to sell and deliver f. o. b. cars Albuquerque, New Mexico, one double-deck car of old ewes at a certain agreed price. It alleged that \$75 had been advanced and paid to appellant as an advance payment upon these sheep, and alleged the failure of the appellant, Sandoval, to keep his contract and to deliver the sheep. A copy of this contract was also attached as an exhibit.

The appellant filed an amended answer

and counterclaim. For the purpose of this appeal it is sufficient to say that the appellant denied that he failed and refused to deliver to the said appellees the said lambs, or any part thereof, and alleged that the appellees did not, at any time before or subsequent to the 10th day of November, 1910, provide any cars upon which the appellant could deliver the lambs and ewes so contracted and agreed to be delivered; and alleged that, after appellees had failed to supply the cars, he made a tender of the lambs and sheep to the appellees, which appellees refused to accept, for the reason that the market price of lambs and sheep of the quality and character contracted for had greatly depreciated prior to the time the appellees had agreed to accept the delivery of the lambs. Appellant alleged in his amended counterclaim that, as a result of the failure of the appellees to keep their contracts, he had suffered damages in a certain amount, and he filed a bill of particulars, showing damage in the amount of \$1,428.90. A reply was filed to the amended answer and counterclaim, which denied substantially all the new matter set up in the amended answer and counterclaim, and denied that the appellees ever agreed to furnish appellant any cars whatever, and alleged that the cars were to be furnished by the appellant for the shipment of said sheep and lambs. This allegation as to the liability of the appellant to furnish the cars, the court, after full argument, struck out of the reply on motion of appellant, holding that, as a matter of law, the appellees were obligated to furnish cars. The cause thereafter came on for hearing, and the court made certain findings, some at the request of the appellant and some at the request of the appellees, and signed a bill of exceptions, in which the substance of all the evidence is set forth. The court found: "That the plaintiffs never demanded from the defendant, Sandoval, at any time, the delivery of sheep and lambs in compliance with the contract, and never designated nor pointed out to the said defendant, Sandoval, any cars upon which Sandoval might load the sheep and lambs described in the contracts, nor notified the said Sandoval that the plaintiffs were ready to receive the sheep and lambs, or had cars in readiness upon which the sheep and lambs might be loaded by the defendant."

It also found: "That between the 5th and 16th days of November, 1910, the market price of lambs in Albuquerque depreciated to the extent of approximately one cent a pound."

It also found that the appellant, Sandoval, failed to deliver the sheep and lambs at the times and places agreed upon in said L.R.A.1917A.

contracts, and rendered judgment for appellees for \$500, with interest at the rate of 6 per cent per annum from October 3, 1910, until paid, and the further sum of \$75, with 6 per cent per annum from the 20th day of October, 1910. It also found that the appellant, Sandoval, did, upon the 16th day of November, tender the sheep and lambs of the kind and number described in the contracts, and which substantially complied with the requirements thereof, and that appellees refused to accept the same upon the ground that the time for the delivery thereof had expired. To the action of the court in holding that the defendant had been guilty of breach of contract and therefore was liable in damages to the plaintiffs, and from the final judgment rendered in accordance with such decision, this appeal is prosecuted.

The order, entered June 2, 1911, striking out the third paragraph of appellees' reply, which paragraph of reply set up the fact that it was the appellant's duty to furnish the cars and load the lambs and sheep thereon, was made by the presiding judge of said court prior to statehood. Judge Reynolds, who tried the case, as appears from the finding, quoted supra, evidently took the view that under the terms of the contract it was the duty of appellant to furnish the cars and deliver the sheep and lambs loaded thereon. Appellant, in his brief, says: "The controlling question in the case which the plaintiff disputed at all times in the lower court is, 'Who was to furnish the cars under the terms of the contract?'"

Appellees refuse to meet appellant upon this issue, and advance a theory, which they deduce from the evidence, in support of the judgment in their favor. Without discussing appellees' theory, we will proceed upon the assumption that appellant has correctly stated the issue, and pass to a consideration of the question upon which he relies for a reversal.

The general rule is that one who undertakes to accomplish a certain result impliedly agrees to supply all means necessary to such result. Here appellant agreed to deliver the lambs and ewes to appellees f. o. b. cars at Albuquerque. The term "f. o. b." has a well-known and clearly understood meaning in the business world, signifying "free on board." Bouvier's Law Dict. Under this contract, then, appellant undertook and stipulated with appellees that he would deliver the stock to them, at his own expense, on board the cars at Albuquerque, and within a stipulated time. When delivery was made, in accordance with the contract of sale, appellees were to make payment for the lambs and ewes.

Appellant admits that he could not deliver the lambs and ewes from his own flock, as was evidently contemplated by both parties, because such animals were infected with scabies, and he was required to "dip" them by the government inspectors. He contends, however, that he did not breach his contract, because appellees failed to have the railroad company set out cars to receive the designated number of lambs and ewes purchased, and to notify him thereof.

It is undeniably true that the early English cases held that, unless it was otherwise provided in a contract to ship f. o. b., the duty of specifying or furnishing the transportation facilities fell upon the buyer. *Armitage v. Insole*, 14 Q. B. 728, 117 Eng. Reprint, 280, 19 L. J. Q. B. N. S. 202, 14 Jur. 619; *Sutherland v. Allhusen*, 14 L. T. N. S. 666. Some of the American state courts have followed the same holding. *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836; *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32; *Kunkle v. Mitchell*, 56 Pa. 100; and the early Wisconsin case of *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938. In Illinois the question has been frequently discussed, but never definitely decided. In the case of *American Trust & Sav. Bank v. Zeigler Coal Co.* 91 C. C. A. 72, 165 Fed. 34, the circuit court of appeals, seventh circuit, in discussing the Illinois cases, said: "In Illinois, however, where these contracts were entered into and made performable, the supreme court has rejected both of the foregoing views of a general rule for ascertaining the obligation, under like contracts for delivery at a mine, and, resorting to evidence of subsequent conduct in performance, has uniformly 'adopted the construction placed upon the contract by the parties themselves' as the test, and so charged the seller with duty to furnish the cars in each instance. *Consolidated Coal Co. v. Jones & A. Co.* 232 Ill. 326, 83 N. E. 851, and prior cases reviewed."

In a more recent Illinois case (*Harman v. Washington Fuel Co.* 228 Ill. 298, 81 N. E. 1017) the supreme court said: "There has been a difference of opinion between different courts as to whether the duty devolves upon the seller or the purchaser to furnish cars where there is a contract for delivery f. o. b. cars and the contract is silent as to which one shall furnish the cars. Some courts have followed the rule, applicable in other cases, that where one makes an agreement to perform an act, whatever is necessary to the performance of the act is a part of his agreement, and it is implied that he will secure the means necessary to the accomplishment of the act. The natural meaning of the words, 'free L.R.A.1917A.

on board,' is that the goods are to be furnished by the seller on board free of all charges and expenses up to and including the loading, and courts adopting the rule just stated hold that the seller must furnish the cars. Other courts, apparently following the rule established when goods were to be delivered free on board a ship, have held that the duty to furnish cars rests upon the purchaser. The term in question was frequently inserted in contracts for sale and delivery of goods free on board a vessel, and it was held that the seller was under no obligation to act until the purchaser should name the ship on which delivery was to be made, for the reason that, until the seller knew the ship, he could not put the goods on board. It was held that the seller was entitled to know on what ship and where he was required to deliver the goods, and that rule has been referred to, although it is manifestly wholly unsuited to shipments by rail under present conditions, at least unless the sale is made to a railroad company, or the means of transportation contemplated is under the control of the purchaser. The question, which is the correct construction of such a contract? has not been determined by this court, and is not now determined."

In the Federal cases *Chicago Lumber Co. v. Comstock*, 18 C. C. A. 207, 34 U. S. App. 414, 71 Fed. 477; *American Trust & Sav. Bank v. Zeigler*, supra, the courts adopted, in this regard, the construction placed upon the contract by the parties, following the Illinois rule. These two cases originated in Illinois, and the Federal courts applied the law as construed by the supreme court of that state.

In the case of *Evanston Elevator & Coal Co. v. Castner*, 138 Fed. 409, decided in the circuit court, northern district of Illinois, Judge Kohlsaat followed the Pennsylvania rule, and held that under the contract for the delivery of coal f. o. b. cars at the mines, it was the duty of the buyer to furnish the cars.

In *Davis v. Alpha Portland Cement Co.* 73 C. C. A. 388, 142 Fed. 74, and *Baltimore & L. R. Co. v. Steel Rail Supply Co.* 59 C. C. A. 419, 123 Fed. 655, the same rule was announced; but these cases both arose in Pennsylvania, and naturally the Federal courts followed the rule established by the supreme court of that state.

In *Graham v. United States*, 110 C. C. A. 465, 188 Fed. 651, circuit court of appeals, fourth circuit, the text of 35 Cyc. 197, was approved, but a decision of this question was not necessarily involved in the case.

We have referred to all the American cases which have been called to our atten-

tion, holding that the duty of furnishing the cars or means of transportation rests upon the buyer, under a contract by the seller to deliver goods to the buyer f. o. b. cars. From the foregoing it will be seen that the supreme court of Pennsylvania is the only state court so holding, and that only two Federal cases, one a decision by a district judge, uninfluenced by state decisions, so decide.

On the other hand, the following state courts have followed the rule, of general application, that where a person has agreed to perform an act, whatever is necessary to the performance of the act is a part of the agreement, and it is implied that he must furnish the means of accomplishing the act, and that therefore, when a vendor has contracted to sell goods f. o. b. cars, he must procure the cars; *Hurst v. Altamont Mfg. Co.* 73 Kan. 422, 6 L.R.A.(N.S.) 928, 117 Am. St. Rep. 525, 85 Pac. 551, 9 Ann. Cas. 549; *Elliott v. Howison*, 146 Ala. 568, 40 So. 1018; *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 58 Wash. 223, 28 L.R.A.(N.S.) 1007, 108 Pac. 621; *Vogt v. Schienbeck*, 122 Wis. 491, 67 L.R.A. 756, 106 Am. St. Rep. 989, 100 N. W. 820, 2 Ann. Cas. 814.

As the question has never been heretofore decided in this state, this court is unhampered by precedent, and is free to adopt the rule which appears to be best suited to present business conditions and the most consonant with reason. The early English cases, in establishing the rule contended for by appellant, necessarily were familiar with the course of business and the manner and method of transporting goods. Such courts knew that most of the shipping was done by boats, which plied at irregular intervals between the different ports of England and foreign countries; that there were no established and unvarying freight rates; and that inland transportation was likewise almost exclusively a matter of private contract. The buyer, in cases where the goods were delivered to the carrier for transportation f. o. b. the point of origin, was required to pay the cost of cartage; hence he was vitally interested in selecting the carrier. No such reason can exist for adherence to this doctrine, under the present transportation methods in the United States. Here the freight charges are fixed and unvarying, without first obtaining the approval of the United States Interstate Commerce Commission in so far as interstate rates are concerned, and the state corporation commission in so far as intrastate rates are concerned. This consideration, which undoubtedly largely influenced the courts in the early cases, no longer is an element to be taken into consideration. L.R.A.1917A.

In view of the known methods of conducting business, and the further fact that daily transactions take place between buyer and seller for the purchase and sale of goods to be shipped to the seller, where the purchase is made f. o. b. cars at the point of shipment, which may be many thousands of miles removed from the point of destination, it would be unreasonable to say that the seller can excuse his default in the shipment of the goods according to the terms of his contract because the buyer has failed to specify or furnish the means of transportation.

In the case of *Vogt v. Schienbeck*, supra, the supreme court of Wisconsin said: "The proposition seems contrary to universal understanding, which ought to be deemed a matter of judicial cognizance without the aid of evidence or adjudged cases. We apprehend that when one buys merchandise of another to be shipped to him by rail from a distant point, the delivery to be made to him f. o. b. cars at the point of starting, such other, as a matter of course, is expected to obtain from the railway company the necessary cars upon which to load the subject of the deal."

This we believe to be the more reasonable and rational rule; hence should be applied in this case, unless some peculiar reason exists by virtue of the contract which makes it nonapplicable. The only one which might be suggested is that the contract fails to name the point of destination; hence appellant was unadvised as to the cars to select. Whether appellees ever advised appellant as to the proposed destination of the lambs and ewes does not appear from the findings by the court, or from the bill of exceptions, which, however, does not purport to contain a stenographic copy of the evidence adduced upon the trial. It is possibly true that it would be incumbent upon the buyer to indicate to the seller, prior to his engaging the cars, the point of destination of the goods purchased, by reason of some rule or custom of the carrier, but as this point was not raised in the trial court by the pleadings, findings or evidence, in so far as we are advised by the transcript of record, we will not consider it.

There is another point, not suggested by counsel, but equally fatal to appellant's recovery. Under the contract appellant had the option of delivering the lambs at any time between the 5th and 10th days of November, and the ewes any time between the 1st and 15th days of the same month. Until appellant notified appellees of the day on which he proposed to deliver, the latter could not possibly know when to have the cars ready for the re-

ception of the stock, if we should assume that it was the duty of the buyer to furnish the cars. That such notice was given is not claimed by appellant.

Where, under a contract, the vendor reserves unto himself the option of delivering the goods sold to the vendee on board a vessel or the cars of a railroad company, upon any one of five days, or any one of fifteen days, assuming that it is the duty of the vendee to furnish the vessel or cars, the vendor is obligated to notify the vendee at what time he proposes to deliver the goods. *Brooklyn Oil Ref. v. Brown*, 38 How. Pr. 444; *Ketcham v. Hiller*, 48 Barb. 596; *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32.

For the reasons stated, the judgment will be affirmed; and it is so ordered.

Hanna and Parker, JJ., concur.

A motion to dismiss motion for rehearing, having been filed, *Roberts, Ch. J.*, on September 4, 1916, handed down the following additional opinion:

On the 2d day of June, 1916, appellant, by his attorney, filed a motion for rehearing herein, in which he contends that the former opinion filed by the court is not in harmony with the correct interpretation of the authorities cited by the court in support thereof; and, further, that it was unfair to appellant for the appellate court to affirm the judgment of the lower court upon a theory which the ruling of the trial court precluded from consideration, and, in order to so decide, to assume that the appellees introduced evidence not contained in the record, which would have supported the opinion upon such theory; and further, that the appellant not having delivered the lambs and ewes before the last day of the time within which he had the opportunity of so delivering was equivalent to notice to the appellees that he had elected to deliver on the last day.

Appellees have moved to dismiss the motion for a rehearing filed, on the ground that the original judgment against the appellant was fully discharged and paid by appellant before the filing of the motion for rehearing, and that such payment was voluntary. The motion to dismiss is accompanied by a certificate of the clerk of the district court of Bernalillo county, showing full payment of the judgment; and it is further shown in the motion that appellees have executed to appellant a full release and discharge from such judgment.

Appellant contends that the motion for rehearing should not be dismissed, because under the majority rule even a voluntary

compliance with the judgment or decree of the court by payment or performance is no bar to an appeal or writ of error for its reversal, particularly where repayment or restitution may be enforced, or the effect of compliance may be otherwise undone, in case of reversal. In support of this contention he cites 3 C. J. p. 675; *Lott v. Davis*, 262 Ill. 148, 104 N. E. 199; *Dakota County v. Glidden*, 113 U. S. 222, 28 L. ed. 981, 5 Sup. Ct. Rep. 428; *Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655; *O'Hara v. MacConnell*, 93 U. S. 150, 23 L. ed. 840; *Patterson v. Keeney*, 165 Cal. 465, 132 Pac. 1043, Ann. Cas. 1914D, 232.

It must be conceded that the weight of authority is to the effect that a judgment debtor does not waive the right to appeal and to reverse the judgment for error by paying the amount thereof, either before or after taking his appeal, no matter whether the payment is made before or after execution has issued and been served upon him. This is so because the judgment creditor has the right and power to issue execution to enforce the judgment or decree, and the judgment debtor by paying and discharging the judgment presumably does not do so voluntarily, but is coerced into paying the same. That this is true is shown by an excerpt from 2 Freeman on Judgments, § 480a, quoted in appellant's brief, in which it is said: "The better view, we think, is that, though execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal."

In each of the cases cited by appellant payment was made on the judgment, while the judgment debtor had the right to cause execution to be issued, and enforce its collection. These cases are all distinguishable from the present case because here appellant, when he took his appeal, executed a supersedeas bond under the provisions of § 16, chap. 77, Laws 1915, by which act on his part the efficacy of the judgment was suspended; hence appellees were powerless to cause execution to be issued on the judgment and enforce the collection of the amount called for thereby.

These facts are somewhat similar to those in the Colorado case of *Bull v. Doss Bros. Electric Constr. Co.* 51 Colo. 459, 119 Pac. 156. There the defendant in error recovered judgment against the plaintiffs in error, and, in order to make the same a lien upon the real property of the judgment debtors, caused a transcript of the docket entry of such judgment to be filed with the recorder of the city and county of Denver, as provided by the Colo-

rado statuta. Thereafter the judgment debtors, plaintiffs in error, took the cause to the supreme court for review, applied for and secured a supersedeas, staying the execution of the judgment. Thereafter, and prior to a decision of the case in the supreme court, plaintiffs in error paid the judgment, and had the same satisfied of record. The court held that such payment was voluntary, and that the writ must be dismissed.

One of the early leading cases on the effect of the payment of the judgment before execution issued upon the right of appeal is that of *Richeson v. Ryan*, 14 Ill. 74, 56 Am. Dec. 493. There Ryan recovered a judgment against Richeson. The latter paid the judgment before execution issued, and then sued out a writ of error to reverse it. The court states the question, "Did the payment operate as a release of errors?" and then proceeds: "If the judgment had been collected by execution, there would not be a doubt of the right of Richeson to prosecute the writ of error. A payment made under such circumstances would be compulsory, and would not preclude him from afterwards reversing the judgment, if erroneous, and then maintaining an action to recover back the amount paid. The payment in question must equally be considered as made under legal compulsion."

The court held that by so paying he did not waive his right to appeal or prosecute error. We believe, from an examination of the authorities, that the correct determination of the question depends upon whether the payment of the judgment is under legal compulsion; that is, assuming that payment is made prior to the issuance of execution, that such payment is regarded as having been compulsory by reason of the right existing in the judgment creditor to have issued execution and to

have enforced payment at the time payment is made. It is well settled that: "If a person voluntarily acquiesces in, or recognizes the validity of, a judgment, order, or decree, or otherwise takes a position which is inconsistent with the right to appeal therefrom, he thereby impliedly waives his right to have such judgment, order, or decree reviewed by an appellate court." 3 C. J. p. 665, § 536.

The reason for the majority rule which recognizes the right of appeal, even though the judgment be paid without execution, is that, the judgment debtor having the power to coerce payment, the payment by the judgment creditor without execution is not a voluntary acquiescence in, or recognition of, the judgment.

Here the appellees were powerless to issue execution, or in any other manner to compel payment of the judgment, notwithstanding which the appellant voluntarily paid the full amount of the judgment. Under these circumstances we believe that the payment amounted to a voluntary acquiescence in and recognition of the validity of the judgment which precludes him from seeking further relief therefrom in this court; hence we must hold that, where a party appeals from a judgment adverse to him in the district court and executes a supersedeas bond which stays and suspends all proceedings under such judgment, and preserves the status quo pending the determination of the appeal and prior to a final determination of the appeal, such party voluntarily pays and satisfies such judgment; such payment amounts to a voluntary acquiescence in and recognition of the validity of such judgment, and estops appellant from further prosecuting his appeal. Hence the motion for rehearing must be dismissed; and it is so ordered.

Hanna and Parker, JJ., concur.

Annotation—Which party is to furnish cars under a contract to ship goods f. o. b.

The earlier cases discussing this question may be found in note to *Hurst v. Altamont Mfg. Co.* 6 L.R.A.(N.S.) 928.

The earlier note shows a difference of opinion between different courts as to whether the duty devolves upon the seller or the purchaser to furnish cars where there is a contract for delivery f. o. b. cars and the contract is silent as to which one shall furnish the cars. Some courts have followed the rule that where one makes an agreement to perform an act whatever is necessary to L.R.A.1917A.

the performance of the act is a part of his agreement, and it is implied that he will secure the means necessary to the accomplishment of the act. The natural meaning of the words, "free on board," is that the goods are to be furnished by the seller on board free of all charges and expenses up to and including the loading, and courts adopting the rule just stated hold that the seller must furnish the cars. This is the view taken in *CULP v. SANDOVAL*, ante, 1157.

This rule is also applied in *R. J. Menz*

Lumber Co. v. E. J. McNeeley & Co. (1910) 58 Wash. 233, 28 L.R.A.(N.S.) 1007, 108 Pac. 621, holding that the acceptance of an order for lumber and shingles f. o. b. required the seller to procure and load the cars.

Other courts, apparently following the rule established when goods were to be delivered free on board a ship, have held that the duty to furnish cars rests upon the purchaser. The term in question was frequently inserted in contracts for sale and delivery of goods free on board a vessel, and it was held that the seller was under no obligation to act until the purchaser should name the ship on which delivery was to be made, for the reason that until the seller knew the ship he could not put the goods on board. This rule, however, is manifestly wholly unsuited to shipment by rail under present conditions, at least unless the sale is made to a railroad company, or the means of transportation contemplated is under the control of the purchaser. See *CULP v. SANDOVAL* and cases in the earlier note.

It is held in *Wiggin v. Marsh Lumber Co.* (1915) — W. Va. —, 87 S. E. 194, that in a contract for the sale and delivery of lumber f. o. b. cars, at a shipping station on a railroad where each party has a separate depot, the contrary not otherwise appearing, it is the duty of the vendee to provide the cars for shipment.

All authorities, however, concede that the prima facie import of the phrase, so far as the duty to furnish means of transportation is concerned, may yield to a contrary intent manifested by the other terms of the contract, or the surrounding circumstances, or a practical construction of the contract by the acts of the parties.

Thus, in *American Trust & Sav. Bank v. Zeigler Coal Co.* (1908) 91 C. C. A. 72, 165 Fed. 34, a contract for the sale of coal to be delivered "f. o. b. cars" at the mine was construed as imposing upon the seller the duty of providing cars. The contract involved was entered into and made performable in Illinois, and, in accordance with the view taken by the supreme court of that state, the construction placed upon the contract by the parties themselves was adopted as the test, acts and correspondence clearly indicating that it was contemplated that the seller was to furnish the cars.

So in *Harman v. Washington Fuel Co.* (1907) 228 Ill. 298, 81 N. E. 1017, the L.R.A.1917A.

parties themselves construed the contract for the sale of coal f. o. b. cars at the mine as requiring the shipper to furnish the cars. Each of them, observed the court, provided that the agreement of the shipper to furnish the coal was to be subject to strikes, car supply, railroad blockades, and other contingencies beyond its control, which clearly implied that the shipper was to furnish the cars. By the contract itself and the construction put upon it by the parties, the cars were to be furnished by the shipper, unless there should be a failure of the car supply.

The obligation to furnish the necessary cars, however, rests upon the contractor rather than the government, under a contract by which the former agrees to transport from the quarry, cut, box, and deliver complete all the granite required for a public work, to be furnished by the government f. o. b. cars at the quarry, even if certain recitals in the preliminary descriptions and conditions can be construed to mean that, as between the quarryman and the government, the latter is bound to furnish the cars, where other recitals indicate that bidders were invited to step into the government's shoes and assume a like obligation to it. *Graham v. United States* (1913) 231 U. S. 474, 58 L. ed. 319, 34 Sup. Ct. Rep. 148, affirming (1911) 110 C. C. A. 465, 188 Fed. 651. It was stated in 188 Fed. 651, that the lower court took a middle ground, and told the jury: "In a contract of that kind, I think there was an obligation on both parties to furnish cars, that reasonable efforts should be made to accommodate each other." And it was further observed that the court's construction of the law was very fair and liberal to defendant, for the general rule is pretty well established that, where the goods are bought f. o. b. cars, the obligation is upon the buyer to furnish the cars necessary in transportation. A sound reason for this rule, says the court, is apparent. The transportation company becomes by law agent or bailee of the buyer; in consequence the buyer, under all ordinary conditions and in the absence of contract provisions to the contrary, should be permitted to select the agent of his choice. It is true that this general rule may be shown to have been modified or reversed by the agreement or contract of the parties, but there is nothing in the case here to cause such a belief.

J. D. C.

OKLAHOMA SUPREME COURT.

J. A. COPELAND, Plff. in Err.,

v.

J. M. BURKE, et al.

(— Okla. —, 158 Pac. 1162.)

Bills and notes — qualified indorsement.

1. A qualified indorsement on a negotiable instrument may be made by adding to the indorser's signature the words, "Without recourse," or words of similar import.

For other cases, see Bills and Notes, III. b, 3, in Dig. 1-52 N. S.

Same — transfer.

2. The words: "I transfer my right, title, and interest in same: J. M. Burk" — written upon the back of a negotiable instrument, by the payee, is not a qualified indorsement, and such payee is liable thereon as an ordinary indorser.

For other cases, see Bills and Notes, III. b, 3, in Dig. 1-52 N. S.

(June 27, 1916.)

ERROR to the District Court for Oklahoma County to review a judgment in defendants' favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Walter, Hilpirt, & Callihan and W. J. Weaver, for plaintiff in error:

The words, "I transfer my right, title, and interest in same, J. M. Burk," written upon the back of the note in question, do not constitute such an assignment in law as would relieve him from any further liability upon the paper.

Mangold & G. Bank v. Utterback, — Okla. —, L.R.A. —, —, 154 Pac. 533; Sears v. Lantz, 47 Iowa, 658; Citizens' Nat. Bank v. Walton, 96 Va. 435, 31 S. E. 890; National Exch. Bank v. Lubrano, 29 R. I. 64, 68 Atl. 944; Rowe v. Gohlman, 44 Tex. Civ. App. 315, 98 S. W. 1077; Kistner v. Peters, 223 Ill. 607, 7 L.R.A.(N.S.) 398, 114 Am. St. Rep. 362, 79 N. E. 311; Mayes Mercantile Co. v. Handley, 6 Ind. Terr. 357, 98 S. W. 125; Leahy v. Haworth, 4 L.R.A.(N.S.) 657, 73 C. C. A. 84, 141 Fed. 850; Lovell v. Everton, 11 Johns. 52; Everett v. Tidball, 34 Neb. 803, 52 N. W. 816; Maine Trust & Bkg. Co. v. Butler, 45 Minn. 506, 12 L.R.A. 370, 48 N. W. 333; Markey v. Corey, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 60 N. W. 493; Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547; Bis-

bing v. Graham, 14 Pa. 14, 53 Am. Dec. 510; Merrill v. Hurley, 6 S. D. 593, 55 Am. St. Rep. 859, 62 N. W. 958; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601; Farnsworth v. Burdick, 94 Kan. 749, 147 Pac. 863.

Messrs. Bennett & Pope, for defendants in error:

Defendant's indorsement on the note is in the language of a quitclaim, and his liability thereon is limited to that of an assignment wherein he covenants that the note is genuine, that it is a valid and legal instrument, that the maker was competent, that he is the lawful holder and has a valid title and right to transfer the note, and has no knowledge of any facts which would render the note worthless.

Spencer v. Halpern, 62 Ark. 595, 36 L.R.A. 120, 37 S. W. 711; Tiedeman, Com. Paper, § 265; Hailey v. Falconer, 32 Ala. 536; Webb v. Plummer, 2 Barn. & Ald. 748, 106 Eng. Reprint, 537, 21 Revised Rep. 479; Brown v. Byrne, 3 El. & Bl. 703, 118 Eng. Reprint, 1304, 2 C. L. R. 1599, 23 L. J. Q. B. N. S. 313, 18 Jur. 700, 2 Week. Rep. 471; Humfrey v. Dale, El. Bl. & El. 1004, 120 Eng. Reprint, 783, 27 L. J. Q. B. N. S. 390, 5 Jur. N. S. 191, 6 Week. Rep. 854; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

Edwards, C., filed the following opinion:

The parties will be referred to as plaintiff and defendant, according to their positions in the lower court. The plaintiff sued the defendant and one E. S. Messengill in the district court upon a negotiable promissory note executed by said Messengill to the defendant, J. M. Burke, payee, and by the said defendant transferred to the plaintiff by memorandum upon the back of the note in these words, "I transfer my right, title, and interest in same. J. M. Burk." The petition is in the ordinary form, alleging the making of the note, its transfer for a valuable consideration before maturity, with a copy of the note and indorsement thereon attached. The defendant Burke demurred, assigning the reason that the petition did not constitute a cause of action against him. The demurrer was sustained. The plaintiff elected to stand upon his petition. Judgment was thereupon rendered for defendant for costs, and the plaintiff appeals.

The only assignment of error is that the court erred in sustaining the demurrer of defendant to the petition of plaintiff.

The case must be determined by the meaning and effect to be given the words preceding the signature of the defendant upon the back of the note in controversy. Do

Headnotes by EDWARDS, C.

Note. — For words of assignment as qualifying indorsement, see annotation following this case, post, 1167.
L.R.A.1917A.

the words used constitute the defendant an indorser in due course, and as such liable for the payment of the note, or is he a mere assignor? Sections 4088 and 4113, Revised Laws 1910, with reference to qualified indorsement, read as follows:

"Qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'Without recourse,' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

It will be seen that a special indorsement does not destroy the negotiability of a note, and the question of negotiability does not enter into the case. There are two widely divergent lines of authority in cases of this kind, one line holding that a memorandum of similar import to that here used exempts the indorser from personal liability or constitutes him a mere assignor. One of the leading cases sustaining this line of holding is *Hailey v. Falconer*, 32 Ala. 536, in which it is held that an indorsement in these words: "For value received this 28th day of February, 1850, I transfer unto John P. Hailey all my right and title in the within note, to be enjoyed in the same manner as may have been by me"—exempts the indorser from personal liability on the note. Another authority, strongly sustaining this line, is *Spencer v. Halpern*, 62 Ark. 595, 36 L.R.A. 120, 37 S. W. 711, the indorsement in that case being in these words: "For value received, I hereby transfer my interest in the within note to Isaac Halpern. Geo. Spencer"—the court, in the course of the opinion, saying: "Had the payee intended to be bound as indorser, why use so many words? Had the transferee expected more than 'the interest' of the transferrer, why did he accept the instrument transferring only his 'interest'? We must accept and interpret the completed contract as the parties made it. They have seen proper to express it at length, and have used unambiguous terms. Construing the terms, 'my interest,' most strongly against the transferrer, we do not feel authorized to say they mean anything more than simply 'my interest.'"

The court in this case adopts the maxim, "*Expressio unius est exclusio alterius*," and rejects the maxim, "*Expressio eorum quae tacite insunt nihil operatur*." This line is further sustained by *Tiedeman on Commercial*, L.R.A.1917A.

cial Paper, § 265: "The declaration that the payee assigns or transfers all his right, title, and interest in the paper would seem to limit in a most effective way the rights acquired by the transferee to those which the transferrer had therein, and thus prevent the writing from operating as an indorsement."

The other line of authority is to the effect that an indorser, in order to limit his personal liability, must do so by words clearly expressing such intent. Some of the decisions sustaining this line are as follows: The early English case of *Richards v. Frankum*, 9 Car. & P. 221, cited by Mr. Tiedeman, in which the indorsement was in these words: "I hereby assign this draft and all benefit of the money secured thereby to John Grainger of Bessillsleigh, in the county of Berks, laborer; and order the within named Thomas Fox Hitchcock to pay him the amount and all interest in respect thereof" which was held to be merely an ordinary indorsement. Daniel on *Negotiable Instruments*, § 688c, reads: "The question arising in such cases is a nice one, and depends upon rules of legal interpretation. The mere signature of the payee, indorsed on the paper, imports an executed contract of assignment, with its implications, and also an executory contract of conditional liability, with its implications. The assignment would be as complete by the mere signature as with the words of assignment written over it. The conditional liability which is executory is implied by the executed contract of assignment and the signature under it, which carries the legal title; and the question is, Does the writing over a signature an express assignment, which the law imports from the signature per se, exclude and negative the idea of conditional liability, which the law also imports if such assignment were not expressed in full? We think not. . . . When the thing done creates the implication of another to be done, we cannot think that the mere expression of the former in full can be regarded as excluding its consequence, when that consequence would follow if the expression were omitted."

The most often cited authority is the case of *Sears v. Lantz*, 47 Iowa, 658, in which the indorsement was in these words: "December 18th, 1876, I hereby assign all my right and title to Louis Meckley. John Bowman"—which the court held to be equivalent to an indorsement of the note, and bound the assignor as an indorser, the court following the earlier case of *Sans v. Wood*, 1 Iowa, 263, in which the same holding was made upon an indorsement in these words: "I assign the within note to Miss

Sarah Coffin." The same holding is made in the case of *Adams v. Blithen*, 66 Me. 19, 22 Am. Rep. 547, upon a similar indorsement. In the case of *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890, the court holds: "Writing on back of negotiable note, signed by one of its two payees, 'For value received, I hereby assign and transfer to F. all right, title, and interest that I may have in the within note,' renders him liable to an innocent holder as an indorser, and not as an assignor, and without regard to the equities between him and the other payee, though F. be such payee."

In the case of *Markey v. Corey*, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 493, it is held: "The negotiability of a promissory note is not destroyed because of an indorsement thereon that it is given in accordance with a certain contract, although the note is one of a series which, by the terms of such contract, were to become payable, at the option of the payee, on failure to pay any of them."

The court in this case follows the Iowa cases above referred to, and says: "The usual mode of transfer of a promissory note is by simply writing the indorser's name upon the back, or by writing also over it, the direction to pay the indorsee named, or order, or to him or bearer. An indorsement, however, may be made in more enlarged terms and the indorser be held liable as such."

The supreme court of Minnesota, in the case of *Maine Trust & Bkg. Co. v. Butler*, 45 Minn. 506, 12 L.R.A. 370, 48 N. W. 333, in a well-reasoned case, follows the doctrine laid down in *Daniel on Negotiable Instruments*, and cites with approval the Iowa and Maine cases above referred to, and adopts the latter maxim referred to by the Arkansas court in the case of *Spencer v. Halpern*, *supra*. In the case considered by the Minnesota court the indorsement was

in these words: "For value received I hereby assign and transfer the within note, together with all interest in and all rights under the mortgage securing the same, to L. D. Cooke"—and the court held that this was not a qualified indorsement, and that the payee was liable as an ordinary indorser.

This question not having heretofore been presented to this court, we feel constrained to adopt the construction placed upon the indorsements of this character by the last-cited line of authorities, as supported by the better reasoning and more in consonance with the commercial needs of the day. In these modern times commercial paper has come to play a very large part in the business life of the country. Commerce is carried on by means of business credit. Commercial paper in great volume continuously passes current by indorsement. The effect of and the liability incurred by an indorsement is a matter of common knowledge. The phrase, "without recourse," as employed in such business transactions, is in everyday use, and we can hardly conceive of a person engaged in business affairs of importance, as was the defendant in this case, who is not familiar with its use and meaning. If the defendant did not intend to be bound by his indorsement on the note in question, he should have used some words which would clearly indicate that he was not an ordinary indorser. The very terms of our statute (*Rev. Laws 1910, § 4088*), *supra*, specify that the indorsement may be qualified by the use of the words, "without recourse," or words of similar import. In our judgment the defendant has not so qualified his indorsement and is liable.

It follows that the judgment must be reversed.

Per Curiam:

Adopted in whole.

Annotation—Bills and notes: words of assignment as qualifying indorsement.

The earlier cases on this subject are collected in the note to *Markey v. Corey*, 36 L.R.A. 117, and this note is supplemental to that part of the former note which is within the present scope.

For effect of transfer of title to note by indorsement in form of guaranty, see the notes to *Dunham v. Peterson*, 36 L.R.A. 232; *McNary v. Farmers' Nat. Bank*, 41 L.R.A. (N.S.) 1009; and *Ireland v. Floyd*, L.R.A. 1915C, 661.

Assignments by separate instruments are not considered; see, for example, *Of*, L.R.A. 1917A.

fenstein v. Weygandt (1913) 89 Kan. 739, 132 Pac. 991.

It will be seen that the conflict of opinion shown in the earlier note continues. Not enough cases of this nature have arisen under the Negotiable Instruments Law to have tested it fully in this respect.

Cases not under the Negotiable Instruments Law.

The numerical weight of authority of cases not under the Negotiable Instruments Law continues to be that words of

assignment do not limit the effect of an indorsement; but some of the cases are affected by special statutes.

In *Jacobs v. Gibson* (1898) 77 Mo. App. 244, it was held that the defendant was liable as an indorser when he indorsed the note, "Jan. 4th, 1895, for value received, I assign the within note to Mrs. L. C. Jacobs. John Gibson."

So one was held liable as an indorser where he indorsed the note to his copayee as follows: "For value received, I hereby assign and transfer unto W. M. Fielding all right, title, and interest that I may have in the within note. Witness my hand, this 29th day of December, 1890," signing his name. *Citizens' Nat. Bank v. Walton* (1898) 96 Va. 436, 31 S. E. 890.

The payee indorsing a note, following its name with the words, "Transferred to W. H. Handley," was held liable as an indorser under the local statute, which provided that "all indorsers or assignors of any instrument in writing assignable by law, for the payment of money alone, on receiving due notice of the nonpayment or protest of any such indorsed or assigned instrument in writing, shall be equally liable with the original maker, obligor, or payee of such instrument, and may be sued for the same at the same time with the maker, obligor, or payee thereof, or may be sued separately." *Mayes Mercantile Co. v. Handley* (1906) 6 Ind. Terr. 357, 98 S. W. 125, rehearing denied in (1907) 7 Ind. Terr. 13, 103 S. W. 599.

An indorsement of the name of the payee on the back of a promissory note, under the words "assign and transfer," vests title in the assignee free from the equities existing between the parties to the instrument. *Leahy v. Haworth* (1905) 4 L.R.A.(N.S.) 657, 73 C. C. A. 84, 141 Fed. 850, where the court said: "In our opinion it is, in all essential respects, the equivalent of a blank indorsement, and relieves an innocent holder from equities existing between the makers and payee. This, we think, would be true under a proper application of the principles of the law merchant; but we are especially satisfied of it in view of the provisions of the statute of Nebraska. By that statute a note, whether payable to a person or his assigns, or to a person or his order, is equally negotiable." In this case there was also a separate indorsement of guaranty.

In *Walker v. Sims* (1899) 64 Pac. 81, briefly reported in 9 Kan. App. 890, the petition alleged that the defendant, as the payee of the note, of which he was also one of the makers, after indorsing

it, "For value received, I sign the within," delivered the same, for a valuable consideration, to the plaintiff. It was held that the allegation was good as against a general demurrer, and that the effect of the indorsement was to change an irregular and imperfect instrument into a note payable to the bearer; the court saying that the words quoted must have been intended as words of transfer equivalent to an indorsement; that, at any rate, they did not destroy the effect of the indorsement of the payee's name.

Where upon the back of a negotiable interest-bearing bond, made payable to a corporation, its managing president wrote the following, and signed the same in his official capacity: "For value received, I hereby assign the within bond, together with all our interest in and all our right under the mortgage securing the same, to Mary E. Merrill, without recourse,"—this was held, to constitute a contract of indorsement, and not to be a mere assignment of the instrument. *Merrill v. Hurley* (1895) 6 S. D. 592, 55 Am. St. Rep. 859, 62 N. W. 958.

Where a note was indorsed: "For value received the within note together with collaterals securing the payment of same is transferred to S. C. Gohlman, Sr. (Signed) 'J. E. Lester,'" it was held that, under the Texas statute, the form of the indorsement whereby the transfer was accomplished would not affect an innocent holder for value. *Rowe v. Gohlman* (1906) 44 Tex. Civ. App. 315, 98 S. W. 1077. The statute provided: "Any person to whom any of the said negotiable instruments may have been assigned may maintain any action in his own name which the original obligee or payee might have brought; but he shall not only allow all just discounts against himself, but, if he obtained the same after it became due, he shall also allow all just discounts against the assignor before notice of the assignment was given to the defendant; but should he obtain such instrument before its maturity, by giving for it a valuable consideration, and without notice of any discount or defense against it, then he shall be compelled to allow only the just discounts against himself."

Where one copayee indorsed the note to the other, "For value received I hereby sell, transfer and assign to F. L. Behrens my one-half interest in the within note, together with the vendor's lien on the property securing same," and there were subsequent indorsements all in the following form except names, "For value received I hereby sell, transfer and assign to R. D. Seaton this note, together

with the vendor's lien on the property securing the same,"—the assignors were held liable as indorsers. *Behrens v. Kirk-gard* (1912) — *Tex. Civ. App.* —, 143 S. W. 698. The court said: "The rule that every indorsement consists *prima facie* of two distinct contracts: (1) the present transfer and negotiation of the note, and (2) the assumption of a future contingent liability on the part of the indorser, does not prevail in this state, where there is no specific language restricting the indorsement. The indorsements herein do not, in our opinion, contain any restrictive language which limits the liability of the indorsers to a mere warranty of the title to notes, and exonerate them from personal liability for the payment thereof."

In other cases words of assignment have been held to qualify the indorsement.

Thus, in *Ellsworth v. Varney* (1899) 83 Ill. App. 94, the court said, in holding that the defendant was not liable on notes assigned by him to the plaintiff: "In the indorsement before us the words, 'For value received, I hereby convey my right, title and interest in within notes to B. F. Ellsworth,' express no further intention than to pass to Ellsworth the title and interest which Varney had in the notes. Having expressed but one of the two legal implications flowing from a general indorsement, or an indorsement in blank, we are constrained to hold that the indorser intended to exclude the other implication." The notes were made by C. to her order, and she indorsed them in blank, and there appeared on the back of each before the quoted indorsement, the following: "Chicago Dec. 1, 189—. Transferred from Frank E. Trude to F. G. Varney," the defendant.

A copayee of a note was held not liable as an indorser where he assigned his interest to his copayee by an indorsement dated the date of the note, and reading: "On the above date, I sine over my interest on the within note to" the copayee, and signed his name. *Bond v. Holloway* (1897) 18 Ind. App. 251, 47 N. E. 838.

(It may be noted that in *Coddington Sav. Bank v. Anderson* (1902) 64 Neb. 205, 89 N. W. 787, it was held that the negotiability of a note was not destroyed by the following signed indorsement: "For value received I hereby assign and transfer the within bond and coupons thereto annexed, together with all my interest in and rights under the mortgage securing the same, to Coddington Savings Bank, without recourse." The court distinguished *Aniba v. Yeomans* (1878) 39 Mich. 171, referred to in the L.R.A.1917A.

earlier note, as there the transfer was of "right, title and interest.")

Under Negotiable Instruments Law.

It was held in *Thorp v. Mindeman* (1904) 123 Wis. 149, 68 L.R.A. 146, 107 Am. St. Rep. 1003, 101 N. W. 417, that a transfer of a promissory note under an indorsement stating a sale, transfer, and assignment of the note and interest coupons "without recourse" does not destroy the commercial character of the indorsement, so as to make it subject to equities under the Negotiable Instruments Law.

See also *COPELAND v. BURKE*, ante, 1165.

Under the Negotiable Instruments Law, a writing by the payee in these words, "I Here By assine this note over to E. H. Farnsworth this the Nov. 1st, 1910," signed by the payee, on the back of a negotiable promissory note, complete and regular on its face, accompanied by delivery to the person named in the writing, is an indorsement of the note. *Farnsworth v. Burdick* (1915) 94 Kan. 749, 147 Pac. 863. But the court does not refer to *Nelson v. Southworth* (1914) 93 Kan. 532, 144 Pac. 835, holding that the rights of a transferee were no greater than those of the payee who had delivered the note upon the following assignment: "For value received I hereby assign and transfer the within note and coupons together with all my interest in and all my rights under the mortgage deed securing the same to . . . without recourse."

Nor does the court in the *Farnsworth Case* refer to the cases of *Hatch v. Barrett* (1885) 34 Kan. 223, 8 Pac. 129, and *Briggs v. Latham* (1887) 36 Kan. 210, 13 Pac. 129, which the court in the *Nelson Case* cited in support of its decision.

It was held in *Evans v. Freeman* (1906) 142 N. C. 61, 54 S. E. 847, that an indorsement, "For value received, I herewith transfer and assign all my right, title and interest in and to the within note to," etc., with date and signature, is a qualified indorsement under the Negotiable Instruments Law, not impairing the negotiability of the note.

In *Gale v. Mayhew* (1910) 161 Mich. 96, 29 L.R.A.(N.S.) 648, 125 N. W. 781, it was held that the provision of the Negotiable Instruments Law that a qualified indorsement, which is defined as an indorsement without recourse, or words of similar import, does not impair the negotiable character of the instrument, does not apply to an indorsement by which one assigns his interest in the note, where another statute prevents the assignee of a negotiable note from suing in his own name. B. B. B.

ILLINOIS SUPREME COURT.

CITY OF CHICAGO, Plff. in Err.,

v.

DRAKE HOTEL COMPANY.

(274 Ill. 408, 113 N. E. 718.)

Municipal corporation — power to prohibit dancing in restaurants.

Power cannot be conferred upon a municipal corporation to prohibit permitting patrons of a public restaurant to dance without extra charge while the place is open for the purchase of refreshments.

For other cases, see Municipal Corporations, II. c, 4, d, in Dig. 1-52 N. S.

(Dunn and Cartwright, JJ., dissent.)

(June 22, 1916.)

ERROR to the Municipal Court of Chicago to review a judgment dismissing a complaint filed to recover a penalty for violation of an ordinance prohibiting dancing in restaurants. Affirmed.

The facts are stated in the opinion.

Messrs. Samuel A. Ettelson, Leon Hornstein, and Harry L. Brin, for plaintiff in error:

Public dancing is a form of public amusement which may be regulated under the police powers of the municipality.

Freund, Pol. Power, § 250; Pearson v. Seattle, 14 Wash. 438, 44 Pac. 884; Com. v. Quinn, 164 Mass. 11, 40 N. E. 1043; State v. Rosenfield, 111 Minn. 301, 29 L.R.A.(N.S.) 331, 137 Am. St. Rep. 557, 126 N. W. 1068; 38 Cyc. 254; Metropolis Theatre Co. v. Chicago, 246 Ill. 20, 92 N. E. 597; Nahser v. Chicago, 271 Ill. 288, L.R.A.1916D, 95, 111 N. E. 119; Schwuchow v. Chicago, 68 Ill. 444; Launder v. Chicago, 111 Ill. 291, 53 Am. Rep. 625; Goodrich v. Busse, 247 Ill. 366, 139 Am. St. Rep. 335, 93 N. E. 292, 20 Ann. Cas. 589; Chicago Packing & Provision Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545; St. Louis v. Western U. Teleg. Co. 149 U. S. 465-469, 37 L. ed. 810-813, 13 Sup. Ct. Rep. 990; St. Anthony v. Brandon, 10 Idaho, 205, 77 Pac. 322; State v. Cochran, 55 Or. 157, 104 Pac. 419, 105 Pac. 884.

The city council's determination in respect to the exercise of its power over the subject matter will not be overruled by the courts.

Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; People v. Smith, 108 Mich. 527, 32 L.R.A. 853, 62 Am. St. Rep. 715, 66 N. W. 382; Freund, Pol. Pow-

er, § 144; Neuendorff v. Duryea, 52 How. Pr. 267; Canada Atlantic Transit Co. v. Chicago, 126 C. C. A. 587, 210 Fed. 7; Chicago v. Shaynin, 258 Ill. 69, 45 L.R.A.(N.S.) 23, 101 N. E. 224; Chicago Dock & Canal Co. v. Fraley, 223 U. S. 680, 57 L. ed. 1022, 33 Sup. Ct. Rep. 715.

The ordinance in question is reasonable.

Dill. Mun. Corp. 5th ed. § 591; People ex rel. Busching v. Ericsson, 263 Ill. 368, L.R.A.1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183; Chicago v. Shaynin, 258 Ill. 69, 45 L.R.A.(N.S.) 23, 101 N. E. 224; Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 331, 85 N. W. 1036; Myers v. Chicago, 196 Ill. 591, 63 N. E. 1037; People ex rel. Morrison v. Cregier, 138 Ill. 401, 28 N. E. 812.

There is no discrimination in prohibiting public dancing in a public place of refreshment.

Dill. Mun. Corp. 5th ed. § 593; State v. Calloway, 11 Idaho, 719, 4 L.R.A.(N.S.) 109, 114 Am. St. Rep. 285, 84 Pac. 27; McClelland v. Denver, 36 Colo. 486, 85 Pac. 126, 10 Ann. Cas. 1014; St. Anthony v. Brandon, 10 Idaho, 205, 77 Pac. 322.

Messrs. Mayer, Meyer, Austrian, & Platt for defendant in error.

Cooke, J., delivered the opinion of the court:

The city of Chicago instituted suit in the municipal court of Chicago against the Drake Hotel Company, a corporation, to recover a penalty for the violation by the defendant of the following provisions of an ordinance of the city: "No person, firm or corporation, either as owner, lessee, manager, officer or agent of a restaurant or public place of refreshment conducted in any other place than a licensed dance hall, shall conduct a dance of the patrons therein or suffer or permit the patrons of same to indulge in dancing while the said place or the room in which the said dancing is indulged in is open to the general public as a place where the public may purchase refreshments."

The penalty provided by the ordinance for a violation of the above provision is a fine of not less than \$5 nor more than \$100 for each offense. A hearing was had before the court upon the defendant's motion to strike the plaintiff's statement of claim, which set up the cause of action, from the files; to quash the complaint and to dismiss the suit. Upon the hearing of this motion it was stipulated that the motion be treated as a motion by the defendant, at the close of all the evidence, to direct a verdict in its favor, and the following stipulation, signed by the parties, was presented for consideration by the court in passing

Note.—For power of municipality to regulate dancing in public places, see annotation following this case, post, 1174. L.R.A.1917A.

upon the motion: "It is hereby stipulated and agreed by and between the parties hereto; by their respective attorneys, that the defendant herein is the manager of a restaurant, and permits its patrons to indulge in dancing while the said restaurant is open to the general public; that said defendant charges no admission fee of any kind to its said restaurant and none for the privilege of dancing in its said restaurant; that the dancing permitted in said restaurant by said defendant has been and is orderly, dignified, quiet, respectable, decent, and peaceful, and in no sense injurious to the public morals, welfare, or health, and in no sense is a public nuisance."

In addition to the stipulation the city offered in evidence an ordinance of the city dividing, for the purpose of licensing, "all theatricals, shows and amusements offered, operated, presented or exhibited for gain or for admission to which the public is required to pay a fee," into 21 classes, and providing, under a penalty, that "no person or corporation either as owner, lessee, manager, officer or agent, shall give, conduct, produce, present or offer for gain or profit any of the foregoing entertainments without a license issued for that purpose." The sixth class includes "dances . . . carried on or engaged in any hall, structure or building." The city also offered evidence showing that the defendant was the owner and manager of the Blackstone Hotel, in the city of Chicago, and of the restaurant therein, and on January 13, 1915, suffered and permitted the patrons of said restaurant to indulge in dancing while the restaurant was open to the general public as a place where refreshments might be purchased, which restaurant was not a licensed dance hall. In addition to the matters shown by the stipulation, the defendant proved, and the court found, that dancing, as conducted in restaurants and public places of refreshment in the city of Chicago, "has always been and is orderly, dignified, quiet, respectable, decent, and peaceful, and in no sense was or is a public nuisance, but was and is a reasonable and harmless method of amusement for the public in said city."

The court quashed the complaint and ordered the statement of claim stricken from the files. The city refusing to file an amended complaint or statement of claim, the suit was dismissed, and the defendant was discharged. The city has brought the record here for review by writ of error; the trial judge having certified that the validity of a municipal ordinance is involved, and that, in his opinion, the public

interest requires that the cause be taken directly to this court.

The only controversy here is whether the city possessed the power to pass the ordinance which defendant in error is charged with having violated. The city contends that the ordinance is proper municipal legislation under and by virtue of clause 41 of § 1, art. 5, of the Cities and Villages Act, which confers upon the city council in cities the power "to license, tax, regulate, suppress and prohibit hawkers, peddlers, pawnbrokers, keepers of ordinaries, theatricals and other exhibitions, shows and amusements, and to revoke such license at pleasure." One of the contentions made by the defendant in error is that this provision of the statute does not confer power upon the city council to license dance halls, but we do not consider it necessary to pass upon that question. The city in its argument assumes that the effect of the ordinance which defendant in error is charged with having violated is to require defendant in error to obtain a license from the city, authorizing it to conduct its restaurant as a dance hall before permitting the patrons of the restaurant to indulge in dancing while the restaurant is open to the general public as a place where refreshments may be purchased. That such is not the effect of the ordinance, when considered alone, is apparent from a mere reading of the same. By its express terms it is an absolute prohibition against permitting the patrons of a restaurant to indulge in dancing while the same is open to the general public as a place where the public may purchase refreshments, unless the restaurant is conducted in a licensed dance hall. In an apparent attempt to show that this ordinance should not be considered alone in determining its purpose and effect, the city offered in evidence another ordinance providing for the licensing of certain amusements, including dances carried on or engaged in in any hall, structure, or building. That ordinance, however, relates only to amusements "offered, operated, presented or exhibited for gain or for admission to which the public is required to pay a fee," and does not apply to amusements where the public is not required to pay any fee or compensation in order to participate in the same. The necessary conclusion to be deduced from this record is that, under the ordinances of the city of Chicago, if valid, the owner of a restaurant or public place of refreshment cannot permit his patrons to indulge in dancing while the restaurant or place of refreshment is open to the public for refreshments, unless he charges them a fee for the privilege of dancing. That the city

has no power to compel the owner of a restaurant to charge a fee or compensation for any privilege that he may see fit to extend to his patrons is too clear to permit of argument. The matter here presented for determination, therefore, resolves itself into the question whether the city council of the city of Chicago has the power to prohibit dancing in restaurants by the patrons thereof where no fee is charged for the privilege. The question whether the city council has the power to regulate dancing in such restaurants is not presented.

For the purpose of this decision it may be conceded that the legislature has, by clause 41 of § 1, art. 5, of the Cities and Villages Act, attempted to confer upon the city council the power to prohibit amusements, and that dancing is one of such amusements. The legislature, however, could confer upon the city council no greater power than the legislature itself possessed; and we have recently held that "the legislature had not the power to pass an act prohibiting all amusements, but only such as came within the legitimate exercise of the police power." *Nahser v. Chicago*, 271 Ill. 288, L.R.A.1916D, 95, 111 N. E. 119.

In *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707, we said: "In order to sustain legislative interference with the business of the citizen by virtue of the police power it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends, in some degree, toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void."

To the same effect is *People v. Weiner*, 271 Ill. 74, L.R.A.1916C, 775, 110 N. E. 870.

There is nothing necessarily harmful in permitting the patrons of a restaurant to dance while the restaurant is open to the general public as a place where the public may purchase refreshments. On the contrary, the evidence here shows, and the municipal court found, that dancing as conducted in restaurants and public places of refreshment in the city of Chicago, including the restaurant conducted by defendant L.R.A.1917A.

in error, always has been and is "orderly, dignified, quiet, respectable, decent, and peaceful," and in no sense was or is a public nuisance, and was and is a reasonable and harmless method of amusement for the public in said city. Because the privilege may be abused is no reason why it shall be denied. *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677.

The ordinance in question is clearly an invasion of the property rights of individuals, and is therefore unreasonable and void.

The judgment of the Municipal Court is affirmed.

Dunn and Cartwright, JJ., dissenting:

We assume without discussion, as the opinion of the court assumes, that public dancing is an amusement, the right to license, tax, regulate, suppress, and prohibit which the legislature has attempted to confer on the city council. In the judgment of the city council the tendency of unregulated public dancing in restaurants and public places of refreshment is vicious and inimical to the public morals; therefore the council enacted that public dancing should not be permitted in restaurants and public places of refreshment conducted elsewhere than in a licensed dance hall. Is the tendency of unregulated public dancing toward the corruption of morals? Does the prohibition of public dancing in unlicensed places tend to prevent the injury to public morals? The city council's affirmative answer to these questions is the basis of the ordinance in controversy. Perhaps there may be men who would arrive at a different conclusion, but it cannot be said that this decision by the legislative authority, of a question clearly within its police power, is so manifestly unreasonable that the judicial authority should set it aside. It may be reasonably assumed that no one doubts that the regulation of public dancing is within the legitimate exercise of the police power. It seems equally clear that the ordinance in question is adapted to secure proper supervision of public dancing by prohibiting it unless licensed. The ordinance must therefore be held valid unless it unreasonably interferes with private rights.

It is true that there is nothing necessarily harmful in permitting the patrons of a restaurant to dance while the restaurant is open to the general public. It is equally true that such dancing is not necessarily a harmless method of amusement. It may be conducted in such a way as to be offensive to public morals. Though dancing as conducted in restaurants and places of

amusement in Chicago fortunately has always been "orderly, dignified, quiet, respectable, decent, and peaceful," as testified by the witness and certified in the statement of facts, it is not necessarily so. It merely happens that the vicious element has not yet obtained a foothold in the restaurants and places of amusement of that city. It is said, on the authority of *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677, because the privilege may be abused is no reason why it shall be denied. It is, however, a very good reason why it should be regulated, and even denied, except upon conditions which will prevent the abuse, and there is nothing in *Des Plaines v. Poyer* to the contrary. The ordinance there simply prohibited open-air dances.

It may be conceded that the city has no power to compel the owner of a restaurant to charge a fee for the privilege of dancing extended to its patrons. This ordinance attempts no such compulsion. It prohibits the extension of the privilege of public dancing, whether free or for pay, in restaurants not conducted in licensed dance halls. An ordinance of the city provides for the licensing of dances in any hall, structure, or building. Although this ordinance relates only to amusements "offered, operated, presented, or exhibited for gain, or for admission to which the public is required to pay a fee," there is nothing to prevent the defendant in error from obtaining a license for a dance hall. Whether it charges all persons, or some persons only, much or little or nothing, for dancing in such hall, or charges some persons more, and others less, is a matter with which the city does not concern itself. Dancing in such licensed hall is regulated, and that is the object of the ordinance in question. It seeks to regulate public dancing in restaurants and public places of refreshment, by requiring the observance in such places of the regulations prevailing in the case of licensed dance halls.

An act not in itself harmful, immoral, or illegal may be declared illegal by a legislative enactment. In the exercise of the police power, an act hurtful to the comfort, safety, or welfare of society may be prohibited by law, even though the prohibition invades the right of liberty or property of an individual. A statute or ordinance having this effect must have a reasonable relation, and be appropriate, to the prevention of something injurious, or the promotion of something beneficial, to the public welfare. Such an enactment does not violate the constitutional provision which protects against deprivation of property without due process of law, though it prohibits and makes criminal an act not in itself

immoral. Particular acts may not themselves be immoral, but the tendency of what is often done in the performance of those acts may be towards what is immoral. If the lawmaking power, considering the circumstances which frequently attend the doing of such acts, thinks that certain admitted evils cannot be prevented unless these acts are prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the enactment made to protect the public morals has no right or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Beoth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425, id. 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798.

The individual must often surrender natural rights for the general good. The constitutional right to bear arms does not justify the carrying of a concealed weapon in violation of a statute, however justifiable such an act might otherwise be. The right of a woman to earn a living and of another to employ her does not justify her employment, contrary to the provisions of a municipal ordinance to serve customers in a place where intoxicating liquors are sold, however orderly the place and virtuous the woman. *Bergman v. Cleveland*, 39 Ohio St. 651. Nor does such right justify her employment beyond the number of hours limited by statute for certain occupations, however able and desirous to work she may be. *People v. Elerding*, 254 Ill. 579, 40 L.R.A. (N.S.) 892, 98 N. E. 982. Cotton in the seed is property, but a statute prohibiting its sale and forbidding its transportation after sunset and before sunrise has been held valid. *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128. The possession of certain game later than five days after the expiration of the open season for such game, though killed in another state, where such killing was lawful, and shipped to a purchaser in this state, may lawfully be prohibited. *Magner v. People*, 97 Ill. 320. So the prohibition of the sale of certain kinds of fish, though caught without the state, where such taking was lawful, was held within the legislative power as a means of enforcing the prohibition of the taking of such fish within the state otherwise than by hook and line. *People v. Booth Fisheries Co.*, 253 Ill. 423, 97 N. E. 837. In *Kettering v. Jacksonville*, 50 Ill. 39, in prosecution for the violation of an ordinance prohibiting the sale of liquor and beer, it was insisted that the beer sold must be shown to be intoxicating; but the court held otherwise, saying: "The city did not see proper to confine the prohibition to beer of

an intoxicating quality, and we have no right to interpolate such a qualification. The city council may have supposed it important to prevent the establishment of any species of beer shops, in view of the fact that intoxicating drinks are so often sold in places which openly deal only in harmless beverages."

The same principle applies to the ordinance in question. The city council, for the suppression of the evils arising from suggestive and immoral dancing, may have

thought it necessary to prevent all public dancing in restaurants and public places of refreshment not conducted in licensed dance halls. If the ordinance tends to the suppression of immoral dancing, the fact that it may interfere in some cases with dancing which is not immoral does not render it invalid.

Petition for rehearing denied October 5, 1916.

Annotation—Power of municipality to regulate dancing in public places.

CHICAGO v. DRAKE HOTEL Co. ante, 1170, seems to be a case of first impression as to the power of a municipality to prohibit dancing in a restaurant by patrons thereof where no fee is charged for the privilege. The actual decision in this case that a municipality has no power to compel the owner of a restaurant to charge a fee for the privilege of dancing extended to its patrons is undoubtedly sound in principle, irrespective of whether or not the majority of the court were right in considering that that was the real question presented; and in fact it is to be observed that the dissenting opinion concedes that a municipality has no such power, the dissent being as to the construction to be placed upon the ordinance involved, the opinion considering that it prohibits the extension of the privilege of public dancing, whether free or for pay, in restaurants not conducted in licensed dance halls, and so presents the question as to the power of a municipality to regulate public dances,—a question which the majority considered as not involved.

The mere incidental use of a room in a public house for dancing was not within the meaning of a statute prohibiting public dances in an unlicensed hall was held in *Marks v. Benjamin* (1839) 2 Moody & R. 225, 5 Mees. & W. 565, 151 Eng. Reprint, 239, 9 L. J. Mag. Cas. N. S. 20, 3 Jur. 1194, and *Gregory v. Tuffs* (1833) 6 Car. & P. (Eng.) 271, 1 Moody & R. 313.

In *Pearson v. Seattle* (1896) 14 Wash. 438, 44 Pac. 884, it was held that a public dance is a public amusement within the meaning of an ordinance imposing a license fee on "every theater, opera, concert, show, exhibition or other public amusement that is given in or adjoining to or connected with any saloon, drinking house or other place where intoxicating liquors are sold or disposed of."

In *Loertscher v. Jersey City* (1913) 84 N. J. L. 537, 87 Atl. 68, it was held that an ordinance to license and regulate balls and dances of the ordinary character cannot be rested upon an act entitled, "An Act Concerning the Granting of Licenses for Shows, Circuses, and Athletic Exhibitions in Cities," and so such act did not authorize the passing of an ordinance forbidding the holding of a ball or dance, either with or without music, in any place where liquors are sold, without first obtaining a license.

As to dancing as a nuisance, see note to *Com. v. Cincinnati*, N. O. & T. P. R. Co. 18 L.R.A.(N.S.) 699.

As to power of municipal corporations to declare particular kinds of amusement nuisances per se, see note to *Re Jones*, 31 L.R.A.(N.S.) 548.

As to requiring license for dance hall or place where dancing is taught, see notes to *People ex rel. Duryea v. Wilber*, 27 L.R.A.(N.S.) 357 and *Mehlos v. Milwaukee*, 51 L.R.A.(N.S.) 1009.

J. H. B.

NEW HAMPSHIRE SUPREME COURT.

CHARLES P. BOWDITCH et al.,
v.

JACKSON COMPANY et al.

(76 N. H. 351, 82 Atl. 1014.)

Corporation — right of majority to dissolve.

1. The majority stockholders of a going L.R.A.1917A.

corporation may close out its property and dissolve the corporation against the protest of the minority, and a court of equity will not interfere in the absence of fraud or irregularity, or such inadequacy of price as to show gross mismanagement.

For other cases, see *Corporations*, V. c, 1, and VI. a, in Dig. 1-52 N. S.

Note. — The power of officers or majority stockholders, against the consent of the minority, to sell the property of the cor-

Same — sale for stock — option to take cash — effect.

2. A minority stockholder of a corporation cannot object to the sale of its assets by the majority because payment is to be made in the stock of another corporation, if he is given an option to take payment for his stock in cash.

For other cases, see Corporations, V. e, 1, and VI. a, in Dig. 1-52 N. S.

Same — sale of assets for stock — ultra vires.

3. A sale of the assets of a corporation for stock of another corporation is not void as ultra vires, if the stock is taken for distribution among stockholders of the former in order to effect its dissolution.

For other cases, see Corporations, IV, b, in Dig. 1-52 N. S.

Same — voting trust — validity.

4. An agreement between stockholders of a corporation to place their stock in trust for the purpose of effecting a dissolution of the corporation within a year, according to a detailed plan of sale, is not invalid.

For other cases, see Corporations, V. g, 2, a, in Dig. 1-52 N. S.

Same — excessive vote — effect.

5. A vote to sell the property of a corporation cannot be set aside because a voting trust voted a larger number of shares than permitted by law, if the proposition was carried by allowing them only the legal number of votes.

For other cases, see Corporations, V. g, 2, a, in Dig. 1-52 N. S.

On Rehearing.

Constitutional law — compulsory sale of corporate property — taking of private rights.

6. The property of minority members of a corporation is not taken within the meaning of a constitutional provision guarantying rights under such circumstances by a sale of the corporate property by the majority to effect a dissolution of the corporation.

For other cases, see Eminent Domain, III, b, 1, in Dig. 1-52 N. S.

Corporation — sale of assets — right to auction.

7. Minority stockholders of a corporation cannot insist on an auction sale of its assets by the majority, who are attempting to close out and dissolve the corporation, for the purpose of fixing the true value of the property.

For other cases, see Corporations, V. e, 1, and VI. a, in Dig. 1-52 N. S.

Same — trusts — dealing with self — intention to hold new stock.

8. That majority stockholders, in selling

the assets of the corporation to another corporation for its stock, intend to retain a portion of such stock coming to them, while the portion going to the minority stockholders will be sold and the proceeds paid to the true owners, does not make them representatives of the buying corporation, within the rule that, in making sales under such circumstances, they cannot deal with themselves.

For other cases, see Corporations, IV. g, 4, in Dig. 1-52 N. S.

(March 5, 1912.)

TRANSFER by the Superior Court for Hillsborough County for the opinion of the Supreme Court, of a suit to enjoin a sale of the assets of the defendant Jackson Company to the defendant Nashua Company. Case discharged.

Plaintiffs allege that, in furtherance of the conspiracy of the defendants to sell the assets of the company, the officers procured the assent of certain of the stockholders to a trust agreement binding them for one year to vote for the sale. In 1910, committees from the defendant companies were appointed to consider the advisability of the sale, and upon their recommendation of the sale, the stock of certain holders was transferred to trustees to hold for one year, vote it for the proposed sale, distribute the proceeds, and take necessary steps to wind up the company. After modification of an order enjoining the sale, a meeting of the stockholders was held at which it was voted to make the sale. Plaintiff questioned the validity of the vote at this meeting on account of the nature of the trust agreement under which the stock was held, and because the trustees voted more than one eighth of the stock.

Messrs. Tyler & Young, Remick & Hollis, Alexander Murchie, and Robert C. Murchie, for plaintiffs:

A majority of stockholders have no power to sell or otherwise transfer all the property of a going, prosperous corporation, against the dissent of a single stockholder.

Dow v. Northern R. Co. 67 N. H. 1, 36 Atl. 510; *Downing v. Mt. Washington Road Co.* 40 N. H. 230; *Easun v. Buckeye Brewing Co.* 51 Fed. 156; *Pearson v. Concord R. Corp.* 62 N. H. 537, 13 Am. St. Rep. 590; *Kidd v. New Hampshire Traction Co.* 74 N. H. 160, 66 Atl. 127; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 16, 26 L. ed. 961, 963; *March v. Eastern R. Co.*

poration essential to its existence as a going concern, is discussed in the note to *Maben v. Gulf Coke & Coal Co.* 35 L.R.A. (N.S.) 396; and see later case, *Beidenkopf v. Des Moines L. Ins. Co.* 46 L.R.A. (N.S.) 290.

The validity of agreements to control the L.R.A.1917A.

voting power of corporate stock, including voting trusts, is discussed in the notes to *Morel v. Hoge*, 16 L.R.A. (N.S.) 1136, and *Carnegie Trust Co. v. Security L. Ins. Co.* 31 L.R.A. (N.S.) 1186; and see later case, *Winsor v. Commonwealth Coal Co.* 33 L.R.A. (N.S.) 63.

40 N. H. 548, 77 Am. Dec. 732; Knoxville v. Knoxville & O. R. Co. 22 Fed. 758; Kean v. Johnson, 9 N. J. Eq. 401; Boston & P. R. Corp. v. New York & N. E. R. Co. 13 R. I. 260; People v. Ballard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54; Abbott v. American Hard Rubber Co. 33 Barb. 578; Elyton Land Co. v. Dowdell, 113 Ala. 177, 59 Am. St. Rep. 105, 20 So. 981; Morris v. Elyton Land Co. 125 Ala. 263, 28 So. 513; Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 55 Pac. 229, 353; Hunt v. American Grocery Co. 81 Fed. 532; Mills v. Central R. Co. 41 N. J. Eq. 1, 2 Atl. 453; Small v. Minneapolis Electro-Matrix Co. 45 Minn. 264, 47 N. W. 797; Balliet v. Brown, 103 Pa. 546; Byrne v. Schuyler Electric Mfg. Co. 65 Conn. 336, 28 L.R.A. 304, 31 Atl. 833.

The proposed sale is invalid on the ground that 446 out of the 490 shares voting in favor of the sale were controlled by the trustee of an illegal voting trust.

Warren v. Pim, 65 N. J. Eq. 36, 55 Atl. 66; Kreisel v. Distilling Co. of America, 61 N. J. Eq. 5, 47 Atl. 471; Harvey v. Linville Improv. Co. 118 N. C. 693, 32 L.R.A. 265, 54 Am. St. Rep. 749, 24 S. E. 489; Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32; Scott v. Scott, 68 N. H. 7, 38 Atl. 567; Re Glen Salt Co. 17 App. Div. 234, 45 N. Y. Supp. 568; Harris v. Scott, 67 N. H. 437, 32 Atl. 770; White v. Thomas Inflatable Tire Co. 52 N. J. Eq. 178, 28 Atl. 75; Moses v. Scott, 84 Ala. 608, 4 So. 742; Griffith v. Jewett, 9 Ohio Dec. Reprint, 627; Hafer v. New York, L. E. & W. R. Co. 9 Ohio Dec. Reprint, 470; Shelmerdine v. Welsh, 47 Phila. Leg. Int. 26; Robotham v. Prudential Ins. Co. 64 N. J. Eq. 673, 53 Atl. 842; 29 Am. & Eng. Enc. Law, 2d ed. 1077, 1078; Thomp. Corp. § 862.

The minority stockholders had the right to protect their rights by injunction against the usurpations of the majority.

Thomp. Corp. § 4502; Dow v. Northern R. Co. 67 N. H. 1, 36 Atl. 510; March v. Eastern R. Co. 40 N. H. 548, 77 Am. Dec. 732.

The acts of the directors of the Jackson Company and those of the directors of the Nashua Manufacturing Company, taken in contemplation of and in furtherance of the proposed sale, are void under the law of this state.

Pearson v. Concord R. Corp. 62 N. H. 537, 13 Am. St. Rep. 590; Kidd v. New Hampshire Traction Co. 74 N. H. 160, 66 Atl. 127; Fisher v. Concord R. Co. 50 N. H. 200.

The minority are entitled to sale at public auction.

Mason v. Pewabic Min. Co. 133 U. S. 50, 33 L. ed. 524, 10 Sup. Ct. Rep. 224; Cook, L.R.A.1917A.

Corp. 6th ed. § 671, n. 3, p. 2009; Ash v. Cummings, 50 N. H. 591; Orr v. Quimby, 54 N. H. 590; Tyrrell v. Washburn, 6 Allen, 466; Talling v. Elba, 120 N. Y. Supp. 693; Post v. Beacon Vacuum Pump & Electrical Co. 28 C. C. A. 431, 50 U. S. App. 271, 84 Fed. 371, 32 C. C. A. 151, 50 U. S. App. 407, 89 Fed. 1; Mumford v. Ecuador Development Co. 111 Fed. 639; Farmers' Loan & T. Co. v. Toledo & S. H. R. Co. 4 C. C. A. 561, 6 U. S. App. 469, 54 Fed. 759; Phillips v. Providence Steam Engine Co. 21 R. I. 302, 45 L.R.A. 560, 43 Atl. 598; Sigourney v. Munn, 7 Conn. 11; Dickinson v. Dickinson, 29 Conn. 600; Briges v. Sperry, 95 U. S. 401, 24 L. ed. 390; 3 Lindley, Partn. chap. 10, § 6, subdiv. 4, p. 555, original ed. vol. 2, p. 629.

Anything less than an auction sale or the equitable substitution of appraisal infringes the constitutional rights of the plaintiffs.

Offield v. New York, N. H. & H. R. Co. 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72; Muhler v. New York & H. R. Co. 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522.

Messrs. Peabody, Arnold, Batchelder, & Luther, and Streeter, Demond, & Woodworth, for defendants:

The majority stockholders of a corporation have the right to determine, in the exercise of a fair business judgment, the time when it shall wind up its affairs and be dissolved.

1 Morawetz, Priv. Corp. 2d ed. §§ 474, 475; 4 Thomp. Corp. §§ 4483, 4496; Noyes, Intercorporate Relations, 2d ed. § 110; 3 Clark & M. Priv. Corp. § 628; Tuscaloosa Mfg. Co. v. Cox, 68 Ala. 71; Wallace v. Pierce-Wallace Pub. Co. 101 Iowa, 313, 38 L.R.A.122, 63 Am. St. Rep. 389, 70 N. W. 216; Elkins v. Camden & A. R. Co. 36 N. J. Eq. 241; Ellerman v. Chicago Junction R. & Union Stockyards Co. 49 N. J. Eq. 217, 23 Atl. 287; Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; Flynn v. Brooklyn City R. Co. 168 N. Y. 493, 53 N. E. 520; Continental Ins. Co. v. New York & H. R. Co. 187 N. Y. 225, 79 N. E. 1026; Chambers v. McKee, 185 Pa. 105, 39 Atl. 822; Oglesby v. Att-rill, 105 U. S. 605, 610, 26 L. ed. 1186, 1188; Noyes, Intercorporate Relations, § 110; Treadwell v. Salisbury Mfg. Co. 7 Gray, 393, 66 Am. Dec. 490; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130; Merchants & Planters Line v. Waganer, 71 Ala. 581; Tanner v. Lindell R. Co. 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155; Arents v. Blackwell's Durham Tobacco Co. 101 Fed. 338; Peabody v. Westerly Waterworks, 20 R. I. 176, 37 Atl. 807; Pringle v. Eltringham Constr. Co. 49 La. Ann. 301, 21 So. 515.

The majority stockholders, as an incident to their power to determine the time when the corporation shall wind up its affairs and dissolve, have the right to sell all the assets of the corporation for such consideration as they may deem proper in the exercise of a fair business judgment.

1 Morawetz, Priv. Corp. 2d ed. § 413; 3 Clark & M. Priv. Corp. § 629; Treadwell v. Salisbury Mfg. Co. 7 Gray, 393, 66 Am. Dec. 490; Peabody v. Westerly Waterworks, 20 R. I. 176, 37 Atl. 807; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130; Merchants & Planters Line v. Wagoner, 71 Ala. 581; Mahen v. Gulf Coal & Coke Co. 173 Ala. 259, 35 L.R.A. (N.S.) 396, 55 So. 607; Tanner v. Lindell R. Co. 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155; Arents v. Blackwell's Durham Tobacco Co. 101 Fed. 338.

The fact that part of the consideration for this sale is payable in stock of the Nashua Company does not affect its validity.

1 Clark & M. Priv. Corp. § 194; Noyes, Intercorporate Relations, 2d ed. § 277; 1 Morawetz, Priv. Corp. 2d ed. § 431; Holmes & G. Mfg. Co. v. Holmes & W. Metal Co. 127 N. Y. 252, 21 Am. St. Rep. 448, 27 N. E. 831; Treadwell v. Salisbury Mfg. Co. 7 Gray, 393, 66 Am. Dec. 490; Howe v. Boston Carpet Co. 16 Gray, 493; Evans v. Boston Heating Co. 157 Mass. 37, 31 N. E. 698; McCutcheon v. Merz Capsule Co. 31 L.R.A. 415, 19 C. C. A. 108, 37 U. S. App. 586, 71 Fed. 787; Metcalf v. American School Furniture Co. 122 Fed. 115.

The trust agreement was valid.

1 Thomp. Corp. § 895; 3 Clark & M. Priv. Corp. p. 2023; Brightman v. Bates, 175 Mass. 105, 55 N. E. 809; Greene v. Nash, 85 Me. 148, 26 Atl. 1114; Smith v. San Francisco & N. P. R. Co. 115 Cal. 584, 35 L.R.A. 309, 56 Am. St. Rep. 119, 47 Pac. 582; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24, 3 Mor. Min. Rep. 551; Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638; Kreissel v. Distilling Co. of America, 61 N. J. Eq. 5, 47 Atl. 471; Woodruff v. Dubuque & S. C. R. Co. 30 Fed. 91.

The shares held by the trustees were legally voted.

3 Clark & M. Priv. Corp. § 649 (h); Sudbury v. Stearns, 21 Pick. 148.

The fact that some of the members of the board of directors of the Jackson Company were also members of the board of directors of the Nashua Company does not furnish any ground for the interference of a court of equity.

United States Steel Corp. v. Hodge, 64 N. J. Eq. 807, 60 L.R.A. 742, 54 Atl. 1; Bijur v. Standard Distilling & Distributing L.R.A.1917A.

Co. 74 N. J. Eq. 546, 70 Atl. 934; Burland v. Earle [1902] A. C. 83, 71 L. J. P. C. N. S. 1, 50 Week. Rep. 241, 85 L. T. N. S. 553, 18 Times L. R. 41, 9 Manson, 17; Northwest Transp. Co. v. Beatty, L. R. 12 App. Cas. 589, 50 L. J. P. C. N. S. 102, 57 L. T. N. S. 426, 36 Week. Rep. 647; Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201.

Where a majority decide to wind up the corporation and dispose of its assets, the almost universal practice is to dispose of the assets of the corporation at private sale.

Treadwell v. Salisbury Mfg. Co. 7 Gray, 393, 66 Am. Dec. 490; Bartholomew v. Derby Rubber Co. 69 Conn. 521, 61 Am. St. Rep. 57, 38 Atl. 45; Sawyer v. Dubuque Printing Co. 77 Iowa, 242, 42 N. W. 300; Peabody v. Westerly Waterworks, 20 R. I. 176, 37 Atl. 807; Mahen v. Gulf Coal & Coke Co. 173 Ala. 259, 35 L.R.A. (N.S.) 396, 55 So. 607; Tanner v. Lindell R. Co. 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155.

Peaslee, J., delivered the opinion of the court:

1. The main question in this case is whether a going business corporation can be closed out and dissolved upon the motion of the majority of its stockholders and against the protest of the minority. The question is a new one in this state, although it has frequently been considered (both in cases where it was necessarily involved and those where it was not) by the courts in other states. The decisions and dicta are conflicting and are quite evenly divided. In the following cases the existence of the power is denied, though in most of them the question was not necessarily involved: Abbot v. American Hard Rubber Co. 33 Barb. 578; People v. Ballard, 184 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54; Kean v. Johnson, 9 N. J. Eq. 401; Forrester v. Boston & M. Consol. Copper & S. Min. Co. 21 Mont. 544, 55 Pac. 229, 353. That the power exists is decided or declared in other cases. Treadwell v. Salisbury Mfg. Co. 7 Gray, 393, 66 Am. Dec. 490; Phillips v. Providence Steam Engine Co. 21 R. I. 302, 45 L.R.A. 560, 43 Atl. 598; Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130, 404 (overruling Kean v. Johnson, 9 N. J. Eq. 401); Merchants' & Planters Line v. Wagoner, 71 Ala. 581; State v. Chilhowee Woolen Mills Co. 115 Tenn. 266, 2 L.R.A. (N.S.) 493, 112 Am. St. Rep. 825, 89 S. W. 741; Tanner v. Lindell R. Co. 180 Mo. 1, 103 Am. St. Rep. 534, 79 S. W. 155; Arents v. Blackwell's Durham Tobacco Co. (C. C.) 101 Fed. 338. The only case in this state having a direct bearing upon the subject is Dow v. Northern R. Co. 67 N. H. 1, 36 Atl. 510. In that case there was an attempt to

change the business of the corporation; and while any expression of opinion on the question here involved was carefully avoided, yet the opinion of Chief Justice Doe contains an exhaustive and illuminating discussion of the nature of a corporation and the source of the power of the majority to act for it. The majority have the agency which in a partnership each partner possesses. Do they, in addition thereto, have the power each partner has to compel a dissolution? The corporation being an outgrowth of the law of partnership, it would be reasonable to expect that so important an incident to the joint undertaking as the right to terminate the enterprise would not be lost by the change in the form of the association.

The fiction that the corporation is a being independent of those who are associated as its stockholders is not favored in this state. *Dow v. Northern R. Co.* 67 N. H. 3, 36 Atl. 510, *supra*. Decisions based upon the idea that there is something sacred in the life of an ordinary business corporation, so that action looking to its extermination is in the nature of a fraud upon the state (*People v. Ballard*, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54), are not authority in a jurisdiction where a different view of the nature of the association is entertained. The question is not one of power granted by the state. It relates solely to the agreement of individuals with each other.

Did the stockholders who united to form the Jackson Company in 1830 understand that the business must be continued perpetually, provided a profit could be made and some stockholder objected to closing it out, or did they understand that the enterprise could be brought to an end at such time as the majority believed to be for the best interest of all concerned? The latter seems the more reasonable and probable conclusion.

Much has been said in the cases upholding the right of the minority to prevent a sale and dissolution, concerning the protection of their rights and saving their property from pillage by the majority. Just how the majority, which sells its own property at the same time and for the same price it sells that of the minority, gains an advantage over the latter, is not readily apparent. Cases might be supposed, and undoubtedly occur, where the majority do obtain some undue advantage from the sale. No one contends that such a sale is valid. But because the power of the majority may be abused, it does not follow that it does not exist. If such a conclusion were to be drawn, minorities would always rule. The plain common sense of the matter is that this is a business venture, to be carried

on as such so long as it appears to be good business judgment to do so. When the time comes that a majority in interest believe that their affairs should be wound up and the proceeds distributed, the rational rule is that this should be done. And since the question here is of a business nature, and the limitations of the power of the majority are fixed by the understanding of the business men who made the original compact, business considerations have more than ordinary weight in determining what the contract was.

It is admitted on all sides that the majority may sell out if the corporation is insolvent. And when brought face to face with the question whether they must wait until the stockholders' investment is all lost before taking action, the conclusion has been that if insolvency is imminent, action may be taken. And the same is true if it is imprudent to continue. 4 *Thomp. Corp.* § 4489, and authorities cited. One reason only is given why the power exists in these cases: It is reasonable to suppose that such authority was contemplated, because this is what sound business judgment dictates should be done. The difference between these cases and the present one is of degree only, not of kind. The majority are not obliged to wait until all possibility that the corporation can go on longer has been negatived. Some of the cases have stated that such is the rule; but the result of this would be to compel the majority to continue a losing business until their investment was entirely wiped out. To avoid so absurd a result, it has been said they could close out when insolvency seemed to be approaching. And so various forms of expression have been used to indicate the time when the majority could take action.

All these are fairly summed up in the statement that the majority may close out the affairs of the company when it can no longer make a reasonable profit. It is believed no court would now hold that the rights of the minority were more extensive than this rule implies.

If the majority may sell to prevent greater losses, why may they not also sell to make greater gains? Bearing in mind that this is purely a business proposition, with no public rights or duties involved, there seems to be no substantial difference between the two cases, as a matter of principle. In each case the sale is made because it is of advantage to the stockholders. Whether the profit to be made is a reasonable one must be a relative matter. Three per cent when others make 2 might be reasonable; but 3 per cent when a sale could be made which would yield the stockholder 10 could hardly be thought an investment

a reasonable person would retain. The loss to the stockholder by a failure to sell out on a basis which would yield him 10 per cent instead of the 3 he is receiving is in fact much greater than it would be if a concern went on neither making nor losing when the investment would earn 4 per cent elsewhere. It does not seem reasonable that the majority should have power to make a sale in the latter case, and not in the former. In neither case would the sale prevent positive loss, but in each it would result in positive gain. And the question is one of future prospects. Its decision requires the exercise of business judgment, sagacity, and power to forecast coming events. It is not an issue appropriate for trial and decision in courts, but rather one to be settled by the judgment of the men conducting the business in question. In a limited sense, the majority act as trustees for all the stockholders. When their acts are impugned by the minority, it is not the function of the court to set its judgment against theirs in settling the wisdom or policy of proposed action. By the contract of association, all questions of this nature were committed to the majority for final decision. *Gamble v. Queens County Water Co.* 123 N. Y. 91, 99, 9 L.R.A. 527, 25 N. E. 201.

The whole difficulty is probably an outgrowth of the early idea that a corporation possessed peculiar attributes of longevity and sanctity. But, as pointed out in *Dow v. Northern R. Co.* 67 N. H. 1, 8, 26, 36 Atl. 510, no such theory prevails here. The business corporation is brought into being solely for the purpose of more conveniently carrying out the joint undertaking of the part owners. The line of distinction between this form of association and certain partnerships is but a shadowy one. *Ib.* 8. It is not reasonable or natural to expect that when this boundary is passed great changes in the relation of the parties will result. A more radical change than that here claimed could not easily be imagined. In the partnership, one partner may compel a winding up from mere whim. In the absence of an agreement to go on for a fixed period of time, nothing short of a fraudulent purpose will prevent his taking valid action to close out the firm at will. *Fletcher v. Reed*, 131 Mass. 312; *Lindley Partn.* *570. By the rule here contended for, the change of the association into a corporation has carried the rule to the opposite extreme. The authority to wind up is lost, and the owner of the smallest share may prevent such action, though it is desired by all his associates. The practical reasons against such a proposition are apparent. The probabilities are opposed to the idea that the

associates intended to enter into such a compact.

It is urged that the analogy of the partnership right does not apply, because the stockholder can sell his shares and so terminate his connection with a management with which he is dissatisfied. It is true he has this legal right; but it is not true that it is an adequate remedy, when a majority desire to retire from the business. The proposition is a practical one. It is not disposed of by offering to the majority a naked legal right the exercise of which will probably deprive them of a considerable share of their property. Partnerships are sometimes formed with transferable shares, but this does not impair the right to compel a dissolution. In the case of special or limited partnerships, the rule is that the general law of partnership applies, unless modified by statute or special agreement. *Tyrrell v. Washburn*, 6 Allen, 466. Accordingly, it was held that where shares in the firm were transferable, and additional shares were issued from time to time, a partner who wished to retire could compel a dissolution and winding up of the firm. *Ib.* The fact that (as in a corporation) the dissatisfied owner could sell his shares was not sufficient to take away his right to other remedies.

The action taken by a majority of the stockholders of the Jackson Company whereby, as a part of the process of winding up the company, they voted to sell all its property to the Nashua Company, was within the power impliedly given to them when the company was formed. The charges that there was fraud in the sale and that it was for an inadequate price have been disproved. Two others causes of complaint remain to be considered.

2. It is urged that because the payment for the property of the Jackson Company was to be made in stock of the Nashua Company, therefore the sale was invalid, because the stockholder never agreed to embark in the Nashua Company's business. It is not necessary to examine this question now. Assuming, for the purposes of this decision, that the position is well taken, its effect is avoided by the provision that a stockholder may have cash instead of Nashua stock. Arrangement having thus been made whereby any stockholder can receive his share of the proceeds of the company's assets in money, his rights are not infringed by a stipulation (in the benefits of which he can share if he so elects) that stockholders may receive Nashua stock instead of money. *Koehler v. St. Mary's Brewing Co.* 228 Pa. 648, 139 Am. St. Rep. 1024, 77 Atl. 1016.

The plaintiffs now suggest that the Trust

Company option is not a sufficient guaranty that the cash will be paid to them. The defendants say that they procured the option as the best available proof of their good faith in making the offer to pay cash to the dissenting stockholders. Until it was settled that the agreements were to be carried out, it would not be expected that the money to pay for the stock would be paid over, or deposited as security. It is assumed that this will now be done by the defendants, under such an order as to details of the transaction as the superior court may make, or the parties may agree upon.

The claim is also made that a purchase by the Jackson Company of Nashua Company stock is ultra vires and voidable. But the substance of this transaction is not a purchase of stock by the Jackson Company. That company is to be dissolved, and in the process of dissolution the proceeds of its property are to be divided among its shareholders. The Nashua Company pays \$585,000 for the property. Those who desire to receive payment in stock can do so, and cash will be paid to those who do not wish to invest in the stock. So far as the Jackson Company takes the stock at all, it is merely to transfer it to those who elect to take it, or to sell it for the guaranteed price and pay the proceeds to those who wish to receive money instead of stock. If the form of the agreements and offers, taken as a whole, infringes the rule here invoked, the substance is not open to such objection. In such a case equity ought not to interfere.

3. The legality of the votes passed at the meeting of the Jackson stockholders is questioned on account of the nature of the trust agreement under which the majority of the stock was then held, and because the trustees voted more than one eighth of the entire stock. While the decisions upon the first question are not entirely in accord, yet substantially all of them recognize that an agreement to vote stock in a certain way may be valid. The rule is well stated in the case chiefly relied upon by the plaintiffs. "If the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then, whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their costockholders, must be dependent upon the purposes for which the trust was created and the powers that were conferred. If stockholders, upon consideration, determine and adjudge L.R.A.1917A.

that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to intrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves, by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan to the exclusion of other stockholders who do not come into the combination, then in my judgment such combination and the acts done to effectuate it are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation." *Kreisæl v. Distilling Co. of America*, 61 N. J. Eq. 5, 14, 47 Atl. 471, 475.

An examination of the cases generally will disclose that in nearly all of them where the agreement was held invalid there were stipulations or covenants which infringed this rule. The propositions that "it is as legitimate for a majority of stockholders to combine as for other people," and that the combination is unlawful only if "the gain was to be at the expense of the corporation, or in some way was to work a wrong to the other stockholders" (*Brightman v. Bates*, 175 Mass. 105, 110, 55 N. E. 809, 810), are generally recognized as sound law (*Chapman v. Bates*, 61 N. J. Eq. 658, 88 Am. St. Rep. 459, 47 Atl. 638; *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24, 3 Mor. Min. Rep. 551; *Smith v. San Francisco & N. P. R. Co.* 115 Cal. 584, 35 L.R.A. 809, 56 Am. St. Rep. 119, 47 Pac. 582. Even the cases holding the particular agreements then under consideration to be invalid usually recognize the proposition that there may be a valid voting trust. *Shepaug Voting Trust Cases*, 60 Conn. 579, 24 Atl. 32; *Gage v. Fisher*, 5 N. D. 297, 31 L.R.A. 557, 65 N. W. 809.

Judged by these standards, the agreement in the present case seems unobjectionable. The trust is to terminate at the end of a year in any event. It contemplates the winding up of the corporation within that time, and sets out in detail the plan of sale and dissolution for which the trustees were authorized to vote. It further provides that the trustees shall not vote so as to substantially change the company's business, except as specifically authorized.

There is nothing here which seeks to work a wrong to the corporation, to confer a benefit upon those joining in the trust, or to turn the management of the stockholders' affairs over to strangers. Judged by the strictest rule of a stockholder's right to the free and honest judgment of his co-stockholders, the agreement here made by more than three fourths of the stockholders is a legitimate arrangement for carrying out their purpose to close out the affairs of the company.

The argument that each stockholder is entitled to the presence of his associates to the end that they shall reason and be reasoned with is not of weight here. The rule of the common law was that no member of a corporation could vote by proxy. 1 *Thomp. Corp.* § 875, and cases cited. But the charter of this company introduces a different doctrine. "Absent members may be represented and vote at such meetings by an agent for that purpose duly authorized by writing, signed by the member or members to be represented." Act to establish a manufacturing corporation, by the name of the Jackson Company, 32 *Ms. Laws*, 1830, p. 197. It is not necessary to now consider what effect the act of 1842, forbidding all proxy voting, giving one vote for each share up to ten, one vote for every two shares between ten and twenty, and no more (*Rev. Stat.* chap. 146, § 20), had upon this right (*Dow v. Northern R. Co.* 67 *N. H.* 1, 25 et seq., 36 *Atl.* 510). The act of 1842 was repealed four years later, and the principle of general proxy voting was adopted. *Laws* 1846, chap. 321, § 5. The limitation of the right, incorporated in the revision of 1867 (*Gen. Stat.* 1867, chap. 134, § 21), was removed in 1901; so that now a proxy can represent more than one stockholder, and one stockholder can be proxy for another. *Laws* 1901, chap. 68. Whether the charter or the general law applies here, the rule is that one or many stockholders may be represented at the stockholders' meeting by an agent.

The claim that the votes cast by the trustees were invalid because they were in effect votes by proxy, and that one stockholder cannot act as proxy for another stockholder, nor can a proxy act for more than one stockholder (*Pub. Stat.* chap. 149, § 22), is answered by the act heretofore referred to. The statute has been repealed. *Laws* 1901, chap. 68. If the statutes authorizing voting by proxy do not apply to a corporation chartered in 1830, then the charter of this company plainly confers rights as broad as those here exercised.

The trustees voted more than one eighth of the whole capital stock, but such action did not affect the result. In any event, they *L.R.A.* 1917A.

lawfully voted 75 shares. Forty-four other shares were voted the same way, and 104 shares were voted against the sale. It is therefore unnecessary to consider whether the statute, passed after the charter was granted, and restricting the right to vote on large holdings of stock (*Laws* 1840, chap. 321, § 5), can affect the rights of these stockholders. As the result was not affected by the action complained of, the vote to sell cannot be set aside for such cause. *Atty. Gen. ex rel. Pearson v. Folson*, 69 *N. H.* 556, 45 *Atl.* 410.

Case discharged.

All concur.

Plaintiff, on January 2, 1912, having moved for a rehearing upon the legality of the sale, and invited further argument upon the method of liquidating the assets, Peaslee, J., handed down the following additional opinion:

The plaintiffs now object to the proposed sale upon the grounds: (1) That the dissolution amounts to a taking of their property against their consent: (2) that in closing out a partnership any partner can compel an auction sale of the property; and (3) that the defendants have agreed for a sale to themselves.

1. The claim of a right to a sale by auction, or a price fixed by a jury, is based first upon the assumption that there is here a taking of the plaintiffs' property in invitum, and that this cannot lawfully be done except upon such an ascertainment of value. If it were true that this amounted to such a taking, then the proceeding could not be upheld upon any theory. Private property cannot be so taken except for public use. But there is here no taking of property whatever. It is a mere question of contract and of carrying the contract into effect. If it is true (as the plaintiffs now admit) that a dissolution of the corporation and a distribution of its assets is a part of the original undertaking of the incorporators, then a sale for the purpose of such distribution is no more a taking of a stockholder's property than a sale of the corporation's manufactured product in the ordinary course of trade would be. In each instance there is a sale of property in which he has an interest. It may be that in each case he protests against the particular transaction. But his present protest cannot revoke his prior consent to a method of doing business which is now being followed, nor can his attempted withdrawal of consent make a proceeding to which he has agreed a taking of his property.

2. The contention that the plaintiffs are entitled as a matter of right to their pro-

portion of the proceeds of all the assets as fixed by an auction sale is also urged upon the assumption that the best selling price reasonably obtainable cannot otherwise be found. Each owner's right is to his proportion of the net proceeds of all the assets. He is entitled to his share of what the property can be sold for, as distinguished from what it is worth. If this implies that the assets must be sold, it does not necessarily involve an auction sale. It not infrequently happens that such a sale would be ruinous, when one by private agreement could be negotiated for a fair price and to the advantage of all concerned. Sales at public auction have been ordered because it was thought that in this way a fair sale and the highest price would be assured. This is not because the parties have a vested right to have the value so fixed, but because courts have thought that the business transaction of liquidation (when imposed upon courts) would be better carried out in this way. It was merely a means for giving the parties their rights in the proceeds. It was not a right in and of itself.

Even in the early English reports, cases are found where sales other than at auction were approved by the chancellor; some going so far as transferring the interest of a minor heir to a surviving partner. In a later case in the House of Lords these authorities are reviewed and the true rule is laid down. "It is very true, as was said at the bar, that on dissolving a partnership of this kind the ordinary course would be for the court to direct a sale of the assets, and, if necessary, a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the judge in chambers. My lords, those provisions are molded in every case by the court to meet the circumstances of the particular case; and it appears to me that, looking at the nature of this business, and looking at the very small interest which was taken in it by the respondent [one-eighth], it would certainly not be desirable in this case to have a sale, or to bring these premises to the hammer for the purpose of ascertaining what sum ought to be given for them. It is a case, therefore, in which, if a decree for a dissolution had been made in the first instance, I apprehend that the court would have thought it right to authorize the owner of seven-eighths of the concern to lay proposals for a purchase before the judge in chambers. I am about to submit to your lordships a provision which will, I think, in another way, arrive in substance at the same end." The following decree was entered: (1) An account for mesne profits. (2) "That an inquiry be made what sum would, on the 21st of Feb-

ruary, 1873, have represented the respondent Daniel Backhouse Syers's one-eighth share in the value of the said music hall and tavern if it had then been sold as a going concern, after deducting all charges thereon and all liabilities of the business."

(3) That upon payment of these sums within a time to be fixed by the judge in chambers, no farther accounts be taken. (5) If payments are not made as ordered, there must be a sale in the usual way. *Syers v. Syers*, L. R. 1 App. Cas. 174, 35 L. T. N. S. 101, 24 Week. Rep. 790.

In commenting on this case, it is said in *Lindley on Partnership*: "Moreover, in *Syers v. Syers* it was held by the House of Lords that in the case then before it the court could, in its discretion, either order the sale of the undertaking as a going concern, or approve of the purchase by one partner of the share of his copartners. The rule as to selling partnership property is merely adopted in order that justice may be done to all parties when no other course has been or can be agreed upon. It is not an arbitrary rule inflexibly applied in all cases, whether it is necessary or not; and although, if one partner or his representative insist on a sale, the court may not be able to refuse to enforce that right, still the court is always inclined to accede to any other mode of settlement which may be fair and just between the parties." And in a footnote: "And qu., whether the discretion alluded to exists in all cases? But why should it not? Its exercise would often be most beneficial." *Lindley, Partn.* 7th ed. 1905, 587.

"A sale is, generally speaking, that method of disposing of the property, or facilitating its division, which is least open to the danger of fraud or mistake, and is therefore much favored. . . . It must always be possible that the peculiar circumstance of the case may make a sale injurious, and that the true interests of all parties may be better preserved and protected without it; and then a court is under no obligation to require a sale." *Parsons, Partn.* 4th ed. § 420.

There is no one hard-and-fast rule for adjusting partnership affairs in court proceedings, and the claim that the partners' shares can be determined only by an auction sale is not well founded. *Mauck v. Mauck*, 54 Ill. 281; *Taylor v. Hutchison*, 25 Gratt. 536, 18 Am. Rep. 699. The suggestion that an order for a sale of the net Jackson assets at auction, limiting the lowest bid to the price fixed by the sale to the Nashua Company, may produce good results and can do no harm, rests upon the assumption that the present offer would still be open to acceptance if the auction failed to develop a

higher bidder. But conceding this, it must also be evident that an attempt to sell at auction might do no good. It is at most a question of the best sale price and how to obtain it. If, upon the evidence, the court is satisfied that this has been obtained, there is no occasion for further proceedings to secure additional evidence on the point. If the court thought the question was not satisfactorily answered by the evidence, it might be appropriate (in a case where cause was shown for liquidation by the court) to order the sale at auction, or in some other way. That the auction sale is not an absolute right is stated in terms in the opinion in *Mason v. Pewabic Min. Co.* 133 U. S. 50, 33 L. ed. 524, 10 Sup. Ct. Rep. 224, the authority chiefly relied upon by the plaintiffs: "We do not say that there may not be circumstances presented to a court of chancery, which is winding up a dissolved corporation and distributing its assets, that will justify a decree ascertaining their value, or the value of certain parts of them, and making a distribution to partners or shareholders on that basis; but this is not the general rule." Even with this qualification, Mr. Justice Bradley stated his opinion to be that "the opinion of the court asserts too strongly the right of the minority stockholders to insist upon a sale. In many cases in this country, a valuation of the interest of a minority, under the direction of the court, has been deemed a proper method of ascertaining their share in the assets, where a sale would be prejudicial to the interests of the whole."

This is the law in cases where the liquidation of the assets is in the hands or under the direction of the court. But liquidation is not necessarily a judicial proceeding, nor can judicial action in reference to it be invoked, except for cause. The plaintiffs' whole contention is based upon the assumption that in every case of dissolution the liquidation is a matter for judicial administration, unless the parties are entirely agreed. The law is otherwise. It is not a matter of course that a court of equity will interfere in the liquidation of the assets of a corporation or firm by a majority in interest. It is the right of the parties to conduct this part of their business for themselves. Before this right can be interfered with it must be made to appear that the majority are assuming to exercise powers not conferred upon them, or are proceeding in a manner not authorized by law.

The typical cases where receivers or sales have been ordered are those where there were only two partners. In case of a disagreement, there was no majority either way. But no case has been cited where, in case of more than two partners, the honest

and judicious action of the majority in closing out the property has been reviewed by a court of equity. In the case at bar cause for a receivership was alleged, but not proved. If it had been established, then the question what kind of a sale should be ordered by the court would arise, as in *Syers v. Syers*, before cited. No cause for a receiver being shown, and the allegations of misconduct having been disproved, it follows that the action of the majority cannot be interfered with.

After a dissolution, each partner still has implied authority to dispose of the firm property by sale or other reasonable mode, necessary for the purpose of winding up the firm. *Lapenta v. Lettieri*, 72 Conn. 377, 77 Am. St. Rep. 315, 44 Atl. 730; *Robbins v. Fuller*, 24 N. Y. 570; *Gray v. Green*, 142 N. Y. 316, 40 Am. St. Rep. 596, 37 N. E. 124; *Walling v. Burgess*, 122 Ind. 299, 7 L.R.A. 481, 22 N. E. 419, 23 N. E. 1076; *Bach v. State Ins. Co.* 64 Iowa, 595, 21 N. W. 99; *Barton v. Lovejoy*, 56 Minn. 380, 45 Am. St. Rep. 482, 57 N. W. 935; *Shanks v. Klein*, 104 U. S. 18, 26 L. ed. 635.

"The dissolution of a partnership terminates the capacity of the individual partners to continue the firm business with the partnership property and assets, and to incur debts in the firm name. But the partnership property will remain to be disposed of and its assets to be collected and partnership debts must be paid. . . . Notwithstanding the dissolution of the partnership, the firm continues to exist for all purposes necessary for winding up its affairs; otherwise, as was said by Lord Justice Turner, it would be necessary to apply for a receiver in every case upon the dissolution of a partnership. *Butchart v. Dresser*, 4 De G. M. & G. 542-544, 43 Eng. Reprint, 619, 10 Hare, 453, 68 Eng. Reprint, 1004, 1 Week. Rep. 178. If partners have not provided for the manner in which the affairs of the partnership shall be wound up, the law provides therefor by continuing the partnership, with its incidents of interest, powers, and obligation, for the purpose of winding up the concerns of the partnership so far as is necessary to that end and no further. *Parsons, Partn.* 420." *Davis v. Megroz*, 55 N. J. L. 427, 431, 26 Atl. 1010.

The power of partners to so close out their affairs is not curtailed by courts in the absence of proof of illegal acts, or at least of gross incompetence. *Birdsall v. Colie*, 10 N. J. Eq. 63; *Cox v. Peters*, 13 N. J. Eq. 39; *Nathan v. Bacon*, 75 N. J. Eq. 401, 72 Atl. 359.

"In case of an actual disagreement he [Kent] adds that the weight of authority is in favor of the power of the majority of the firm, acting in good faith, to bind the

minority. And such ought to be the law; for where there is a community of interest, certainly it is the will of the majority, and not the will of the minority, that ought to control. If there is a fraudulent combination on the part of the majority to injure or oppress the minority, the law is otherwise. But, in the absence of fraud, certainly it is the majority, and not the minority, that ought to control." *Staples v. Sprague*, 75 Me. 458, 460.

The rule applies with added force in the case of a corporation, where there is no such thing as binding action by one individual, but all action is to be taken by the majority. The majority are trustees with not only the power, but also the positive duty, to liquidate the assets. The question is how this can best be done. Upon this question they act in good faith and negotiate a sale which, upon investigation, is found to be for an adequate price. A reasonable price having been obtained in a manner approved by a majority of the beneficiaries, there is no equity in the claim of a dissatisfied minority that the trust should be administered in accordance with their views and against the wishes of the majority.

It was urged at the argument that the finding in the superior court on the question of the adequacy of price did not go so far as to include the fact that the price was fair if measured in the selling price of the Nashua stock. The argument was that while $1\frac{1}{2}$ shares of Nashua stock might be a fair equivalent for one share of Jackson stock, it was not found that \$585,000 was a fair cash price for the net Jackson assets. It was then suggested to counsel that, if the assumption in the former opinion that the finding covered both points was erroneous, application might be made to the superior court to limit the finding according to its true intent. Such application has been made, and the presiding justice has not qualified the former statement. This is taken to mean that the construction heretofore put upon it is not contrary to its intended meaning.

But even if it be conceded that there has been no finding of a fair sale at a price fixed in terms of money, still the plaintiffs have failed to make out a case. If there is no finding that the price is adequate, neither is there one that it is inadequate. The sale being one the majority had power to make, and being free from all taint of fraud or irregularity, a court of equity will not interfere unless there be such inadequacy of price as to amount to proof of gross mismanagement. It is not incumbent on the L.R.A.1917A.

defendants in such a case to prove a sale for full value, for they are not called upon to justify their action. It is for the plaintiffs to show that the defendants have been guilty of a violation of duty.

3. The majority act is in a sense as trustees for the minority in the winding up. They hold the property to carry out certain purposes, and in doing this it is well settled that they cannot contract with themselves. And the rule is the same as to contracts with a corporation in which they have a financial interest. But that was not the situation here. As to that part of the transaction whereby the Jackson Company received Nashua Company stock, it is evident that there was no adverse interest. Such interest in the Nashua Company as exists was created by the sale. It was not a pre-existing interest which made it desirable to sell out the Jackson Company for a small price. The only difference in the ultimate situation of the parties was that the majority would hold their Nashua stock, while that of the minority would be sold. There is no possibility of conflicting interest in the agreement with the Nashua Company. It was of equal advantage to every Jackson stockholder to secure as much Nashua stock as possible in exchange for the Jackson assets. Nor does such conflict appear in the sale of the Nashua stock to the American Trust Company, upon the guaranty and presumably for the benefit of Baylies. This sale would not affect the Nashua Company, in which the assenting Jackson stockholders had prospective interests. They would neither gain nor lose by a sale of other Nashua stock, by and to third parties, at a certain price.

The theories of the law governing liquidation, which are advanced in support of the present motion, are not in harmony with the trend of the authorities. The broad proposition that, in the event of the dissolution either of a partnership or a corporation, a dissatisfied minority can take from the majority the power to dispose of the assets in any reasonable way, cannot be sustained. Before the control of liquidation is taken from the majority, it must be shown that they have violated their trust; and before a sale negotiated by them can be interfered with, it must appear that it was not a fair sale.

Rehearing denied.

All concur.

Dismissed by the Supreme Court of the United States, November 1, 1915, 239 U. S. 627, 60 L. ed. 474, 36 Sup. Ct. Rep. 164.

NEW MEXICO SUPREME COURT.

ERASTUS LACEY

v.

CHARLES LEMMONS, Appt.

(— N. M. —, 159 Pac. 949.)

Constitutional law — seizure of confined calves.

Section 1632, Code 1915, which authorizes the seizure and sale of animals under seven months of age if confined in any of the ways mentioned in the section and unaccompanied by their mothers, and which requires no notice, actual or constructive, to the owner, of such seizure and sale, is unconstitutional as authorizing the taking of property without due process of law.

For other cases, see Constitutional Law, II, b, 7, c, in Dig. 1-52 N. S.

(August 9, 1916.)

A PPEAL by defendant from a judgment of the District Court for Lincoln County in plaintiff's favor in an action brought to recover possession of eleven head of cattle. Affirmed.

The facts are stated in the opinion.

Messrs. Mann & Nicholas for appellant.
Mr. George W. Prichard for appellee.

Parker, J., delivered the opinion of the court:

This was an action in replevin brought by the plaintiff and appellee against the defendant and appellant for eleven head of cattle. The complaint alleged that the plaintiff was the owner of the calves, and that in January, 1912, all the said calves were in his possession at his ranch; that defendant, claiming to be an inspector of the cattle sanitary board of the state, took the said calves from his possession and failed and refused to return them; that at the time they were taken the animals were young calves from four to eight or ten months old, and were kept in a corral and pasture adjoining plaintiff's ranch; that four of the calves were only four or five months old, and for that reason were unbranded; that they were worth \$22 per head. It appears that six of the calves were returned to the plaintiff after suit was brought.

Headnote by PARKER, J.

Note.—The constitutionality of statutes infringing freedom to deal with one's property, enacted in order to prevent larceny, is treated in the note to *State v. Brooken*, L.R.A.1915B, 213, which, as stated in the foregoing opinion, involved other provisions of the statute which is passed upon in *LACEY v. LEMMONS*.
L.R.A.1917A.

The defendant answered, admitting the taking of the calves in controversy, alleging that at the time of the taking the calves were held in an inclosure and were not accompanied by their mothers, and that they were not calves of milch cows actually used to furnish milk for household purposes on carrying on a dairy; that upon information and belief each of the said calves was under the age of seven months at the time of taking, and were separated from their mothers, and that demand of plaintiff that he produce the mothers of the said calves within a reasonable time was made; that appellee failed to produce the mothers; and that up to the time of the service of the writ of replevin no attempt had been made by appellee to prove his ownership.

The court sustained a motion interposed by plaintiff for judgment on the pleadings, and rendered judgment against the defendant. The defendant appealed.

The defendant justifies under §§ 1628 and 1632, Code 1915, which are as follows:

"Sec. 1628. That hereafter it shall be unlawful for any person, firm or corporation to hold under herd, confine in any pasture, building, corral or other inclosure, or to picket out, hobble, tie together or in any manner interfere with the freedom of calves of neat cattle or colts of horses, asses and burros which are less than seven months old except such young animals be accompanied by their mothers.

"This provision shall not apply to the calves of milch cows when such cows are actually used to furnish milk for household purposes or for carrying on a dairy; but in every such case the person, firm or corporation separating calves from their mothers for either of these purposes shall, upon the demand of any cattle owner, sheriff, inspector or any . . . officer, produce, in a reasonable time, the mother of each one of such calves so that interested parties may ascertain if the cow does or does not claim and suckle such calf."

"Sec. 1632. That all animals held in violation of the preceding four sections shall be considered estrays, and it shall be the duty of any inspector appointed by the cattle sanitary board of the state of New Mexico, who shall receive notice of such violation, to take into his possession as estrays or unclaimed live stock all such animals and hold them for proof of ownership. If the ownership of such estrays be not proved within ten days, they shall be sold by the inspector having them in charge at the highest price obtainable; the funds received from such sale, after the costs of keeping and sale have been deducted, shall be turned over to the cattle board to be kept and disposed of in the same manner as is now pro-

vided by law for funds arising from the sale of estrays."

No question is made but that the cattle inspector followed the provisions of this statute. The question presented is whether § 1632, Code 1915, is violative of § 18, art. 2, of the Constitution, which contains the usual guaranty against the deprivation of life, liberty, or property without due process of law. In *State v. Brooken*, 19 N. M. 404, L.R.A.1915B, 213, 143 Pac. 479, Ann. Cas. 1916D, 136, we had § 1628, Code 1915, before us for consideration, and we there upheld the constitutionality of the same. In that case there is contained what might be construed as an intimation by the court that § 1632, Code 1915, might be held to be unconstitutional on the ground that it provided for the taking of private property without due process of law. But this question was not decided by the court in that case, and was mentioned for the reason merely that, even if it were unconstitutional, it would not invalidate § 1628, which was there under consideration.

We have, then, for consideration for the first time, the question as to whether § 1632 authorizes a proceeding violative of the citizens' constitutional right. It is to be noticed that this section contains a definition of what are estrays. It provides, taken in connection with § 1628, that all calves of neat cattle, and other animals named, under seven months of age, held under herd or confined in any of the ways named in the section, shall be considered estrays. Taking into consideration the nature of the property, we can see no objection to this definition. It is a matter of common knowledge that calves of neat cattle, if separated from their mothers long enough to become weaned, can never afterwards be identified so that the ownership thereof may be established. Cattle in this state almost universally roam at large upon the public ranges, and the only means of identification and the only proof of ownership is by brands. It is also a matter of common knowledge and experience that the only means of identification of the ownership of calves until they are branded is by the observation of the mother and the calf together. If the mother suckles the calf, the identity of the ownership of the calf is established. If the calf is separated from the mother until it becomes weaned, this evidence of ownership is lost and destroyed, rendering the calf subject to the machinations of the cattle thief and with no means of bringing him to justice.

This section, then, is but a legislative declaration that, in regard to this class of property, the mere possession of calves under seven months of age is no evidence L.R.A.1917A.

whatever of ownership, and that calves held under the circumstances mentioned in the statute and as existing in this case are really estrays because the ownership thereof is, and must be, from a legal and practical standpoint, unknown. As we pointed out in *State v. Brooken*, supra, it is a proper and legitimate exercise of the police power for the legislature, in the interest of the stock raising business in the state, to regulate to this extent the use, management, and control of this class of property.

A much more serious consideration arises out of the fact that the statute provides for a seizure and sale of the animals and the payment of the money, less the costs of keeping and sale, to the cattle board, to be kept and disposed of in the same manner as is provided by law for funds arising from the sale of estrays. The disposition of the funds arising from the sale of estrays is provided for in § 162, Code 1915. This section provides that at any time within two years after the sale of the animals the lawful owner may apply to the cattle sanitary board and receive the net amount resulting from such sale, less the sum of \$1 for each estray to be retained by the cattle sanitary board upon the owner proving his ownership to the satisfaction of said cattle sanitary board.

It is to be observed in this connection that this statute provides for no judicial hearing, and provides for no notice of any kind whatever to the owner of the animals seized. It is to be further noticed that the net proceeds, less \$1 for each estray, are to be paid over to the owner of the animals at any time within two years, upon such owner proving his ownership to the satisfaction of the cattle sanitary board. The nature of the proof required of the owner to establish his ownership is not pointed out in the statute.

The question then is whether this statute authorizes the taking of property without due process of law. The term "due process of law" has been often defined, but it is of such a nature that no general definition can be formulated which "shall be accurate, complete in itself, and at the same time appropriate in all the cases. The diversity of definition is certainly not surprising when we consider the diversity of cases for the purposes of which it has been attempted, and reflect that a definition that is sufficient for one case and applicable to its facts may be altogether insufficient or entirely inapplicable in another." *Cooley*, Const. Lim. 7th ed. p. 502.

Mr. Webster's definition in the famous *Dartmouth College Case*, *Dartmouth College v. Woodward*, 4 Wheat. 519, 4 L. ed. 630, is as follows: "By the law of the land

is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, . . . and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

Judge Cooley points out that this definition is apt and suitable as applied to judicial proceedings. He says, however: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribed for the class of cases to which the one in question belongs."

See Cooley, *Const. Lim.* pp. 503 and 506.

It is well established that, in the exercise of the police power, the power of taxation, and the power of eminent domain for governmental purposes, due process of law, in a constitutional sense, does not require judicial process and a proceeding according to the course of the common law. Cooley, *Const. Lim.* 7th ed. p. 507; 6 R. C. L. 452, § 448; 1 R. C. L. 1148, § 89; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; Chicago, B. & Q. R. Co. v. Nebraska, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; People ex rel. Herrick v. Smith, 21 N. Y. 595, 599; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; Re State, 54 Mich. 417, 23 N. W. 189; Davidson v. New Orleans, 96 U. S. 97, 104, 24 L. ed. 616, 619; Crum v. Bray, 121 Ga. 709, 49 S. E. 686, 1 Ann. Cas. 991; Gilchrist v. Schmidling, 12 Kan. 263, 271; Weimer v. Bunbury, 30 Mich. 201, 210; Shook v. Sexton, 37 Wash. 509, 79 Pac. 1093.

If the proceedings in the case at bar are otherwise lawful, there can be no objection to them because they are administrative, and not judicial.

The trouble with this statute arises out of the fact that no notice is required to be given the alleged owner, either actual or constructive. We assume that either would be sufficient in cases of this kind. It is true that in this case the alleged owner did have knowledge of the seizure of the cattle by the cattle inspector, as is evidenced by the fact that he brought this action of replevin against the inspector, and by the allegations in the pleadings. But this was accidental, and can have no effect in determining the question. It is not what is done

under a statute in a given case, but it is what may be done, that determines its constitutionality. *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. And in cases like this the circumstances might, and often would, be such that the alleged owner would have no notice whatever of the seizure and sale of the cattle until long after the same had occurred. The statute also contemplates the passing of the title and relegates the alleged owner to the recovery of the proceeds of sale, less certain deductions, from the cattle sanitary board.

We are compelled to hold that this statute authorizes the taking of property without due process of law. That the proceedings authorized are without judicial process is no objection. But in proceedings before administrative officers or bodies, at some time before the property is finally taken, the owner ordinarily must have notice and opportunity to be heard. 6 R. C. L. p. 446, § 442; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435; *Crum v. Bray*, 121 Ga. 709, 49 S. E. 686, 1 Ann. Cas. 991; *Greer v. Downey*, 8 Ariz. 164, 61 L.R.A. 408, 71 Pac. 900.

The doctrine stated has been specifically applied to the taking up of animals running at large, in some of the cases cited, and the doctrine is stated and many cases cited in 1 R. C. L. p. 1148, § 89. See also *Armstrong v. Brown*, 90 Am. St. Rep. 207, and note (106 Ky. 81, 50 S. W. 17).

In this connection it may be well to note the distinction between a case of this kind and those cases where some controlling necessity for the public good requires immediate action, and where the property of the citizen may be taken without notice and without compensation. The destruction of property to prevent the spread of fires in cities and towns, the destruction of animals afflicted with contagious diseases endangering the public health, are familiar examples of this class of cases. In those cases the rights of the individual must yield to the general welfare of the many.

But in cases like the one at bar no controlling necessity exists to seize and sell cattle taken by a cattle inspector. When cattle situated as these were are seized, the claimant or owner should have an opportunity to assert his right thereto by producing the evidence of their ownership before the cattle inspector, before the same are sold. He should have the right to institute and maintain a suitable action for their recovery, and, as before seen, the statute should require notice to him for that purpose.

It is a matter of regret that we are com-

pelled to declare this act unconstitutional. It is a matter of common knowledge that the most effective way and the method most largely practised in this state to effectuate the larceny of cattle is to separate calves from their mothers; this destroying all means of identification and proof of ownership by the true owner. The fact remains, however, that the law must be enforced as

it is found to exist, and the remedy lies with the legislative department to enact a suitable statute on this subject.

For the reasons stated, the judgment of the court below will be affirmed; and it is so ordered.

Roberts, Ch. J., and Hanna, J., concur.

WASHINGTON SUPREME COURT.

MRS. CARRIE IHRIG, Appt.,
v.

C. B. BUSSELL et al., Respts.

(68 Wash. 70, 122 Pac. 608.)

Replevin — condition of bond — prosecution of action — success.

1. A condition in a replevin bond for the prosecution of the action does not render the surety liable merely for failure to establish a right to the property.

For other cases, see *Replevin*, II. a, in Dig. 1-52 N. S.

Same — dismissal of action — liability for value of property.

2. A judgment of dismissal with costs in a replevin suit does not render the sureties liable for the value of the property in case it is not returned, under a bond conditioned for the prosecution of the action, the return of the property, if return thereof is adjudged, and for payment of such sum as may be adjudged against plaintiff.

For other cases, see *Replevin*, II. a, in Dig. 1-52 N. S.

Judgment — replevin — failure to direct return of property — estoppel.

3. A defendant in a replevin suit who is entitled to a return of the property, but acquiesces in the entry of a judgment merely dismissing the action, cannot maintain another action to recover such property from the plaintiff, who took it into his possession.

For other cases, see *Estoppel*, II. c, in Dig. 1-52 N. S.

(April 8, 1912.)

APPEAL by plaintiff from a judgment of the Superior Court for King County granting defendants' motion for judgment notwithstanding the verdict in an action upon a bond given in a replevin suit for the recovery of certain property. Affirmed.

The facts are stated in the opinion.

Mr. Vince H. Faben, for appellant:

The condition in the bond to prosecute

the action to judgment is breached by a dismissal or other termination of the action prior to the trial upon the merits.

Berghoff v. Heckwolf, 26 Mo. 511; *Boom v. St. Paul Foundry & Mfg. Co.* 33 Minn. 253, 22 N. W. 538; *Pittsburgh Nat. Bank v. Hall*, 107 Pa. 583; *Gould v. Warner*, 3 Wend. 54; *Brown v. Parker*, 5 Blackf. 291; *Biddinger v. Pratt*, 50 Ohio St. 719, 35 N. E. 795; *Wells, Replevin*, 2d ed. § 415; *Cobbey, Replevin*, 2d ed. §§ 1253, 1254; *Vinyard v. Barnes*, 124 Ill. 346, 16 N. E. 254.

In replevin the plaintiff must recover upon the strength of his own right of possession and his failure to so recover entitles the defendant to a return as a matter of course.

Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; *Three States Lumber Co. v. Blanka*, 69 L.R.A. 283, 66 C. C. A. 353, 133 Fed. 479; *Meigs v. Keach*, 1 Wash. Terr. 306.

Defendant Bussell is liable notwithstanding the surety may not be.

Brown v. Baldwin, 46 Wash. 106, 89 Pac. 483; *Carlson v. Curran*, 42 Wash. 647, 6 L.R.A.(N.S.) 260, 85 Pac. 627; *Maitland v. Purdy*, 49 Wash. 575, 96 Pac. 154; *Fransoli v. Thompson*, 55 Wash. 259, 104 Pac. 278.

Mr. G. E. de Steiguer, for respondent C. B. Bussell:

There can be no recovery upon the bond.

Boyer v. Fowler, 1 Wash. Terr. 102; *Chambers v. Waters*, 7 Cal. 390; *Vallandingham v. Ray*, 128 Ky. 506, 108 S. W. 896; *Mitchum v. Stanton*, 49 Cal. 302; *Colorado Springs Co. v. Hopkins*, 5 Colo. 206; *Ladd v. Prentice*, 14 Conn. 117; *Vinyard v. Barnes*, 124 Ill. 346, 16 N. E. 254; *Thomas v. Irwin*, 90 Ind. 557; *Citizens' State Bank v. Morse*, 60 Kan. 858, 57 Pac. 115; *Smallwood v. Norton*, 20 Me. 83, 37 Am. Dec. 39; *Badlam v. Tucker*, 1 Pick. 284; *Clark v. Norton*, 6 Minn. 412, Gil. 277; *Munding v. Michael*, 2 Ohio Dec. 158.

A judgment is conclusive of all matters litigated or which might have been litigated in a former action between the same parties.

Stay v. Stay, 59 Wash. 651, 110 Pac. 549; *Olson v. Title Trust Co.* 58 Wash. 599, 109 Pac. 49; *Spokane Valley Land & Water Co.*

Note. — As to liability on replevin bond where suit is dismissed or discontinued or nonsuit suffered, without a judgment for the return of the property, see annotation following this case, post, 1191. L.R.A.1917A.

v. Jones, 53 Wash. 41, 101 Pac. 515; Snowden v. Anderson, 51 Wash. 234, 98 Pac. 610; Clark v. Norton, 6 Minn. 412, Gil. 277; Vinyard v. Barnes, 124 Ill. 346, 16 N. E. 254; Colorado Springs Co. v. Hopkins, 5 Colo. 206; Chambers v. Waters, 7 Cal. 390; Kenyon v. Wilson, 78 Iowa, 408, 43 N. W. 227; Bradley Engineering & Mach. Co. v. Muzzy, 54 Wash. 227, 103 Pac. 37, 18 Ann. Cas. 1072.

Mr. William W. Wilshire for respondent Fidelity and Deposit Company.

Fullerton, J., delivered the opinion of the court:

On December 4, 1905, one Thomas Carstens, then owning certain personal property, consisting of bedroom suits and furnishings, made a conditional sale of the same to the appellant, Carrie Ihrig, for the sum of \$5,600. Of the purchase price, \$1,800 was paid at the time the contract was entered into, and the balance, \$4,000, was agreed to be paid in instalments of \$150 each on the 1st day of each month, commencing with the month of January, 1906. The contract of sale was put in writing and duly recorded. The contract was subsequently assigned by Carstens to one J. O. Bruggemann, and by Bruggemann to the respondent C. B. Bussell. The payments on the contract were not kept up according to its terms, and thereafter, on January 5, 1907, Bussell brought an action in replevin against Mrs. Ihrig to recover the property. He filed a claim and delivery bond with his correspondent as surety, and possession of the property was taken from Mrs. Ihrig at the commencement of the action. The bond conformed substantially to the requirements of the statute, which provides that such bond shall be conditioned "for the prosecution of the action, for the return of the property if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff." Mrs. Ihrig defended the replevin action, setting up by way of answer, among other things, that there had been a modification of the contract while it was still owned by Carstens, by the terms of which the amount to be paid monthly on the contract was reduced from \$150 to \$75 per month. The action was tried by the court without a jury, and on the issue of a modification of the contract the court found in favor of Mrs. Ihrig, finding, further, that there had been no default on her part, and directed that a judgment be prepared in her favor. A judgment was thereupon prepared by counsel for Mrs. Ihrig, finding that the property was of the value of \$5,000, and directing that the property be returned to Mrs. Ihrig, or, if return thereof could not

be had, that she have judgment against the plaintiff for \$5,000, the value thereof. On this judgment being presented to the court, he took the matter under advisement, and after consideration struck therefrom all that pertained to the value of the property, its return to Mrs. Ihrig, and judgment in her favor for the value of the property in case return thereof could not be had, and caused a judgment to be entered to the effect that the action be dismissed, and the defendant recover her costs. The costs were thereafter ascertained and paid into court by the plaintiff.

In January, 1910, the present action was begun by Mrs. Ihrig against Bussell and his surety on the replevin bond to recover the value of the property taken thereunder. In answer to the complaint, the respondents, among other defenses, set up the judgment in the replevin action, and pleaded their compliance therewith by the payment of the money judgment rendered against them. On the trial the judgment was introduced in evidence, together with evidence of the payment of the money judgment, and the court was requested to rule that there was no liability on the bond for the value of the property because return thereof had not been adjudged in the replevin action, and because they had complied with the conditions of the judgment as actually rendered and entered. The request was overruled for the time being, and the verdict of the jury taken as to the value of the property. On the return of the verdict, each of the respondents moved for judgment in their favor notwithstanding the verdict, which motions the court granted, entering a judgment to the effect that the plaintiff take nothing by her action. This appeal followed.

Conforming the replevin bond to the statutory requirements, it will be observed that the condition of the bond is limited to three things, namely, for the prosecution of the action, for the return of the property to the defendant if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff.

The appellant bases her cause of action upon the first of these conditions. She contends that the requirement that the plaintiff shall prosecute the action means that he shall prosecute it to effect, that he must make good his right of possession to the property seized, and that he renders his surety liable on the bond for the full penalty thereof if he fails so to do. But it would seem that this could hardly be the meaning of the condition in question. If it were so, there would be but little necessity for the other conditions, as the whole of

the liability upon the bond would be expressed by the first. It may be, as some of the cases seem to hold, that had the plaintiff suffered a dismissal of his suit either for want of prosecution or because in the judgment of the court no cause of action was stated in his complaint, that he would have rendered his surety liable on the bond for the value of the property, but this result does not follow when he prosecutes his action to a judgment upon the merits, whether that judgment be for or against him. In either case he has prosecuted his action, and from thence on the further liability of the surety is determined by the conditions of the judgment.

If the judgment require a return of the property, or the payment of the money in case return cannot be had, or require the payment of money for any cause, the surety is liable for any breach of the requirements, but no liability arises for the value of the property seized from the mere fact that the defendant is awarded costs in the action after a trial upon the merits. The authorities seem to be in accord upon the propositions stated. In *Thomas v. Irwin*, 90 Ind. 557, the facts were similar to the facts in the case at bar. The plaintiff in a replevin action gave a bond as required by a statute almost the exact counterpart of our own, and secured possession of the property involved. A verdict was returned in favor of the defendant on which a judgment for costs was rendered. In a subsequent action upon the bond the court held the sureties not liable for the value of the property, since its return was not adjudged in the replevin action. In the course of its opinion the court said: "The difficulty arises out of the fact that the judgment in the replevin action did not provide for a return of the property. Judgments and not verdicts rule causes. The verdict in the replevin action exerts no controlling influence in this collateral proceeding, for in it the rights of the parties are to be measured by the judgment, and we cannot overleap it and act upon the verdict. Nor can we here inquire whether the judgment was right or wrong. . . . It is a general rule that sureties are not to be held beyond the terms of their contract, and a statutory undertaking must be construed so as to give effect to the terms employed. . . . The liability of the surety on the bond in suit is, by the terms employed, limited to three things: The due prosecution of the action, the return of the property if a return be adjudged, and the payment of such sums of money as may be recovered against the plaintiff. These are independent things. If a complaint should charge a failure to prosecute, and a recovery of damages, it would certainly not be

a sufficient answer to aver that the property had been returned; and, on the other hand, if a return had been adjudged in such a case, it would not be sufficient to answer payment of costs and damages. The question is, however, so well settled by authority that we deem it unnecessary to enter upon a discussion of this point, and content ourselves with quoting from a recent treatise the following statement of the rule: "These conditions have always been treated as independent, and if either was not complied with the bond was forfeited." 2 *Sutherland, Damages*, 42. . . . A surety cannot be held for a thing he did not undertake to perform, and in this case the surety did not undertake to be responsible for the return of the property unless a return should be adjudged by the court. This is, as we have shown, an independent condition, and no liability can be fastened on the surety, unless it is made to appear that the act alleged to constitute the breach is within the terms of the condition. We are unable to perceive how a failure to return the property can constitute a breach in a case where there has been no judgment for a return. The undertaking is not a general one for the return of the property, but is an undertaking for the return in case it shall be so adjudged, and the contract of the surety is, therefore, restricted and limited by the terms of the instrument. The liability of the surety depends upon the judgment, for, unless a judgment is entered awarding a return, the case is not within the contract. To bring the case within the terms of the contract, it must be made to appear that the court had awarded a return. To hold the surety liable for a failure to return where no return had been adjudged would be to hold him in a case not within the spirit or letter of his undertaking." A similar state of facts was presented in the case of *Vallandigham v. Ray*, 128 Ky. 506, 108 S. W. 896. Holding that no recovery could be had in an action upon the replevin bond, the court said: "One of the provisions of the bond is that the plaintiff in the replevin suit will duly prosecute that action. As above stated, the record in this case shows that he did so. The other covenants in the bond are to the effect that the plaintiff shall return the property if a restitution is adjudged, and that they will be answerable to the defendants in the replevin suit for such sums as may be adjudged them therein. In order to determine the liability of the bondsmen upon these two covenants of the bond, we must look alone to the judgment in the replevin suit, for the covenants expressly provide that their liability in these particulars is to be measured by that judgment. When so

tested, we find that there has been no breach of the bond whatever for which these bondsmen can be held liable." To the same effect are the following cases: *Vinyard v. Barnes*, 124 Ill. 346, 16 N. E. 254; *Chambers v. Waters*, 7 Cal. 390; *Clark v. Norton*, 6 Minn. 412, Gil. 277; *Mitchum v. Stanton*, 49 Cal. 302; *Colorado Springs Co. v. Hopkins*, 5 Colo. 206. The case of *Meigs v. Keach*, 1 Wash. Terr. 306, is cited by the appellant as maintaining the position that an action will lie upon the bond in suit. In that case it appears that Keach brought suit against Meigs to recover the possession of certain personal property, and therein obtained possession by giving a replevin bond with sureties, that Meigs gave bond according to the statute and obtained a return of the property, and that Keach thereupon dismissed his action and paid the costs. After this had been done, Meigs began an action upon the bond, alleging the facts we have set forth, "and, in addition thereto, a breach of the former bond by failure to prosecute, and damages." A demurrer was sustained to the complaint in the court below, which was reversed on appeal, the court saying: "It is settled law that where, in an action for the recovery of personal property, a statutory bond is given by the plaintiff, to prosecute, and the plaintiff discontinues, even with the consent of defendant, and a fortiori if without defendant's consent, the defendant can sue upon the bond and recover for breach." The case seems to be contrary to the earlier case of *Boyer v. Fowler*, 1 Wash. Terr. 102, but, conceding it applicable to our present statutes, it is distinguishable from the

case at bar for the reason that there was a breach of the conditions of the bond in that the plaintiff failed to prosecute his action, while in the present case the plaintiff did prosecute his action to a judgment on the merits, and complied with the judgment rendered against him. We conclude, therefore, that the court did not err in refusing to allow a recovery on the bond.

The appellant further contends that she should have been allowed to recover against Bussell as for a conversion of the property. But it seems to us that her rights to the property were, or should have been, tried out in the replevin action. The question of the right to the property was then the sole question at issue. When the property was found by the court to have been wrongfully taken from her, she had the right to take a judgment for the return of the property to her, or for its value in case a return thereof could not be had, and she was bound at her peril to see that the proper judgment was entered. It is true that she attempted to have a judgment entered which seemingly conformed to her rights, which the court refused her. If this refusal was wrong, her remedy was not to acquiesce therein and bring a new action. She should have moved against the judgment itself, and, if necessary, appealed therefrom. But the judgment standing unmodified and unreversed measures her rights to the property between herself and the adverse party to the action.

The judgment is affirmed.

Dunbar, Ch. J., and Gose, Mount, and Parker, JJ., concur.

Annotation—Liability on replevin in bond where suit is dismissed or discontinued or nonsuit suffered, without a judgment for the return of the property.

The question as to elements of damages recoverable in an action on replevin bond is discussed in note to *Lake v. Hargis*, 30 L.R.A.(N.S.) 366.

Generally a replevin bond conforms to statute and is usually conditioned for the prosecution of the action, for the return of the property if return thereof is adjudged, and for the payment of such sum as may for any cause be recovered against the plaintiff. The conditions of the bond are independent and liability accrues whenever there is a breach of one or more of them.

The condition of a replevin bond to prosecute to or with effect is broken where plaintiff suffers a voluntary or involuntary nonsuit, dismissal, or discontinuance of the action; and the de-

endant is entitled to an action on the bond for damages actually sustained, including a return of the property or its value if title be in him. *Lapp v. Ritter* (1898) 88 Fed. 108 (full value of property recoverable, together with costs and damages for its unlawful caption and detention, unless the plaintiff in replevin proves, in mitigation of damages, title to or interest in the property in suit); *Allen v. Woodford* (1869) 36 Conn. 143 (value of property recoverable on failure to return writ, but evidence of title in plaintiff in replevin admissible in mitigation of damages; distinguishing *Armsbee v. Davis* (1844) 16 Conn. 567, on the latter point, upon the ground that in that case the court, upon the withdrawal of the replevin action by

plaintiff, entered judgment against him for the return of the property; and on the further ground that in that case the evidence was offered as a complete defense, whereas in the case at bar it was offered simply in mitigation of damages); *Mills v. Gleason* (1862) 21 Cal. 274 (value of property recoverable on dismissal); *Cox v. Sargent* (1897) 10 Colo. App. 1, 50 Pac. 201 (value of property recoverable on dismissal); *Persse v. Watrous* (1861) 30 Conn. 139 (value of property recoverable on withdrawal of replevin suit); *Truitt v. Collins* (1899) 2 Penn. (Del.) 36, 45 Atl. 541 (costs and actual damages sustained not to exceed penalty of bond where nonsuit had been entered); *Langdoc v. Parkinson* (1878) 2 Ill. App. 136 (costs recoverable where plaintiff in replevin takes nonsuit); *Flannigan v. Erwin* (1912) 173 Ill. App. 452 (value of property upon discontinuance of suit); *O'Neal v. Wade* (1852) 3 Ind. 410 (damages claimed recoverable on dismissal by agreement of parties); *Peffley v. Kenrick* (1891) 4 Ind. App. 510, 31 N. E. 40 (value of property recoverable on dismissal of replevin suit); *Sherry v. Foresman* (1841) 6 Blackf. (Ind.) 56 (damages actually sustained recoverable notwithstanding dismissal of replevin suit against the will of plaintiff); *Wiseman v. Lynn* (1872) 39 Ind. 250 (obligors liable for value of property on dismissal of suit, but fact that property belonged to plaintiff goes in mitigation of damages); *Hall v. Smith* (1859) 10 Iowa, 45 (value of property recoverable upon dismissal of replevin suit with or without defendant's consent); *Manning v. Manning* (1881) 26 Kan. 98 (value of property recoverable on dismissal of suit); *McKey v. Lauffin* (1892) 48 Kan. 581, 30 Pac. 16 (value of property recoverable on dismissal); *Roman v. Stratton* (1810) 2 Bibb (Ky.) 199 (value of property recoverable where writ of replevin is quashed as having improvidently issued); *Kentucky Land & Immigration Co. v. Crabtree* (1904) 118 Ky. 395, 80 S. W. 1161, 4 Ann. Cas. 1133 (value of property and costs recoverable on dismissal by plaintiff); *Smith v. Whiting* (1868) 100 Mass. 122 (nominal damages recoverable on failure to prosecute to final judgment, although defendant in replevin had no lawful title to replevied property); *Parrott v. Scott* (1887) 6 Mont. 340, 12 Pac. 763 (actual damages sustained recoverable on dismissal); *Alderman v. Roessel* (1898) 52 S. C. 162, 29 S. E. 385 (actual damages, or, in absence of proof of actual damages, nominal damages, recoverable on discontinuance of replevin suit); *Meigs v. Keach* (1870) 1 Wash. Terr. 306 (value of property recoverable on discontinuance of suit).

inal damages, recoverable on discontinuance of replevin suit); *Meigs v. Keach* (1870) 1 Wash. Terr. 306 (value of property recoverable on discontinuance of suit).

So a dismissal of a replevin suit constitutes a breach of the bond entitling the obligee to an action for a return of the property or its value, although the dismissal was ordered on his own motion for defect in writ (*Waddell v. Bradway* (1882) 84 Ind. 537; *Tuck v. Moses* (1866) 54 Mo. 115); or for want of jurisdiction (*Biddinger v. Pratt* (1893) 50 Ohio St. 719, 35 N. E. 795; *Pierce v. King* (1884) 14 R. I. 611; *Seaboard Air Line R. Co. v. Hewlett* (1913) 94 S. C. 478, 78 S. E. 329; *Welsh v. O'Brien* (1868) 28 U. C. Q. B. 405); or for failure of plaintiff to prosecute (*McAlester v. Suchy* (1898) 1 Ind. Terr. 666, 43 S. W. 952).

A plaintiff in replevin has a right to dismiss the action without leave of the court; but on such dismissal the defendant is entitled to judgment as upon issue found against the plaintiff. *Maxey v. White* (1876) 53 Miss. 80.

The conditions of a replevin bond being distinct and independent, it is not necessary to the maintaining of an action for breach of condition to prosecute that there should have been a judgment in the action of replevin for the return of the property or for damages. *Mills v. Gleason* (1862) 21 Cal. 274; *Cox v. Sargent* (1897) 10 Colo. App. 1, 50 Pac. 201; *Persse v. Watrous* (1861) 30 Conn. 139; *Flannigan v. Erwin* (1912) 173 Ill. App. 452; *Peffley v. Kenrick* (1891) 4 Ind. App. 510, 31 N. E. 40; *Brown v. Parker* (1840) 5 Blackf. (Ind.) 291; *Little v. Bliss* (1895) 55 Kan. 94, 39 Pac. 1025; *Boom v. St. Paul Foundry & Mfg. Co.* (1885) 33 Minn. 253, 22 N. W. 538; *Elliott v. Black* (1870) 45 Mo. 372; *Berghoff v. Heckwolf* (1858) 26 Mo. 511; see, however, *IHRIG v. BUSSELL*, ante, 1188.

In an action founded on a breach of the condition of a replevin bond for the return of the property or its value, if a return thereof is adjudged, there can be no recovery for the value of the property in the absence of a judgment awarding a return, for the liability of the sureties is measured by their undertaking. *Chambers v. Waters* (1857) 7 Cal. 390 (sureties discharged by satisfying judgment against principal for costs); *Mitchum v. Stanton* (1874) 49 Cal. 302 (even though judgment rendered on appeal); *Colorado Springs Co. v. Hopkins* (1880) 5 Colo. 206 (an allegation merely

of failure to deliver held bad on demurrer, the breach assigned being breach of the condition to deliver property in case return thereof shall be awarded); *Ladd v. Prentice* (1840) 14 Conn. 109 (holding that, if the defendant in replevin intends to avail himself of his attachment, he must put in a plea which lays a foundation for a decision that the property shall be returned. But if his plea precludes the possibility of such a decision, he foregoes forever the opportunity of enforcing his attachment against the property, or making any claim upon the bond); *Vinyard v. Barnes* (1888) 124 Ill. 346, 16 N. E. 254 (holding that there can be no recovery of value of property replevied without proof of a judgment awarding its return, notwithstanding the condition to prosecute with effect may have been breached by a dismissal of the replevin suit, since it must be assumed that it was made to appear that the plaintiff had become entitled to the property, in view of the provision of the statute that, if the plaintiff fails to prosecute with effect, judgment shall be given for the return of the property unless the plaintiff in the meantime shall have become entitled to the possession of the property); *Thomas v. Irwin* (1883) 90 Ind. 557 (although the verdict found that the defendants in the replevin suit were entitled to a return, since judgments and not verdicts rule cases; see also *IHRIG v. RUSSELL*); *Citizens' State Bank v. Morse* (1899) 60 Kan. 526, 57 Pac. 115 (a verdict for defendant in replevin for costs not being an adjudication); *Kentucky Land & Immigration Co. v. Crabtree* (1904) 118 Ky. 395, 80 S. W. 1161, 4 Ann. Cas. 1133 (defendant not alleging any breach of bond, except a failure to return property or pay value thereof); *Vallandigham v. Ray* (1908) 128 Ky. 506, 108 S. W. 896 (defendants sought to defeat plaintiff's right of recovery by nonsuit; and in this they were successful, for their demurrer to plaintiff's petition was sustained, and his petition was dismissed, with judgment for their costs); *Cooper v. Brown* (1838) 7 Dana (Ky.) 333 (judgment for return necessary to compel return of property taken, or to maintain action on bond for failure to return it); *Howard v. Wyatt* (1911) 145 Ky. 424, 140 S. W. 655 (no recovery for damages on bond where action for claim and delivery is dismissed without prejudice for want of prosecution on motion of the defendant and no return of the property is adjudged, and no judgment rendered

for damages for its detention); *Clark v. Norton* (1861) 6 Minn. 412, Gil. 277, (holding if an action in replevin before a justice is simply dismissed with costs, there being no judgment for a return, the defendant cannot recover the value of the property in an action on the replevin bond); *Munding v. Michael* (1895; C. C.) 2 Ohio Dec. 158 (holding that there is no liability on bond for value of property where the court failed to award a judgment for its return in accordance with statute).

In an action for breach of a bond, with condition to prosecute, the recovery must be limited to the damages actually sustained by the plaintiff in said suit; but where a technical breach of the bond is shown, while there should be a recovery for something, the recovery may be merely nominal, in the absence of proof of actual damages. See *Alderman v. Roesel* (1898) 52 S. O. 162, 29 S. E. 385.

It will be observed that in *IHRIG v. BUSSELL*, ante, 1188, a recovery on the bond was denied, for none of the conditions was broken, the action being prosecuted to judgment on the merits, no return of the property being adjudged, and plaintiff in replevin having paid the costs in accordance with the judgment of dismissal.

In *Ernst Bros. v. Hogue* (1888) 86 Ala. 502, 5 So. 738, an action on a replevin bond conditioned that plaintiffs in the detinue suit should deliver the property to the defendants within thirty days after judgment and pay damages for its detention and costs of suit in case of a failure to recover, it was held that where the detinue suit was dismissed and no summary judgment recovered on the bond, nominal damages, at least, were recoverable for breach of the condition, it being proper for defendants to allege ownership of the property, not in bar, but in mitigation of damages.

In a replevin suit the plaintiff was nonsuited, and judgment for the return of the property and costs was entered. The value of the property taken was not assessed by the jury. Upon the writ issued on the judgment, only a portion of the property was returned, and to recover damages for a failure to return the balance, and also damages for the original taking and detention of the property, the suit *Ginaca v. Atwood* (1857) 8 Cal. 446, was instituted. The court said: "To the extent, then, in which the conditions of the undertaking have not been complied with, the de-

defendants are liable. It is for damages arising from a failure to return the property that the action will lie, not for damages for the original taking and detention; these latter should have been found in the replevin suit; not having been so, they cannot be recovered of the sureties. The undertaking was for the payment of such sum as should for any cause be recovered against the plaintiff in that suit; no sum beyond the costs was recovered, and it follows that the liability of the sureties is limited to that extent, and such damages as may have arisen from a failure to return the entire property."

Where plaintiff in replevin, after obtaining possession of the goods, dismissed his suit without a trial and judgment was rendered against him for costs, but without a return being awarded, it was held, in *Fellheimer v. Hainline* (1896) 65 Ill. App. 384, that the liability of the surety being strictly limited to a breach of the conditions on the bond, he would not be responsible for plaintiff's wrong, if any, in taking and holding the goods, but only for his failure to prosecute the replevin suit with effect,—the only condition shown to have been broken.

In *Wall v. Humphreys* (1836) 4 Dana (Ky.) 209, it was held that the omission of the averment in the declaration that the obligor had not in fact restored the property prevented recovery of damages for failure to return it.

Where suit was dismissed for the plaintiff's failure to file a sufficient bond, it was held in *Morrison v. Yancey* (1886) 23 Mo. App. 670, that the failure to assess damages in the replevin suit in consequence of plaintiff's conduct would not bar an action on the bond against plaintiff and his sureties.

In *Bown v. Weppner* (1892) 62 Hun, 579, 17 N. Y. Supp. 193, defendant in replevin made no allegation of ownership or right of possession of the property, denied possession, and asked for a dismissal of the complaint, but did not demand judgment for the return of the property to him; plaintiff thereupon, believing a valid levy had been made, discontinued his action, and a judgment of dismissal was entered. It was held that defendant could not recover in an action on the bond against the sureties, the court stating that the sureties were bound only for a return of the property in case possession thereof should be adjudged to defendant, and that he could not have judgment awarding possession of the property to him because he had L.R.A.1917A.

not demanded such judgment by his answer.

It is held in *Mounts v. Murphy* (1907) 126 Ky. 803, 104 S. W. 978, that where the replevin suit was dismissed on motion of the defendant for failure of plaintiff to execute a bond for cost, and a judgment was entered for a return of the property but no judgment was rendered for damages for the detention, the defendant could not maintain an action on the bond to recover damages for the detention, but, in consequence of the property being injured, could recover its difference in value when received and when returned.

Where a replevin suit was dismissed on motion of defendant on the ground that the trial justice had no jurisdiction, and the property was ordered to be returned to defendant, it was held in *Elder v. Greene* (1891) 34 S. C. 154, 13 S. E. 323, an action on the replevin bond, that the justice being without jurisdiction, a failure to obey his order to return the property did not constitute a breach of the condition of the bond requiring a return when "adjudged by any competent authority."

Where, however, a replevin suit is compromised and dismissed by the parties, no suit can be maintained on the replevin bond. *Gerard v. Dill* (1884) 96 Ind. 101. In this case there was an agreement of compromise, providing that all matters of difference should be forever ended, and that all litigation should cease. J. D. C.

WEST VIRGINIA SUPREME COURT OF APPEALS.

HOMER E. HOLT, Admr., etc., of J. F. Gardner, Deceased, Plff. in Err.,

v.

OTIS ELEVATOR COMPANY.

(— W. Va. —, 90 S. E. 333.)

Judgment — non obstante veredicto — when granted.

1. A judgment non obstante veredicto must be based upon the merits of the case as disclosed by the pleadings, not in any sense upon the evidence adduced upon a material issue properly joined. It is not tanta-

Headnotes by POFFENBARGER, J.

Note.—The right to judgment non obstante veredicto because of failure of proof is discussed in the notes to *Kirk v. Salt Lake City*, 12 L.R.A.(N.S.) 1021, and *Neill v. Metropolitan Casualty Ins. Co.* L.R.A. 1916E, 828.

mount to a motion to set aside a verdict for lack of evidence to sustain it, nor can it be used for such purpose, or to obtain a judgment of dismissal for lack of evidence. *For other cases, see Judgment, I. c, 4, in Dig. 1-52 N. S.*

Appeal — waiver of errors — failure to move for new trial.

2. By his failure to move for a new trial in the trial court, a party against whom a verdict has been rendered waives all errors committed by the court in the progress of the trial, including the erroneous overruling of motions having for their purpose relief from the verdict on the theory of a total want of evidence to sustain it.

For other cases, see Appeal and Error, VII. k, in Dig. 1-52 N. S.

Trial — dismissal of action — setting aside verdict.

3. Though the trial court may deem the evidence insufficient to sustain a verdict for the plaintiff, it cannot, after having set aside the verdict at the instance of the plaintiff urging such action on other and untenable grounds, properly render a judgment of dismissal of the action on a motion by the defendant for judgment non obstante veredicto, by way of correction of its error in refusing to direct a verdict for the defendant for lack of evidence.

For other cases, see Judgment, I. c, 4, in Dig. 1-52 N. S.

Appeal — harmless error.

4. Any errors that may have been committed against a plaintiff in instructions pertaining to his right to recover only, and not in any way touching the measure of damages, are rendered harmless by a verdict in his favor; for they manifestly did not influence the jury to his prejudice.

For other cases, see Appeal and Error, VII. k, 4, in Dig. 1-52 N. S.

Same — amount of damages.

5. In a case of indeterminate damages for which the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce belief that they were influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case.

For other cases, see Appeal and Error, VII. l, 2, b, in Dig. 1-52 N. S.

Same — reinstatement of judgment.

6. If the defendant in error cross assigned error in the action of the trial court in setting aside a verdict on the motion of the plaintiff in error, upon insufficient grounds, or upon its own motion for lack of evidence, in a case in which the defendant in error had moved for a new trial and then withdrawn its motion and moved for judgment non obstante veredicto on the ground of lack of evidence to sustain the verdict, the appellate court, on reversing the judgment of dismissal improperly rendered L.R.A.1917A.

on said last motion, will reinstate the verdict and enter judgment thereon.

For other cases, see Appeal and Error, VIII. in Dig. 1-52 N. S.

(October 10, 1916.)

ERROR to the Circuit Court for Cabell County to review a judgment sustaining a motion for judgment notwithstanding the verdict, and dismissing an action brought to recover damages for the alleged wrongful death of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. W. K. Cowden and Holt, Duncan, & Holt, for plaintiff in error:

The evidence was sufficient to establish negligence on the part of the defendant resulting in the accident, and the question as to whether or not negligence was shown was, under the circumstances, a question to be decided by the jury.

Washington v. Baltimore & O. R. Co. 17 W. Va. 190; Johnson v. Baltimore & O. R. Co. 25 W. Va. 570; Nuzum v. Pittsburgh, C. & St. L. R. Co. 30 W. Va. 236, 4 S. E. 242; Sebrell v. Barrows, 36 W. Va. 212, 14 S. E. 996; Morrison v. Appalachian Power Co. 75 W. Va. 608, 84 S. E. 506; Stuck v. Kanawha & M. R. Co. — W. Va. —, 86 S. E. 13; Carstens Packing Co. v. Godo, 125 C. C. A. 320, 208 Fed. 8; Beeler v. Butte & L. Copper Development Co. 41 Mont. 465, 110 Pac. 528; Bowman v. Marceline Coal & Min. Co. 168 Mo. App. 703, 154 S. W. 891.

Negligence on the part of defendant having been established, plaintiff was entitled to recover, for the defenses of assumption of risk, contributory negligence, and fellow servancy are not available to defendant on account of its failure to comply with the provisions of the Workmen's Compensation Law of West Virginia.

De Francesco v. Piney Min. Co. — W. Va. —, 86 S. E. 777, 10 N. C. C. A. 1015.

Under the practice, either at common law or as established in this state, a judgment non obstante veredicto could not be rendered by the court upon the pleadings, or on account of the character of proof that had been offered before the jury.

21 Am. & Eng. Enc. Law, 2d ed. p. 546; 23 Cyc. 788; Stephens, Pl. p. 96; 4 Minor, Inst. pt. 1, p. 946.

Mr. W. A. Hosack also for plaintiff in error.

Messrs. Williams, Scott, & Lovett, for defendant in error:

The Workmen's Compensation Law of West Virginia does not make the employer an insurer of the lives of its employees, and it requires that, before recovery can be had

in this and like cases, the injury must be caused "by the wrongful act, neglect, or default of the employer, its officers, agents, or employees," and does not add any new duties to be performed by the employer to those theretofore imposed by common law or by statute.

De Francesco v. Piney Min. Co. — W. Va. —, 86 S. E. 777, 10 N. C. C. A. 1015.

Nor does it change the rule that negligence must be proven, and that the fact that an injury was received created no presumption of negligence.

Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; *Stewart v. Ohio River R. Co.* 40 W. Va. 188, 20 S. E. 922; *Ketterman v. Dry Fork R. Co.* 48 W. Va. 606, 37 S. E. 683.

The evidence was undisputed, and was such that all reasonable minds must draw the same conclusion from it, that is, that no negligence was shown by the plaintiff, and therefore it was the duty of the trial court to strike the evidence from the jury and enter judgment for the defendant, or instruct the jury to find a verdict for the defendant.

Ketterman v. Dry Fork R. Co. supra.

It was the duty of the circuit court to enter a judgment in favor of the defendant notwithstanding the verdict of the jury, and thus end the litigation.

Barker v. Stephenson, 67 W. Va. 496, 68 S. E. 113; *Watkins v. Angotti*, 65 W. Va. 193, 63 S. E. 969; *Soward v. American Car Co.* 66 W. Va. 266, 66 S. E. 329; *Holyman v. Kanawha & M. R. Co.* 65 W. Va. 264, 22 L.R.A.(N.S.) 741, 64 S. E. 536, 17 Ann. Cas. 1149; *McMillan v. Middle States Coal & Coke Co.* 61 W. Va. 531, 11 L.R.A.(N.S.) 840, 57 S. E. 129; *Anderson v. Tug River Coal & Coke Co.* 59 W. Va. 301, 53 S. E. 713; *Maupin v. Scottish Union & Nat. Ins. Co.* 53 W. Va. 557, 45 S. E. 1003; *Cincinnati Gas & E. Co. v. Archdeacon*, 80 Ohio St. 27, 88 N. E. 125, 21 Am. Neg. Rep. 251.

Poffenbarger, J., delivered the opinion of the court:

A judgment of dismissal entered in an action of trespass on the case, under somewhat anomalous conditions, has raised, upon this writ of error, some rather novel contentions.

Contenting itself with cross-examination of the plaintiff's witnesses, the defendant offered no testimony on its own behalf. The plaintiff having introduced his evidence and rested his case, the defendant requested the court to give a peremptory instruction to find for it, and the plaintiff sought four instructions drafted upon the theory of sufficiency of the evidence to sustain a verdict. The court declined to give the defendant's

peremptory instruction, gave the instructions asked for by the plaintiff, and read to the jury a written charge. After having deliberated for some time, the jury came into court and reported their inability to agree upon a verdict. Thereupon the court again read to them the instructions previously given, and delivered to them an oral charge or address concerning the legal method of deliberation and arrival at a conclusion. Thereafter a verdict was returned, in which the plaintiff's damages were assessed at \$750. The defendant moved the court to set it aside, but withdrew its motion before the court acted upon it, and then moved for judgment for the defendant notwithstanding the verdict. Thereupon the plaintiff moved the court to set aside the verdict and grant a new trial. The court set aside the verdict, and then, being of the opinion that its refusal to give the peremptory instruction asked for was erroneous, sustained the motion for judgment non obstante veredicto, and dismissed the plaintiff's action.

Complaining only of the refusal of a new trial and the rendition of the final judgment, the plaintiff endeavors to sustain the action of the court in setting aside the verdict, on the ground of errors in the oral and written charges delivered to the jury by the court. On the other hand, the defendant endeavors to sustain the denial of a new trial and rendition of the judgment, and cross assigns error in the setting aside of the verdict in the event of failure in its effort to sustain the final judgment of dismissal.

The order denying right of recovery in the manner above indicated stands upon its recited assumption of insufficiency of the evidence to sustain the verdict. The motion upon which the order is predicated is not, however, applicable to the relief sought. It pertains to the rights of the parties as disclosed by the pleadings only, and does not extend to the evidence adduced upon the issue made. At common law, judgments non obstante veredicto could have been granted, originally, in the plaintiff's favor only, and only in cases in which the plea confessed the cause of action and set up insufficient matter in avoidance thereof. It was a form of judgment by confession. Later, the rule was extended so as to permit such judgment to be applied for and entered in favor of the defendant when the plaintiff's pleadings were insufficient to sustain a judgment in his favor. They could not be taken in any case in which the pleadings stated a good cause of action and defense and made a material issue of fact for the jury. *Richmire v. Andrews & G. Eleva-*

tor Co. 11 N. D. 453, 455, 92 N. W. 819; 4 Minor, Inst. 946, 947; Stephens, Pl. p. 186, § 95; 2 Enc. Pl. & Pr. 912. By statute, this remedy has been extended in Minnesota and North Dakota and perhaps some other states to the case in which an issue has been properly joined, and plaintiff's case is wholly unsupported by evidence and incapable of being made better. *Cruikshank v. St. Paul F. & M. Ins. Co.* 75 Minn. 266, 77 N. W. 958; *Marquardt v. Hubner*, 77 Minn. 442, 80 N. W. 617; *Merritt v. Great Northern R. Co.* 81 Minn. 496, 84 N. W. 321, 9 Am. Neg. Rep. 61; *Richmire v. Andrews & G. Elevator Co.* 11 N. D. 453, 92 N. W. 819; *Pine Tree Lumber Co. v. Fargo*, 12 N. D. 360, 96 N. W. 357. This extension seems to have been made in New York and Washington, but whether it was done by virtue of an act of the legislature does not appear from the decisions. *Glennon v. Erie R. Co.* 86 App. Div. 397, 83 N. Y. Supp. 875; *Casety v. Jamison*, 35 Wash. 478, 77 Pac. 800. In each of the two states last mentioned, the Code practice prevails, and but little regard is had for common-law procedure. As to matters of practice, the courts in such states have much more latitude than we have. Until altered or repealed by the legislature, such part of the common law and the laws of this state as were in force when the Constitution was adopted, and are not repugnant thereto, continue to operate and bind the courts of this state. Const. art. 8, § 21; Code, chap. 13, § 5 (§ 334). Since the common law does not permit the use of a motion for judgment notwithstanding the verdict as a remedy for correction of errors made in the progress of a jury trial, such as the overruling of a motion to strike out the plaintiff's evidence or to direct a verdict, or in any other way to test the sufficiency of the plaintiff's evidence, and that law has not been repealed or amended in that respect by the legislature, both the circuit court and this court are bound by it, and the rendition of judgment thereon, complained of here, was obviously erroneous, if the declaration states a cause of action, and it does unquestionably.

Inability of the court to relieve from the verdict on the motion for judgment non obstante veredicto, because of its inapplicability, withdrawal of the defendant's motion to set aside the verdict for lack of evidence to sustain it, and its cross assignment of error here, obviously and necessarily deny power in this court consistently to give any relief against the verdict at the instance of the defendant; and, unless the court below properly set it aside on the motion of the plaintiff, it must stand and constitute

the basis of a judgment here. Evidently the defendant does not want a new trial. It withdrew its motion therefor, and now asks this court to reinstate the verdict, if it is denied the benefit of the action of the trial court in its motion for judgment. Its manifest purpose was to limit the recovery to the amount of the verdict, if it should be held liable. Unfortunately, perhaps, it unintentionally conceded liability by the withdrawal of its motion to set aside the verdict and grant a new trial. To avail himself, in the appellate court, of errors made in the progress of a trial, such as erroneous rulings respecting the admission and rejection of evidence, giving and refusal of instructions, and overruling of motions to strike out evidence and direct a verdict, the party prejudiced thereby must move for a new trial and except to the action of the court in refusing it. *Humphrey v. West*, 3 Rand. (Va.) 516; *Riddle v. Core*, 21 W. Va. 530; *State v. Hall*, 26 W. Va. 236, 237; *Danks v. Rodeheaver*, 26 W. Va. 274; *State v. Phares*, 24 W. Va. 657. Though the court has power to set aside the verdict of a jury on its own motion (*Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63), it cannot consistently do so over the protest of the party against whom it stands.

No doubt the argument inducing the action of the trial court was total lack of evidence to sustain the allegations of the declaration, but it was not argument for a new trial. Such is the argument here, but it is attended by a protest against a new trial. The defendant framed its motions so as to avoid the hazard of a larger verdict on a new trial and to risk everything else on a motion for complete exoneration. The verdict may have been set aside not on the grounds urged by the plaintiff, but because the court thought there was no evidence to sustain it. In other words, the order may possibly be regarded as having been made *ex mero motu*. But, if so, it was made against the will of the defendant, for it manifestly did not want to be relieved of the verdict if a new trial was to follow, nor unless its motion for dismissal should prevail and thus end the case. If it saw fit voluntarily to subject itself to a light verdict rather than take the risk of a heavy one on a new trial, there was no reason for objection to that course on the part of the court. It is an established rule of this court not to grant a new trial except upon request, and there is no occasion for a different rule in the trial courts. Moreover, it would unsettle the practice to permit a remedy designed for one purpose to be diverted to another. The orderly administra-

tion of justice demands substantial adherence to established rules of practice.

The cross assignment of error must prevail. In the charges of the court complained of, there was no possible element of prejudice to the plaintiff, if it be conceded that they were flagrantly and palpably erroneous, for they pertained not to the amount of recovery, but to the right to recover; and, if erroneous, the plaintiff obtained a verdict, notwithstanding the errors. As the supposed errors did not prevent the jury from finding liability on the part of the defendant, they could not have prejudiced the plaintiff. The jury must necessarily have disregarded them. Authority need not be cited for the proposition that a party cannot complain of errors which have done him no harm. However, We are not to be understood as declaring the charges of the court were erroneous. As to that, we have made no inquiry whatever.

Nor can the annulment of the verdict be justified on the ground of meagerness of

the damages. The jury had grave doubt of the right of recovery. Though he had been married and was the father of a child, the decedent had been divorced from his wife, and he does not seem to have devoted his energies to the support or care of his daughter. The value of his life to his next of kin was evidently far below that of the average father, and it was within the province of the jury to award such damages as they deemed to be fair and just under all the circumstances. Nothing in the record or the circumstances disclosed indicates any passion, partiality, corruption, or prejudice on the part of the jury to which the meagerness complained of may be attributed. Hence the court could not properly disturb the verdict on that ground. *Trice v. Chesapeake & O. R. Co.* 40 W. Va. 271, 21 S. W. 1022. For the reasons stated, the judgment will be reversed, the verdict reinstated, and a judgment entered thereon. Costs will be awarded the plaintiff in error as the party substantially prevailing.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

NORTHERN PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

UNITED STATES OF AMERICA.

(129 C. C. A. 514, 213 Fed. 162.)

Master and servant — excessive service — report.

1. An omission by a common carrier from a periodical report of the instances of excessive service of its employees, made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission pursuant to the amendment of § 20 of the act to regulate commerce (Act June 18, 1910, chap. 309, § 14), of one or more instances that should have been included therein, or any mistake of law or fact made therein in good faith, does not subject the common carrier to liability for the penalties or forfeitures denounced by that amendment for a failure to file the periodical report.

For other cases, see Penalties, in Dig. 1-52 N. S.

Statute — construction.

2. The apparent and natural meaning of the terms of a statute is to be preferred to any curious recondite signification de-

duced by study, ingenuity, and strong desire.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Same — reasonableness.

3. A reasonable, sensible interpretation of a statute should be preferred to an irrational signification that renders the law unjust and oppressive.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Same — contents.

4. A penal statute which creates a new offense and prescribes the punishment for it must clearly state the persons and acts denounced.

For other cases, see Statutes, I. c, 1, in Dig. 1-52 N. S.

Criminal law — ex post facto law.

5. An act or omission which is not clearly an offense by the expressed will of the legislative body before it is committed may not be made so after its commission by the introduction into the law of declarations, or by the expunging therefrom of words or terms, by the judiciary.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

(March 21, 1914.)

ERROR to the District Court of the United States for the District of North Dakota, F. A. Youmans, Judge, to review a judgment convicting defendant of failing to correct an omission from its monthly report, of an instance of excessive service of some of its employees. Reversed.

The facts are stated in the opinion.

Headnotes by SANBORN, Circuit Judge.

Note. — As to construction, applicability, and effect of hours of service laws, see annotation following this case, post, 1202. L.R.A.1917A.

Argued before Sanborn and Hook, Circuit Judges, and Pope, District Judge.

Messrs. C. W. Bunn, Emerson Hadley, and Watson & Young, for plaintiff in error:

The statute is penal, and cannot by construction be made to include anything not within the plain meaning of its terms.

Erbaugh v. United States, 97 C. C. A. 663, 173 Fed. 433; United States v. Kansas City Southern R. Co. 121 C. C. A. 136, 202 Fed. 828; Bonnell v. Griswold, 80 N. Y. 128; Chase v. Curtis, 113 U. S. 452, 28 L. ed. 1038, 5 Sup. Ct. Rep. 554; Pier v. Hanmore, 86 N. Y. 95; Matthews v. Patterson, 16 Colo. 215, 26 Pac. 812.

Messrs. Edward Engerud and Phillip J. Doherty, for the United States:

Failure of defendant to report specific instances of service of train employees in excess of the period fixed by the Hours of Service Act, such omission being due to mistake of law on the part of the carrier, makes such carrier subject to the penalties laid down in § 20 of the act to regulate commerce.

Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612; United States v. Yazoo & M. Valley R. Co. 203 Fed. 159; United States v. Chicago, M. & P. S. R. Co. 195 Fed. 783; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; Southern Exp. Co. v. Com. 92 Va. 50, 41 L.R.A. 436, 22 S. E. 809; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; United States v. Southern P. Co. 94 C. C. A. 629, 169 Fed. 407.

Sanborn, Circuit Judge, delivered the opinion of the court:

The railway company complains of a judgment of \$500 against it for five fines of \$100 each for failing for five successive days to correct an unintentional omission of an instance of excessive service of some of its employees from its monthly report of such instances, filed with the Interstate Commerce Commission on November 29, 1912.

The Interstate Commerce Commission, under the authority of the amendment of § 20 of the act to regulate commerce of February 4, 1887, chap. 104, 24 Stat. at L. 386, Comp. Stat. 1913, § 8592, made June 18, 1910, and found in chap. 309, § 14, 36 Stat. at L. 555, Comp. Stat. 1913, § 8592, made an order on June 28, 1911, that all carriers subject to the provisions of "An Act to Promote the Safety of Employees and Travelers upon Railroads by Limiting the Hours of Service of Employees Thereon," commonly called the Hours of Service Act (Act March L.R.A.1917A.

4, 1907, chap. 2939, 34 Stat. at L. 1415, Comp. Stat. 1913, § 8677), should "report within thirty days after the end of each month, under oath, all instances where employees subject to said act have been on duty for a longer period than that provided in such act," and it was for an innocent omission of one instance from one of these monthly reports that this action was brought. Section 20 of the Act of 1887, as amended by Act June 29, 1906 (34 Stat. at L. pp. 584, 593, chap. 3591, § 7, Comp. Stat. 1913, § 8592), authorized the Commission to require annual reports from each common carrier subject to the act, of its capital stock issued, the amounts paid therefor, the manner of payment, therefor, its dividends paid, its surplus fund, the number of its stockholders, its funded and floating debt, the cost and value of its property, franchises, and equipment, the number of its employees and the salaries paid each class, its accidents, earnings, receipts, expenditures, etc., and it empowered the Commission to require from each carrier specific answers to all questions upon which the Commission might need information. A subsequent portion of this § 20, as amended in 1910 (36 Stat. at L. 556, chap. 309, Comp. Stat. 1913, § 8592), read in this way: "If any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such party shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority by general or special orders to require said carriers, or any of them, to file monthly reports of earnings and expenses, and to file periodical or special, or both periodical and special, reports concerning any matters about which the Commission is authorized or required by this or any other law to inquire or to keep itself informed or which it is required to enforce; and such periodical or special reports shall be under oath whenever the Commission so requires; and if any such carrier shall fail to make and file any such periodical or special report, within the time fixed by the Commission, it shall be subject to the forfeitures last above provided."

This quotation contains the only definition of the offense and the only specification of the penalties involved in this case. The offense is the failure "to make and file any

such periodical . . . report within the time fixed by the Commission," and the penalties are "the forfeitures last above provided." The forfeitures last above provided are prescribed for the failure of the carrier to file in due time its annual report, which is required to set forth the vast mass of statistics and information required by the first portion of § 20, and for its failure to answer any specific question propounded by the Commission within the time lawfully prescribed for the answer, and these penalties are the forfeiture of \$100 for each and every day the carrier shall continue to be in default with respect to the annual report or the answers to the questions. The judgment in this case was rendered upon the pleadings, and the material facts which they disclose are these: On October 29, 1911, an engineer, fireman, conductor, and two brakemen were called at 7:30 P. M. to take out a wrecker train at 8:10 P. M. from Jamestown, North Dakota, but it subsequently proved unnecessary to send that train out, and at 8:10 P. M. these employees were released from duty, and notified that they would not be required for service until 10:35 P. M., and they rendered no service prior to that time, except that the engineer and fireman kept the fire in their engine alive. At 10:35 P. M. they took a train east from Jamestown to Mapleton, where they arrived and where their service ceased at 1:15 P. M., October 30, 1911, so that, unless they were in service between 8:10 P. M. and 10:35 P. M., October 29, 1911, their service was only fourteen hours and forty minutes, and they rendered no excess service. If, on the other hand, they were on duty between 8:10 P. M. and 10:35 P. M., October 29th, their continuous service exceeded the sixteen hours limited by the Hours of Service Act. It was conceded at the hearing in this court that the United States had sued the company, had recovered, and the company had paid, the penalty prescribed by the Hours of Service Act for this excessive service, and that by that judgment the fact that these employees were on duty from 8:10 P. M., October 29th, until 1:15 P. M., October 30th, was rendered res judicata. On November 29, 1911, the railway company filed its monthly report, under oath, of the instances of hours of service of its employees on duty during October for longer periods than those named in the Hours of Service Act, in the form and in accordance with the regulations of the Interstate Commerce Commission, and many such instances were disclosed therein. By reason of the abandonment of the wrecker train, the company did not consider or understand, when it made and filed this report, that it was required to report the in-

stance which has been described, and its report was intended in good faith to be true and complete, and to embrace any and all instances where its employees were kept in service longer during the month of October than the times limited by the act of Congress, but it did not specify the instance of excessive service on which this suit is founded. The result is that the case, in brief, is this:

The Commission lawfully required the company to file within thirty days after the end of each month a monthly or periodical report of all instances of hours of service of its employees on duty for a longer period than that named in the Hours of Service Act. The 20th section of the act to regulate commerce, as amended, fixed a penalty of \$100 for each and every successive day of failure of the company to file such a periodical report. The company filed in good faith such a periodical report, under oath, within the time fixed, but unintentionally and by mistake omitted one instance of excessive service from its report which it should have included. Is such an omission a failure to file the periodical report which renders the company liable to the penalty of \$100 for each successive day after the expiration of the thirty days within which the report is required to be filed? The court below answered this question in the affirmative, and in support of that conclusion counsel for the government contend that the mistake of the company here was a mistake of law, and not of fact, and for the purposes of this discussion and decision this contention may be admitted to be sound. They argue that the order of the Commission required a monthly report of all instances of excessive service, that the filing of the report of all instances but one was a failure to file a report of all instances, and therefore a failure to file the periodical report which created a liability to the penalties prescribed by the act. But it is not true that a carrier that in good faith files an incorrect or incomplete periodical report, under oath, in due time, has failed to file any such periodical report. If it were, such a carrier would be liable to penalties for each of the instances of excessive service specified in such a filed report as much as for those omitted, and such a result is too intolerable and oppressive to be seriously contemplated. Counsel cite and review the cases that treat of the constitutionality of the Hours of Service Act, of its worthy purpose, of the authority of the Commission to require the reports, and of the duty of the courts to enforce the law (*Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 621, 55 L. ed. 878, 883, 31 Sup. Ct. Rep. 621;

United States v. Yazoo & M. Valley R. Co. (D. C.) 203 Fed. 159; United States v. Chicago, M. & P. S. R. Co. (D. C.) 195 Fed. 783; but they present no direct authority that the filing in good faith of an incomplete or incorrect report, affidavit, complaint, answer, or other such article required by law, is a failure to file any such article which subjects the delinquent to a penalty denounced for such a failure. And there are many reasons why that proposition fails to commend itself to our judgment.

A reasonable, sensible meaning should be attributed to a statute in preference to one which is irrational and improbable. *Madden v. Lancaster County*, 12 C. C. A. 566, 573, 27 U. S. App. 528, 65 Fed. 188, 195; *Omaha Water Co. v. Omaha*, 12 L.R.A. (N.S.) 736, 77 C. O. A. 267, 279, 147 Fed. 1, 18, 8 Ann. Cas. 614; *Armour Packing Co. v. United States*, 14 L.R.A. (N.S.) 400, 82 C. C. A. 135, 152, 155, 153 Fed. 1, 18, 21; *Lafayette County v. Wonderly*, 34 C. C. A. 360, 363, 92 Fed. 313, 316; *Webber v. St. Paul City R. Co.* 38 C. C. A. 79, 82, 97 Fed. 140, 143. The penalties denounced by § 20 of the act to regulate commerce, as amended by the Act of June 18, 1910 (36 Stat. at L. 556, chap. 309, Comp. Stat. 1913, § 8592), for the failure to file this monthly report, are the same as those prescribed by the same section for failure of a carrier to file its annual report. They are \$100 for each and every day the carrier shall continue to be in default with respect thereto. The annual report requires such a vast amount of information, so many statistics and details, that it is improbable, if not impossible, that any carrier could ever make such a report without some unintentional omission of information required and some mistakes in the information given. If the failure to file an annual report without such an omission and without any mistake or misinformation therein is such a failure to file an annual report as makes the carrier liable for the penalties, it must be difficult, if not impossible, for any carrier to escape them, and it is incredible that the Congress intended to subject carriers to the forfeitures prescribed for the failure to file these annual reports on account of such inadvertent omissions or mistakes in them. If the Congress did not so intend in the case of the annual report, it probably did not have that intention in the case of the monthly report, for the same penalties are prescribed in the same section for the failure to file each.

The penalties are \$100 for each and every day the default in filing the report continues. If these penalties are incurred for failure to file the report, as the statute L.R.A.1917A.

reads, the act of Congress is neither unreasonable nor excessively drastic, for the carrier knows, or may readily ascertain, whether or not it has filed its report in due time, and hence it is easy for it to prevent any continuing default. But, if these penalties are incurred by its innocent omission from or mistake in the specifications of excessive service in the report filed by the carrier, the statute becomes irrational and unduly oppressive, for the carrier is not aware, and will not have notice, of such unintentional omissions and mistakes when it makes its report, and yet for each omission or mistake it may incur a penalty of \$100 every day for at least 360 days, or \$36,000, and thus an honest error of law or mistake of fact in making the report may easily entail a penalty of \$36,000, while a wilful delay to file the report immediately and under oath would be limited to \$100 or \$200. Indeed, if the construction claimed by counsel for the government is the true interpretation of this act, the United States could recover of the defendant for its omission in this case \$100 for each day between November 30, 1911, and September 14, 1912, when the complaint in this case was filed, or \$28,900. Such an interpretation of this act of Congress renders it so unjust and oppressive that we cannot think that Congress intended that it should receive such a construction.

Again, this amendment of June 18, 1910 (36 Stat. at L. 556, chap. 309, Comp. Stat. 1913, § 8592), created and penalized a new offense, the failure of a carrier to file its monthly or periodical report of instances of the excessive service of its employees within the time fixed by the Commission.

A statute which creates a new offense and prescribes its punishment must state clearly the persons and acts denounced. An act which was not an offense by the expressed will of the legislative body before it was done may not be justly or lawfully made so by construction after it is committed, either by the introduction into the Statute of Declarations, or the expunging therefrom of words or terms, by the judiciary. Congress might have modified this clause which describes and limits the offense, to wit, "If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures last above provided," so that it would have read, "And if any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, or shall omit to specify in any such report it files any instance of excessive service required to be reported therein, it shall be subject to the forfeitures

last above provided." But it did not do so; the legal presumption is that it did not intend to do so, and it is not the province of the judiciary thus to amend the statute and by such amendment to create and punish another class of offenses. Nothing comes to mind more appropriate to the determination of the question here at issue than the familiar words of Chief Justice Marshall: "Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated." *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *United States v. Ninety-Nine Diamonds*, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 12, 139 Fed. 961, 964; *First Nat. Bank v. United States*, 46 L.R.A.(N.S.) 1139, 124 C. C. A. 256, 206 Fed. 374, 376.

The natural apparent meaning of the terms of a statute should always be preferred to any recondite signification discovered only by study, ingenuity, and strong desire. *United States v. Ninety-Nine Diamonds*, 2 L.R.A.(N.S.) 185, 72 C. C. A. 9, 12, 139 Fed. 961, 964; *First Nat. Bank v. United States*, *supra*. The natural apparent meaning of this statute is that Congress relied, and intended to rely, upon the oath to the periodical report and the penalty for perjury in wilfully falsely making it, as security for the completeness and truth of

the report, and upon the penalty for the failure to file it as security for its filing alone. The terms of the statute are plain, and they fail to declare the innocent omission of an instance of excessive service from or the mistake in a report an offense punishable by the fines it specifies. Reason and authority alike teach that the act of omitting from a periodical report filed in good faith an instance or item which should have been included therein, or a mistake in the information which the report contains, is not the offense of failing to file any such periodical report. *United States v. Four Hundred Twenty Dollars* (D. C.) 162 Fed. 803, 804; *Bonnell v. Griswold*, 80 N. Y. 128, 132, 133; *Pier v. Hammore*, 86 N. Y. 95, 100; *Matthews v. Patterson*, 16 Colo. 215, 26 Pac. 812, 813; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504.

And the conclusion is that an omission by a carrier from the periodical report of the instances of excessive service of its employees, made and filed in good faith within the time prescribed therefor by the Interstate Commerce Commission under the amendment of § 20 of the act to regulate commerce (36 Stat. at L. 556, chap. 309, Comp. Stat. 1913, § 8592), of one or more instances that should have been included therein, or any mistake of law or fact therein made in good faith, does not subject the carrier to liability for the penalties or forfeitures denounced by that amendment for the failure to file a periodical report.

The judgment below must therefore be reversed, and the case must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion; and it is so ordered.

Affirmed by the Supreme Court of the United States, December 4, 1916, 242 U. S. 190, 61 L. ed. —, 37 Sup. Ct. Rep. 22.

Annotation—Construction, applicability, and effect of Hours of Service Laws.

For the earlier cases upon this question, see the note to *Great Northern R. Co. v. United States*, L.R.A.1915D, 408, which the present note supplements.

Nature of statutes and general rules for their construction.

Supplementing note in L.R.A.1915D, 408.

The purpose of the Federal Hours of Service Statute is to promote the safety of employees and travelers upon railroads by limiting the hours of service, on the theory that by excessive periods L.R.A.1917A.

of duty the employees become fatigued and more or less careless, thus causing accidents leading to injuries and to the destruction of life and property, and the statute therefore should receive a construction to carry out the purpose intended by Congress. *United States v. Atchison, T. & S. F. R. Co.* (1915) 236 Fed. 154.

It is remedial in its nature and should be liberally construed to effect its purpose. *St. Joseph & G. I. R. Co. v. United States* (1916) 146 C. C. A. 397, 232 Fed. 349; *United States v. Minne-*

apolis & St. L. R. Co. (1916) 236 Fed. 414.

Although it is to be enforced through the imposition of penalties, it is not to be construed so strictly as to defeat the obvious intention of Congress. *United States v. Grand Rapids & I. R. Co.* (1915) 224 Fed. 667, 140 C. C. A. 177.

Thus, in *Oregon Short Line R. Co. v. United States* (1916) — C. C. A. —, 234 Fed. 584, the court said: "We regard the statute as one not dealing with violations of the criminal law, but as remedial in its nature and effect, designed to protect persons traveling by way of interstate carriers and the employees of such carriers, by preventing conditions that necessarily are more or less conducive to danger to both such travelers and employees. And although it may be called punitive in so far as it prescribes penalties for its violation, still the primary rule of construction is that which will make the law effectual in its main purpose."

In *United States v. Atlantic Coast Line Co.* (1915) 224 Fed. 160, the court says that the statute is remedial in its purpose and scope, and penal in its means of enforcement, and that, while courts frequently invoke the principle in the interpretation of remedial statutes that doubtful language should be construed liberally to suppress the evil and advance the remedy, whereas penal statutes should be construed strictly to narrow the scope of the penalty, probably the better rule is to give to the entire statute a fair construction for the purpose of ascertaining the legislative mind and giving effect to its purpose, which was the safety of employees and of the traveling public.

Intent to violate statute.

Supplementing note in L.R.A.1915D, 409.

Although a telegraph operator remains on duty for a longer period than that permitted by statute, without the knowledge, permission, or consent of the carrier, and in violation of instructions to all agents and operators prohibiting them from working in any capacity or performing any service of whatever nature in excess of nine hours in any twenty-four hour period, such service comes within the provision of the statute that the carrier "shall be deemed to have had knowledge of all acts of all its officers and agents," and the carrier will be liable for such violation of the statute. *Oregon Short Line R. Co. v. L.R.A.1917A.*

United States (1916) — C. C. A. —, 234 Fed. 584, affirming (1915) 228 Fed. 561.

In *Oregon-Washington R. & Nav. Co. v. United States* (1915) 223 Fed. 596, 139 C. C. A. 142, affirming (1914) 213 Fed. 688, it was held that, where one of three telegraph operators was discharged and until his place was filled the work was divided between the two remaining operators, one of them being instructed to work three hours as station agent and six hours as telegraph operator, and not to work more than the statutory total time of nine hours in each twenty-four-hour period, but because of the station being short-handed such operator found himself compelled to serve twelve hours as station agent instead of three, it was not a harsh application of the letter of the statute to hold that the railroad company had knowledge of all the acts of all its officers and agents with respect to the excessive employment of such operator.

While correspondence between a railroad company and the Interstate Commerce Commission showing approval by the Commission of the railroad's system of operating a telegraph station not involved in the prosecution, but similar to the one involved, does not estop the government from recovering the penalties incurred by the railroad for a violation of the act at the stations in question, it may be that such an approval led the company to believe that it might lawfully continue the use of its telegraph systems at the places involved in the prosecution, and therefore may be considered in mitigation. *United States v. Illinois C. R. Co.* (1915) 234 Fed. 433.

And where it appears that a carrier proceeded in fixing periods of release for its employees with the purpose of complying with the law, and that it is in good faith in its claim that the periods of release exempted it from liability, it should not be made to suffer a heavy penalty under the circumstances. *United States v. Minneapolis & St. L. R. Co.* (1916) 236 Fed. 414.

What employees come within the statutes.

Supplementing note in L.R.A.1915D, 410.

In *Com. v. John T. Connor Co.* (1915) 222 Mass. 299, L.R.A.1916B, 1236, 110 N. E. 301, it is held that a girl employed in a grocery store whose duty it was to receive pay from customers according to slips presented, incidentally doing a trifling amount of bookkeeping in connection with the slips handed to her, came

within the prohibition of a statute providing, "No woman shall be employed in laboring in any factory or workshop or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange," more than ten hours in any one day.

The Federal Hours of Service Statute applies to an employee on a work train operated wholly within one state, where the train was made up of cars of material brought from another state and the material was intended to be used on the roadbed within the state, but had not reached its destination when the violation occurred, the road being a through highway of interstate commerce. *St. Joseph & G. I. R. Co. v. United States* (1916) 146 C. C. A. 397, 232 Fed. 349.

Under the provision of the Federal Hours of Service Statute that no operator, train despatcher, or other employee who, by the use of the telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty, etc., the term, "other employee who by the use," etc., transmits such orders, is not to be qualified by an implied limitation to those whose primary and principal duty is thus described, but applies to employees who have such duties to perform regularly and habitually, although they are not in any sense their principal or primary duties. *Chicago, R. I. & P. R. Co. v. United States* (1915) 141 C. C. A. 135, 226 Fed. 27.

So employees whose principal duties were to attend to switches, but whose duties also consisted in regularly transmitting by telephone, from a shanty at which they were stationed, information that passenger trains were approaching, to a towerman some distance away at a crossing of railroad tracks, so that he could give such passenger trains a clear way over freight trains, came within such provisions of the statutes. *Ibid.*

So, also, towermen whose principal duty was to operate levers, but who also were required to telephone orders pertaining to train movements, came within such class. *Chicago & N. W. R. Co. v. United States* (1915) 144 C. C. A. 138, 226 Fed. 30.

Where a telegraph operator was employed by a railroad which was operated wholly within one state, but which ran its trains for part of their route over the road of another company, which was a part of an interstate highway, and such operator was required to receive telegraph orders from and transmit them

to the employees of the interstate carrier, to facilitate the movement and insure the safety of the trains of both roads in operating the portion of the interstate road which was used jointly, both such operator and the railroad were engaged in interstate commerce and came within the operation of the Federal Hours of Service Statute. *Denver & I. R. Co. v. United States* (1916) — C. C. A. —, 236 Fed. 685.

Telegraph operators on duty at a wreck, while not in a sense part of the crew of a wrecking or relief train, are nevertheless employees engaged in and about service in connection with the wreck quite as important as that of any member of the crew proper, whose work is of an emergency character and necessarily of uncertain duration; and to extend the act to a telegrapher so employed would be contrary to the provisions and spirit of the act, and entirely inconsistent with its manifest purpose and intent. *United States v. Baltimore & O. R. Co.* (1915) 226 Fed. 220.

What is included as overtime.

Supplementing note in L.R.A.1915D, 415.

In *State v. Lange Canning Co.* (1916) — Wis. —, 157 N. W. 777, it is held that under a statute limiting the number of hours that women may be employed to ten hours in any one day or fifty-five hours in any one week, and in night work to eight hours in any one day and forty-eight hours in any week, and defining day work as that done between 6 o'clock in the morning and 8 o'clock P. M., and night work as that done between 8 o'clock P. M. and 6 o'clock A. M., the maximum number of hours which a woman could be required to work in any one day was limited to ten, although the work was done partly before 8 o'clock P. M. and partly thereafter on the same day.

In determining whether an employee has worked more than the permitted time during twenty-four hours under the Federal Hours of Service Statute, his time of service should be calculated from the time at which he went on duty each day, and so the prosecution may not arbitrarily select any point during the regular hours of service for the purpose of reckoning the time of employment; but where the intervals granted for off periods are short, as, for instance, one or two hours, and are variable as to when the intermission is taken, it becomes a question of fact as to whether or not such intermissions were not mere

subterfuges resorted to for the purpose of evading the act. *United States v. Missouri P. R. Co.* (1916) 235 Fed. 944.

The Federal Hours of Service Act applies to any employee actually engaged in or connected with the movement of any interstate trains regardless of whether at the time the offense was committed he was so employed. So, when a telegraph operator whose regular duties required him occasionally to handle interstate orders was required to exceed the hours permitted by the act, a violation thereof occurred, though on the particular day in question he handled no interstate orders. *Denver & I. R. Co. v. United States* (Fed.) *supra*.

Where a telegraph operator at a station operated night and day works as an operator for the permitted time of nine hours, and then continues to work in a clerical capacity for three hours more, such period of service will be considered as a whole, and will constitute a violation of the nine-hour provision. *Oregon Short Line R. Co. v. United States* (1916) — C. C. A. —, 234 Fed. 584.

The time during which a fireman is required to watch a stationary locomotive is to be included in determining whether he worked excessive hours. *St. Joseph & G. I. R. Co. v. United States* (1916) 146 C. C. A. 397, 232 Fed. 349.

A release, to justify a reduction of time under the Federal Hours of Service Statute, can be given only, by some officer or agent having authority to give it. So, where the crew of a train which became derailed cut the engine loose and proceeded a mile from the point of derailment to a farmhouse, where they had lunch and rested until a derrick arrived, such time should be included in determining whether the statute was violated. *Denver & R. G. R. Co. v. United States* (1916) — C. C. A. —, 233 Fed. 62.

In *United States v. Minneapolis & St. L. R. Co.* (1916) 236 Fed. 414, the court adopted the rule promulgated in *Southern P. Co. v. United States* (1915) 137 C. C. A. 584, 222 Fed. 46, that a release of employees coming under the Federal Hours of Service Statute must, to be deducted from the total hours of service, be definite and certain as to the periods of time, and substantial and opportune as to the period of rest, and, in discussing what is a substantial period of rest, which is a question of fact, said: "Rest is largely psychological. The circumstances must be such as to induce rest. The problem is not solved by saying that the men could have gone to bed and

slept for an hour or an hour and twenty minutes aside from the time they were at their meals. We are dealing with human nature. The public is interested in actual rest not in opportunities for rest; and while I realize that the employers cannot be held responsible for failure of employees to rest when the opportunity is given them, yet I feel that the opportunity, to be 'substantial and opportune,' must be under such circumstances that the average employee will in fact rest."

Applying the rule above stated, the court held that absolute releases for periods of two hours and two hours and twenty minutes respectively, in periods of over seventeen hours of service, at such a time that a meal is eaten during the period, under ordinary circumstances, is not an opportune period for rest, and should not be deducted from the total period of service. *Ibid*.

Where a train crew made a trip from Salt Lake City to Park City and return, a distance of 33 miles, which was usually made well within the sixteen-hour period, and no extra crews were kept at Park City, and the company had no person there competent to take charge of the train or engine, the round trip must be treated as a continuous journey, and Park City simply as a way station. *Denver & R. G. R. Co. v. United States* (Fed.) *supra*.

The statute not only imposes upon a carrier what might be called a negative obligation forbidding it from requiring or permitting an employee to remain on duty more than sixteen hours, but also imposes an affirmative duty to relieve such employee after sixteen hours of consecutive service, unless it is prevented from doing so by some of the matters specified in the proviso; and, while it could continue the service so far as might be necessary to permit the train to be operated to a point, having due regard to all the circumstances and surrounding facts, where the train crew could be relieved or allowed to take the rest required by the statute, it should not permit or require an employee to continue to the end of his run, although but for some delay due to a matter referred to or covered by the proviso in the statute, he would have been able to complete the run within the time specified. *United States v. Atchison, T. & S. F. R. Co.* (1915) 236 Fed. 154.

The purpose of the statute was to limit the time of service of employees and at the same time, in cases of emergency, to give some latitude in the enforcing of

the act, looking to the practical working of the same; and the purpose, therefore, was to place some limit on the time in which additional service could be rendered in case of emergency, and it was not intended that this additional service should be rendered save in an emergency, nor is it within the spirit of the act that the employees should be the sole judges of when the emergency exists to warrant extra service. *United States v. Baltimore & O. R. Co.* (1915) 226 Fed. 220.

A one-hour period from 12 o'clock noon to 1 o'clock P. M. during which a telegraph operator was permitted and required to and did leave the office and station, and was not subject to call by the company except in case of emergency, is to be excluded from the hours of service. *United States v. Atchison, T. & S. F. R. Co.* (1916) 232 Fed. 196.

What is an emergency, etc., within the statutes—under the Federal act.

Supplementing note in L.R.A.1915D, 420.

The term "emergency," as used in the statute relating to telegraph operators, is not synonymous with accident or casualty or act of God, but signifies a condition which may arise out of either. *United States v. Atlantic Coast Line Co.* (1915) 224 Fed. 160.

While the term "emergency," as used with reference to telegraph operators, is of less significance than the terms "casualty" or "unavoidable accident," used in the 3d section of the Hours of Service Act, it does not embrace the ordinary and everyday ups and downs of railroad operations; and the fact that a despatcher intended to have three carloads of live stock which had been delivered to the company taken into a certain train, but forgot and failed to order that the cars be picked up by that train, and, in order to avoid holding the live stock until the following day, ordered another train to pick them up, and that in consequence the operator at that point could not leave his duties until the permitted hours of service had been exceeded, did not amount to an emergency within the statute. *United States v. Missouri P. R. Co.* (1916) 235 Fed. 944.

Where an emergency was caused by the sickness of a telegraph operator, the sole question as to whether there was a violation of the statute depended on whether, when such emergency arose, the defendant was prevented by casualty or unavoidable accident from meeting it; and where it did not appear that it could not have been met by the defendant, but L.R.A.1917A.

no effort was made to meet such emergency, the extended period of service required of another employee was not caused by an emergency or by a casualty. *United States v. Atlantic Coast Line Co.* (Fed.) supra.

Where a train was derailed and the conductor informed the despatcher that the track could be cleared for traffic within a certain period, and the despatcher permitted another train to proceed in reliance upon the conductor's estimate of the time it would take to clear the track, which in fact took considerably longer than the conductor's estimate, and resulted in the delay of the second train so that its crew was on duty for more than sixteen hours, the company was not relieved from liability for such overtime work, where there was telephone communication between the two points, so there was no excuse for acting on first impressions as to the time that the line would be so obstructed. *Denver & R. G. R. Co. v. United States* (1916) — C. C. A. —, 233 Fed. 62.

In *United States v. Missouri P. R. Co.* (Fed.) supra, it was held that the carrier failed to show, by any of the following groups of facts, such emergencies as would excuse it from exceeding the hours of service permitted by the Hours of Service Act:

—that a trainload of silks was delivered to the carrier, that the time of delivery at the connecting point had been erroneously reported to the carrier's despatcher, that the transportation of silk was very profitable, that the silk was of great value and an easy subject of theft, and could not be permitted to stand on sidings, and that it was necessary to hold the operator overtime to expedite the shipment;

—that a train pulled loose from the tender a drawbar, which delayed it in reaching the station where the operator was engaged, and rendered it necessary to hold him overtime until the train reached the station;

—that a train was delayed on account of broken packing rings in one of the cylinders of the engine, which in turn required the holding of the operator at the particular station until the delayed train reached it;

—that a passenger train carrying mail was delayed in reaching the station at which the operator was held overtime, on account of various and sundry reasons at different stations en route, and that the operator was held until it arrived to handle mail and care for passengers;

—that a passenger train was delayed by the failure of an air pump on the engine hauling it, making it necessary to hold the operator overtime;

—that the coal chutes at the station in question were nearly out of coal, that the train despatcher overlooked his duty in ordering the chutes filled, and that this neglect on the part of the despatcher brought about a delay which required the holding of the operator overtime;

—that the loss of the relief valve of the superheater on the engine, and also heavy winds, snow, and cold weather, and a badly clinkered fire, delayed the train and required holding the operator overtime;

—that a mail and passenger train was delayed by the bad working of the steam heating connections, by thawing out steam heating connections and ash pan, by meeting another delayed train, by cold, snow, wind, and a badly clinkered fire due to weather conditions.

But the delay of a train in reaching its station on account of a wreck which it could not pass until the track was cleared constituted an emergency which excused a railway company for holding an operator overtime. *United States v. Missouri P. R. Co.* (1916) 235 Fed. 944.

A derailment is an event which is not to be anticipated in good railroading, and it was not within the intention of Congress, in case of such serious matters as derailments and collisions, to take from the company the protection of the statute made in the exception in case of casualties, even if such events were caused by the negligence of the company or its employees, and therefore, in case of a derailment, it is not incumbent upon the company, in order to bring itself within the proviso, to show that the derailment was not due to its negligence or to the negligence of its employees. *Denver & R. G. R. Co. v. United States* (Fed.) *supra*.

Where a watchman, without justification, refused to take charge of an engine which was ordered laid up because the crew had been in service the permitted period of time, alleging as his reason therefor that he feared the engine might blow up as he had previously had some difficulty in operating its injector, and the trainmen were unable to arrange for somebody else to take charge of the engine, so that the fireman volunteered to meet the emergency and remain on duty more than the permitted period, the unforeseen insubordination of the watchman was a casualty within the meaning of the statute. *Ibid.* L.R.A.1917A.

The fact that an operator who was called as a witness before a court at another place than that of his employment was detained in court for a longer period than the court usually was in session, so that he was unable to return in time to go on duty at the usual time, was an emergency within the statute which justified the employment of the other operators at that place for the additional four hours provided for, and this was not affected by the fact that the operator in question was called as a witness for the defendant railroad company, as his duty to obey the summons was not because of his contract relation with the railroad company, but because he was a citizen of the state, and his attendance, while at the suggestion of the railroad company, was at the command of the court and pertained to the administration of justice, and therefore imposed upon the railroad company no other or higher degree of duty for making provision for meeting the requirements of the statute by reason thereof than if he had been summoned by any other party to a suit. *United States v. Atlantic Coast Line Co.* (1915) 224 Fed. 160.

Pleading and proof as to emergency, etc. — under Federal act.

Supplementing note in L.R.A.1915D, 423.

In a prosecution under the Federal Hours of Service Statute, when it is admitted that the train crews in question were actually on duty in excess of the time limited by the statute, the burden is upon the carrier to show that the excess service was justified by the exception contained in the act. *United States v. Atchison, T. & S. F. R. Co.* (1915) 236 Fed. 154.

Effect of violation of Federal Hours of Service Act on liability for injuries to employees.

Supplementing note in L.R.A.1915D, p. 424.

The case of *St. Louis, I. M. & S. R. Co. v. McWhirter*, cited in the note above referred to, is followed in *Atchison, T. & S. F. R. Co. v. Swearingen* (1915) 239 U. S. 339, 60 L. ed. 317, 36 Sup. Ct. Rep. 121, 10 N. C. C. A. 778, which holds that violation of the overtime provision of the act does not render the carrier unqualifiedly liable for injuries received by a servant while working overtime, unless the unlawful retention in service contributes to the injury.

In *Baltimore & O. R. Co. v. Wilson* (1916) 242 U. S. —, 61 L. ed. —, 37 Sup.

Ct. Rep. 123, it is held that a violation of the Hours of Service Act by keeping a railway employee on duty for more than sixteen consecutive hours excludes, by virtue of the provisions of the Employer's Liability Act, the defenses of contributory negligence and assumption of risk in an action by such employee for injuries received after a rest of fourteen hours, where it was far from impossible that the fatigue resulting from the excessive hours of service should have been a cause proximately contributing to the injury received, as, to have the effect of abolishing such defenses, it is not necessary that the injury happen during the violation of the law, or within the period of ten hours' rest required after a period of service of sixteen hours, as such period of ten hours is fixed only as a minimum of rest, and does not fix the limit of the possible connection between the overwork and the injury at ten hours, and has nothing to do with the question of the varying rest actually needed after work extended beyond the lawful time.

What offices are operated night and day under the Federal Hours of Service Statute.

Supplementing note in L.R.A.1915D, 425.

The interpretation placed by the Interstate Commerce Commission upon the terms, "towers, offices, places, and stations," and "continuously operated night and day," used in the Hours of Service Statute, though not controlling upon the courts, is quite persuasive, is entitled to much weight, and may well be followed unless it clearly appears, from the plain language of the enactment, to be erroneous. *United States v. Illinois C. R. Co.* (1915) 234 Fed. 433.

The Federal Hours of Service Statute relating to telegraph operators in all towers, offices, places, and stations continuously operated night and day, and stations operated only during the daytime, was intended to deal with all telegraph offices through which interstate train orders are transmitted. *United States v. Grand Rapids & I. R. Co.* (1915) 144 C. C. A. 177, 224 Fed. 667.

Under the above rule of interpretation offices which were operated, subject to negligible intermissions, from 4:30 A. M. to 9:30 P. M., and from 6:30 A. M. to 11 P. M. respectively, came within the class of offices operated continuously night and day, and this interpretation is strengthened by the fact that the services rendered in every twenty-four-hour period in such offices were seventeen

hours and sixteen and one half hours respectively, or four hours and three and one half hours more in each twenty-four-hour period than would have been permissible to one telegraph operator even in a daytime office. *Ibid.*

In determining whether a telegraph station is operated during the daytime only, or continuously night and day, while it may be that in certain seasons of the year and in certain localities the place cannot be operated for thirteen hours by the light of day only, nor nine hours in what is commonly called the nighttime, nevertheless, by dividing the day of twenty-four hours into periods of twelve hours each, from 6 A. M. to 6 P. M. and from 6 P. M. to 6 A. M., as is commonly done, there need be no difficulty in determining the daytime from the night, within the contemplation of the statute. *United States v. Illinois C. R. Co.* (Fed.) supra.

In *United States v. Grand Rapids & I. R. Co.* (Fed.) supra, the court, in distinguishing between telegraph stations which were "continuously operated night and day" and stations "operated only during the daytime," says that the dominant characteristic of the daytime class is that for a substantial portion of the year the whole service, and for the rest of the year by far the greater length of the daily service, fall within the hours of daylight, while the controlling characteristic of the night and day class is that the service extends into both night and day throughout the year, the fluctuations in length of service that may be rendered during the hours of daylight not seeming to the court to be material, whether the one or the other of the classes is considered; and, while as respects the daytime class the maximum service of thirteen hours prescribed for a single operator cannot be performed during the greater part of the year within the hours of daylight, yet the parts of service which cannot be so performed correspond in terms with hours of daylight for a substantial portion of the year, and so are, for all purposes of the classification, parts of the day, and not of the night; and as respects the night and day service it always falls in material parts within both the night and the day. Continuing the court said: "When the two classes are so considered we do not see why confusion should arise from the use of either the word 'only' in connection with the 'daytime' class, or the word 'continuously' with the 'night and day' class. The words 'only' and 'continuously' are to be read in connection with their

respective classes and as descriptive of conditions recurring and demanding 'day' service on the one hand, and 'night and day' service on the other. The fact that such conditions may or may not recur and also remain throughout each day or each night and day cannot affect the identity of either class." So it cannot be doubted that offices are operated night and day within the true intentment of the statute whenever the same or similar and substantial lengths of service recur therein regularly every day and night for a series of successive twenty-four-hour periods, even though the offices are not operated continuously during every hour from midnight to midnight.

The test for determining the period that employees engaged in transmitting orders by telegraph or telephone may be kept on duty during a twenty-four-hour period is the time during which the office, station, or place where the employee is to perform such duties is kept open during a twenty-four-hour period, and not the number or frequency of the train orders that may be transmitted or received during a given period; so, if the traffic of a carrier is such that it deems it necessary that train orders be transmitted or received by the use of the telegraph or telephone at certain stations during the day and night, it must limit the hours of service of its employees who are to perform such service in interstate traffic to not exceeding nine hours in the aggregate in any twenty-four hour period. *United States v. Illinois C. R. Co. (Fed.) supra.*

When a telegraph office is changed from day service to continuous service, it is not in continuous service within the meaning of the act on the day upon which the change is made, so as to render the company liable where an employee works up to the time the change is made, more than the time permitted to operators in a continuously operated station, but less than that permitted in day offices, although as a matter of fact the office is kept open continuously on the day in question. *United States v. Oregon Short Line R. Co. (1915) 228 Fed. 561.*

Whether the place where an employee is to perform the duty of receiving and transmitting orders by telegraph or telephone "in towers, offices, places, and stations" is in a station building or above it or a short distance from it or in them all at different times during the same period of service is quite immaterial, but may be arranged to suit the convenience

of the carrier without making two separate and distinct places for the transmission and receipt of such orders. *United States v. Illinois C. R. Co. (Fed.) supra.*

So, where two telegraph stations are maintained less than half a mile apart and the operator at one works from 7 A. M. to 7 P. M., when he delivers the books, orders, and undelivered messages to the operator at the other station, who works from 7 P. M. to 7 A. M., and then similarly turns the affairs over to the first office, each having the same telegraphic duties in turn, there is such identity of service performed at the two places and such close connection between them in the methods of performance that they are, in substance and effect, a single office, place, or station operated night and day within the meaning of the Federal Hours of Service Statute, although each place has a separate and complete mechanical equipment, each has a separate signal call, and is separately numbered and designated as a station on the company's official list, and this arrangement was adopted for reasons of convenience before the passage of the statute, and not for the purpose of evading it. *Atchison, T. & S. F. R. Co. v. United States (1916) — C. C. A. —, 236 Fed. 906.*

Reports under Federal Hours of Service Act.

Supplementing note in L.R.A.1915D, 426.

The penalty of \$100 a day for failure to file periodical reports required by the Interstate Commerce Commission under the Federal Hours of Service Act is for the failure to file any report at all, not for failure to file an accurate report; so that it is not to be applied where a report is filed containing inaccuracies or misstatements. *Elgin, J. & E. R. Co. v. United States (1915) 142 C. C. A. 107, 227 Fed. 411. See also NORTHERN P. R. Co. v. UNITED STATES.*

The purpose of the order requiring reports by railroad companies to the Interstate Commerce Commission of extra hours of service which its employees are required to work is to secure information concerning such extra hours of service, and it is required that all extra hours of service be reported, not merely those in excess of the four additional hours for three days in each week which are permitted in case of emergency. *United States v. Baltimore & O. R. Co. (1915) 226 Fed. 220.*

The penalty of \$100 for the failure to

make the report of the extra hours of service is to be imposed separately for each employee working overtime which the company fails to report. *Ibid.*

But where a railroad company has acted in good faith in failing to report instances of overtime worked by its employees, under the belief that it was not required to report the same because such overtime was covered by the extra time

permitted in case of emergencies, only a minimum fine of \$100 should be imposed once for each employee, and not for each day such report was in default, as to impose the larger penalty under such facts would be harsh in the extreme and tend unduly to burden the railroad rather than to attain the wise objects which the statute in question was intended to effect. *Ibid.* R. L. S.

KENTUCKY COURT OF APPEALS.

COLEMAN D. CALLOWAY, Exr., etc., of
Lucy Calloway, Deceased, et al., Appts.,
v.

MRS. WOODIE WHITE et al.

(171 Ky. 366, 188 S. W. 410.)

Evidence — to show intention of testator.

1. Partial intestacy appearing in the face of the will cannot be remedied by parol evidence as to the intention of testator.

For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.

Will — implied devise of real estate from devise of income.

2. A devise of the corpus of the estate by implication is not effected by a will directing that "the proceeds of my land and real estate be divided into two equal parts," one part to be used by testator's son and the other by his daughter and her children, that after the death of his daughter her part of the income shall be divided among her children, that if it be thought advisable to sell and have a division after the youngest grandchild becomes twenty-one years of age, the son is appointed executor and trustee for that purpose, and that, should the son die without heirs, his sister and her children shall inherit his portion of the estate. *For other cases, see Wills, III. f, in Dig. 1-52 N. S.*

(October 5, 1916.)

APPPEAL by the executor and certain defendants from a judgment of the Circuit Court for Fayette County construing the will of Lucy Calloway, deceased, in a suit for the settlement of her estate. Affirmed.

The facts are stated in the opinion.

Mr. James N. Elliott, for appellants:

There was a complete disposition by testatrix of her real estate.

32 Cyc. 409; 40 Cyc. 1536; Mayes v. Karn, 115 Ky. 264, 72 S. W. 1111; Bowles v. Winchester, 13 Bush, 3.

The words "dying without issue" are uni-

Note. — As to devise or bequest by implication, see annotation following this case, post, 1213.
L.R.A.1917A.

formely held in this state to mean, "dying without issue in the lifetime of the testatrix, unless some other period is clearly fixed by the will."

Webster v. Webster, 93 Ky. 632, 21 S. W. 332; Washer v. Washer, 143 Ky. 645, 137 S. W. 227; Blackwell v. Blackwell, 147 Ky. 264, 143 S. W. 1010; Burnam v. Suttle, 148 Ky. 495, 147 S. W. 3.

Mr. George C. Webb, for appellees:

Whatever the intention of Mrs. Calloway might have been, the language which she used only disposed of the income or rent from her real estate until the youngest grandchild then living had arrived at the age of twenty-one (21) years; and as to the remainder interest in the real estate, she died intestate and the land passed by descent to her children, Coleman D. Calloway and Woodie White.

1 Jarman, Wills, 409; Bingel v. Volz, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13; Caldwell v. Caldwell, 7 Bush, 517; Collier v. Grimesey, 36 Ohio St. 17; Simmons v. Morgan, 25 R. I. 212, 55 Atl. 522; Morrison v. Schorr, 197 Ill. 554, 64 N. E. 545; Mayes v. Karn, 115 Ky. 266, 72 S. W. 1111.

Miller, Ch. J., delivered the opinion of the court:

Lucy Calloway, a resident of Fayette county, died in April, 1909, leaving a last will and testament, which reads as follows:

June 15th, 1901.

I, Lucy Calloway, of the State of Kentucky and county of Fayette, being of sound mind do make and declare this to be my last will and testament, to wit: First I will that all of my just debts and funeral expenses be paid. Second that all of my personal property and effects be divided equally between my son Coleman D. Calloway and my daughter Woodie White. I further devise and will that the proceeds of my land and real estate be divided into two equal parts, one part to be used by my son Coleman and the other part be equally divided between my daughter Woodie White and her children; if one of these children

should die after the death of their mother I will that the other children shall inherit that child's part to be equally divided between the living children unless having children of his or her own.

I further will that after the death of my daughter Woodie White that her part of the income of my estate be equally divided between her children. I further will that if it should be thought advisable to sell and have a division after the youngest of my grandchildren becomes of the age of twenty-one years I appoint my son Coleman D. Calloway executor and trustee of the same. I further will that should my son Coleman die, without heirs, that his sister and her children shall inherit his portion of my estate. I further will that in case of the death of my son Coleman Calloway that the property be transferred to the hands of a reliable trust company to be used for the benefit of my daughter and her children until the youngest child becomes of age.

I do hereby appoint my son, Coleman Calloway, executor and trustee of this my last will and testament without bond.

Signed by my hand this 15th day of June, 1901.

Lucy Calloway.

The will was duly probated in the Fayette county court, and Coleman D. Calloway qualified as executor and trustee thereunder. Mrs. Calloway's estate consisted of certain personal property and a farm of 152 acres in Fayette county. At the time she made her will, and at the time of her death, Lucy Calloway had two children, a son, Coleman D. Calloway, and a daughter, Woodie White; and on said dates Woodie White had three children, Calloway White, Elizabeth White Judy, and Nannie White Taylor, all of whom were more than twenty-one years of age at the time this action was filed.

In November, 1914, this action was instituted by Coleman D. Calloway, as executor and in his own right, against Mrs. Woodie White and her three children above named, seeking a settlement of the estate of Lucy Calloway and a construction of her will. The personalty and the income or rents from the land received during the minority of the youngest granddaughter have been distributed in accordance with the will. The only question now pressed relates to the court's construction of the will in holding that it failed to dispose of the land and the future rents.

The circuit court was of opinion that, whatever the intention of Mrs. Calloway might have been, the language which she used in her will only disposed of the income

or rent from her real estate until the youngest grandchild then living had arrived at the age of twenty-one years; that as to the remaining interest in the real estate, she had died intestate; and, consequently, that the land had passed by descent to her children, Coleman D. Calloway and Woodie White, in fee simple. From the judgment Coleman D. Calloway, executor, and Calloway White, Elizabeth White Judy, and Nannie White Taylor prosecute this appeal.

As the law requires a will of both real and personal estate to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testatrix's intended disposition. It would have been of little avail, says Jarman, to require the will to be in writing, or to fence a testator around with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit scheme of his disposition, deficiencies might be supplied or its inaccuracies corrected from extrinsic sources. 1 Jarman, Wills, 499. In 40 Cyc. 1389, the rule is stated as follows: "A will cannot be construed by a mere conjecture as to the intention of the testator; but it is the intention which the testator expresses in his will that controls, and not that which he may have had in his mind, or which is manifested by some other paper not a part of the will, or by previous declarations."

And, in *Wright v. Denn*, 10 Wheat. 204, 6 L. ed. 303, Mr. Justice Story said: "It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention, with reasonable certainty, on the face of his will. For the law will not suffer the heir to be disinherited upon conjecture."

While the purpose of construction, as applied to wills, is unquestionably to arrive at the intention of the testator, that intention is not that which existed in the mind of the testator, but that which is expressed by the language of the will. The rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed. Extraneous testimony is incompetent to supply an intentional omission, or to contradict an express intention in a will. *Caldwell v. Caldwell*, 7 Bush, 517.

Applying these rules to the will before us, we find that Mrs. Calloway undertakes to dispose of her personal property; she uses apt words for that purpose. But when she

comes to deal with her real estate, she does not say that it shall be divided into two equal parts, but that the proceeds of the land shall be so divided; and, in the next paragraph, in speaking of the part going to her daughter Woodie, she speaks of it as her part of the income, showing clearly that, where she used the word "proceeds," she meant the income or rent of the land. In addition, to show that this was her intention, she directs that one part thereof is to be used by her son Coleman Calloway, evidently referring to the income or rent of the land. It is only in one of the later lines of the will that she speaks inferentially, at most, of her real estate, by saying that, if it should be thought advisable to sell and have a division after the expiration of the minority period, she appoints her son Coleman D. Calloway "executor and trustee of the same." This sentence is perhaps incomplete. But it is sufficient to indicate that the testatrix contemplated that the land was not to be divided or sold until the youngest of her grandchildren should become twenty-one years of age.

It is clear, therefore, that in the portion of the will preceding the words "after the youngest of my grandchildren becomes of the age of twenty-one years," there is no actual disposition of any portion of the real estate; it treats only with the income or rent derived therefrom. It is true that, in some cases, the courts have held that a disposition of the proceeds of the income of property was equivalent to the disposition of the property itself; but in such cases those words were not modified by other expressions in the will, such as we have here. After the clause last above referred to, the testatrix undertakes to appoint Coleman Calloway as executor and trustee of the will; and she then provides that, if Coleman should die without heirs, his sister and her children should inherit his portion of her estate, without in any way signifying what that portion was.

So, at the most, the appellants can only contend that there was a break in the language of the testatrix, which shows on its face, perhaps, that there has been an omission of something which she intended to say, or which she failed to say. Perhaps this omission was the final disposition of her real estate; and perhaps it was not. Neither can it be said that there is a devise of the land to Coleman D. Calloway and Mrs. White, by implication. The rule as to what will amount to a devise by implication is stated as follows in 40 Cyc. 1390: "In order to carry out the intention of a testator and prevent the will from failing of effect, a devise or bequest may be implied, although it has not been formally

expressed in the will, unless the implication violates public policy or some settled rule of positive law. The presumption, however, is very strong against the testator having intended any devise or bequest not set forth in his will, and in order that the devise or bequest may be effectual the implication must be a necessary one; that is, the probability of an intention to make the devise or bequest implied must appear from the will to be so strong that a contrary intention cannot reasonably be supposed to have existed in the testator's mind. Such an implication cannot rest on mere conjecture, although it is not required that the implication be absolutely irresistible. Where a testator erroneously recites in his will that he has by the will given certain property when he has not effectually done so, such recital may be taken as sufficient evidence and expression of his intention to give by will, and the devise or bequest must be implied; but such an implication will not arise from an erroneous recital that he has, by some instrument other than the will, given property to a certain named person, when in fact he has not done so, nor will such an implication arise from an erroneous recital that some other person, independent of the will, has title to or an interest in the property, or from a mere recital that the testator is about to make a conveyance to a certain person."

In *Crane v. Doty*, 1 Ohio St. 279, the court said: "In order to raise an estate by implication, the two following circumstances must concur: First, an interest or estate in the property, less than the whole, must be created expressly by the will, in order that it may appear that the testator had the disposition of the property in his mind; second, the person to take by implication must be named or described in connection with the raising of such interest or estate."

And in *Parker v. Tootal*, 11 H. L. Cas. 143, 11 Eng. Reprint, 1286, Lord Westbury, in defining implication, said: "Implication may be founded upon two grounds: It may either arise from an elliptical form of expression, which involves and implies something else as contemplated by the person using the expression; or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else, . . . which is a consequence necessarily resulting from that direction."

With regard to the expression "necessary implication" Lord Eldon, in *Wilkinson v. Adam*, 1 Ves. & B. 422, 35 Eng. Reprint, 163, 25 Eng. Rul. Cas. 506, said: "In construing a will, conjecture must not be taken

for implication; but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed."

But a gift by implication will not be inferred from mere silence; it must be founded on expressions in the will. *Nickerson v. Bowly*, 8 Met. 424; *Jones v. Gane*, 205 Mass. 37, 91 N. E. 129; *Re Reinhardt*, 74 Cal. 365, 16 Pac. 13; *O'Hearn v. O'Hearn*, 114 Wis. 428, 58 L.R.A. 105, 90 N. W. 450; *Langston v. Langston*, 2 Clark & F. 194, 6 Eng. Reprint, 1128, 8 Bligh, N. R. 167, 6 Eng. Reprint, 908; *Abbott v. Middleton*, 7 H. L. Cas. 68, 11 Eng. Reprint, 28, 28 L. J. Ch. N. S. 110, 5 Jur. N. S. 717, 25 Eng. Rul. Cas. 732. In the final analysis, however, it is upon the principle of carrying into effect the supposed intention of the testator that all the cases of devise by implication rest. If the language employed by the testator cannot reasonably be accounted for, except upon the supposition that he intended to make a certain disposition, but, through lack of learning, want of advice, inadvertence, or mistake, failed to use the legal or proper phrases, the courts will carry into effect the intention so shown by implying such disposition, unless that dis-

position would contravene some well-established legal rule. *Connor v. Gardner*, 15 L.R.A.(N.S.) 73, and note (230 Ill. 258, 82 N. E. 640).

But the will before us does not show such an ineffectual attempt to devise the testatrix's real estate as would amount to a devise by implication. We have no authority to make a will for the testatrix; we can only undertake to apply the rules of law to her language as we find it. The words "die without issue," and equivalent phrases, are uniformly held in this state to mean "die without issue in the lifetime of the testator," unless some other period is clearly fixed by the will. *Webster v. Webster*, 93 Ky. 632, 21 S. W. 332; *Washer v. Washer*, 143 Ky. 645, 137 S. W. 227; *Blackwell v. Blackwell*, 147 Ky. 264, 143 S. W. 1010; *Burnam v. Suttle*, 148 Ky. 495, 147 S. W. 3. This limitation in the will before us refers, therefore, to *Coleman D. Calloway's* death before the death of the testatrix,—an event which did not happen.

We conclude, therefore, the testatrix failed to make a final disposition of her land; and, under the well-established rule of law, that portion of her estate descended to her son and daughter, as her heirs.
Judgment affirmed.

Annotation—Devise or bequest by implication.

The present annotation, like that in 15 L.R.A.(N.S.) 73, which it supplements, deals merely with the general principles and rules by which the courts have been guided in determining cases of the character under consideration.

"It is," as is stated in the earlier note, "upon the principle of carrying into effect the supposed intention of the testator, that all the cases of devise or bequest by implication have been decided. If the language employed by the testator cannot reasonably be accounted for, except upon the supposition that he intended to make a certain disposition, but, through lack of learning, want of advice, inadvertence, or mistake, failed to use the legal or proper phrases, the courts will carry into effect the intention so shown by implying such disposition, unless that disposition would contravene some well-established legal rule."

Thus, the general rule is that bequests or devises by implication are sustained, unless the implication violates public policy or some well-established rule of law, where no direct language in a will is found to support them, but where, from informal language used, read in the light of its context, such reasonable

construction can be placed on it as implies an intention to make a bequest or devise. The following cases support this rule: *Re Blake* (1910) 157 Cal. 448, 108 Pac. 287; *Riverside Trust Co. v. Rogers* (1915) 89 Conn. 690, 96 Atl. 180; *Eyer v. Williamson* (1912) 256 Ill. 540, 100 N. E. 188; *Martin v. Martin* (1916) 273 Ill. 595, 113 N. E. 150; *Porter v. Union Trust Co.* (1915) 182 Ind. 637, 108 N. E. 117; *Gibson v. Brown* (1915) — Ind. App. —, 110 N. E. 716, rehearing denied in (1916) — Ind. App. —, 112 N. E. 894; *CALLOWAY v. WHITE*, ante, 1210, quoting 40 Cyc. 1390 with approval; *Jones v. Gane* (1910) 205 Mass. 37, 91 N. E. 129; *Hall v. Beebe* (1916) 223 Mass. 306, 111 N. E. 899; *Bateman v. Case* (1912) 170 Mich. 617, 136 N. W. 590; *Ball v. Phelan* (1908) 94 Miss. 293, 23 L.R.A.(N.S.) 895, 49 So. 956, expressly holding that there can be no devise or bequest by implication where such an implication would violate public policy or the settled rules of positive law; *Clark v. Kittenplan* (1909) 63 Misc. 122, 118 N. Y. Supp. 404; *Grothe's Estate* (1910) 229 Pa. 186, 78 Atl. 83; *Earle v. Goberly* (1909) 65 W. Va. 163, 64 S. E. 628, 17 Ann. Cas. 479; *Re Ley* (1912) — B. O.

—, 5 D. L. R. 1, 21 West. L. R. 757; *Re Cotter* (1915) 34 Ont. L. Rep. 24.

But the intention to make a certain devise or bequest must be deduced from the instrument itself, and not from a mere failure to express it. *Martin v. United States* (1911) 46 Ct. Cl. (Fed.) 372; *Myrick v. Williamson* (1914) 190 Ala. 485, 67 So. 273; *Re Blake* (1910) 157 Cal. 448, 108 Pac. 287, holding that while the intention of the testator is to be reached from what he has said, this includes not only a determination of what he meant by the explicit use of language, but also the necessary implication arising from language which he has employed, although less explicit; *Riverside Trust Co. v. Rogers* (1915) 89 Conn. 690, 96 Atl. 180; *Bond v. Moore* (1908) 236 Ill. 576, 19 L.R.A. (N.S.) 540, 86 N. E. 386, holding that the intention sought is not that which by inference may be presumed to have existed in the mind of the testator, but that which by the words used in the will he has expressed; *Porter v. Union Trust Co.* (1915) 182 Ind. 637, 108 N. E. 117; *CALLOWAY v. WHITE*; *Jones v. Gane* (1910) 205 Mass. 37, 91 N. E. 129; *Hall v. Beebe* (1916) 223 Mass. 306, 117 N. E. 899; *Ball v. Phelan* (1908) 94 Miss. 293, 23 L.R.A. (N.S.) 895, 49 So. 956; *Grothe's Estate* (1910) 229 Pa. 186, 78 Atl. 88, holding that courts have no authority to insert a provision disposing of an estate under the assumption that it was the intention of the testator; *Allis's Will* (1916) 163 Wis. 452, 157 N. W. 548. A gift or devise by implication cannot be inferred from an absolute silence on the subject (*Bond v. Moore* (Ill.) supra; *CALLOWAY v. WHITE*; *Jones v. Gane* (1910) 205 Mass. 37, 91 N. E. 129); and while any reasonable construction will be adopted consistent with the terms of the will, so as to dispose of the entire estate, where no intention is shown by the will as to the disposition of a part of the testator's property, such part must be regarded as not disposed of (*Bond v. Moore* (Ill.) supra), even the presumptive intention to avoid an intestacy not affording a sufficient reason for implying a gift (*Grothe's Estate* (1910) 229 Pa. 186, 78 Atl. 88). And, of course, if the words of a will, construed in their ordinary sense, or expressly, make a valid will of the whole estate, there is no room for implication. *Myrick v. Williamson* (Ala.) and *Riverside Trust Co. v. Rogers* (Conn.) supra, holding that if the devise or bequest is expressly made, there is no room for a gift by implication; *Porter v. Union L.R.A.* 1917A.

Trust Co. (1915) 182 Ind. 637, 108 N. E. 117; *CALLOWAY v. WHITE*; *Hall v. Beebe* (1916) 223 Mass. 306, 111 N. E. 899. In fact, an implication may never add to or take from an express disposition. *Riverside Trust Co. v. Rogers* (Conn.) and *Porter v. Union Trust Co.* (Ind.) supra; *Holt v. Wilson* (1910) 82 Kan. 268, 108 Pac. 87.

In determining the testator's intention, conflicting statements are to be reconciled and all of the parts of the will are to be given effect. In fact, every word should be given effect if it can be given effect without defeating the general purpose of the will, or contravening the established rules of law or public policy. *Martin v. United States* (Fed.); *Re Blake* (Cal.); and *Porter v. Union Trust Co.* (Ind.) supra; *Ball v. Phelan* (1908) 94 Miss. 293, 23 L.R.A. (N.S.) 895, 49 So. 956. So, the court may look at the possible consequences which would result from a construction of the provisions of a will for the purpose of determining whether, where the language is not explicit, but is open to construction, it was the intention of the testator that such consequences should follow. *Re Blake* (Cal.) and *Ball v. Phelan* (Miss.) supra. But the probabilities as to the testator's intention cannot be weighed. *Bond v. Moore* (Ill.) supra. And the testator cannot effect by implication what he cannot do directly. *Re Blake* (Cal.) supra. However, an estate by implication will be raised to defeat attributing to a phrase used in a will a purposeless effect. *Ibid.*

As to the character of the implication necessary to create a devise or bequest, it has been ruled that it must not rest on conjecture or speculation; it must be necessary, and not merely possible (*Myrick v. Williamson* (Ala.) and *Re Blake* (Cal.) supra, holding that conjecture and speculation cannot be indulged in to import into a will something which no language used by the testator warrants, simply because he seems to have omitted something which it is reasonable to assume should have been provided for; *Bond v. Moore* (Ill.) supra; *Eyer v. Williamson* (1912) 256 Ill. 540, 100 N. E. 188; *Porter v. Union Trust Co.* (Ind.) supra; *CALLOWAY v. WHITE*, ante, 1210; *Ball v. Phelan* (Miss.) supra; *Tuttle v. Woolworth* (1908) 74 N. J. Eq. 310, 77 Atl. 684; *Clark v. Kittenplan* (1909) 63 Misc. 122, 118 N. Y. Supp. 404); it must be so plain as to be clearly apparent or irresistible to the mind (*Myrick v. Williamson* (1914) 190 Ala. 485, 67 So. 273; *Riverside Trust Co. v. Rogers*

(1915) 89 Conn. 690, 96 Atl. 180; Bond v. Moore (1908) 236 Ill. 576, 19 L.R.A. (N.S.) 540, 86 N. E. 386, holding that the necessity must be so clear that no reasonable doubt of the intention can exist [but see Eyer v. Williamson (1912) 256 Ill. 540, 100 N. E. 188, as set out infra, this paragraph]; Grothe's Estate (1910) 229 Pa. 186, 78 Atl. 88, holding that the implication must be "clear"; and it must preclude a suspicion that a contrary intention to that imported could have existed in the mind of the testator (Myrick v. Williamson (Ala.); Riverside Trust Co. v. Rogers (Conn.); and Bond v. Moore (Ill.) supra; Martin v. Martin (1916) 273 Ill. 595, 113 N. E. 150; CALLOWAY v. WHITE; Ball v. Phelan (Miss.) supra; Tuttle v. Woolworth (1908) 74 N. J. Eq. 310, 77 Atl. 684; Smith v. Dugan (1911) 145 App. Div. 877, 130 N. Y. Supp. 649, affirmed without opinion in (1912) 205 N. Y. 556, 98 N. E. 1116; Earle v. Goberly (1909) 65 W. Va. 163, 64 S. E. 628, 17 Ann. Cas. 479, per headnote and authorities cited). However, it has also been said that "a strong probable implication of a devise arising from the will is sufficient" (Re Blake (1910) 157 Cal. 448, 108 Pac. 287); that it is not required that the inference should be absolutely irresistible, but that it is enough if the circumstances, taken together, leave no doubt as to the intention of the testator (Eyer v. Williamson (Ill.) supra; CALLOWAY v. WHITE, quoting 40 Cyc. 1390; Ball v. Phelan (1908) 94 Miss. 293, 23 L.R.A. (N.S.) 895, 49 So. 956); and that the tendency of the modern cases is rather to extend than narrow the rule of raising a devise by implication (Re Blake (Cal.) supra). The implication may be drawn from slight circumstances appearing from the will. Re Blake (Cal.) and Ball v. Phelan (Miss.) supra, holding that where the will necessarily limits the estate of a child to one for life, the court will lay hold of slight circumstances to raise a gift in the issue of such child, so as to avoid imputing to the testator the intention of giving to the devisee over, to the exclusion of the life tenant. And a bequest or devise may be implied from an erroneous recital in the will that such property has been given by it (Riverside Trust Co. v. Rogers (Conn.) supra, holding that a reference to a disposition in the earlier part of a will which in fact does not appear may evidence the intention to make the gift omitted, and from it the law may imply the gift omitted; Porter L.R.A.1917A.

v. Union Trust Co. (1915) 182 Ind. 637, 108 N. E. 117; CALLOWAY v. WHITE; Smith v. Smith (1910) 113 Md. 495, 31 L.R.A. (N.S.) 922, 140 Am. St. Rep. 435, 77 Atl. 975, expressly so holding), but not from an erroneous recital in reference to a disposition by an instrument other than the will, as such a recital does not disclose a purpose and intent to dispose by the will (Porter v. Union Trust Co. (Ind.) supra; CALLOWAY v. WHITE; Smith v. Smith (Md.) supra). And a reference to a disposition in the early part of a will which in part exists does not indicate an intention to give the part omitted, since the description applies accurately to that before given. Riverside Trust Co. v. Rogers (Conn.) supra. So, if the language used points back to a prior gift correctly described, and does not express a gift other than this, there can be no estate by implication. Ibid.

Where a gift is implied, as from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality, so that where one is future and contingent, the other must be. Re Blake (Cal.) supra.

Courts will more readily sustain a devise by implication to children upon arriving at age or marriage where some beneficial interest has been given them during minority than where no interest of any kind has been given them; but this principle must be carefully guarded in its application, as the question whether a devise by implication is to be maintained or not cannot be determined by the application thereof alone. Ball v. Phelan (Miss.) supra. The simple fact that the principal is not distributable until the death of the last of several legatees is not, of itself, sufficient to create an implied gift to the survivor. Grothe's Estate (Pa.) supra. Nor can a gift to a grandchild be implied from a gift to a child, defeasible if the latter dies without children surviving. Allis's Will (1916) 163 Wis. 452, 157 N. W. 548. In Re Blake (Cal.) supra, a devise was implied from an elliptical expression as to issue.

As to effect of a limitation over in case the person to whom property is given in the first instance dies without lineal descendants, issue, children, heirs of the body, etc., to give to his issue an interest by implication, either by way of remainder, executory devise, or substitutional gift, see note to Anderson v. United Realty Co. 51 L.R.A. (N.S.) 485.

G. J. C.

MARYLAND COURT OF APPEALS.

JAMES J. BYRNE, Inspector of Buildings,
Appt.,
v.

MARYLAND REALTY COMPANY.

(— Md. —, 98 Atl. 547.)

Constitutional law — regulation of character of buildings.

The legislature cannot, in view of the constitutional protection of property rights, limit the buildings to be erected in a specified section of a municipality to separate and unattached dwellings not less than a specified distance apart.

For other cases, see Constitutional Law, II, b, 2, in Dig. 1-52 N. 8.

(June 23, 1916.)

APPEAL by respondent from an order of the Court of Common Pleas of Baltimore city granting a writ of mandamus to compel him to issue a permit for the erection of certain buildings. Affirmed.

The facts are stated in the opinion.

Messrs. Robert F. Leach, Jr., and S. S. Field for appellant.

Messrs. Harry E. Karr, Benson & Karr, and John D. Nock for appellee.

Burke, J., delivered the opinion of the court:

It was provided by § 1 of chapter 693 of the Acts of 1912, "that no dwelling house shall be erected within that section of Baltimore city embraced within the following lines: Beginning at the intersection of the western city boundary and Forest Park avenue, and running thence easterly along Forest Park avenue to Garrison avenue; thence southerly along Garrison avenue to Duvall avenue; thence westerly along Duvall avenue to the western city boundary, and thence northerly to the place of beginning, unless the same is constructed as a separate and unattached building; and if such dwellings are of frame construction they shall be at least 20 feet apart, and if of stone or brick construction they shall be at least 10 feet apart."

The Maryland Realty Company, a body corporate and the appellee on this record, is the owner of a lot in fee, for which it paid \$15,000, lying within the limits described in the act. The lot has a frontage of 259 feet and 3 inches on the west side of Garrison avenue between Dalrymple avenue and Bonner road, with an average depth of from 100 feet to 167 feet and 3 inches

to a 10-foot alley. The appellee desired to improve its lot by the erection thereon of semidetached two-story, slag roof, brick dwellings, and, after securing a permit from the appeal tax court, it filed with James J. Byrne, the inspector of buildings of Baltimore city, plans and specifications showing the character of buildings it proposed to erect subject to the supervision of the building inspector and in conformity with the building laws of Baltimore city. Mr. Byrne, the inspector of buildings, refused to issue a permit for the erection of the proposed buildings. The appellee thereupon filed a petition for mandamus in the court of common pleas of Baltimore city against him to compel the issuing of the permit for the erection of the buildings shown on the plans and specifications filed with him. Mr. Byrne, the inspector, showed that he refused to issue the permit for the following reasons set out in his answer: "That the granting or refusing of said permit, as asked for, involves the question of the construction of a class of improvements which, under all the circumstances, would be highly detrimental to one of the largest, most beautiful and artistically developed suburban communities, constituting the suburbs of the city of Baltimore, as is evidenced by resolution of the Forest Park Improvement Association, passed on the 22d day of June, 1915, a copy of which is filed herewith, and prayed to be taken as a part of this answer, and marked 'Respondent's exhibit A;' that, further answering, this respondent shows that, aside from the question of policy and wisdom, your respondent could not grant the permit applied for in the premises, because the buildings and improvements contemplated by the petitioner violate the provisions of chapter 693 of the Acts of the General Assembly of Maryland for the year 1912, and this respondent is advised that said act is in full force and effect and is valid and constitutional."

The resolution of the Forest Park Improvement Association filed with his answer states fully and clearly all the reasons which have been or can be urged in support of the refusal of the appellant to issue the permit. The material portion of the resolution is here inserted: "Whereas, Garrison avenue is the most attractive avenue in Baltimore city, being 80 feet wide and most of it more than 400 feet above tide level, winding its way for more than 2 miles through the sections known as Beulah Villas, Mont Alto, Brookline, Forest Park, and Lenox to West Arlington on the north, and on and near which avenue are located the finest frame cottage residences within the limits of Baltimore city, each situated within its own grounds and having beautiful

Note. — As to exercise of police power for esthetic purposes, see annotation following this case, post, 1220.
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and well-kept lawns, hedges, shrubberies, and flowers, said avenue being under the especial care of the city forester, who has caused fine shade trees to be planted on each side of the avenue 30 feet apart; such avenue being as yet wholly free from this cheap, two-story development of congested dwellings, which, however proper they may be in the central section of the city, are very detrimental and undesirable in this northwest corner of the city, devoted as it is to cottage and parklike development, and which are particularly undesirable on beautiful Garrison avenue; and whereas it appears that the building inspector has refused to issue said permit because of an act of the general assembly of Maryland, passed in 1912, and known as chapter 693, wherein it is provided that no such dwelling houses shall be erected within a certain area embracing this particular place where the said realty company contemplate erecting these cheap, two-story dwellings; and whereas said act of 1912 was passed at the solicitation of this association, the members of which called the attention of the members of the legislature to the fact that the area embraced by the act seemed to be the only one in the vast area of many hundreds of acres unprovided with adequate building restrictions, and particularly called attention to the language used by your court of appeals in the case of *Cochran v. Preston*, 108 Md. at page 229, 23 L.R.A. (N.S.) 1163, 129 Am. St. Rep. 432, 70 Atl. 114, 15 Ann. Cas. 1048, which says: 'It may be that in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational value of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction, under some circumstances, to the exercise of this power even for such purposes' (the power referred to being the enforcement of a legislative conception of artistic beauty and symmetry), though it was also pointed out to the members of the general assembly by the members of this association that this area, covered as it is by frame cottages and surrounded by hundreds of acres of other frame cottages, should be protected by the act from fire risk as much as possible, and also because of the lack of sewer facilities it should not be too closely built upon; and, further, that there would be vast property loss and loss to the taxable basis to permit in this cottage neighborhood, these dreaded spots of the two-story house development; and whereas this association is anxious to impress the executive and judicial departments of our government, the same as it did the legislative branch, with the belief

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that in this section of Baltimore, at least, civilization has reached the point where the educational value of the fine arts as expressed and embodied in architectural symmetry and harmony and in the health-giving spaces of green grass and freedom from congestion and pollution from numerous cesspools and a lessened danger of fires, makes the Act of 1912 a highly beneficial and salutary one."

Testimony was taken by the respective parties, and the case was argued and submitted. On December 31, 1915, the court ordered the writ of mandamus to issue as prayed, and from that order the present appeal was taken.

The record shows that the appellee's lot is bounded by Garrison avenue on the front and by Winfield avenue on the back, and by Bonner road on the south and Dalrymple avenue on the north. In the same square in which the appellee's lot is located there is erected a Sunday-school building, constructed partly with concrete blocks and with wood and shingles. To the south of Bonner road facing the lot in question there are six inexpensive frame cottages. On the southwest corner of Winfield avenue and Dalrymple avenue there is a solid row of two-story brick houses of 21 feet front. On Dalrymple avenue between Winfield and Garrison avenue there have been erected twelve semidetached two-story brick front porch houses, with bay windows, and in close proximity to the lot there are a number of other two-story brick houses.

The character of houses which the appellee is asking to build upon his property is described by the witnesses as two-story brick, semidetached houses, with front and rear porches, bay windows on the front, heated by steam, and to cost about \$2,500 each to build. It is stated that they would have ornamental fronts and would make attractive houses, thoroughly modern and up to date, and would have a ten-year guaranteed slag roof, and that they would be equal, if not better, than the same character of houses already erected in the neighborhood. The houses would be semidetached, that is, would be built in pairs, with a distance of 8 feet between each pair of houses, and would front on Garrison avenue. The record shows that, because of the class of buildings surrounding the lot and in close proximity thereto on the south, west, and north, the only businesslike method of improving the lot is by the class of improvements proposed, and that it would be financial suicide to erect cottages on the lot with a view of selling them.

There was some suggestion in the testimony that houses such as it is proposed to erect upon this lot would be a menace to

the public health, and therefore their erection might be prohibited under the police power for these reasons. But there is no substantial support for this contention on the facts. There is nothing inherently dangerous to the public safety or the public health in properly constructed semidetached brick houses, and to prohibit their construction upon this ground would be carrying the police power to an extent that would alarm the public. There is no authority for such a proposition in this state, and we have found no American case to support it. So far as fire risk is concerned, the facts show that the proposed houses would be less dangerous than the frame cottages in the neighborhood.

Garrison avenue and the character of the improvements along that avenue from Walbrook Junction are fairly accurately described in the resolution of the Forest Park Improvement Association. It is a fine avenue, and the houses fronting on it are attractive and beautiful, and there can be no doubt that a majority of the residents there are opposed to the building of these proposed houses. It would appear, however, that the extent of depreciation to property on the avenue has been very much exaggerated. It is doubtful if the proposed construction would have any appreciable injurious effect upon the property on either side of the avenue lying between Walbrook Junction and Clayton road. It would undoubtedly be objectionable to some residents in close proximity to it, and it would undoubtedly depreciate to some extent the value of some property. But this court has no power, under the plain and settled rules of law, to prevent the construction of the houses. The legislature had no power to pass the act. The act does not relate to the police power, and its enforcement would deprive the appellees of property rights guaranteed by the Constitution, which cannot be invaded for purely esthetic purposes under the guise of police power. It is said in *Bostock v. Sams*, 95 Md. 400, 59 L.R.A. 282, 93 Am. St. Rep. 394, 52 Atl. 665, that "it cannot be pretended that the citizen has not the common-law right to acquire title to a lot of land, qualified or absolute, in a city as elsewhere, and to build upon and improve it as his taste, his convenience, or his interest may suggest, or as his means may justify, without taking into consideration whether his buildings and improvements will conform in 'size, general character, and appearance' to the 'general character of the buildings previously erected in the same locality,' even though there might be those in whose 'judgment' his so building might, in some way, 'tend to depreciate the value

of surrounding improved or unimproved property.'"

In *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 34 L.R.A. (N.S.) 998, 94 N. E. 920, the court declared void the statute forbidding under penalty the erection and maintenance of any structure for advertising purposes within 500 feet of any park or boulevard. In the course of the opinion the court said:

"It is sought to sustain the validity of this act as a proper exercise of the police power of the state. The natural right every citizen has to use his property according to his own will is necessarily subject to the limitation that in such use others shall not be injured. All uses of property or courses of conduct which are injurious to the health, comfort, safety, and welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power may result in inconvenience or loss to individuals. In this respect individual rights must be subordinate to the higher rights of the public. The power that the state may exercise in this regard is the overruling law of necessity, and is founded upon the maxim, 'Salus populi est suprema lex.' The existence and exercise of this power are an essential attribute of sovereignty, and the establishment of government presupposes that the individual citizen surrenders all private rights the exercise of which would prove hurtful to the citizens generally. *Chicago v. Rogers Park Water Co.* 214 Ill. 212, 73 N. E. 375; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. While the general principle above announced is uniformly recognized, it is equally true that the owner of property has the right to make any use of it he desires that does not endanger or threaten the safety, health, comfort, or general welfare of the public.

"It does not follow that because a statute has been enacted for the ostensible purpose of guarding the safety, health, comfort, or promoting the general welfare, it must be accepted as a proper exercise of the police power of the state; nor can a statute which is, in fact, a proper exercise of such power, be declared void merely because it results in circumscribing limits of individual conduct to narrower bounds. Necessarily there are limits beyond which legislation cannot constitutionally go in depriving individuals of their natural rights and liberties. To determine where the rights of the individual end and those of the public begin is a question which must be determined by the courts. The Constitution is the highest written law of the state. The courts must obey both the Constitution and the statutes, but, in case of

conflict between the two, the Constitution must control, and the statute must give way. When there has been an attempt to exercise the police power of the state by the lawmaking department of the government, and the validity of such act is challenged as being an unreasonable invasion of private rights, the courts must, upon their own responsibility, determine whether in the particular case the constitutional limits have been passed. *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496. . . .

The citizen has always been supposed to be free to determine the style of architecture of his house, the color of the paint that he puts thereon, the number and character of trees he will plant, the style and quality of the clothes that he and his family will wear, and it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other like matters, although the highly cultured may find on every street, in every town and city, many things that are not only open to criticism, but shocking to the esthetic taste. The courts of this country have, with great unanimity, held that the police power cannot interfere with private property rights for purely esthetic purposes."

There are many other cases distinctly holding that the police power cannot be exercised for purely esthetic purposes. *Welch v. Swasey*, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Com. v. Boston Advertising Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601. In the note to *State v. Whitlock*, reported in 16 Ann. Cas. 765, it is said: "While the promotion of esthetic or artistic considerations is a proper object of governmental care, these considerations alone will not justify, as an exercise of the police power, a radical restriction of the right of an owner of property to use his property in an ordinary and beneficial way."

Following this note, and in the cases to which we have referred, will be found a long line of cases holding that the police power cannot be exercised merely for esthetic considerations, and we have not found any cases to the contrary. The reason for this rule is well stated in *Quintini v. Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62, 1 So. 625: "The law can know no distinction between citizens because of the superior cultivation of the one over the other. It is with common humanity that legislatures and courts must deal; and that use of property which in all common sense and reason is not a nuisance to the average man cannot be prohibited because repugnant to some sentiment of a particular class."

To support the statute, counsel for the

appellant referred to *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 562, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, and to *Noble State Bank v. Haskell*, 219 U. S. 111, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, and they rely upon certain general language of the court in those cases which, if disconnected with the context and read apart from the facts of the cases, would confer upon the legislature almost unlimited power, and would authorize it in the name of the police power to overturn the foundations of constitutional government. But when the language of the court is read in the light of the fact with which it was dealing, it is clear that the court did not intend to lay down any new doctrine of the police power. In *Baltimore & O. R. Co. v. Waters*, 105 Md. 396, 12 L.R.A. (N.S.) 326, 66 Atl. 685, Judge Pearce said: "The counsel for the appellee lay much stress upon the case of *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 592, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175, in which the court said that the police power embraced regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety. In that case a public corporation charged by law with the duty of causing a large body of swamp lands to be drained and made capable of cultivation adopted a plan which required the enlarging and deepening of the channel of a natural water course running through the district, the best and only practicable mode of effecting the drainage. This plan also required the removal of the foundations of a bridge erected by the defendant railway over this water course, which the railway company refused to do, or permit to be done, until it was paid such a sum as would compensate it for the cost of removal and of constructing a new bridge over the widened and deepened stream. It was held by the court that the drainage of so large a body of lands 'so as to make them fit for human habitation is a public purpose, to accomplish which the state may, by appropriate agencies, exert the general powers it possesses for the common good.'"

In *Noble State Bank v. Haskell*, supra, in which Mr. Justice Holmes said that the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare," the court was dealing with the police power of the state of Oklahoma to regulate banking within the state, and to provide guaranties under the authority of the state and under

its direction against the insolvency of banks organized, maintained, and operated with the sanction and under the authority of the state. It was held that the statutory provision for compulsory assessments, for the purpose of making up the guaranty fund so provided to be paid by the various banking institutions, was, under all the circumstances, within the police power of the state. That the court did not understand that it was announcing any new doctrine, or unduly extending the accepted doctrine of the police power is evident from the opinion of Justice Holmes, filed on the motion for a rehearing of that case. After saying that the judgment delivered "seems to have conveyed a wrong impression of the opinion of the court in some details," and after referring to certain cases cited in the opinion, he said that those cases "were cited to establish, not that property might be taken for a private use, but that among the public uses for which it might be taken were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private. This case, in our opinion, is of that sort. The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, not to give a new or wider scope to the power." [219 U. S. 580, 55 L. ed. 343, 32 L.R.A.(N.S.) 1065, 31 Sup. Ct. Rep. 299.]

The facts of the two last-cited cases are

so widely different from those of the case before us as to deprive them of any application to this case.

In *Shaffer v. Union Min. Co.* 55 Md. 81, 15 Mor. Min. Rep. 59, this court quoted with approval the following passage from *Cooley's Constitutional Limitations*: "To forbid to an individual, or a class, the right to the acquisition or enjoyment of property, in such manner as should be permitted to the community at large, would be to deprive them of liberty, in particulars of primary importance to their pursuit of happiness."

In *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, the Supreme Court said: "To justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

From the facts of these cases cited it must be apparent that, under the firmly settled principles of law, which it is our duty to maintain, chapter 693 of the Acts of 1912 is invalid; and, as that is the sole question of law presented in this appeal, the order appealed from must be affirmed.

Order affirmed; the appellant to pay the costs above and below.

Annotation—Exercise of police power for esthetic purposes.

This question was considered in the annotations to *Wineburgh Advertising Co. v. Murphy*, 21 L.R.A.(N.S.) 735, and *Haller Sign Works v. Physical Culture Training School*, 34 L.R.A.(N.S.) 998, to which this note is supplementary. These notes are in the main confined to cases that expressly consider the right to base restrictions upon the use of property upon esthetic considerations. Esthetic purposes are not infrequently promoted by restrictions that are supported by other considerations. Various specific forms of restrictions which may, to some extent, involve esthetic considerations, are treated in other annotations in this series:

As to power to establish building lines, see annotation to *Eubank v. Richmond*, 42 L.R.A.(N.S.) 1123; *Willison v. Cooke*, 44 L.R.A.(N.S.) 1030; and *Fruth v. Board of Affairs*, L.R.A.1915C, 981.

Generally as to validity of restrictions as to location of mercantile business, see annotation to *People ex rel. Friend v. Chicago*, 49 L.R.A.(N.S.) 438. L.R.A.1917A.

As to power of municipal corporations to prohibit factories, see annotation to *St. Louis v. Dreisoerner*, 41 L.R.A.(N.S.) 177.

As stated in the earlier annotation it is almost unanimously held that a state or municipality cannot, without compensation, by virtue of the police power alone, limit, for purely esthetic purposes, the use which a citizen may make of his property.

This conclusion is sustained by the holding in *BYRNE v. MARYLAND REALTY Co.* ante, 1216, that the legislature cannot, in view of the constitutional protection of property rights, limit the buildings to be erected in a specified section of a city to separate and unattached dwellings not less than a specified distance apart.

And a like result has been reached in several later cases involving the validity of statutes and ordinances seeking to establish building lines or to exclude places of business from residential sections.

Thus, in *Fruth v. Board of Affairs*

(1915) 75 W. Va. 456, L.R.A.1915C, 981, 84 S. E. 105, an ordinance of a municipal corporation which provided for the establishment of a building line on a certain street, and prohibited abutting owners from encroaching thereon, was held unenforceable as a police regulation where it was based on merely esthetic considerations. The court here approved the cases holding that ordinances based merely on esthetic grounds and having no reference to the public safety and protection cannot be sustained under the police power, and stated that they did not wish to go counter to the great weight of authority and take advanced grounds on the question of the police power to regulate and control the use of private property based on mere esthetic grounds and having no reasonable reference to the safety, health, morals, and general welfare of the public.

In *Buffalo v. Kellner* (1915) 90 Misc. 407, 153 N. Y. Supp. 472, the provisions of the charter authorizing the city to prescribe general regulations for the erection of buildings, and providing that before the construction or remodeling of any building the owner should file with the building commissioner a sworn statement of the character and use of the building he proposed to erect "and its location on his premises," were held not to confer power on the city council to pass ordinances regulating the location of buildings. The court quoting from *Dillon on Municipal Corporations* said: "By virtue of the police power merely, neither the legislature nor the city council exercising delegative powers to legislate by ordinance can impose restrictions upon the use of private property which are induced solely by esthetic considerations and have no relation to health, safety, convenience, comfort, or welfare of the city and its inhabitants;" and further stated that it was of the opinion that neither the legislature nor a municipality could arbitrarily assume the right to control the location of buildings to be erected on lots, and said: "Reasonable building ordinances may be enacted and enforced designed to conserve health and safety, and to that end such ordinances may require that sanitary plumbing shall be installed, proper fire escapes provided, suitable ventilation had, and matters of that kind regulated. Such regulations, however, are of quite a different character than one conferring a power to dictate whether a given building shall be placed in the rear or the front of a lot." L.R.A.1917A.

In *State ex rel. Lachtman v. Houghton* (1916) — Minn. —, 158 N. W. 1017, an ordinance prohibiting the erection of ordinary store buildings in a residential district was held not a valid exercise of the police power. The court stated that the authorities are unanimous that restrictions upon the use of property cannot be imposed under the police power for purely esthetic considerations, and remarked that under the police power the legislature may impose reasonable restrictions, and may make any reasonable regulations in respect to the use which the owner may make of his property which tend to promote the general well-being or to secure to others that use and enjoyment of their own property to which they are lawfully entitled, but that when it attempts to forbid the owner from making a use of his property which is not harmful to the public, and does not interfere with the rightful use and enjoyment of his own property by others, it invades property rights secured to the owner by both the state and Federal Constitutions.

And the court in *People ex rel. Friend v. Chicago* (1913) 261 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292, in holding an ordinance invalid which made it unlawful to locate, build, or construct any retail store in any block used exclusively for residential purposes without the written consent of a majority of the property owners, said that it might be that the owners of property in residential districts might prefer not to have retail stores in their blocks, but that if such was the case it arose solely from esthetic considerations disconnected entirely from any relation to the public health, morals, comfort, or general welfare, and that legislation, either by the state or municipal corporations, which interferes with private property rights or personal liberty, cannot be sustained for purely esthetic purposes.

And a like view was taken and conclusion reached in *Willison v. Cooke* (1913) 54 Colo. 320, 44 L.R.A. (N.S.) 1030, 130 Pac. 828, where a similar ordinance was held invalid.

And in *St. Louis v. Dreisoerner* (1912) 243 Mo. 217, 41 L.R.A. (N.S.) 177, 147 S. W. 998, it was held that a municipality could not, under the police power and the general welfare clause of its charter, forbid the operation near a public park of a manufacturing establishment using planes or saws operated by power. The court said that the police power only extends to the regulation of employment prejudicial to the public

safety, health, morals, and good government of the citizenry, and ends where the public interests are not beneficially served; and that it does not sanction the confiscation of private property for esthetic purposes.

In *Calvo v. New Orleans* (1915) 136 La. 480, 67 So. 338, where the charter of a city gave it all powers, privileges, and functions which, by or pursuant to the Constitution of the state, had been or could be granted to or exercised by any city, and the legislature had given the city authority over all places of business likely to be or which might become detrimental to health or comfort, it was held that the city was not authorized to pass an ordinance declaring it unlawful to establish or operate any sort of business whatever, on a certain avenue, the object of which was declared to be to confine buildings on the avenue to residences only. The court stated that the ordinance was not adopted to safeguard the public health, safety, morals, comfort, or general welfare; that it embraced esthetic considerations only, and that these were not named in the city charter as matters for consideration by the council; that the esthetic did not fall within the exercise of the police power; and that it was not such a necessity as would authorize the police to interfere with the liberty of action and property rights of individual citizens.

And statutes and ordinances attempting to regulate billboards, which are based merely on esthetic considerations, are likewise invalid as an exercise of the police power.

Thus, in *Com. v. Boston Advertising Co.* (1905) 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601, it was held that the state could not forbid the use of land near a park or parkway for advertising purposes, without making compensation to the owner of the property. The court stated that probably all would agree that, judged by a fair criterion, the promotion of education stands upon a higher plane than the promotion of esthetic culture or enjoyment, and would better justify the imposition of a burden without compensation; but that no one would contend that the state could authorize the taking of land for a schoolhouse without providing compensation to the owner, and remarked that if the police power, technically so-called, would not justify a taking of property without compensation to promote the education of youth, it would not justify such a taking for L.R.A.1917A.

the promotion of merely esthetic purposes.

In *Chicago v. Gunning System* (1905) 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 892, the court stated that the purpose of a section of an ordinance forbidding the erection of billboards on boulevards and pleasure drives or in any street where three fourths of the buildings were used for residential purposes without the consent of the property owners, and another section dealing with the size and height of the boards and providing for an annual license fee of 50 cents per square foot for existing billboards exceeding 100 square feet in area, seemed to be mainly sentimental, and to prevent the erection of signs which might be offensive to the esthetic sensibilities of those residing or passing through the vicinity of the billboards, and held the sections in question unreasonable and unenforceable.

In *Bryan v. Chester* (1905) 212 Pa. 259, 108 Am. St. Rep. 870, 61 Atl. 894, the court remarked that under the police power a municipality might prohibit the erection of insecure billboards within its limits, prevent the exhibition from secure ones of immoral or indecent advertisements or pictures, and protect the community from any actual nuisance resulting from the use of them, but held that an ordinance reciting in the preamble that, in the sense of the council, show bills and advertising boards were unsightly, and providing that no additional boards should be erected or constructed within the city limits, was invalid. The court stated that though as a matter of fact billboards might not be unsightly to the eyes of any other person than those of the members of the council, and might not be a nuisance nor create one, and the advertisement might neither shock nor offend public decency, yet, under the ordinance in question, an owner of private property could not erect a billboard on his land, and that such an ordinance was a gross interference with the lawful use of private property.

In *State v. Staples* (1911) 157 N. C. 637, 37 L.R.A.(N.S.) 696, 73 S. E. 112, the court, in holding an ordinance forbidding the construction of billboards nearer than 24 inches to the ground when not placed against solid walls, valid on the ground that it was for the protection of the public safety and health; referred to *State v. Whitlock* (1908) 149 N. C. 542, 128 Am. St. Rep. 670, 63 S. E. 123, 16 Ann. Cas. 765, which is set out in the note in 21 L.R.A.(N.S.) 736, and recog-

nized that such an ordinance as was involved in that case, which was based on esthetic considerations alone, could not be upheld.

The decision in *Haller Sign Works v. Physical Culture Training School* (1911) 249 Ill. 436, 34 L.R.A.(N.S.) 998, 94 N. E. 920, and *Chicago v. Gunning System*, supra, were distinguished in *Thomas Cusack Co. v. Chicago* (1914) 267 Ill. 344, 108 N. E. 340, Ann. Cas. 1916C, 488, where an ordinance making it unlawful for any person to erect any billboard or signboard on any public street in which one half of the buildings on both sides of the street are used exclusively for residential purposes, without first obtaining the consent in writing of the owners or duly authorized agents of the owners owning a majority of the frontage of the property on both sides of the street in the block in which the billboard or signboard is to be erected, was held not an unreasonable exercise of the police power, as it tended to protect the public against fires and disorderly persons. This decision was affirmed by the United States Supreme Court in (1916) 242 U. S. —, 61 L. ed. —, 37 Sup. Ct.

Rep. 190, where it was held that this ordinance did not offend against the 5th and 14th Amendments of the Federal Constitution, the court holding that there was sufficient evidence that the ordinance tended to promote the safety, morality, health, and decency of the community to justify it under the police power.

In *Cream City Bill Posting Co. v. Milwaukee* (1914) 158 Wis. 86, 147 N. W. 25, the court stated that they did not discover in the ordinance regulating billboards and fences for advertising purposes which was before them, any evidence that its passage was prompted by esthetic considerations. The ordinance in question, among other things, provided that billboards should not exceed 12 feet in height, that the lower edge should not be more than 3 feet nor less than 2 feet from the surface of the ground; that the end should not be nearer than 3 feet to any building or wall; that they should be erected at such a distance from the line of the street as should be equal or greater than the height of the board.

J. T. W.

MINNESOTA SUPREME COURT.

YONCALLA STATE BANK, Appt.,
v.
LENA GEMMILL, Respt.

(— Minn. —, 159 N. W. 798.)

Corporation — stockholder's liability — right to increase.

1. At the time the plaintiff, a state bank of Oregon, was organized and defendant became owner of shares of stock therein, the Constitution of said state contained no provision reserving in the state the right to amend or alter the charter of the bank so as to increase the obligations of its stockholders, but, on the contrary, a provision of the Constitution at that time did guarantee that a stockholder should not be lia-

ble beyond the unpaid par value of the shares of stock owned. A subsequent amendment of said provision, imposing a double liability upon stockholders in banks, cannot be held to embrace those who became such previous to the adoption of the amendment.

For other cases, see *Constitutional Law*, II, §, 1, a, (2), in *Dig. 1-52 N. S.*

Banks — police power — stockholder's liability.

2. The right to regulate and control banking business under the police power of the state cannot go to the extent of imposing a personal liability upon the stockholders in a bank contrary to the express constitutional provision in force at the time of the organization of the bank and the purchase of the stock by the stockholder.

For other cases, see *Constitutional Law*, II, §, 1, a, (2), in *Dig. 1-52 N. S.*

Headnotes by *HOLT, J.*

(November 3, 1916.)

Note.—The alteration of stockholders' liability as impairment of the obligation of contract is discussed in the note to *Douglass v. Loftus*, L.R.A.1915B, 797.

Some concrete phases of the subject of the police power over banks are discussed in the notes to *State v. Richcreek*, 5 L.R.A. (N.S.) 874, and *Weed v. Bergh*, 25 L.R.A. (N.S.) 1217; and see later case, *Marymont v. Nevada State Bkg. Board*, 32 L.R.A. (N.S.) 477. It should be stated here that the decision in *First State Bank v. Shallenberger*, 172 Fed. 999, cited in the footnote in L.R.A.1917A.

25 L.R.A.(N.S.) 1217, has since been reversed by the United States Supreme Court in 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189.

The constitutionality of bank guaranty law is discussed in the note to *Abilene Nat. Bank v. Dolley*, 32 L.R.A.(N.S.) 1065.

The question whether a charter or license for a bank may be refused upon general considerations of public policy has been considered in the case of *Schaake v. Dolley*, 37 L.R.A.(N.S.) 877.

APPPEAL by plaintiff from an order of the District Court for Mower County sustaining a demurrer to a complaint filed to enforce double liability on the holder of certain shares of plaintiff's stock. Affirmed.

The facts are stated in the opinion.

Messrs. Allen & Fletcher, for appellant:

The imposition of the double liability on the stock of the defendant after she had purchased the same was a valid exercise of the police power of the state of Oregon, and hence did not violate the obligation of her contract.

State ex rel. Beek v. Wagener, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; Stettler v. O'Hara, 69 Or. 519, L.R.A.—, —, 139 Pac. 743, Ann. Cas. 1916A, 217; State ex rel. Lachtman v. Houghton, — Minn.—, 158 N. W. 1017; 6 R. C. L. p. 189; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. ed. 989; Youngblood v. Birmingham Trust & Sav. Co. 95 Ala. 521, 20 L.R.A. 58, 36 Am. St. Rep. 245, 12 So. 579; Meadowcroft v. People, 163 Ill. 56, 35 L.R.A. 176, 54 Am. St. Rep. 447, 45 N. E. 991; Ex parte Pittman, 31 Nev. 43, 22 L.R.A.(N.S.) 266, 99 Pac. 700, 20 Ann. Cas. 1319; Baker v. State, 54 Wis. 368, 12 N. W. 12; Com. v. Rockafellow, 163 Pa. 139, 29 Atl. 757; Cummings v. Spaunhorst, 5 Mo. App. 21; State v. Richcreek, 5 L.R.A.(N.S.) 874, and note, 167 Ind. 217, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; Blaker v. Hood, 53 Kan. 499, 24 L.R.A. 854, 36 Pac. 1115; Cartmell v. Commercial Bank & T. Co. 153 Ky. 798, 156 S. W. 1048; State Sav. & Commercial Bank v. Anderson, 165 Cal. 437, L.R.A.1915E, 675, 132 Pac. 755; Seymour v. Bank of Minnesota, 79 Minn. 211, 81 N. W. 1059; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; Shallenberger v. First State Bank, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189; Assaria State Bank v. Dolley, 219 U. S. 121, 55 L. ed. 123, 31 Sup. Ct. Rep. 189; Lankford v. Platte Iron Works Co. 235 U. S. 461, 59 L. ed. 316, 35 Sup. Ct. Rep. 173; Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190; State ex rel. Goodsell v. Woodmansee, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; Weed v. Bergh, 25 L.R.A.(N.S.) 1217, and note, 141 Wis. 569, 124 N. W. 664; People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243; State v. Scougal, 15 L.R.A. 477, and note, 3 S. D. 55, 44 Am. St. Rep. 756, L.R.A.1917A.

51 N. W. 858; Marymont v. Nevada State Bkg. Board, 33 Nev. 333, 32 L.R.A.(N.S.) 477, 111 Pac. 295, Ann. Cas. 1914A, 162; 1 Morse, Banks & Bkg. 4th ed. § 13; 5 Cyc. 433; Boone, Bkg. § 10; 7 C. J. 480; 3 R. C. L. 378; Schaafe v. Dolley, 85 Kan. 598, 37 L.R.A.(N.S.) 877, 118 Pac. 80, Ann. Cas. 1913A, 254; Freund, Pol. Power, §§ 399, 400.

The imposition of the double liability on the stock of the defendant after she had purchased the same did not violate the obligation of her contract, for, in creating the Yoncalla State Bank, the state of Oregon reserved the right to alter, amend, or repeal its charter.

Re Gibson, 21 N. Y. 9; Sherman v. Smith, 1 Black, 587, 17 L. ed. 163; McGowan v. McDonald, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418; Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188; Re Empire City Bank, 18 N. Y. 199; Williams v. Nall, 108 Ky. 21, 55 S. W. 706; Bissell v. Heath, 98 Mich. 472, 57 N. W. 585; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335; Douglass v. Loftus, L.R.A. 1915B, 810, note; State v. Malheur County Ct. 54 Or. 255, 101 Pac. 907, 103 Pac. 446; Endlich, Interpretation of Statutes, § 210; Booth's Will, 40 Or. 154, 61 Pac. 1135, 66 Pac. 710; Bower v. Holladay, 18 Or. 491, 22 Pac. 553, 556; State ex rel. Childs v. Routh, 61 Minn. 205, 63 N. W. 621; Parker v. Hubbard, 64 Ala. 203; Waterworks Co. v. Burkhardt, 41 Ind. 364; 8 Cyc. 749; Cooley, Const. Lim. 7th ed. p. 216; Rundlett v. St. Paul, 64 Minn. 223, 66 N. W. 967; Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717; State ex rel. Patterson Street Lighting Co. v. Jones, 98 Minn. 6, 106 N. W. 963; Lewis's Sutherland, Stat. Constr. § 237; Bank of the Metropolis v. Faber, 150 N. Y. 200, 44 N. E. 779; State ex rel. Atty. Gen. v. Trulock, 109 Ark. 556, 160 S. W. 516; Re Prime, 136 N. Y. 347, 18 L.R.A. 713, 32 N. E. 1091; Kalich v. Knapp, 73 Or. 558, 142 Pac. 594, 145 Pac. 22; Branch v. Albee, 71 Or. 188, 142 Pac. 598; 1 McQuillin, Mun. Corp. p. 100; Farrell v. Portland, 52 Or. 582, 98 Pac. 145; McMinnville v. Howenstine, 56 Or. 451, 109 Pac. 81, Ann. Cas. 1912C, 193; Thurber v. McMinnville, 63 Or. 410, 128 Pac. 43; State v. Schluer, 59 Or. 18, 115 Pac. 1057.

No retrospective construction need be given to the amendment in order to sustain its validity.

Brown v. Hughes, 89 Minn. 150, 94 N. W. 438; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Aultman & T. Co. v. O'Dowd, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756; Sleeper v. Goodwin, 67 Wis. 577, 31

N. W. 335; Barnes v. Arnold, 23 Misc. 197, 51 N. Y. Supp. 1109.

Messrs. Sasse & French and E. Everett Eder, for respondent:

The imposition of the double liability upon the defendant was not a valid exercise of the police power of the state of Oregon, and hence violated the obligation of her contract.

10 Cyc. 670; Van Pelt v. Gardner, 54 Neb. 701, 74 N. W. 1083, 75 N. W. 874; Ireland v. Palestine, B. N. P. & N. W. Turnp. Co. 19 Ohio St. 369; Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver) 10 Wall. 566, 19 L. ed. 1029; State v. Chicago, M. & St. P. R. Co. 68 Minn. 381, 38 L.R.A. 672, 64 Am. St. Rep. 482, 71 N. W. 400; Lormtsen v. Union Fishermen's Co. 71 Or. 540, 143 Pac. 621.

The imposition of the double liability on the stock of the defendant after she had purchased the same violated the obligation of her contract, for, in creating the Yoncalla State Bank, the state of Oregon did not reserve the right to alter, repeal, or amend its charter.

Freund, Pol. Power, p. 361; 16 Cyc. 893; Hoyt v. McNeil, 13 Minn. 390, Gil. 362; Myers v. Chicago, St. P. M. & O. R. Co. 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694; State ex rel. Childs v. Routh, 61 Minn. 209, 63 N. W. 621; Sutherland, Stat. Conatr. § 133; Rundlett v. St. Paul, 64 Minn. 223, 66 N. W. 967; Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717; State ex rel. Patterson Street Lighting Co. v. Jones, 98 Minn. 6, 106 N. W. 963; Acme Dairy Co. v. Astoria, 49 Or. 520, 90 Pac. 153; Farrell v. Columbia, 50 Or. 171, 91 Pac. 546, 93 Pac. 264.

The validity and constitutionality of the amendment may be sustained without giving it the retrospective construction called for by the present suit.

Brown v. Hughes, 89 Minn. 151, 94 N. W. 438; Black, Const. Law, 67; Grenada County v. Brogden, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; United States ex rel. Atty. Gen. v. Delaware & H. Co. 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527; Auffm'ordt v. Rasin, 102 U. S. 620, 26 L. ed. 262.

Holt, J., delivered the opinion of the court:

The state superintendent of banks of the state of Oregon, upon ascertaining that a state bank is insolvent, may levy an assessment against the stockholders and collect the assessment by suit brought in the name of the bank. This suit was so brought against defendant. The facts are these: L.R.A.1917A.

The plaintiff bank was organized under the laws of Oregon in 1911, and is now insolvent. On January 9, 1912, defendant purchased fifteen shares of its capital stock, paying in full par value of \$100 in cash. November 12, 1912, the people of Oregon adopted a constitutional amendment whereby stockholders in state banks may be held liable in double the amount of the par value of the shares of stock owned. The court sustained a demurrer to the complaint, and plaintiff appeals.

If the amendment of § 3, art. 11, of the Constitution of the state of Oregon, adopted on the date before mentioned, was designed to impose, and could impose, a double liability upon persons who became stockholders in banks previous to its adoption, the demurrer should have been overruled, for no question is made of the authority to bring this suit, or of the need of the assessment to pay creditors, or of the regularity of the steps preliminary to suit. The constitutional provisions of Oregon pleaded as controlling defendant's liability are these: viz., § 3, art. 11, in force and effect for more than three years prior to the amendment mentioned, reading as follows: "The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more."

By the amendment of November 29, 1912 (Laws 1913, p. 8), the section was made to take this form: "The stockholders of all corporations and joint stock companies shall be liable for the indebtedness of said corporation to the amount of their stock subscribed and unpaid, and no more, excepting that the stockholders of corporations or joint stock companies conducting the business of banking shall be individually liable equally and ratably, and not one for another, for the benefit of the depositors of said bank, to the amount of their stock at the par value thereof, in addition to the par value of such shares."

When plaintiff was organized and when defendant became a stockholder therein § 2 of the same article read: "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town."

It is stated in the briefs that from the formation of the state until 1906, when said § 2 was amended so as to read as just stated, it appeared in this form: "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws

passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights."

Appellant concedes that under the doctrine of the Dartmouth College Case, 4 Wheat. 518, 4 L. ed. 629, a state may not alter or amend the charter of a corporation so as to impair contract rights, unless such power was reserved by the state at the time the charter was granted. But it is contended that because of the original reading of said § 2 it is permissible and proper to construe said section as it read at the time the bank was organized into a reservation by the state of the power to alter, amend, or repeal charters of corporations or laws affecting them so as to add to the liabilities of stockholders, and, if this contention be held unsound, that the police power of the state is authority for the imposition of a double liability upon all stockholders in banks, including those who became such when the Constitution expressly limited liability to the unpaid amount of the par value of their shares of stock. Assuming that originally § 2 had the reading claimed in the briefs, it seems quite clear that when, in 1906, it was amended "so as to read" as alleged in the complaint, nothing at all remained of the former language of the section. It was wiped out, and its wording could not be thereafter used to add anything to the provisions that took its place. There occurs to us no good reason for excepting this case from the general rule applicable as well to constitutional as to statutory amendments, that, when a specific section is amended "to read as follows," the amended section is construed, as to any matter after the amendment, as if it had been originally in the amended form. Dunnell's Dig. (Minn.) § 8928, and the cases there cited. Moreover, in view of the plain and certain language of said § 3, as it stood when plaintiff was organized and defendant bought her stock, no effort should be made to create by implication or doubtful construction a reserved power in the state of Oregon to so alter or amend the charter of plaintiff as to place any liability upon its stockholders beyond "the amount of the stock subscribed for and unpaid."

Much is made of the police power of the state in virtue of which banks may be regulated and controlled so as to safeguard the public. Laws have been enacted and sustained as within the police power, holding officers and directors of banks criminally and civilly liable for receiving deposits when the bank is insolvent. The legislation of Oklahoma, establishing a depositor's guaranty fund by assessing all state banks, was upheld in *Noble State Bank v. Haskell*, L.R.A.1917A.

219 U. S. 104, 55 L. ed. 112, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, as a valid exercise of the state's police power. And among the objections overruled in the last-named case we find these; viz., that the law deprived the bank of its property without due process of law for the benefit of depositors in another bank in which it had no interest, and that the act impaired the obligations of the bank's contract with the state as evidenced by its charter. And there can be no question but that, when funds of a bank are taken to create a guaranty fund, it is equivalent to a taking from its stockholders. But it is one thing to impose burdens upon the property voluntarily placed in a banking business by a stockholder of a bank, and quite another to impose a personal liability upon him, thereby subjecting property which he has not devoted to banking business to be taken from him to pay creditors of the bank, and this in the face of the constitutional guaranty when he became a stockholder that it shall not be done. It seems to us quite clear that the police power of the state does not go to the extent of authorizing the recovery here invoked against defendant.

Without considering the contention of defendant that the amendment should be given a prospective effect only, under the familiar rule that laws are not to be given a retrospective effect unless the intention of the lawmakers to so do is clearly manifest, we conclude that the demurrer was correctly disposed of.

Order affirmed.

NEW MEXICO SUPREME COURT.

TERRITORY OF NEW MEXICO

v.

BENITO LOBATO, Appt.

(17 N. M. 666, 134 Pac. 222.)

Indictment — murder — sufficiency.

1. An indictment for murder in the first degree, in other respects sufficient, which concludes in the following language: "Did

Headnotes by ROBERTS, Ch. J.

Note. — As to manner and time of raising defense of former jeopardy, see annotation following this case, post, 1233.

Generally, as to evidence of specific instances to prove character, see note to *McQuiggan v. Ladd*, 14 L.R.A. (N.S.) 689.

For admissibility of evidence of turbulent and dangerous character of victim of assault or homicide on issue of self-defense, see note to *Davenport v. Silvey*, L.R.A. 1916A, 1245.

strike and beat the said Juan Trujillo, giving to him, the said Juan Trujillo, in and upon the top of the head of him, the said Juan Trujillo, one mortal contusion, bruise, fracture, and wound, of which said mortal wound the said Juan Trujillo thence continually languished until, on the 30th day of December, A. D. 1909, between the hours of 2 and 3 o'clock in the morning of said day, he there died"—charges that the deceased died of the mortal wound alleged to have been inflicted by the defendant.

For other cases, see Indictment, etc., II. c, 3, in Dig. 1-52 N. S.

Criminal law — pleading — former jeopardy.

2. The common law, adopted by statute in this state as the rule of practice and decision in criminal cases, requires the defense of former jeopardy to be specially pleaded, and such defense is not admissible under the general issue. Held, where such defense is not so pleaded, it cannot be raised by motion, upon the conclusion of the state's case, for an instructed verdict.

For other cases, see Criminal Law, II. f, in Dig. 1-52 N. S.

Jurors — validity.

3. The record in this case shows that a valid jury was impaneled to try defendant.

Continuance — discretion.

4. The granting or denying of a motion for continuance is within the discretion of the trial court, and, unless such discretion has been abused, to the injury of the defendant, the denial of such motion will not constitute error.

For other cases, see Appeal and Error, VII. i, 2, in Dig. 1-52 N. S.

Same — absence of counsel.

5. It is not an abuse of discretion by the trial court to refuse to grant a continuance, where the only ground stated in the application is the absence of counsel for defendant in an adjoining county, attending court.

For other cases, see Appeal and Error, VII. i, 2, in Dig. 1-52 N. S.

Appeal — instructions — waiver of objections.

6. Where instructions given by the court in a criminal case are objectionable to the defendant, he must call the court's attention to the claimed error in such instructions prior to or at the time they are given, so that the court may have an opportunity to correct the alleged error; and objections filed in the clerk's office to instructions two days after the trial and verdict will not be considered.

For other cases, see Appeal and Error, V. c, in Dig. 1-52 N. S.

Same — refusal of requests.

7. The same rule applies to requested instructions which the court refuses to give. It is the duty of the defendant, if he intends to predicate error upon such refusal, to except to the action of the court at the time in refusing to give such instructions.

For other cases, see Appeal and Error, V. c, in Dig. 1-52 N. S.

L.R.A.1917A.

Homicide — defense — reputation of deceased.

8. In cases of homicide it is permissible to allow the defendant to show the general reputation of the deceased as to being a lawless and violent character; but specific acts of violence on the part of the deceased may not be shown.

For other cases, see Evidence, XI. c, in Dig. 1-52 N. S.

Evidence — demonstrative — skull.

9. The trial court properly admitted in evidence a portion of the skull of the deceased, showing the character of one of the claimed mortal wounds alleged to have been inflicted by the defendant.

For other cases, see Evidence, V. in Dig. 1-52 N. S.

Same — statements to sheriff.

10. Defendant cannot predicate error upon the action of the court in permitting the sheriff who arrested defendant, to testify to an alleged conversation had with defendant, where there was no showing that such statement was made under duress, threats, or promises.

For other cases, see Evidence, X. c, in Dig. 1-52 N. S.

(May 9, 1913.)

APPEAL by defendant from a judgment of the District Court for Taos County convicting him of voluntary manslaughter. Affirmed.

The facts are stated in the opinion.

Messrs. Catron & Catron for appellant.
Messrs. Frank W. Clancy, Attorney General, and H. S. Clancy, Assistant Attorney General, for the Territory.

Roberts, Ch. J., delivered the opinion of the court:

Appellant relies upon six grounds of error for a reversal of this cause, which we will discuss in the order presented.

The first contention urged is that the court erred in overruling the demurrer to the indictment. Several grounds of demurrer were stated, but appellant here urges for consideration only the following: "Said indictment does not charge that deceased died of the mortal wounds alleged to have been inflicted by the defendant." The same objection was also raised by motion in arrest of judgment. That portion of the indictment necessary to be set out in order that the ground of objection may be intelligently understood reads as follows: "Did strike and beat the said Juan Trujillo, giving to him, the said Juan Trujillo, in and upon the top of the head of him, the said Juan Trujillo, one mortal contusion, bruise, fracture, and wound, of which said mortal wound the said Juan Trujillo thence continually languished until, on the 30th day of December, A. D. 1909, between the

hours of 2 and 3 o'clock in the morning of said day, he there died."

We do not believe the language used in the indictment and quoted above, by any rule of construction, justifies the assertion that it does not charge that the deceased died of the mortal wounds inflicted by the defendant. Briefly stated, and stripped of legal verbiage, the indictment charged that Trujillo was given a mortal wound by the defendant, "of which mortal wound" the said Trujillo "there died." It is true the indictment alleges, after using the language, "of which said mortal wound," that "the said Juan Trujillo continually languished until, on the 30th day of December, A. D. 1909, between the hours of 2 and 3 o'clock in the morning of said day," and that such language intervenes between the words, "of which said mortal wounds" and "he there died;" still it is all a part of one sentence, and such language simply relates what occurred between the infliction of the wounds and the death. The charge is that he died of the mortal wounds so received, and the recital is made that of the mortal wounds so received he languished, followed by a statement of the time of his death. The charge is all part of one sentence, separated only by commas, and only by a strained construction can appellant's contention be sustained.

In the preparation of this indictment the district attorney did not follow the usual approved form, and such practice is not to be commended. Such officials, by the exercise of ordinary care and prudence in drafting indictments, can avoid all question as to the sufficiency thereof. While innovations are unwise, the antagonism to them that will preclude the use of equivalent expressions would be even more pernicious. *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349. Appellant has cited us to the following cases, which he insists hold such an indictment defective: *State v. Blan*, 69 Mo. 317; *State v. Sundheimer*, 93 Mo. 311, 6 S. W. 52; *People v. Aro*, 6 Cal. 208, 65 Am. Dec. 503; *People v. Wallace*, 9 Cal. 31; *Edmondson v. State*, 41 Tex. 496. An examination of the cases, however, will show that the language used in the indictments therein under consideration was altogether different from that used in the one now before the court.

On the other hand, the attorney general has called our attention to the case of *Lutz v. Com.* 29 Pa. 441, where the charge that death resulted from the wounds inflicted was not nearly so positive or direct as in the indictment in this case, and the same was upheld by that court. In the Pennsylvania case the language was as follows: "One mortal wound of the length of 1 inch

and the depth of 6 inches, of which said mortal wound he, the said Richard O'Leary, from the said 27th day of June, in the year aforesaid, at the county aforesaid, until the 28th day of the same month of June, in the year aforesaid, at the county aforesaid, did languish, and languishing did live, on which said 28th day of June, in the year aforesaid, the said Richard O'Leary, in the county aforesaid, died." Speaking of this language, the court there say: "The rule undoubtedly is that an indictment for murder must expressly show that the party died of the hurt specially described and set forth; but in construing indictments we are not, whilst avoiding intendments against the life of the prisoner, to fall into such extreme astutia as shall ignore the force and meaning of language."

The holding of the Pennsylvania court was approved by the supreme court of Illinois in the case of *Palmer v. People*, 138 Ill. 356, 32 Am. St. Rep. 146, 28 N. E. 130. The court say: "The mortal wound was given one day, and the deceased languished or grew weaker until the next day, and died. It is clear that he died of the mortal wound given, of which he languished to death. The respective dates of the stroke and of the death are sufficiently stated. *Lutz v. Com.* supra; 2 Bishop, Crim. Proc. § 528; Bishop, Directions & Forms, § 520; *State v. Conley*, 39 Me. 78; *State v. Haney*, 67 N. C. 467; 9 Am. & Eng. Enc. Law, 636."

In the case of *Tickle v. State*, 6 Tex. App. 623, an indictment of similar phraseology was held sufficient. The court said: "The indictment alleges that the defendant, on the 5th day of March, 1876, in the county of Navarro and state of Texas, inflicted upon James Shields a mortal wound, 'of which mortal wound he, the said James Shields, then and there languished, and afterwards, to wit, on the 10th day of March, 1876, languishing, died.' This we think sufficiently charges that the death of Shields proceeded from the wounds." See also *United States v. Ball*, 163 U. S. 662, 41 L. ed. 300, 16 Sup. Ct. Rep. 1192.

For the reasons stated, we are of the opinion that the demurrer to the indictment was properly overruled. The indictment alleged an assault and the nature thereof, the mortal wounding of the deceased, and that the deceased died of such wounds within a year and a day, and was therefore sufficient.

When defendant was first brought into court to answer the indictment in this case, he pleaded not guilty. Thereafter the record discloses that the defendant, without withdrawing his prior plea, and without leave of court first had or obtained, filed a demurrer to the indictment. No action ap-

pears to have been taken upon said demurrer until the day set for trial. Upon that day the record shows that the demurrer came on for hearing, and was overruled by the court, and the record continues: "Whereupon both parties announced themselves ready for trial, and now comes the jury, as follows; to wit" (followed by the names of twelve jurors, and the usual formal entry showing the impaneling and swearing of the jury). Thereafter the record recites: "Thereupon, it appearing to E. C. Abbott, Esq., district attorney, that defendant had not been arraigned, and had not pleaded since to the overruling of the defendant's demurrer, upon motion, the court dismissed the jury and directed that the defendant be arraigned and plead." This language is followed by a recital of the arraignment and plea of not guilty of the defendant. Thereafter the record shows that the same twelve jurors first impaneled were placed in the box, and shows that said jurors were sworn; but it is not plain as to whether the record intends to show that such jurors were re-sworn after the second formal arraignment and plea of the defendant, or whether it is attempting to recite the fact that such jurors were sworn prior to their dismissal theretofore, as recited.

The defendant did not plead former jeopardy specially; neither did he raise it by motion, or call it to the attention of the court in any manner, prior to entering upon the trial of the case; but at the conclusion of the testimony on the part of the territory he interposed a motion for an instructed verdict, and, as one of the grounds for said motion, attempted to raise the question of former jeopardy as follows: "That the record of the court shows former jeopardy, in that it shows that a jury had, prior to this trial, been called, impaneled, and sworn to try this case and the charges contained in the said indictment, and that thereafter the jury was dismissed." Former jeopardy was also relied upon in a motion filed in arrest of judgment.

In the view we take of the question, it is not necessary for us to determine the question as to whether or not the defendant was placed in jeopardy by the swearing of the first jury, for the reason that the matter was not properly raised or presented to the court. Section 3422, Rev. Stat. Comp. Laws 1897, is as follows: "In criminal cases, the common law, as recognized by the United States and the several states of the Union, shall be the rule of practice and decision." Several of the states have statutes altering the common-law provisions as to practice and procedure in criminal cases. Some such statutes provide that a defend-

ant may put in issue, under a plea of not guilty, all defenses which he may have to the charge upon which he is being prosecuted, and in those states it is uniformly held that he may prove, under such general issue, former jeopardy, or autrefois acquit or convict. However, according to the doctrine of the common law, jeopardy, or former conviction or acquittal, must be specially pleaded, and such defenses are not admissible under the general issue. 9 Enc. Pl. & Pr. 630.

"The defendant's plea of not guilty puts in issue all of the allegations of the indictment or information, and nothing more. In this case the defendant would not have been allowed to prove at the trial that he had been once in jeopardy, for there was no such issue in the case, and could be none unless he saw fit to make it by plea." *People v. Bennett*, 114 Cal. 56, 45 Pac. 1013. In that case the defendant filed no special plea, and attempted to raise the question of former jeopardy by his motion for a new trial. The court held that this could not be done, for it would be permitting the defendant to introduce evidence upon his motion for a new trial that would not have been admitted if offered at the trial. The defendant, going to trial upon the general issue of not guilty, and having filed no special plea in bar setting up former jeopardy, could not introduce in evidence such former jeopardy, and, as he could not introduce such fact in evidence, he could not reply upon it in his motion for an instructed verdict.

"The whole question of once in jeopardy was entirely foreign to the case, unless raised by a special plea, and, when so raised, an issue of fact was presented, which the jury alone possessed the power to pass upon." *People v. Bennett*, supra. In the California cases above cited, the defendant was being prosecuted upon the same information under which he claimed former jeopardy had attached. See also *Zachary v. State*, 7 Baxt. 1; *State v. Washington*, 28 La. Ann. 129; *State v. Barnes*, 32 Me. 534; *Rickles v. State*, 68 Ala. 538; also *De Arman v. State*, 77 Ala. 10, where the court held that a former conviction or acquittal must be specially pleaded, and, when so pleaded, the issue joined on it must be tried and determined before the issue on the plea of not guilty is submitted to the jury.

In the case of *State v. Buzzell*, 58 N. H. 257, 42 Am. Rep. 586, the court, in speaking of the defense of former acquittal or former jeopardy, said: "Former acquittal or former jeopardy, as a defense, is a plea of discharge or release that gives a reason why the defendant ought not to answer the indictment, and ought not to be put upon

trial for the crime alleged. 4 Bl. Com. 335. The plea of not guilty raises the question not whether, by former acquittal or jeopardy, he is discharged from a crime, but whether he committed it. When, as in this case, there is an opportunity to plead former judgment or jeopardy, and it is not pleaded, the case is as if there were no former judgment or jeopardy." See also *Guenther v. People*, 22 Colo. 121, 43 Pac. 999, where the court held that former acquittal or conviction must be pleaded specially; evidence of either not being admissible under the plea of not guilty.

The supreme court of Massachusetts, in the case of *Com. v. Chesley*, 107 Mass. 223, state the rule as follows: "If the defendant relied upon a former acquittal, he should have pleaded it specially, so that issue might have been taken upon it, either to the court or the jury. It cannot be proved under the general issue."

In the case of *McBean v. State*, 3 Heisk. 20, the defendant had filed a formal plea in bar of former conviction; but such plea was not urged by counsel, and they proceeded with the trial without first insisting on a determination of the plea so filed. After examining one witness, they attempted to rest and secure a determination upon such plea; the right to do so was denied. The court said: "The defendant and his counsel were bound to know and to take notice of the pleadings which were on file in the case, and going to trial upon the plea of 'not guilty' alone was a waiver of the defense of 'former conviction.'" See also *Re Allison*, 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820, where the court held that the defense of prior jeopardy for the same crime should be presented by special plea to the trial court. See also *Logan v. State*, — Miss. —, 40 So. 323; *Com. v. Merrill*, 8 Allen, 545.

It is true cases can be found holding that it is not necessary to plead former jeopardy where such fact appears upon the record in the case upon trial; but an examination of the cases so holding will demonstrate the fact that the courts in such cases apparently entirely overlooked the common-law rule, and no good reason, we believe, can be advanced in support of such doctrine. Former jeopardy is properly a plea in bar of the action, and it does not go to the merits. If such plea is well taken, it disposes of the case. It has nothing to do with the question of the guilt or innocence of the defendant.

For the reasons stated, we are of the opinion that the court did not err in refusing to direct a verdict of not guilty upon the ground of former jeopardy.

The third proposition discussed by *ap. L.R.A.1917A.*

pellant is that there was no valid jury impaneled and sworn to try the case, and therefore defendant was not accorded due process of law, as required by the Constitution of the United States and the laws of New Mexico; but the record disposes of this contention adversely to the appellant. After the second arraignment the record recites: "And now, the issues in the above-entitled cause being joined, both parties again announce themselves ready for trial, and now comes the jury as follows; to wit" (setting forth the same twelve jurors theretofore shown by the record to have been impaneled), and continues: "Twelve good and lawful men taken from the body of the county of Taos and territory of New Mexico, sworn to well and truly try the issues joined in the cause now pending, and a true verdict therein to render according to the law, the evidence, and the instructions of the court."

Appellant relies upon the fact that the jurors so selected and impaneled were the same jurors theretofore selected and dismissed by the court, so that the defendant could be rearraigned. There is nothing in the record to show but that such jury was selected in the manner required by law, and no objection or question appears to have been raised by appellant at the time.

The fourth ground assigned is that the court erred in refusing to grant appellant a continuance. The motion for a continuance was based upon the ground that appellant's counsel could not be present at the trial, and was supported by the affidavit of the attorney. It does not appear, however, that appellant could not procure other counsel fully capable of representing him, and in fact the record in this case shows that the defendant was ably defended, and it does not appear that he suffered in any manner by reason of the denial of such motion. The granting or denying of a motion for continuance is within the discretion of the trial court, and unless such discretion has been abused, to the injury of the defendant, the denial of such motion will not constitute error. A number of cases have been cited by counsel for appellant in his brief to sustain his position that it was error to overrule the motion for a continuance; but there are innumerable cases which show that a request for a continuance on the ground of the absence of certain counsel is not looked upon by the courts with favor. "Since the court trying the cause is from personal observation familiar with all the attendant circumstances, and has the best opportunity of forming a correct opinion upon the case presented, the presumption will be in favor of its action; and in no case will the exercise of this dis-

cretion be reviewed, where it manifestly appears that justice has been done without sacrificing the rights of the defendant." 9 Cyc. 168.

The absence of counsel was due to the fact that he was attending court held in another county in a civil case there pending. The following quotation will show that there was no abuse of discretion upon the part of the district court in overruling the motion for continuance upon such grounds. In the case of *Roberts v. People*, 9 Colo. 465, 13 Pac. 634, the court said in passing upon the denial of a motion for continuance on account of the absence of attorney for the defendant: "The judge of the criminal court cannot reasonably be required to postpone the business of his court in order to suit the convenience of lawyers who may desire to attend the sessions of other courts. Such a ruling could not be sustained on either principle or authority, and, if it could, the results would be detrimental to the public interests, and in many cases to the interests of suitors as well. It would in many instances interfere with the prompt despatch of business in the various courts, and tend to prolong their sessions, thus adding materially to the expenses thereof."

In *People v. Goldenson*, 76 Cal. 341, 19 Pac. 167, the court said: "To hold that a defendant charged with crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, and that the court, jury, and witnesses must await the convenience of his counsel in fulfilling other engagements, would be subversive of the prompt administration and execution of the laws, upon which depends largely their effectiveness, and subject the time and service of citizens serving the state gratuitously, as jurors and witnesses, to the wishes and interest of the attorney engaged in the defense. It is too apparent for argument that the court below must, in the nature of things, have some control over such matters; and, if it has any discretion, it is equally apparent that it was not used in this particular instance."

The case last cited would seem to be particularly applicable to the case at bar, in that, as held in other cases which will be cited, it was the business of counsel to know when there would be a term of court held in the county of Taos, or when an adjourned term thereof would be held. "The absence of counsel for the defendant in an adjoining county, attending court, is no ground for continuance. If it were, where terms of court conflict, continuances would be of frequent occurrence." *Van Horn v. State*, 5 Wyo. 501, 510, 40 Pac. 964, 966. L.R.A.1917A.

"In regard to the other cause for continuance, the absence of his leading counsel, such cause might under some circumstances be sufficient to demand the continuance of a case. But this case does not present such facts as would, we think, entitle defendant to a continuance for this reason, nor is it shown that he suffered any injury on account of the absence of his leading counsel. He was ably and faithfully represented on the trial of the case by other counsel, as the record abundantly attests." *Walker v. State*, 13 Tex. App. 645.

Appellant also assigns as error the giving by the court of certain instructions, and its refusal to give other instructions requested by the defendant. A reference to the record, however, shows that the instructions in the case were filed in the clerk's office on the 25th day of May, 1911, which is the date when the instructions were given. There is nothing to indicate any objection or exception to the instructions so given until two days thereafter, when a paper was filed in the clerk's office, purporting to be exceptions to the instructions. This court has held that, where instructions given by the court are objectionable to the defendant, the court's attention must be called to such objectionable instructions at the time they are given, so that the court can, in a proper case, correct the same. See *State v. Eaker*, 17 N. M. 479, 131 Pac. 489, decided at the present term of this court. The same doctrine was announced by the territorial supreme court. *Territory v. Caldwell*, 14 N. M. 535, 98 Pac. 167; *Territory v. Gonzales*, 14 N. M. 31, 89 Pac. 250; *Territory v. Watson*, 12 N. M. 419, 78 Pac. 504; *Territory v. O'Donnell*, 4 N. M. 196, 12 Pac. 743.

The same rule applies to requested instructions which the court refuses to give. It is the duty of the defendant, if he intends to predicate error upon such refusal, to except to the action of the court at the time in refusing to give such instructions. The theory upon which the doctrine announced by the court is based is that the attention of the court should be specifically called, by objection, to the error of its proposed action in giving or refusing to give instructions at the time of such giving or refusal, and the reason for such objection stated, so that the court may have the benefit of having pointed out to it the alleged errors, and the ground upon which the party predicates his claim. at the time, to correct and rectify the mistake. The filing of specific objections and exceptions two days, or at any time, after the jury has retired, is of no assistance to the court, and does not comply with the rule. For the reasons

stated, the court will not consider the claimed error as to such instructions.

It is next claimed that the court erred in its refusal to permit evidence of specific acts showing lawless and violent conduct on the part of the deceased. The well-established rule in this state is that in cases of homicide it is permissible to allow the defendant to show the general reputation of the deceased as to being a lawless and violent character, but not to permit evidence of specific acts on the part of the deceased. *United States v. Densmore*, 12 N. M. 99, 75 Pac. 31.

It is also made a matter of complaint that the court erred in admitting in evidence a portion of the skull of the deceased. The evidence discloses that there was another mortal wound upon the head of the deceased, while the portion of the skull produced showed only one of these mortal wounds; but there was no error on the part of the court in this regard, and the defendant has failed to show how he was prejudiced in any manner by such action of the court.

It is lastly urged that the court erred in admitting the evidence of the sheriff of Taos county as to a conversation with the defendant while defendant was in jail; the claim being made that the conversation was something in the nature of a confession, and that it was not shown to be voluntary. An examination of the record, however, discloses that the conversation testified to by the sheriff was practically the same as the evidence given in the case by the defendant himself. Such statement, so made by the defendant, did not tend to incriminate him in any manner, but was self-exculpatory, and defendant cannot predicate error thereon. Again, no evidence was presented, either upon cross-examination of this witness or by any other witness, that anything which the prisoner said was in consequence of duress or threats or promises, or otherwise than entirely voluntary.

Finding no error in the record, the judgment of the lower court is affirmed.

A motion for rehearing having been filed, *Roberts*, Ch. J., on July 21, 1913, filed the following additional opinion:

In the former opinion we say: "The defendant did not plead former jeopardy specially; neither did he raise it by motion, or call it to the attention of the court in any manner, prior to entering upon the trial of the case." This statement would seemingly indicate that the question could have been raised either by plea in bar or by motion, before entering upon the trial of the case; but the authorities cited imply that such question could only be raised by

a plea in bar. It is true some courts hold that such question can only be raised by a plea in bar, even where the defendant is being prosecuted under the same indictment upon which he contends he has already been placed in jeopardy; still, as contended by appellant here, we believe the question can be raised by motion, or in any other appropriate manner, where the defendant is being prosecuted upon the same indictment and the record in the case contains a recital of all the facts upon which defendant relies. While this is true, the question must be raised at the earliest opportunity. If the defendant has not been arraigned, it must be interposed upon arraignment; if he has already been arraigned, and no second arraignment is necessary, it must be raised before entering upon the trial of the case.

In this case the question appears of record in the same case, and no good reason exists for the interposition of a special plea. The record in this case discloses that the defendant did not raise the question of former jeopardy in any manner prior to entering upon the trial of the case, and only did so at the conclusion of the state's case by a motion for an instructed verdict. A very interesting discussion of the question will be found in a case note to the case of *State v. White*, 71 Kan. 356, 80 Pac. 589, reported in 6 Ann. Cas. 132. The annotator says: "It has been held in a number of cases that a person accused of crime waives his privilege of immunity from second jeopardy by failing to plead or otherwise set up the former jeopardy when he is arraigned in the second prosecution."

The text is supported by numerous adjudicated cases. In the Kansas case the court says: "When about to be placed in jeopardy before a second jury, the accused may, if he so desire, take the chances of a favorable verdict. Should he choose so to do, no one can gainsay him; but it is his duty to make his election then. If it be his purpose to rely upon his right to bar further proceedings, he should then so declare. He cannot hazard a trial, and when defeated revert to a matter which would have prevented a trial. Failing to interpose an objection to entering upon a second trial, he must be held to have waived the right to do so, and must abide the result that he invited."

To permit a defendant to sit idly by until he ascertain the strength of the state's case against him, and then permit him, should the state make out a strong case which he felt he could not overcome, to raise the question of former jeopardy, would be, as remarked by the Kansas court in the cases cited supra, to "sanction a practice which might be termed trifling with the court."

Therefore, after a careful review of the authorities, we are of the opinion that the question of former jeopardy may be raised, where the facts upon which such plea is based appear of record in the same case, by a plea in bar, or by a motion for discharge of the defendant, or by objecting to entering upon the second trial upon such ground, or in any other appropriate manner by which the matter is called to the attention of the trial court, but that such question must be

raised at the first opportunity. In this case, the question not having been raised until the state had concluded its case, it came too late, and the court properly overruled the motion for an instructed verdict.

For the reasons stated, the motion for rehearing is denied.

Affirmed by the Supreme Court of the United States, Dec. 11, 1916, in 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 107.

Annotation—Manner and time of raising defense of former jeopardy.

The right to have claim of former jeopardy determined in habeas corpus proceeding was covered by the note to *Hovey v. Sheffner*, 15 L.R.A.(N.S.) 227, and that question is here excluded.

The general rule.

The general rule is that the issue of former conviction, acquittal, or other jeopardy must be raised by special plea. *Rickles v. State* (1881) 68 Ala. 538; *De Arman v. State* (1884) 77 Ala. 10; *Bay-singer v. State* (1884) 77 Ala. 60; *Jordan v. State* (1886) 81 Ala. 20, 1 So. 577; *Burton v. State* (1896) 115 Ala. 1, 22 So. 585; *Mooring v. State* (1900) 129 Ala. 66, 29 So. 664; *Johnson v. State* (1901) 134 Ala. 58, 32 So. 724; *Roberson v. State* (1913) 183 Ala. 43, 62 So. 837; *Graham v. State* (1914) 11 Ala. App. 113, 65 So. 717; *People v. Bennett* (1896) 114 Cal. 56, 45 Pac. 1013; *People v. Strickler* (1914) 167 Cal. 627, 140 Pac. 270; *Re Allison* (1889) 13 Colo. 525, 10 L.R.A. 790, 16 Am. St. Rep. 224, 22 Pac. 820 (not a direct holding); *Guenther v. People* (1896) 22 Colo. 121, 43 Pac. 999 (there need be no exception taken to the overruling of the plea to perfect the appeal, and it is unnecessary to verify the plea where willingness to do so is expressed); *Hall v. State* (1898) 103 Ga. 403, 29 S. E. 915 (governed by statute); *Mance v. State* (1908) 5 Ga. App. 229, 62 S. E. 1053 (not a direct holding); *Sable v. State* (1914) 14 Ga. App. 816, 82 S. E. 379; *State v. White* (1905) 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132 (see same case, *infra*, as to exception to the rule); *Com. v. Olds* (1824) 5 Litt. (Ky.) 137 (not a direct holding); *Carter v. Com.* (1880) 2 Ky. L. Rep. 311 (abstract); *Shirley v. Com.* (1911) 143 Ky. 183, 136 S. W. 227 (plea authorized and form prescribed by statute; not a direct holding); *Fugate v. Com.* (1916) 171 Ky. 227, 188 S. W. 324; *State v. Barnes* (1851) 32 Me. 530; *State v. Hoylehan* (1912) 109 Me. 281, 83 Atl. 1106; *Com. v. O'Neil* (1892) L.R.A.1917A.

— *Mass.* —, 29 N. E. 1146 (statute cited); *Com. v. Merrill* (1864) 8 Allen (Mass.) 545 (statute cited authorizing the plea, but not requiring it); *Com. v. Chesley* (1871) 107 Mass. 223; *State v. Ireland* (1906) 89 Miss. 763, 42 So. 797; *State v. Baker* (1915) 264 Mo. 339, 175 S. W. 64; *People v. Benjamin* (1855) 2 Park. Crim. Rep. (N. Y.) 201; *People v. Signarale* (1888) 110 N. Y. 29, 17 N. E. 135 (this was the rule of the common law, and the Code of Criminal Procedure, §§ 333, 339, recognizes the rule); *People v. Cuatt* (1911) 70 Misc. 453, 126 N. Y. Supp. 1114 (applying the rule under the Code. See *People v. McGrath* (N. Y.) *infra*, for full explanation of the Code); *State v. Morgan* (1886) 95 N. C. 641; *State v. Barnes* (1915) 29 N. D. 164, 150 N. W. 557; *Com. v. Maher* (1883) 16 Phila. (Pa.) 451; *Zachary v. State* (1872) 7 Baxt. (Tenn.) 1; *Robinson v. State* (1886) 21 Tex. App. 160, 17 S. W. 632; *Samuels v. State* (1888) 25 Tex. App. 537, 8 S. W. 656; *Clement v. State* (1906) — Tex. Crim. Rep. —, 86 S. W. 1016; *De Leon v. State* (1908) 55 Tex. Crim. Rep. 39, 114 S. W. 828; *Lindley v. State* (1909) 57 Tex. Crim. Rep. 346, 123 S. W. 141; *Lee v. State* (1912) 66 Tex. Crim. Rep. 567, 40 L.R.A.(N.S.) 1132, 148 S. W. 567; *Re Maughan* (1889) 6 Utah, 167, 21 Pac. 1088; *Re Barton* (1889) 6 Utah, 264, 21 Pac. 998; *State v. Cross* (1898) 44 W. Va. 315, 29 S. E. 527; *TERRITORY v. LOBATO*, ante, 1226. There are also numerous cases not within the scope of this note, where the court proceeded upon the assumption that the general rule is correct. The Supreme Court of the United States in affirming *TERRITORY v. LOBATO* (1916) 242 U. S. —, 61 L. ed. —, 37 Sup. Ct. Rep. 107, did not pass upon the point here considered, but held that under the facts there was no merit in the defendants' claim of former jeopardy.

The New York Code of Criminal Procedure provides three kinds of pleas to

an indictment: (1) Guilty; (2) not guilty; (3) a plea of former judgment of conviction or acquittal of the crime charged, which may be pleaded with or without the plea of not guilty. It was held in *People v. McGrath* (1911) 202 N. Y. 445, 96 N. E. 92, that, where no judgment has been rendered on the former verdict, the provisions of the Code do not apply, but in such case "any objection on the record which clearly raises that issue at the outset of the second trial is sufficient as a plea in bar," for the reason that the guaranty against twofold jeopardy is a constitutional right.

A plea of former jeopardy, being a plea in bar, should not be pleaded simultaneously with a plea to the merits, but should precede such plea. *United States v. Hopkins* (1912) 228 Fed. 173.

Evidence as to former acquittal, conviction, or jeopardy of the defendant for the same offense cannot be admitted under the general issue, a special plea being a necessary prerequisite for the introduction of such evidence. *Jordan v. State* (1886) 81 Ala. 20, 1 So. 577; *Rickles v. State* (1881) 68 Ala. 538 (the record of the former proceedings is inadmissible); *Baysinger v. State* (1884) 77 Ala. 60; *Mooring v. State* (1900) 129 Ala. 66, 29 So. 664; *People v. Bennett* (1896) 114 Cal. 56, 45 Pac. 1013; *Hall v. State* (1898) 103 Ga. 403, 29 S. E. 915 (the plea was required by statute); *Taylor v. State* (1916) 17 Ga. App. 447, 87 S. E. 602; *State v. Barnes* (1851) 32 Me. 530; *State v. Ireland* (1906) 89 Miss. 763, 42 So. 797; *People v. Benjamin* (1855) 2 Park. Crim. Rep. (N. Y.) 201.

Exceptions to the general rule.

Some courts have made an exception to the rule where the record itself discloses all the facts upon which the claim of former jeopardy is based. In such case it has been held that, when the question is brought to the attention of the court, judicial notice of the facts contained in the record then before the court will be taken, rendering a plea containing the same facts unnecessary and superfluous. *State v. White* (1905) 71 Kan. 356, 80 Pac. 589, 6 Ann. Cas. 132; *People v. Harding* (1884) 53 Mich. 481, 19 N. W. 155; *People v. Taylor* (1898) 117 Mich. 583, 76 N. W. 158; *George v. State* (1899) 59 Neb. 163, 80 N. W. 486; *Jackson v. State* (1915) 11 Okla. Crim. Rep. 523, 148 Pac. 1058; *Foster v. State* (1888) 25 Tex. App. 543, 8 S. W. 664; *Richardson v. State*, 47 Tex. L.R.A.1917A.

Crim. Rep. 592, 85 S. W. 282; *Robinson v. State* (1886) 21 Tex. App. 160, 17 S. W. 632; *Riggs v. State* (1906) — Tex. Crim. Rep. —, 96 S. W. 25; *De Leon v. State* (1908) 55 Tex. Crim. Rep. 39, 114 S. W. 828 (In the Texas cases here cited the facts were such as to bring the cases within the exception stated in *Samuels v. State* (Tex.) *infra*, so that they may not be authority for the broader exception to which they are here cited); *TERRITORY v. LOBATO*. This exception strongly implies that the courts making it hold to the general rule, but only those passing directly upon that question have been cited under the general rule, *supra*.

Contra: *Carter v. Com.* (1880) 2 Ky. L. Rep. 311 (abstract) (facts were inserted in the indictment by the prosecutor with a view to increasing the punishment); *State v. Hoylehan* (1912) 109 Me. 281, 83 Atl. 1106 (the practice of setting up prior conviction by motion instead of by special plea is not to be encouraged, even if the prior conviction is shown by the record of the same court); *Samuels v. State* (1888) 25 Tex. App. 537, 8 S. W. 656 (the only exception is conviction of the lesser offense charged; then the plea of former acquittal of the higher offense, if a new trial is had is unnecessary). And the restriction noted in *Samuels v. State* (Tex.) *supra*, finds some support in *People v. Bennett* (1896) 114 Cal. 59, 45 Pac. 1013; *State v. Cross* (1898) 44 W. Va. 319, 29 S. E. 527.

And it was held in *State v. Conlin* (1855) 27 Vt. 318, that in a class of cases in the prosecution of which the statute provided that the complaint may be oral or informal, there need be no formal or special plea of former conviction, but evidence on that issue should be admitted under the plea of not guilty.

In *State v. Thomas* (1916) — Del. —, 97 Atl. 869, the court said: "We do not think the record is admissible to show former jeopardy in bar of the present prosecution, in the absence of a special plea setting up such a defense, as the record does not disclose on its face that the former acquittal relied upon was in the same prosecution now before the court."

General rule changed by some statutes.

It will be seen, *supra*, that the Codes of Practice enacted by many states leave the general rule unchanged; but the following cases show that it has been changed by statute in a few states:

Under the Illinois statute, which pro-

vides that "upon the arraignment of a prisoner it shall be sufficient, without complying with any other form, to declare orally, by himself or his counsel, that he is not guilty," a plea of former conviction is not necessary, since that issue is raised, so that evidence thereon must be admitted, by the general plea; hence a demurrer to such plea is properly sustained and the defendant cannot complain. *Hankins v. People* (1883) 106 Ill. 628.

In *People v. Brady* (1916) 272 Ill. 401, 112 N. E. 126, the court, in discussing the sufficiency of an indictment, said: "It is further contended the nature and cause of the accusation are not sufficiently stated in the indictment so as to enable the defendants to plead the judgment in bar of a subsequent prosecution for the same offense. Under the present practice, whether the indictment is for the same offense as that charged in a former indictment under which there has been a final judgment is not determined by an inspection and comparison of the indictments under a plea setting up the former judgment in bar. The defense of former acquittal or conviction may be made under the plea of not guilty, and on the trial the party accused and the particular offense may be shown by parol testimony. *Hankins v. People* (Ill.) *supra*; *Swalley v. People* (1886) 116 Ill. 247, 4 N. E. 379, 6 Am. Crim. Rep. 414; *Bartell v. United States* (1912) 227 U. S. 427, 57 L. ed. 583, 33 Sup. Ct. Rep. 383; *Morton v. People* (1868) 47 Ill. 468.

And under the Indiana statute, 2 *Gavin & H.* 413, § 97, which provides that "in all criminal prosecutions the defendant may plead the general issue orally, which shall be entered on the minutes of the court, and under it every matter of defense may be proved," former conviction may be proved under a plea of the general issue. *Clem v. State* (1873) 42 Ind. 420, 13 Am. Rep. 369; *Brinkman v. State* (1877) 57 Ind. 76; *Wilkinson v. State* (1877) 59 Ind. 416, 26 Am. Rep. 84, 2 Am. Crim. Rep. 596; *Danneburg v. State* (1863) 20 Ind. 181 (not a direct holding; the case was decided in 1863, and no mention is made of the statute); *Bryant v. State* (1880) 72 Ind. 400.

This statute, unlike the Illinois statute quoted *supra*, confers a privilege upon the defendant, and was not designed to take away from him his right to enter a special plea of any defense that he could have so pleaded before its enactment; hence it is error to refuse to ac-

cept a special plea of former acquittal if it is tendered. *Clem v. State* (Ind.) *supra*. But the later Indiana statutes have been interpreted in this respect like the Illinois statute; *Williams v. State* (1907) 169 Ind. 384, 82 N. E. 790; *Lucas v. State* (1909) 173 Ind. 302, 90 N. E. 305.

Where an examination had been held before a magistrate according to statute and the accused discharged, it was held in *Morrissey v. People* (1863) 11 Mich. 327, that the facts may be proved by the defendant in bar of the prosecution, under the plea of not guilty. This decision, however, seems to be based upon the fact that the statute does not permit informations to be filed after accused has been discharged upon his preliminary examination, and none of the judges considered the question of former acquittal.

Under a Penal Code which provided but three kinds of pleas to an indictment, i. e., "guilty," "not guilty," and "a former judgment of acquittal or conviction of the offense charged," it was held in *People v. Cage* (1874) 48 Cal. 323, 17 Am. Rep. 436, that the defense of former jeopardy without either conviction or acquittal must be taken advantage of under one or the other of these pleas; hence under the plea of "not guilty" evidence of such former jeopardy could be admitted by virtue of another section which provided that all matters of fact tending to establish a defense other than that specified in the three kinds of pleas may be given in evidence under the plea of not guilty.

In *People v. Stoll* (1904) 143 Cal. 689, 77 Pac. 818, where the trial court had exceeded its jurisdiction in directing an acquittal upon the opening statement by the prosecuting attorney, and the appeal was by the people, it was held that the appellate court would not decide the question of former jeopardy raised by the defendant, but would reverse the decision and order a new trial, at which the plea of former jeopardy might be entered and considered.

Time when issue must be raised.

As a general rule, the issue of former acquittal, conviction, or other jeopardy *should* be raised before going to trial on the general issue, assuming that it cannot be tried under the general issue, and practically all courts hold that it *must* be raised at that stage of the trial, unless there are circumstances that make it inappropriate at that time and appropriate at another time.

But it has been held that the plea may be filed after the jury has been impaneled and the plea of not guilty entered. *Pizano v. State* (1886) 20 *Tex. App.* 139, 54 *Am. Rep.* 511.

The failure to enter a special plea of former jeopardy, or in some way raise the issue, operates as a waiver of the right to interpose the objection. *Jordan v. State* (1886) 81 *Ala.* 20, 1 *So.* 577; *Johnson v. State* (1901) 134 *Ala.* 58, 32 *So.* 724; *Roberson v. State* (1913) 183 *Ala.* 43, 62 *So.* 837; *Re Allison* (1889) 13 *Colo.* 525, 10 *L.R.A.* 790, 16 *Am. St. Rep.* 224, 22 *Pac.* 820; *Hill v. State* (1871) 41 *Ga.* 484, cited in *Hall v. State* (1898) 103 *Ga.* 403, 29 *S. E.* 915; *State v. White* (1905) 71 *Kan.* 356, 80 *Pac.* 589, 6 *Ann. Cas.* 132; *Powers v. State* (1903) 83 *Miss.* 691, 36 *So.* 6; *State v. Webb* (1881) 74 *Mo.* 333; *Johnson v. State* (1888) 26 *Tex. App.* 631, 10 *S. W.* 235; *Barton v. State* (1898) — *Tex. Crim. Rep.* —, 43 *S. W.* 987; *Re Barton* (1889) 6 *Utah*, 264, 21 *Pac.* 998; also see cases cited *infra*.

After a plea of "not guilty" and a plea of "former jeopardy," the withdrawal of the not guilty plea and the entry of a plea of "guilty" operate as a waiver of the plea of former jeopardy, and the defendant cannot then raise that issue on motion for arrest of judgment. *People v. Strickler* (1914) 167 *Cal.* 627, 140 *Pac.* 270.

In *Powers v. State* (1903) 83 *Miss.* 691, 36 *So.* 6, it was said that there is great force in the argument that, where the attention of the court is not called to a special plea of former acquittal filed in the case, but the defendant enters the plea of not guilty and proceeds to trial, there is an implied withdrawal of the special plea. However, in the case before the court the special plea had been overruled, but no entry of the ruling made, and the trial court had ordered the entry *nunc pro tunc*; so the decision rests upon the broader ground of merit.

Where the defendant, after filing a plea of former acquittal, goes to trial on the general issue without further invoking any action of the court on the special plea, such plea is properly treated as abandoned. *Norwood v. State* (1907) 3 *Ga. App.* 325, 59 *S. E.* 828.

But it was held in *Gillespie v. State* (1906) 168 *Ind.* 298, 80 *N. E.* 829, that the defendant, having once properly presented to the trial court the question of his former jeopardy with a demand for his discharge, need not repeat the demand in order to save his rights on *L.R.A.* 1917A.

appeal; the court in this case, however, had ruled on the question.

In *Tomasson v. State* (1903) 112 *Tenn.* 596, 79 *S. W.* 802, it was held that, where the accused objected to the illegal discharge of two jurors and the filling of the vacant places, he did not, by asking, after his objections had been overruled, for a new venire, waive his right to plead former jeopardy.

The issue cannot be first raised on appeal. *Reed v. State* (1912) 103 *Ark.* 391, 147 *S. W.* 76, *Ann. Cas.* 1914B, 811; *Mooring v. State* (1900) 129 *Ala.* 66, 29 *So.* 664; *Phillips v. State* (1914) 73 *Tex. Crim. Rep.* 317, 164 *S. W.* 1004.

Nor can it be raised for the first time on motion for arrest of judgment or on motion for a new trial. *Graham v. State* (1914) 11 *Ala. App.* 113, 65 *S. W.* 717; *People v. Bennett* (1896) 114 *Cal.* 58, 45 *Pac.* 1013; *State v. Durein* (1904) 70 *Kan.* 1, 15 *L.R.A.(N.S.)* 908, 78 *Pac.* 152, rehearing in (1904) 70 *Kan.* 13, 15 *L.R.A.(N.S.)* 925, 80 *Pac.* 987; *State v. Washington* (1876) 28 *La. Ann.* 129; *State v. Morgan* (1886) 95 *N. O.* 641; *State v. Barnes* (1915) 29 *N. D.* 164, 150 *N. W.* 557; *State v. Houghton* (1904) 45 *Or.* 110, 75 *Pac.* 887, cited with approval in *Gue v. Eugene* (1908) 53 *Or.* 282, 100 *Pac.* 254; *Com. v. Maher* (1883) 16 *Phila. (Pa.)* 451; *Pickett v. State* (1901) 43 *Tex. Crim. Rep.* 1, 63 *S. W.* 325; *Lee v. State* (1912) 66 *Tex. Crim. Rep.* 567, 40 *L.R.A.(N.S.)* 1132, 148 *S. W.* 567; *Barton v. State* (1898) — *Tex. Crim. Rep.* —, 43 *S. W.* 987 (the offer was made after verdict on what purported to be a motion for a new trial); *Hill v. State* (1916) — *Tex. Crim. Rep.* —, 186 *S. W.* 769.

And, although a statute allows proof of former acquittal to be admitted under the general issue, that issue cannot be raised by motion in arrest of judgment. *Dalton v. People* (1906) 224 *Ill.* 333, 79 *N. E.* 669; *People v. McGinnis* (1908) 234 *Ill.* 68, 123 *Am. St. Rep.* 73, 84 *N. E.* 687.

The issue cannot be raised after testimony has been received on the general issue. *Hall v. State* (1898) 103 *Ga.* 403, 29 *S. E.* 915; *State v. White* (1905) 71 *Kan.* 356, 80 *Pac.* 589, 6 *Ann. Cas.* 132; *Logan v. State* (1906) — *Miss.* —, 40 *So.* 323; *McNulty v. State* (1903) 110 *Tenn.* 482, 75 *S. W.* 1015, 15 *Am. Crim. Rep.* 302 (unless accompanied by an affidavit setting out good and sufficient reasons why the plea was not filed at the beginning of the case); *Murray v. State* (1909) 56 *Tex. Crim. Rep.* 438, 120 *S. W.* 437. In this last case the verdict in the

first trial was returned during the trial on the second indictment, and the court held that the trial court did not err in rejecting the plea of the former acquittal at that stage of the trial; that defendant should have asked a postponement of the second trial if he wished to await the verdict of the other trial. But see other cases, *infra*, on this situation.

But in *Howard v. State* (1903) 83 Miss. 378, 35 So. 653, it was held that the trial court ought to have allowed a plea of former conviction which was offered after the trial had proceeded "for some length." But see *Logan v. State* (1906) — Miss. —, 40 So. 323, a later Mississippi case.

After the case has been argued to the jury and the court has started to give the charge, it is too late to enter a plea of former jeopardy. *People v. Solani* (1907) 6 Cal. App. 103, 91 Pac. 654.

But it is reversible error for the court to limit the time for the preparation of the plea of former jeopardy to fifteen minutes, against the objection of defendant's attorney, and then strike it out on the motion of the prosecuting attorney on the ground that it was presented too late, the court having proceeded with the trial and the state having taken the testimony of several witnesses when the plea was completed and offered. *Coon v. State* (1886) 21 Tex. App. 332, 17 S. W. 351.

In *People v. Stewart* (1883) 64 Cal. 60, 28 Pac. 112, where, after the jury was sworn and some evidence had been taken, a juror was excused on account of sickness, necessitating a beginning

de novo, it was held that the court should have permitted pleas of former acquittal and former jeopardy offered by the defense; but the appellate court refused to decide whether the judgment would have been reversed because of the refusal to permit the pleas, if there had been no other ground for the reversal.

And it has been held that, though a statute requires a special plea of former conviction, the plea must be allowed after all the evidence has been introduced, where the trial resulting in the conviction was pending during the second trial, and conviction did not take place until then, for the reason that the plea was offered as soon as the opportunity was presented. *Pearce v. Com.* (1883) 5 Ky. L. Rep. 407. But see *Murray v. State* (Tex.) *supra*.

And it was held in *Wadley v. State* (1909) 96 Miss. 77, 50 So. 494, that in a case where it takes the state's testimony to develop the appropriateness of the plea,—where the date of an offense which could be a continuing one was left blank in the indictment,—the plea of former conviction must be allowed at that stage of the trial when the identity of the offense is revealed, even though the state had introduced evidence. The court says that it is the best practice to plead at the opening of the trial, but that there is no rule of pleading that makes the practice imperative.

And it was held in *State v. Martin* (1872) 30 Wis. 222, 11 Am. Rep. 567, that, where there has been no arraignment upon the second trial, the right to plead former jeopardy is not lost.

J. W. M.

WASHINGTON SUPREME COURT. (Department No. 1.)

LOTTIE B. ALGOE, Appt.,
v.

PACIFIC MUTUAL LIFE INSURANCE
COMPANY OF CALIFORNIA, Resp't.

(91 Wash. 324, 157 Pac. 993.)

Insurance — borrowing on policy —
lapse — extended insurance.

1. The fact that money borrowed by an insured upon his policy remains unpaid when the policy lapses for nonpayment of premiums does not prevent the operation of the provision for the automatic extension of the policy for the period which the

Note. — For effect of loan as working forfeiture of option under policy of insurance, see annotation following this case, post, 1241 L.R.A.1917A.

amount of reserve would purchase, the extension clause containing a condition for "any indebtedness being repaid" and the deduction of accrued premiums from the face of the policy upon settlement, if the policy also provides that indebtedness to the company shall be deducted in any settlement of the policy, so that the face of the policy, and not the reserve, is set apart for repayment of the loan.

For other cases, see *Insurance*, III. c, in Dig. 1-52 N. N.

Same — provision of loan contract — effect on terms of policy.

2. A provision in a contract between an insured and the insurer for a loan on the policy, that in case of default in payment of premiums the reserve shall be applied in payment of the loan and the overplus applied to the purchase of a single payment paid-up policy, does not, in case the insured dies before the application is made, prevent the

operation of a provision in the policy for automatic extension of the insurance for the term purchasable by the policy reserve. *For other cases, see Insurance, III. c, in Dig. 1-52 N. S.*

(June 1, 1916.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in her favor, for less than the sum demanded, in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Zent, Powell, & Redfield, for appellant:

The acts and statements of the insurance company were, in their legal effect, a waiver of any forfeiture resulting from nonpayment of premium.

Titus v. Glens Falls Ins. Co. 81 N. Y. 410; Washburn v. Union Cent. L. Ins. Co. 143 Ala. 485, 38 So. 1011; Mettner v. Northwestern Nat. L. Ins. Co. 127 Iowa, 205, 103 N. W. 112; Illinois Life Asso. v. Wells, 200 Ill. 445, 65 N. E. 1072; New England Mut. L. Ins. Co. v. Springgate, 129 Ky. 627, 19 L.R.A.(N.S.) 227, 112 S. W. 681, 113 S. W. 824; Murray v. Home Ben. Life Asso. 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309; Veal v. Security Mut. L. Ins. Co. 6 Ga. App. 721, 65 S. E. 714; Bennett v. Union Cent. L. Ins. Co. 203 Ill. 439, 67 N. E. 971; Occidental L. Ins. Co. v. Jacobson, 15 Ariz. 242, 137 Pac. 869; Galliher v. State Mut. L. Ins. Co. 150 Ala. 543, 124 Am. St. Rep. 83, 43 So. 833; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; Chicago L. Ins. Co. v. Warner, 80 Ill. 410; Equitable Life Assur. Soc. v. Ellis, 105 Tex. 526, 147 S. W. 1152, 152 S. W. 625; 25 Cyc. 858; Security Mut. L. Ins. Co. v. Riley, 157 Ala. 553, 47 So. 735; Gafford v. Globe Transfer & Storage Co. 71 Wash. 204, 128 Pac. 228; Elhart v. Pacific Mut. L. Ins. Co. 47 Wash. 659, 92 Pac. 419.

Mr. Winfield R. Smith, for respondent:

Repayment of the policy loan is a condition precedent to extended insurance.

Drury v. New York L. Ins. Co. 115 Ky. 681, 61 L.R.A. 714, 103 Am. St. Rep. 351, 74 S. W. 663; Union Cent. L. Ins. Co. v. Buxer, 62 Ohio St. 385, 49 L.R.A. 737, 57 N. E. 66; Northwestern Mut. L. Ins. Co. v. Barber, 92 Ky. 427, 15 L.R.A. 449, 17 S. W. 796; Equitable Life Assur. Soc. v. Evans, 25 Tex. Civ. App. 563, 64 S. W. 74; Universal L. Ins. Co. v. Devore, 88 Va. 778, 14 S. E. 532; McLaughlin v. Equitable L. Assur. Soc. 38 Neb. 725, 57 N. W. 557; Sheerer v. Manhattan L. Ins. Co. 20 Fed. 886; Coffey v. Universal L. Ins. Co. 10 L.R.A.1917A.

Biss. 354, 7 Fed. 301; Inloes v. Prudential Ins. Co. 109 Mo. App. 104, 82 S. W. 1089; Universal L. Ins. Co. v. Whitehead, 58 Miss. 226, 38 Am. Rep. 322.

The year for which the insurance had been paid, and the thirty days of grace, had passed. The policy thereupon lapsed automatically.

Iles v. Mutual Reserve L. Ins. Co. 50 Wash. 49, 18 L.R.A.(N.S.) 902, 96 Pac. 522; Roehner v. Knickerbocker L. Ins. Co. 63 N. Y. 160; Hudson v. Knickerbocker L. Ins. Co. 28 N. J. Eq. 167; New York L. Ins. Co. v. Statham, 93 U. S. 24, 30, 23 L. ed. 789, 791, 19 Am. Rep. 512; Behling v. Northwestern Nat. L. Ins. Co. 117 Wis. 24, 93 N. W. 800; Ashbrook v. Phoenix Mut. Ins. Co. 94 Mo. 72, 6 S. W. 462.

The insured's rights (except certain conditional rights of which he took no advantage) were gone, and in order to restore them it would be necessary to create them anew. This would require either a new contract with new consideration, or some action by the insured on some representation of the company which would give rise to an estoppel.

Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631; Hubbard v. Mutual Reserve Fund Life Asso. 80 Fed. 681; Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 326, 333, 24 L. ed. 387, 390; Burdick v. Security Life Asso. 77 Mo. App. 629; Morris v. Orient Ins. Co. 106 Ga. 472, 33 S. E. 430; United Firemen's Ins. Co. v. Thomas, 47 L.R.A. 450, 27 C. C. A. 42, 53 U. S. App. 517, 82 Fed. 406.

In order to reinstate an expired policy, unless by contract, the elements of estoppel must all be present.

Mettner v. Northwestern Nat. L. Ins. Co. 127 Iowa, 205, 103 N. W. 112; Illinois Life Asso. v. Wells, 200 Ill. 445, 65 N. E. 1072; New England Mut. L. Ins. Co. v. Springgate, 129 Ky. 627, 19 L.R.A.(N.S.) 227, 112 S. W. 681, 113 S. W. 824; Murray v. Home Ben. L. Asso. 90 Cal. 402, 25 Am. St. Rep. 133, 27 Pac. 309.

Ellis, J., delivered the opinion of the court:

Action to recover on a \$5,000 twenty-year life insurance policy. The case was tried on a statement of agreed facts. The policy was issued on February 15, 1902, to Otis Lee Algoe, payable to the plaintiff, his wife. The annual premium was \$217.50, payable on February 15th. All premiums up to and including that falling due February 15, 1913, were paid. On January 28, 1913, the insured obtained a loan of \$1,477 from defendant upon the policy, executing at the time a loan contract and delivering the policy to defendant, in whose posses-

sion it still is. The annual premium on the policy and the annual interest in advance on the loan, both of which fell due on February 15, 1914, were never paid. The insured died April 15, 1914. Defendant was immediately notified of that fact. The reserve value of the policy at that time was \$1,640.80. There was also an unpaid dividend of \$34.75. Defendant thereafter applied this reserve value in payment of its loan of \$1,477, and entered the remaining \$163.80 of the reserve as payment in full for \$270 of paid-up nonparticipating insurance upon the life of the insured at his then age. No policy was issued, but defendant admits that this \$270 is owing to plaintiff. That sum was tendered before commencement of this action, but was refused. The court found that the \$270 had been deposited in the registry of the court, and so remained and entered judgment for plaintiff in that sum, less the sum of \$18, costs. Plaintiff appeals.

Stated in their natural order appellant's contentions are: (1) That the policy was by its terms in force for the full sum of \$5,000 at the time of the death of the insured; (2) that the insurer in any event waived the default in payment of the premium. If the first claim is correct, the second need not be considered. The first claim must be determined from the terms of the contract of insurance and the terms of the loan contract. This involves the construction of the application (referred to in and made a part of the policy), the policy itself, and the loan agreement. The application provides: "That such policy shall lapse and be void if any premium or instalment thereon is not paid as therein provided, and that then all previous payments shall be forfeited to the company, except as therein otherwise provided."

Among the conditions of the policy are the following:

"Incontestability.—This policy shall be indisputable, after two years from its date of issue, for the amount due, provided the premiums are duly paid. . . .

"Loans.—After premiums have been paid upon this policy for not less than three full years, the party having the right of surrender hereunder may borrow upon it, in accordance with the rules and regulations of the company, 75 per cent of its cash value at the time the loan is requested. Any indebtedness to the company, from the insured, beneficiary, or assignee, shall first be deducted in any settlement of this policy.

"Values and Additions.—If all the annual dividends apportioned to this policy are used for the purchase of additional insurance thereto, then and in that case the values, respectively, of this policy shall be L.R.A.1917A.

not less than stipulated in the 'schedule of policy values' below; provided, that in event of termination by 'surrender value' under said schedule, this policy shall be duly surrendered to the company while in force, or within three months of its date of lapse, and that all indebtedness above mentioned shall first be repaid."

Then follow schedules of policy values and surrender values and further provisions as follows:

"If any dividend is withdrawn or used in reduction of premium payment, this policy will nevertheless be entitled to one of the following values: (1) After payment of premiums for three full years, if duly surrendered to the company while in force or within three months of its date of lapse, any indebtedness being then repaid, to full paid nonparticipating life insurance in amount equal to as many twentieth parts of the principal sum of this policy as there have been full annual premiums paid hereon, together with any existing additions by dividend. . . .

"Extension Condition.—After this policy has been in force three full years, should it lapse and not be surrendered as provided above, the full amount of the policy at date of lapse, any indebtedness being repaid within three months thereafter, will be extended, without request or demand therefor, as nonparticipating term insurance, but only for the period specified in the 'schedule of extended insurance' following: Provided, that the said term insurance shall be based upon completed insurance years only, and that if the insured dies within three years from such lapse, all unpaid premiums, with interest at 6 per cent per annum, shall be deducted from the amount insured."

It is a stipulated fact that "the net value of the said policy above indebtedness was sufficient so that if applied at or after February 15, 1914, to the purchase of \$5,000 of nonparticipating term insurance upon the life of the insured, the said term insurance would have been in force at and beyond the time of his death."

It seems to be conceded that, under the provisions of the policy proper, the first condition above quoted, and the application, the policy automatically lapsed thirty days after a failure of the insured to pay any premium when due (subject to the provisions for realization of surrender value by surrender of the policy "all indebtedness being first repaid" within three months after such lapse), unless the policy for the full sum of \$5,000 was automatically kept alive by the "extension condition" last above quoted.

The appellant argues that, inasmuch as there was a reserve value in excess of the

loan sufficient to carry the policy beyond the death of the insured, the policy was automatically extended for the full amount. This is based upon the fact that extension is to be made "without request or demand." The respondent contends that the payment of the loan was a condition precedent to the right to extend insurance because of the last provision of the extension condition that "if the insured dies within three years from such lapse, all unpaid premiums, with interest at 6 per cent per annum, shall be deducted from the amount insured."

That because of this provision the insured had no right to set off against his loan the reserve value of his policy and have the remainder applied to the purchase of extended insurance. There would be some force in this claim were this the only thing in the policy touching the subject, but the loan provision of the policy itself, which we have quoted, declares that "any indebtedness to the company, from the insured, beneficiary or assignee, shall first be deducted in any settlement of this policy."

This negatives the idea that the payment of the loan is a condition precedent to the assertion of any other rights of the insured or beneficiary under the policy. This loan provision of the policy is the basis of the right to demand a loan, on the one hand, and the right to take a pledge of the policy to secure the loan, on the other. It must therefore be read into the loan agreement as one of its terms. The status of the policy and the rights of the parties thereunder became fixed as of the date of the death of the assured. Among those rights was, the right of the beneficiary to extend insurance, a right not forfeitable for nonpayment of premiums. At that time there stood to the credit of the assured, which of course survived to the credit of the beneficiary, a reserve value in the sum of \$1,640.80. This is conceded. The policy not having been surrendered and its cash value collected nor converted into paid-up nonparticipating term insurance as provided in the condition as to "values and additions" above quoted, there can be no doubt that had there been no loan the whole of this reserve would have been automatically applied in extending the insurance for the full face of the policy. This must be and is conceded. This automatic extension, being expressly declared to attach "without request or demand therefor," would have attached as a fixed right immediately on the lapse of the policy for nonpayment of premiums without surrender of the policy. The question is thus reduced to this: Was there any indebtedness due from the insured to the insurer at the date of the lapse? Technically yes, but there was a reserve to his credit sufficient

to meet it. As said by another court in answer to the same claim as that of respondent here: "As it seems to us, there was no indebtedness due from the insured to the insurer when the policy lapsed on October 26, 1907, but, on the contrary, the company was, after deducting the indebtedness of the insured to it, due the insured a balance of \$42.22, an amount sufficient to purchase an extended insurance for a period beyond his death, and he had not applied for paid-up insurance for the amount of this balance, and that by the very terms of the contract between the parties the insured had the right to rely, as doubtless he did, upon the provision contained in clause 2d of his policy, that he should be entitled to have the balance to his credit with the insurer applied to the purchase of extended insurance, unless he demanded paid-up insurance and surrendered his policy." *Stratton v. New York L. Ins. Co.* 115 Va. 257, 264, 78 S. E. 636, 638.

So, here the insurer had in its hands a reserve of \$1,640.80 to the credit of the insured. The three months after lapse within which the loan might be paid and the insurance automatically extended had not expired. The insurer could no more refuse to apply this in payment of the loan and apply the surplus to extended insurance, than it could have refused a tender of the amount of the loan from any other funds of the insured and so avoid the automatic extension. This follows from the specific direction in the loan provision of the policy that any indebtedness shall be deducted in any settlement of the policy. "Any other construction would be a 'snare to the unwary.'" *Stark v. John Hancock Mut. L. Ins. Co.* 176 Mo. App. 574, 159 S. W. 753. By the very terms of the policy the insured, when he found he could not pay the premium, had the right to rely upon this course and the consequent automatic extension of his insurance for the full amount and for such time as the surplus would pay for. While the surrender of the policy and the payment of premiums within three months after lapse may be regarded as a condition precedent to the right to demand the cash value of the policy or paid-up term insurance, this is because the right to so elect was in the insured and could only be so asserted. It does not follow that the payment of the loan from other sources than the reserve is a condition precedent to the right to extended insurance. That is a right which accrued automatically without any affirmative act of election. Such seems to us a reasonable construction of the policy. The extension condition is, to say the least, ambiguous, and needlessly so. Its words were of the insurer's selection. *Life*

insurance is, in its nature, complex and difficult for the layman to understand. Policies are prepared by experts, who know and can anticipate the bearing and possible complications of every contingency. So long as insurance companies insist upon the use of ambiguous, intricate, and technical provisions which conceal, rather than frankly disclose, their own intentions, the courts must, in fairness to those who purchase insurance, construe every ambiguity in favor of the insured. *Mathews v. Modern Woodmen*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483. As said in *Stark v. John Hancock Mut. L. Ins. Co.* supra, in answer to the same contention as that advanced by the company here: "If it had been the intention of the company to render nugatory its promise to continue the policy as paid-up insurance after two premiums had been paid, in the event there was existing indebtedness, it would have been easy to say so in unambiguous, unequivocal language."

We hold that under this policy itself the fact of the loan did not forfeit the right to extended insurance for the full amount of the policy.

Nor do we find that the loan contract gave the right to the insurance company to forfeit this extended insurance after the death of the insured. The loan contract does provide that "upon any default hereunder in premium or interest, after delaying not less than thirty days from default (demand and notice being waived), the company may terminate said policy and obtain the amount due on said sums by deducting and retaining the same from the reserve on said policy, and the overplus, if any, shall at once be applied as a single premium of life insurance, at the present published rates of the company, to the purchase from the company, upon the life of said insured, at insured's age at such due date, of fully paid-up insurance for such amount as such overplus will so buy, payable under the same conditions as said original policy, but without premium return or participation in profits or further pay-

ment of premiums, and thereupon said pledged policy and all provisions and insurance thereunder are canceled and surrendered to the company."

This was intended only as furnishing to the company a means of foreclosing the lien on the policy by canceling the policy prior to a loss thereon incurred by death of the insured. It was never intended as a forfeiture of rights or of the cancellation of a liability which had become vested and accrued by the death of the insured. *Stratton v. New York L. Ins. Co.* supra; *Drury v. New York L. Ins. Co.* 115 Ky. 681, 61 L.R.A. 714, 103 Am. St. Rep. 351, 74 S. W. 663. No foreclosure was then necessary or possible. The loan provision of the policy itself takes care of that contingency. It provides, as we have seen, that any indebtedness to the company from the insured, beneficiary, or assignee shall first be deducted in any settlement of this policy. In the *Stratton Case* judgment was awarded for the full amount of the policy, without any deduction of the amount of the loan, apparently on the theory that the loan had been paid in the reduced period of risk. We are not satisfied with the soundness of that view. Had there been no lapse of the policy, the appellant could only have recovered the amount of the policy, less the amount of the loan. At any rate, the appellant admits, both in her complaint in the court below and in her brief in this court, that the amount of the loan should be deducted from the amount due in settlement of the policy.

The judgment is reversed and the cause is remanded, with direction to enter judgment for appellant in the sum of \$5,034.75, with interest from May 23, 1914, the date of proof of death, less the amount of the outstanding loan, and accrued interest thereon at 6 per cent per annum, and less, also the amount of the unpaid premium and interest thereon at 6 per cent per annum.

Morris, Ch. J., and Mount, Chadwick, and Fullerton, JJ., concur.

Annotation—Insurance: effect of loan as working forfeiture of options under policy.

The cases collected in this note have considered the effect of a loan to insured by insurer on the security of his policy, as working a forfeiture of any of the rights granted to him by provisions of the policy in case of default in premium or on the loan.

Cases which have considered the question as to whether such a loan operates to reduce the cash surrender value or the

term of extended insurance will be found in note to *Emig v. Mutual Ben. L. Ins. Co.* 23 L.R.A.(N.S.) 828.

As to whether option provisions in policy of life insurance operate automatically, see note to *Jones v. Provident Sav. L. Assur. Soc.* 25 L.R.A.(N.S.) 803.

The fact that insured has obtained a loan upon a policy will not deprive beneficiary of the right to extended insurance

provided for by the nonforfeiture clause of the policy, where, upon insured's default in the payment of interest on the loan and of premium on the policy, the company failed to exercise its right of foreclosure, as provided for by the loan agreement upon default, prior to the death of the insured, and so the policy had become a death claim against the company. *McEachern v. New York L. Ins. Co.* (1914) 15 Ga. App. 222, 82 S. E. 820.

Incurring the debt, the court said, did not extinguish the policy or any part thereof. Insured did not sell the policy to the company, he simply pledged it as security. All rights guaranteed him by the policy continued, subject to the company's right to have the debt paid and its power to foreclose the pledge for that purpose. A foreclosure of the pledge, the court stated further, under terms of the loan agreement, required some affirmative action on the part of the insurer amounting to a compliance with the stipulations contained in that contract, sufficient to show that the pledge was in fact foreclosed in accordance with the method specified in the agreement; and so, having failed to exercise its option to foreclose prior to the death of the insured, it was too late after his death, when the policy has become a death claim.

So, also, under a policy which provides that any indebtedness to the company shall be deducted in the settlement of the policy, the fact that a loan has been obtained will not, on default of premium, preclude the right to an extended insurance, although the provisions of the loan agreement may have intended that, upon default in payment of loan or interest, the policy shall be foreclosed, and upon foreclosure the only privilege remaining in the insured would be the right to paid-up insurance, where no effort is made to foreclose the policy until a loss is suffered by death of the insured. *Stratton v. New York L. Ins. Co.* (1913) 115 Va. 257, 78 S. E. 636.

The court stated that "we are unable to appreciate the force of the argument on behalf of the defendant in error, that the 'loan agreement' changed the contractual relations between the insured and the insurer. This agreement does provide that, if default should be made in the payment of any premium on the policy, or any interest on the loan, on the date when due, the defendant in error, without demand or notice of any kind, might deduct the amount due on

the loan from the reserve on the policy computed as stipulated for in the agreement, and the balance of the reserve fund so computed would be taken as a single premium of life insurance at the published rates of the company, and shall be applied to the purchase of paid-up or extended insurance upon the life of the insured under said policy, at the age of said insured on said due date, payable under the same conditions as the original policy, without premium return, participation in profits, or further payment of premiums; but the purpose of this 'loan agreement' was doubtless intended as providing a method of collecting and securing to defendant in error, the insurer, the loan of \$100, which method was by foreclosure of the policy, and upon foreclosure the only privilege remaining in the insured was the right to paid-up insurance for an amount to be computed by the insurer after the indebtedness had been deducted from the reserve value of the policy. We cannot construe this 'loan agreement' as a waiver on the part of the insured, either expressly or impliedly, of any of his 'nonforfeiture' privileges under the policy, but these privileges, as it seems to us, remained intact to the insured, subject, however, to the right of the insurer to cancel and foreclose the policy whenever it chose so to do after default in the payment of any premium past due and owing on the policy, or in the payment of interest due on the loan made thereon; but again it is to be observed that defendant in error did not avail itself of this right and did not attempt the foreclosure of the policy until after it had incurred a loss thereon by reason of the death of the insured weeks before any action towards a foreclosure of the policy was taken, and after it had treated the policy as in full force and had endeavored to collect the 'blue note' taken for unpaid premiums, or to get from the insured renewals of this note. The foreclosure of the policy was neither automatically effected on October 26, 1907, upon the failure of the insured to pay the 'blue note' due on that date, nor was it effected on that date, or after, and before the death of the insured by any affirmative action on the part of the defendant in error. To effect a foreclosure of a policy some affirmative act was required on the part of the defendant in error." And see *ALGOE v. PACIFIC MUT. L. INS. CO.* ante, 1237, which held that the fact of the loan did not forfeit the right to extended insurance for the full amount of the policy; the court stating that the loan

agreement was intended only as furnishing a means of foreclosing the lien on the policy by canceling the policy prior to a loss incurred by insured's death.

Where an insurance policy is assigned as collateral security for the payment of a note given for a loan obtained from the insurance company by insured, the note bearing the statement that the policy is assigned and surrendered to the company for cancellation in satisfaction of the note and in settlement of the cash-surrender value of the policy, the insurance company, on failure of insured to pay the note at maturity, has not the arbitrary right to forfeit or cancel the policy at its own option, and certainly not upon such an inequitable basis as would deprive the insured of any part of the cash-surrender value of the policy in liquidating his debt if it had such value over and above the debt. *Mutual L. Ins. Co. v. Twyman* (1906) 122 Ky. 513, 121 Am. St. Rep. 471, 92 S. W. 335, 97 S. W. 391. The court stated that when insured failed to pay the note according to the terms of the contract, the company, instead of treating such failure as a forfeiture of the assigned policy, and without his consent arbitrarily fixing his cash-surrender value, should, like any other creditor holding a debt secured by a lien, have resorted to a court of equity for the enforcement of its right; and although in an action for such a purpose a decree for the sale of the policy, as other collateral or mortgaged property may be sold, would not be allowed, the sale of a policy of insurance in that way being forbidden by law, the court could decree its cancellation upon allowing to the insured its full cash-surrender value less the debt.

In *Stark v. John Hancock Mut. L. Ins. Co.* (1913) 176 Mo. App. 574, 159 S. W. 758, under a provision in a life policy that "if the third or subsequent annual premium or instalment thereon shall not be paid when due the company will (there being then no existing indebtedness as aforesaid, after payment of premiums for . . . seven full years . . . without any action on the part of the insured, continue this policy as paid-up insurance," it was held that an indebtedness at the time of the default did not forfeit the right to paid-up insurance, but that the provision in question operated merely to make an existing indebtedness of the insured a lien on the sum payable under the policy, to be deducted

from the amount for which the policy is to be continued.

And in *Rustin v. Aetna L. Ins. Co.* (1915) 98 Neb. 426, 153 N. W. 548, it was said that the fact of an indebtedness to the insurance company does not forfeit the right to continued or paid-up insurance, but simply leaves the amount of the paid-up insurance or the amount to be extended dependent upon a computation to be made when the amount of the indebtedness is determined. And to the same effect is *Taylor v. New York L. Ins. Co.* (1910) 197 N. Y. 324, 90 N. E. 964.

But where under the policy insured had an option of a loan, or in case he defaulted in the next premium the option to take either an extended insurance or a paid-up policy, it was held in *Jagoe v. Aetna L. Ins. Co.* (1906) 123 Ky. 510, 96 S. W. 598, that, having obtained a loan to the full amount of the loan value of his policy, he had surrendered his rights to the other option, the policy providing that no extended insurance would be granted where there was any indebtedness against the policy, and the loan agreement providing that if the loan should remain unpaid sixty days after it became due or if any premium under the policy became due and unpaid for sixty days or more, the insurer was authorized to issue a paid-up policy to the amount provided for by the terms of the policy after deducting therefrom such proportion as the indebtedness on account of the original policy bore to the net single premium for said paid-up policy.

Where the nonforfeiture clause of an insurance policy provides that extended insurance shall be without loans, insured who has obtained a loan from the insurer has no right to extended insurance upon default in payment of premium if his debt to the company is not paid, but the company, under the provisions of the loan agreement, has the right to cancel the policy for its surrender value. *Hayes v. New York L. Ins. Co.* (1910) 68 Misc. (N. Y.) 558, 124 N. Y. Supp. 792, affirmed without opinion in (1912) 150 App. Div. 927, 135 N. Y. Supp. 1116.

In *New York L. Ins. Co. v. Curry* (1903) 115 Ky. 100, 61 L.R.A. 268, 103 Am. St. Rep. 297, 72 S. W. 736, it was held that a contract by which an insurance company loaning money on the security of a paid-up policy issued by it may, at its option, require a surrender of the policy for its cash value upon default in payment of the loan or interest thereon, is void.

J. H. B.

WEST VIRGINIA SUPREME COURT
OF APPEALS.

ORLAND H. BOOTEN

v.

A. C. PINSON, Plff. in Err.

GAIL T. DUDGEON

v.

JOHN S. HALL, Plff. in Err.,

TUNIS NUNNEMAKER et al., Appts.,

v.

O. H. BOOTEN et al.

JOHN S. HALL, Appt.,

v.

SAME.

A. C. PINSON, Appt.,

v.

SAME.

(— W. Va. —, 89 S. E. 985.)

Mandamus — to secure office.

1. Mandamus is a proper remedy to admit a person to office from which he is wrongfully excluded, provided he is shown to have a clear, prima facie, legal right thereto.

For other cases, see Mandamus, I. f, in Dig 1-52 N. S.

Officer — vested right.

2. A vested right to a municipal office does not exist, and the legislature may, by altering the charter of a city, abolish an office, although the term for which the claimant thereto was elected has not expired.

For other cases, see Officers, I. e, 2, in Dig. 1-52 N. S.

Same — qualification — presumption.

3. When the governor has appointed certain persons to offices, pursuant to a legislative act creating the offices and authorizing him to appoint persons to fill the same, having certain defined qualifications, it will be presumed, in the absence of a showing to the contrary, that the persons so appointed are legally qualified.

For other cases, see Evidence, II. e, 1, in Dig. 1-52 N. S.

Municipal corporations — commission government — constitutionality.

4. Chapter 14, Acts 1915, amending the charter of the city of Williamson, a city of more than 2,000 inhabitants, changing the plan of its government from the ordinary form, administered by a mayor and councilmen, to a government by five commissioners, and authorizing the governor to appoint the first commissioners, to hold office for a

period of two years, beginning July 1, 1915, and ending June 30, 1917, and providing for the election of their successors by the voters of said city, at the first election provided for in the act, to be held on the first Thursday in June, 1917, does not contravene § 9, art. 10, or any other written provision, or violate the spirit of the Constitution.

For other cases, see Municipal Corporations, I. d, in Dig. 1-52 N. S.

Same — appointment of officers by governor.

5. The legislature is not prohibited by the Constitution from establishing municipalities and providing for their government by officers to be appointed by the governor; such acts are within its lawful power.

For other cases, see Municipal Corporations, II. a, in Dig. 1-52 N. S.

Courts — constitutionality of statutes — duty.

6. Unless the question is free from doubt, it is the duty of courts to uphold legislative acts as constitutional.

For other cases, see Courts, I. c, 2, in Dig. 1-52 N. S.

(Poffenbarger, J., dissents.)

(December 17, 1915.)

ERROR to the Circuit Court for Mingo County to review a judgment in plaintiffs' favor in mandamus proceedings for their admission to the offices of mayor and clerk, respectively, of the city of Williamson, to which they had been appointed. Affirmed.

APPEAL by plaintiffs from decrees of the Circuit Court for Mingo County in favor of defendants in actions brought to restrain them from interfering with plaintiffs' possession of their respective offices pending the proceedings in mandamus. Affirmed.

The facts are stated in the opinion.

Messrs. Vinson & Thompson, John A. Sheppard, Wiles & Blas, and Campbell, Brown, & Davis, for plaintiffs in error:

Mandamus is not the proper remedy.

Merrill, Mandamus, § 143; 2 Spelling, Extr. Relief, § 1383; 25 Cyc. § 256; 19 Am. & Eng. Enc. Law, pp. 769, 770; Bailey, Habeas Corpus, pp. 987, 1252; People ex rel. McLaughlin v. Police Comrs. 174 N. Y. 450, 95 Am. St. Rep. 596, 67 N. E. 78; Moses, Mandamus, § 150; High. Extr. Legal Rem. §§ 49, 67.

It is essential that the relator in mandamus show by the allegations of the writ a clear, legal, prima facie right to the office.

Fisher v. Charleston, 17 W. Va. 595; Kline v. McKelvey, 57 W. Va. 30, 49 S. E. 896; Merrill, Mandamus, § 275; 2 Spelling, Extr. Relief, § 1574; 26 Cyc. 433, 434;

Headnotes by WILLIAMS, J.

Note.—As to constitutionality of commission form of government for municipalities, see annotation following this case, post, 1260.
L.R.A.1917A.

State ex rel. Moyer v. Baldwin, 19 L.R.A. (N.S.) 62, note; Justices of Jefferson County v. Clark, 1 T. B. Mon. 82; Justices of Spencer County Ct. v. Harcourt, 4 B. Mon. 499; Burton v. Hansford, 10 W. Va. 470, 27 Am. Rep. 57; 13 Enc. Pl. & Pr. 676, 695, 696; People ex rel. Besse v. Crotty, 93 Ill. 180; Shively v. Pennoyer, 27 Or. 33, 39 Pac. 396; Sudler v. Lankford, 82 Md. 142, 33 Atl. 455.

The appointees of the governor, in whom the act purports to vest the power of taxation, are not corporate authorities within the meaning of art. 10, § 9, of the Constitution, and would be without power to raise revenue for the government of the city.

Douglass v. Harrisville, 9 W. Va. 162, 27 Am. Rep. 548; Brannon v. County Ct. 33 W. Va. 789, 8 L.R.A. 304, 11 S. E. 34; Neale v. County Ct. 43 W. Va. 94, 27 S. E. 370; Gray, Limitations of Taxing Power, §§ 555, 560, 563a; Dill. Mun. Corp. 5th ed. §§ 1372, 1373; Tiedeman, Mun. Corp. § 254; Winans v. Winans, 22 W. Va. 678; 8 Cyc. 739; Harward v. St. Clair & M. Levee & Drainage Co. 51 Ill. 130; Hessler v. Drainage Comrs. 53 Ill. 105; Lovington v. Wider, 53 Ill. 302; Wider v. East St. Louis, 55 Ill. 135; People ex rel. Wilson v. Salomon, 51 Ill. 37; People ex rel. McCagg v. Chicago, 51 Ill. 17; Gage v. Graham, 57 Ill. 144; County Ct. v. People, 58 Ill. 456; Trustees of Schools v. People, 63 Ill. 299; Decker v. Hughes, 68 Ill. 33; People ex rel. Cairo & St. L. R. Co. v. Dupuyt, 71 Ill. 651; Updike v. Wright, 81 Ill. 49; People v. McAdams, 82 Ill. 356; Gaddis v. Richland County, 92 Ill. 119; Cornell v. People, 107 Ill. 372; Mather v. Ottawa, 114 Ill. 659, 3 N. E. 216; Wetherell v. Devine, 116 Ill. 631, 6 N. E. 24; Snell v. Chicago, 133 Ill. 413, 8 L.R.A. 858, 24 N. E. 532; People ex rel. Neil v. Knopf, 171 Ill. 191, 49 N. E. 424; Givins v. Chicago, 188 Ill. 348, 58 N. E. 912; Morgan v. Schusselle, 228 Ill. 106, 81 N. E. 814; Weightman v. Clark, 103 U. S. 256, 26 L. ed. 392; Quincy v. Cooke, 107 U. S. 549, 554, 27 L. ed. 549, 551, 2 Sup. Ct. Rep. 614; O'Brien v. Wheelock, 184 U. S. 450, 486, 46 L. ed. 636, 653, 22 Sup. Ct. Rep. 354; Vallyelly v. Park Comrs. 16 N. D. 25, 15 L.R.A. (N.S.) 61, 111 N. W. 615; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Potter v. Calumet Electric Street R. Co. 158 Fed. 521; Parks v. Wyandotte County, 61 Fed. 436; Board of Education v. Trustees, 129 Cal. 599, 62 Pac. 173; State ex rel. Wright v. Standford, 24 Utah, 148, 66 Pac. 1061; State ex rel. Howe v. Des Moines, 103 Iowa, 76, 39 L.R.A. 285, 64 Am. St. Rep. 157, 72 N. W. 639; Schultes v. Eberly, 82 Ala. 242, 2 So. 345; People ex rel. Wider v. Canty, L.R.A.1917A.

55 Ill. 33; East St. Louis v. Witts, 59 Ill. 155; Hinze v. People, 92 Ill. 406; People ex rel. Dunham v. Morgan, 90 Ill. 558; Deaty, Taxn. § 55; Cooley, Taxn. 3d ed. p. 1307; State ex rel. Gerry v. Edwards, 42 Mont. 135, 32 L.R.A. (N.S.) 1078, 111 Pac. 734, Ann. Cas. 1912A, 1063.

Legislative control of municipalities is not without its limitations even in the absence of an express constitutional inhibition. The fundamental principle of local self-government requires that the local affairs and property of municipalities shall be regulated by authorities chosen by the people of the community, and such officers cannot be appointed by the central or state authority.

State ex rel. Dillon v. County Ct. 60 W. Va. 339, 55 S. E. 382; Von Holst, Const. Law, 271; Cooley, Const. Lim. 5th ed. 203, 282, 283; People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Rathbone v. Wirth, 6 App. Div. 277, 40 N. Y. Supp. 535; People v. Morris, 13 Wend. 325; 2 Webster, 392; Hamilton v. St. Louis County Ct. 15 Mo. 5; Black, Const. Law, §§ 181, 185, 187, 188; McQuillin, Mun. Corp. §§ 167, 169, 176, 177; People ex rel. Wood v. Draper, 15 N. Y. 532; People ex rel. Bolton v. Albertson, 55 N. Y. 50; Ingersoll, Pub. Corp. § 64; Davidson v. Hine, 151 Mich. 294, 15 L.R.A. (N.S.) 575, 123 Am. St. Rep. 267, 115 N. W. 246, 14 Ann. Cas. 352; State ex rel. Jameson v. Denny, 118 Ind. 382, 4 L.R.A. 79, 21 N. E. 252; Evansville v. State, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; Pom. Const. Law, 9th ed. § 151; People ex rel. Park Comrs. v. Detroit, 28 Mich. 228, 15 Am. Rep. 202; People ex rel. Townsend v. Porter, 90 N. Y. 68; State ex rel. Geake v. Fox, 158 Ind. 126, 56 L.R.A. 893, 63 N. E. 19; State ex rel. White v. Barker, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 222, 89 N. W. 204; Rathbone v. Wirth, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; State ex rel. Broerman, v. Hamilton County, 54 Ohio St. 333, 43 N. E. 587; Lexington v. Thompson, 113 Ky. 540, 57 L.R.A. 775, 101 Am. St. Rep. 361, 68 S. W. 477; Helena Consol. Water Co. v. Steele, 20 Mont. 1, 37 L.R.A. 412, 49 Pac. 382; State ex rel. Holt v. Denny, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; Moreland v. Millen, 126 Mich. 381, 85 N. W. 882.

The appointments made do not purport to be provisional. It is apparent that no exigency or emergency required provisional appointments for a full term of office, and even if provisional appointments could be authorized in any event, these cannot be regarded as such.

State v. Lovell, 70 Miss. 309, 12 So. 341; Dill. Mun. Corp. 5th ed. § 414; People ex

rel. *Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882; *Saratoga Springs v. Van Norder*, 75 App. Div. 204, 77 N. Y. Supp. 1020.

The possession, management, and control of property possessed by the municipal corporation in its local and proprietary capacity for a term of years, without its assent, by a board appointed by the governor, is in violation of the due process clauses of the Federal and state Constitutions.

Hunter v. Pittsburgh, 207 U. S. 179, 52 L. ed. 159, 28 Sup. Ct. Rep. 40; *Dill. Mun. Corp.* 5th ed. § 109; *State ex rel. White v. Barker*, 116 Iowa, 96, 57 L.R.A. 244, 93 Am. St. Rep. 230, 89 N. W. 204; *Lexington v. Thompson*, 113 Ky. 540, 57 L.R.A. 775, 101 Am. St. Rep. 371, 68 S. W. 477; *State ex rel. Geake v. Fox*, 158 Ind. 126, 56 L.R.A. 893, 63 N. E. 23.

Even where the power of appointment limited by the act to the appointment of municipal officers having exclusively governmental functions in which the state at large has an interest, the act would nevertheless be void; for it is a special act, fixing the powers, etc., and the manner of election and appointment of public officers and agents in contravention of art. 4, § 8, of the Constitution.

State ex rel. Thompson v. McAllister, 38 W. Va. 492, 24 L.R.A. 343, 18 S. E. 770; *Sutherland, Stat. Constr.* 151; *Rathbone v. Wirth*, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; *Dill. Mun. Corp.* 5th ed. § 372.

The act is void because violative of the principle of free government, that the majority shall rule, and because it contemplates that a majority of the board shall belong to one of the leading political parties of the state, and the minority thereof to the other leading political party, thus imposing a political qualification for office.

Rathbone v. Wirth, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; *State ex rel. Thompson v. McAllister*, 38 W. Va. 485, 24 L.R.A. 343, 18 S. E. 770; *Dill. Mun. Corp.* 5th ed. § 372.

It is beyond the power of the legislature to oust the incumbent during a fixed term of office, while leaving the powers, duties, and functions of the office substantially the same by the same or a different name.

Phares v. State, 3 W. Va. 567, 100 Am. Dec. 777; *Throop, Pub. Off.* § 346; *Malone v. Williams*, 118 Tenn. 390, 121 Am. St. Rep. 1002, 103 S. W. 798; *State ex rel. Orr v. Leonard*, 86 Tenn. 485, 7 S. W. 453; *McCulley v. State*, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134; *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 1, 25 Am. Dec. 677; *State Prison v. Day*, 124 N. C. 362, 46 L.R.A. L.R.A.1917A.

295, 32 S. E. 748; *State ex rel. Walser v. Bellamy*, 120 N. C. 212, 27 S. E. 113; *Silvey v. Boyle*, 20 Utah, 205, 57 Pac. 880; *Adams v. Roberts*, 119 Ky. 304, 83 S. W. 1035; *State ex rel. Holmes v. Wiltz*, 11 La. Ann. 439.

Messrs. *Goodykoontz & Scherr and Holt, Duncan, & Holt*, for defendants in error:

The relator Booten has the commission of the governor under the act of the legislature, and, in consequence, has a prima facie title to the office. Presumably the act is constitutional, and under such circumstances mandamus will lie.

Schmulbach v. Speidel, 50 W. Va. 553, 55 L.R.A. 922, 40 S. E. 424; *Bridges v. Shallcross*, 6 W. Va. 568; *Kline v. McKelvey*, 57 W. Va. 29, 49 S. E. 896; *Morgantown Bank v. Foster*, 35 W. Va. 366, 13 S. E. 996; *Martin v. South Salem Land Co.* 94 Va. 28, 26 S. E. 592; *Sinclair v. Young*, 100 Va. 284, 40 S. E. 907.

The presumption is in favor of the governor's appointment, and, if he made a mistake, or violated his duty by selecting someone who was not eligible, the fact must be set up by way of defense.

Winslow v. Beal, 6 Call (Va.) 44; *Robinet v. Preston*, 4 Gratt. 141; *Perkins v. Hawkins*, 9 Gratt. 649; 9 Enc. Ev. 944.

The ratification of legislative enactment through the medium of a referendum is unknown to our Constitution and laws.

Re Senate Bill, 12 Colo. 188, 21 Pac. 481; *Redell v. Moores*, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243; *State ex rel. Abbott v. Dodge County*, 8 Neb. 124, 30 Am. Rep. 819; *Bliss v. Kraus*, 16 Ohio St. 54; *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362; *Astor v. New York*, 62 N. Y. 567.

The legislature of West Virginia in its power to create, regulate, or even to destroy, municipal corporations, is unlimited under the West Virginia Constitution, where the municipality in question has a population of 2,000 or more.

Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 8, 8 L. ed. 231, 234, 10 Sup. Ct. Rep. 19; 1 *Dill. Mun. Corp.* 5th ed. 154, § 98; *President etc. of Revenue v. State*, 45 Ala. 399; *Americus v. Perry*, 114 Ga. 879, 57 L.R.A. 230, 40 S. E. 1004; *Churchill v. Walker*, 68 Ga. 681; *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488; *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40, 217 Pa. 239, 120 Am. St. Rep. 845, 66 Atl. 348; *Philadelphia v. Fox*, 64 Pa. 169; *Coyle v. Gray*, 7 Houst. (Del.) 44, 40 Am. St. Rep. 109, 30 Atl. 728; *Harris v. Wright*, 121 N. C. 172, 28 S. E. 269; *Newport v. Horton*, 22

R. I. 196, 50 L.R.A. 330, 47 Atl. 312; Wulf v. Kansas City, 77 Kan. 358, 94 Pac. 207; State ex rel. Atty. Gen. v. Covington, 29 Ohio St. 102; State ex rel. Herron v. Smith, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; Astor v. New York, 62 N. Y. 567; People ex rel. McLean v. Flagg, 46 N. Y. 401; State ex rel. Rosenstock v. Swift, 11 Nev. 128; Com. v. Plaisted, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; David v. Portland Water Committee, 14 Or. 98, 12 Pac. 174; Gooch v. Exeter, 70 N. H. 413, 85 Am. St. Rep. 637, 48 Atl. 1100; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; State ex rel. Atwood v. Hunter, 38 Kan. 578, 17 Pac. 177; State ex rel. Police Comrs. v. County Ct. 34 Mo. 546; Burch v. Hardwicke, 30 Gratt. 24, 32 Am. Rep. 640; State ex rel. Bulkeley v. Williams, 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421; Redell v. Moores, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243; Re Senate Bill, 12 Colo. 188, 21 Pac. 481.

The act provides that the appointees shall only hold office until the next general election. After that time there can be no appointments, but everything must be by election. A special election was thus obviated, and the temporary character of the appointments preserved.

People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; State ex rel. Dillon v. County Ct. 60 W. Va. 351, 55 S. E. 382; State v. Lovell, 70 Miss. 309, 12 So. 341.

The new charter does not violate the principle of government by the majority, nor impose a political qualification for office in violation of the Constitution.

Peyton v. Holley, 72 W. Va. 540, 78 S. E. 666; Carter v. Stowers, 72 W. Va. 662, 78 S. E. 974.

Williams, J., delivered the opinion of the court:

Two of these proceedings are in mandamus, one of which has for its object the admission of Orland H. Booten to the office of mayor of the city of Williamson and incidental ouster of A. C. Pinson, who now occupies it, on the ground of title thereto in Booten and lack of such title in Pinson; and the other, the admission of Gail T. Dudgeon to the office of clerk of said city and ouster of John S. Hall, who holds the same office under the name of recorder. The other three proceedings are in equity, one by Pinson to enjoin the defendants from interference with his office until the question of title can be settled, another by Nunnemaker and five others, councilmen of the city, to restrain Booten and others, commissioners appointed under an act of the legislature to take over the management of the

city, from interfering with them until the validity of the act can be determined, and the third by Hall to enjoin Booten and others, commissioners, from interfering with his office of recorder, pending the litigation in the mandamus cases.

Prior to the 1st day of July, 1915, the city of Williamson was governed by a council consisting of six members, a mayor, and a recorder. By an act of the legislature passed at the regular session thereof in 1915, the charter under which the city was so organized and governed was amended and re-enacted, so as to provide for government thereof, on and after the 1st day of July, 1915, by five commissioners. The new scheme of government is bipartisan in character. The terms of the office of the commissioners are two years. Not more than three of them can be members of the same political party; and the governor was authorized to appoint them, for the first term of two years, beginning on the 1st day of July, 1915, and ending on the 30th day of June, 1917. Thereafter the commissioners are to be elected every two years. Respondents in the mandamus proceedings had been elected under the old charter for terms of two years, beginning on the 1st day of May, 1915, and ending on the 30th day of April, 1917; and the new charter provided that those in office at the time of its passage (which was held, in State ex rel. Peters v. Pinson, — W. Va. —, 85 S. E. 786, to mean the time the act took effect) should hold until the 1st day of July, 1915. Under the new act, the governor appointed Booten, Dudgeon, Studebaker, Green, and Cooper commissioners, and, agreeably to a provision of the act, they elected Booten mayor and Dudgeon city clerk. Pinson, mayor, and Hall, recorder, denying the constitutionality of the act legislating them out of office, and under which the governor had made his appointments, refused, after the 30th day of June, 1915, to vacate the offices held by them and to permit Booten and Dudgeon to take them. Thereupon Booten and Dudgeon instituted their respective proceedings in mandamus for their admission into these two offices, and Pinson brought his suit in equity against Booten and the commissioners to restrain them from interfering with his possession, pending the proceedings in mandamus. Hall took like action against interference with his possession, and Nunnemaker and his associate councilmen took the same method for maintaining their positions. The circuit court heard all of the proceedings at one time, and, being of the opinion that the act under which the commissioners were appointed was valid, awarded the writs of mandamus and dissolved the injunctions, in

so far as they related to or affected Booten and Dudgeon, but left them in force as to Studebaker, Green, and Cooper, the three commissioners who had taken no steps to obtain possession of the offices to which they had been appointed. Writs of error in the law proceedings and appeals in the chancery causes have brought the judgments and decrees here for reversal.

All of the defenses in the mandamus proceedings, inappropriateness of the remedy, lack of an averment of eligibility of the plaintiffs, and invalidity of the act under which they were appointed, were interposed by motions to quash the writs.

It is admitted that, if respondents are in possession of the offices without any color or right, mandamus is the proper remedy to admit thereto the rightful claimants, under the authority of *Bridges v. Shallcross*, 6 W. Va. 562, *Kline v. McKelvey*, 57 W. Va. 30, 49 S. E. 896, and *Schmubach v. Speidel*, 50 W. Va. 553, 55 L.R.A. 922, 40 S. E. 424. Whatever may be the remedy in other states, the cases above cited settle the rule in this state that mandamus lies to admit to office the rightful claimant thereof, the only condition being that relator must show a "clear prima facie right thereto, shown by a commission, certificate, or other legal evidence thereof." *Kline v. McKelvey*, supra. Counsel seek to distinguish the case at bar from those cited, on the ground that relators have not shown such clear prima facie right as is required. Whether they have, or not, depends upon whether the act amending the charter of Williamson is constitutional. If it is, then the governor's commissions prove relators' rights to the offices and likewise show that respondents are holding without color of right. The question is one of law and not of fact; and it cannot be said, because the legal question is a difficult one, the prima facie right does not appear. The court must determine whether or not the act is valid, in order to determine whether respondents have such title as will justify the issuance of the writ; and a decision of that question of law determines at once the rights of both sets of claimants.

Complaint is made that the act robs respondents of the greater portions of the terms of office for which they were lawfully elected. The law recognizes no such thing as a vested right in a political office, created by the legislature; hence the cutting short of their terms violates no personal rights. If respondents have any rights, they are political, not personal, and are subject to the legislative will. True, respondents were elected for terms which were to expire April 30, 1917; but their election was had under the old charter, which is abrogated L.R.A.1917A.

by the new one, if it is constitutional, providing for a new form of city government by a different class of municipal officers.

It is further urged that the motion to quash the alternative writ should have been sustained on the ground that eligibility of relators is not averred. Sections 6 and 10 of the act are as follows:

(6) "No person shall be eligible to the office of commissioner unless at the time of his election he is legally entitled to vote in the city election for member of the commission, and was for the preceding year assessed with taxes upon real or personal property within the said city of the assessed value of \$200, and shall actually have paid the taxes so assessed."

(10) "It shall be the duty of the governor, on or before the first Thursday in June, one thousand nine hundred and fifteen, to appoint for said city five commissioners, not more than three of whom to be selected from the same political party and having the qualifications herein prescribed, whose term of office shall begin on the first day of July, one thousand nine hundred and fifteen, and continue until June thirty, one thousand nine hundred and seventeen, and until their successors are elected and qualified as prescribed by law."

The alternative writ does not expressly allege that relators possessed the required qualifications. It does allege, however, that the governor "did on the 2d day of June, 1915, pursuant to said act, appoint the five following commissioners for the city of Williamson," naming relators. Their eligibility may properly be inferred from the governor's appointment. It will be presumed that official action has been properly performed; and, eligibility being a question to be determined by the governor before exercising the power of appointment, it will be presumed that he appointed eligible persons. 16 Cyc. 1077; 9 Enc. Ev. 944; *Lawson*, Presumptive Ev. 67; *Throop*, Pub. Off. § 19; *Robinett v. Preston*, 4 Gratt. 141. "A public officer is presumed to have done his duty until the contrary is shown." *Winslow v. Beal*, 6 Call (Va.) 45. In view of this legal presumption, the question of eligibility cannot be raised by motion to quash or demur. The two cases from Kentucky, cited by counsel, although more nearly in point than any others to which our attention has been called, do not support their contention. They are *Justices of Jefferson County v. Clark*, 1 T. B. Mon. 82, and *Justices of Spencer County Ct. v. Harcourt*, 4 B. Mon. 499. In the former case Clark's eligibility was raised by the return to the alternative writ of mandamus, and in the latter case the rule issued against Harcourt to appear and show cause why his seat

should not be declared vacant called his attention to the fact that made him ineligible, and, in his answer to the rule, he admitted it. In neither of those cases was the question of eligibility raised by demurrer or motion to quash.

It is strenuously urged by the learned counsel for plaintiffs in error that the act is in contravention of both the letter and the spirit of our Constitution, and is therefore void; and many of the provisions of the Constitution are cited, and § 9, art. 10, is particularly relied on as imposing restrictions upon the legislature respecting its control over municipalities. It is claimed that the legislature exceeded its constitutional powers when it undertook to provide for the appointment of the municipal officers of the city of Williamson without the consent of its citizens. First, let us inquire if the Constitution does actually contain any express limitations in that respect. Section 9, art. 10, the provision on which the greatest reliance is placed, is as follows: "The legislature may, by law, authorize the corporate authorities of cities, towns and villages, for corporate purposes, to assess and collect taxes; but such taxes shall be uniform, with respect to persons and property within the jurisdiction of the authority imposing the same."

We observe that this section does not provide who shall constitute the corporate authorities, nor how they will be brought into being, whether by appointment or by election. It was intended to confine the right of taxation to the corporate authorities, and to limit their power to levy taxes for corporate purposes only. It is not a limitation upon the power of the legislature to prescribe the number and official character of the municipal authorities, and the manner in which they shall be chosen.

It is claimed shall § 9, art. 10, of our Constitution is modeled after a similar clause in the Constitution of Illinois, and that, under the authority of *Winans v. Winans*, 22 W. Va. 678, and *Brannon v. County Ct.* 33 W. Va. 789, 8 L.R.A. 304, 11 S. E. 34, we also adopted the construction previously placed on it by the supreme court of Illinois; and numerous decisions are cited from that state in support of the proposition that by the phrase "corporate authorities" is meant officers who are either directly elected by the people, or appointed by some mode to which they have given their assent. From a careful examination of the cases cited, it will be seen that the court's decisions did not rest upon a construction of that particular provision standing alone, but was derived from a consideration of the spirit of the entire instrument as indicated by other provisions read in connection with L.R.A.1917A.

the one from which our § 9, art. 10, is taken.

One of the earliest cases to which we are cited is *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278, decided in 1869. By an act approved February 8, 1869, the legislature designated certain lands in North Chicago and Lake View to be acquired and used for a public park, to be known as Lincoln Park. The park was placed under the exclusive control and management of a board of commissioners, who were authorized to purchase the lands within the boundaries prescribed by the act, and have the title thereto conveyed to the city. The lands were to be paid for with funds to be derived from bonds of the city of Chicago, which the act required the mayor, comptroller, and clerk of said city to issue and deliver to the park commissioners from time to time as they should demand. The mayor, comptroller, and clerk refused to issue the bonds, and the commissioners sought to compel them to do so by mandamus. The case was decided upon a demurrer to the alternative writ raising the constitutionality of the act. The court held the park commissioners were not the corporate authorities within the meaning of § 5, art. 9, of the Illinois Constitution, and that, while the act did not expressly confer upon the commissioners the power to levy and collect taxes, it did so indirectly, by authorizing them to create a debt for which the city was made liable and compelled to pay. The court, in its opinion, considered other provisions of the Constitution, particularly § 37, art. 3, prohibiting the state from creating a debt exceeding \$50,000 without the consent of the people, to be manifested by a vote at a general election. The act authorized the creation of a debt on the city of Chicago, more than ten times the amount the legislature could place upon the people of the state, without their assent expressed by a vote. Breese, Ch. J., in the opinion (51 Ill. page 34), referring to the section last cited, says it ought to "settle the question beyond all controversy." He further says (51 Ill. page 36). "The legislature, in imposing this burden upon the city of Chicago, assumed a power which the Constitution of the state, in its spirit and true meaning, inhibited them from exercising."

We do not see how the case could have been otherwise properly decided. Everyone must admit that the park commissioners were not the "corporate authorities" of Chicago, within the meaning of § 5, art. 9, of the Illinois Constitution, and that the effect of the act was to violate that provision. That case has been followed in numerous other decisions in that state.

In *Lovington v. Wider*, 53 Ill. 302, it appears that the legislature, in 1867, passed an act establishing a police for the city of East St. Louis, providing for the appointment by the governor of three police commissioners, who were to control the police department of the city. They were authorized to make annual estimates to the city council of the money necessary for the maintenance of their department, and, in case the council failed to appropriate the money according to their estimates, they were authorized to issue certificates of indebtedness in the name of the city, which were receivable in payment of city taxes; and by an amendatory act these certificates were convertible into city bonds, on the demand of the holder. The court held this act to be in violation of § 5, art. 9, of the Constitution of 1848, a similar provision to § 9, art. 10, of our Constitution. The city of East St. Louis being already supplied with a mayor and common council, the similarity between the two cases is easily discernible. But the court there laid down the following proposition, viz.: "By corporate authorities, as used in this clause of the Constitution, must be understood those municipal officers who are either directly elected by the people of the municipality, or appointed in some mode to which they have given their assent,"—citing *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278, and other cases.

It thus appears that the court's definition of "corporate authorities," and of how they shall be brought into being, is not derived from a construction of the single provision in the Illinois Constitution from which § 9, art. 10, of our Constitution is taken, but is derived from the spirit and tenor of their Constitution, construed in its entirety. Hence it cannot be said that, because we adopted § 9, art. 10, from the Constitution of Illinois, we thereby adopted the construction which the courts of that state placed on it. Standing alone, and unaided by other provisions indicating a purpose to place restraints upon the legislature respecting its power over municipalities, § 9, art. 10, could not properly be given the construction contended for without resorting to unwarranted implications. Restraints upon legislative powers are not to be lightly inferred.

Municipalities derive all their power as well as their existence from the legislature, and in the absence of any express constitutional reservations in their favor, or express limitations upon the legislative control over them, they can exercise only such powers as are directly conferred by their charters. One of the most essential powers of government is the right to raise revenue; L.R.A.1917A.

no government could maintain itself without such power. Yet it must be admitted that municipalities have no right to levy taxes, unless the authority to do so is expressly conferred by the legislature, or is necessarily implied from some other power expressly given, which cannot be exercised without the right to levy a tax, as, for instance, the power to issue bonds, with no express provision as to how they shall be paid. 5 *McQuillin*, Mun. Corp. § 2363; 4 *Dill*, Mun. Corp. 5th ed. §§ 1377 to 1380. The taxing power belongs alone to sovereignty. No such power inheres in municipal corporations. It is needless to cite authorities to support a principle so universally recognized as this. But, for a fuller discussion of it, see *Federal Street & P. Valley Pass. R. Co. v. Pittsburg*, 226 Pa. 419, 75 Atl. 662, and *Richmond v. Daniel*, 14 Gratt. 385.

Municipalities are but political subdivisions of the state, created by the legislature for purposes of governmental convenience, deriving not only some, but all, of their powers from the legislature. They are mere creatures of the legislature, exercising certain delegated governmental functions which the legislature may revoke at will. In fact, public policy forbids the irrevocable dedication of governmental powers. The power to create implies the power to destroy. Furthermore, the legislature may incorporate a city of more than 2,000 inhabitants even against the will of the inhabitants. Consent or acceptance is not required as formerly, when charters were granted by the Crown. It may also, without the consent of a city, change its form of government, determine the number and character of its officers, and define their powers and duties. It may even prescribe the mode of procedure to be observed in passing its ordinances. *Moundville v. Yost*, 75 W. Va. 224, 83 S. E. 910. It may prescribe a different qualification for municipal officers than is required of state officers. *State ex rel. Thompson v. McAllister*, 38 W. Va. 485, 24 L.R.A. 343, 18 S. E. 770; *Kahle v. Peters*, 64 W. Va. 400, 62 S. E. 691, 1119; *McMillin v. Neeley*, 66 W. Va. 490, 66 S. E. 635. In the absence of any express constitutional restriction, it may also prescribe the qualification of municipal electors. 2 *McQuillin*, Mun. Corp. § 413; 1 *Dill*, Mun. Corp. §§ 59 and 371; 15 *Cyc.* 296; *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383; *Wheeler v. Brady*, 15 Kan. 26; *State ex rel. Whittemore v. Peacock*, 15 Neb. 442, 19 N. W. 685; *Belles v. Burr*, 76 Mich. 1, 43 N. W. 24; *Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208, 34 Pac. 947; *Plummer v. Yost*, 144 Ill. 68, 19 L.R.A. 110, 33 N. E. 191. "The right to

vote is not an inherent or absolute right generally reserved in Bills of Rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the Federal Constitution, such right is under the control of the sovereign power of the state, and where the Constitution has conferred the right and prescribed the qualifications of electors, the legislature cannot change or add to them in any way; but where the Constitution does not confer the right to vote or prescribe the qualifications of voters, it is competent for the legislature, as the representative of the lawmaking power of the state, to do so." *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 22 L.R.A. 124, 14 So. 383.

In his opinion in *Burch v. Hardwicke*, 30 Gratt. 24, 32 Am. Rep. 640, Judge Staples says: "They [municipalities] are instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the Constitution."

Note the word "expressly."

In *Hornbrook v. Elm Grove*, 40 W. Va. at page 549, 28 L.R.A. 416, 21 S. E. 853, Judge Brannon, in the opinion, quotes with approval from the opinion of Justice Field in *Meriwether v. Garrett*, 102 U. S. 511, 26 L. ed. 204, the following: "Municipal corporations are mere instrumentalities of the state for the more convenient administration of local government. Their powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies, and repeated by text-writers. There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control."

In view of these vast powers, which it must be admitted, the legislature may exercise in the control over municipalities, unless expressly restrained by the Constitution; how can it be logically said that municipalities have inherent rights? Can it be possible for inherent rights to exist, which may not be enjoyed except at the will of some authority other than those who claim the rights? The rights contended for cannot be enjoyed in any manner without the legislative will. To say that municipalities have inherent political rights, and at the same time admit all their powers are delegated by the legislature, is a contradiction in terms. The principle contended for seems to be both illogical and paradoxical.

We look to the Constitution to ascertain what restraints, if any, the people have placed upon the legislature, not to deter-

mine what powers they have conferred; for, under our republican form of government, the legislature possesses the sole power to make laws, and it is necessarily invested with all the sovereign power of the people, within its sphere. Nothing that is a proper subject of legislation is withheld by implication.

Counsel cite § 4, art. 4, § 39, art. 6, and §§ 6-9, art. 10, of the Constitution, as recognizing the right of local self-government. We have already considered § 9, art. 10, which we think is the only one among those cited that can have any possible bearing on the question. A mere perusal of the others will show they are not in point. We find in the Constitution no express provision restricting the legislative power to regulate and control municipal governments in cities containing a population of more than 2,000 and the only manner in which its power over smaller towns is qualified is that it cannot incorporate such towns, or amend their charters, except by general laws. But it is insisted that, even though the Constitution contains no express inhibition upon the legislative power over municipalities, the right of local self-government must be inferred; that such right is inherent in the people of every community; that when our forefathers came to this country they brought this principle with them; that forms of local self-government existed before written Constitutions; and that, in the adoption of state Constitutions, it was never intended by the people that they were surrendering to the legislature the right of local self-government. A few of the states have held such principle to exist, notably Michigan, Indiana, and Kentucky. One of the leading cases so holding is *People ex rel. LeRoy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, decided in 1871. In that case all of the judges filed opinions. It was a quo warranto proceeding to test the right of certain persons to hold office as Water and Sewer Commissioners for the city of Detroit, which they were holding by virtue of an act of the legislature passed in 1871, creating said Board of Commissioners, and appointing the members thereof to office, to hold for terms of two, four, six, and eight years, respectively. The constitutionality of the act was assailed on two grounds: (1) That by the Constitution of the state the right of appointment to local office was given to the executive department, and not to the legislature; and (2) that the appointment contravened the right of local self-government. The extreme views there expressed by Judge Cooley, respecting the so-called right of local self-government, were not necessary to a decision of the case, and are clearly against the great weight of

American authorities. To what extent that distinguished jurist may have been influenced by the express provisions of his own state Constitution it is hard to determine from reading his opinion; but that he was in fact influenced to some extent thereby is shown by the following quotation from the report (24 Mich. 109). He says: "But I think that, so far as is important to a decision of the case before us, there is an express recognition of the right of local authority by the Constitution. That instrument provides (art. 15, § 14) that 'judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed, at such time and in such manner as the legislature may direct.' It is conceded that all elections must, under this section, be by the electors of the municipality. But it is to be observed that there is no express declaration to that effect to be found in the Constitution; and it may well be asked what there is to localize the elections any more than the appointments. The answer must be that in examining the whole instrument a general intent is found pervading it, which clearly indicates that these elections are to be by the local voters, and not by the legislature, or by the people of a larger territory than that immediately concerned. I think, also, that when the Constitution is examined in the light of previous and contemporaneous history, the like general intent requires, in language equally clear and imperative, that the choice of the other corporate officers shall be made in some form, either directly or indirectly, by the corporators themselves."

The supreme court of Indiana, in *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L.R.A. 79, 21 N. E. 252, asserted the same doctrine, and quoted with approval from the opinion of Judge Cooley. But the dissenting opinion, filed in that case by Justice Mitchell, we think, expresses the correct principle. At 118 Ind. page 412, he says: "The Constitution has erected no standard by which to determine what constitutes local self-government, or what are natural and inherent rights, as those terms relate to municipal government. These are questions of political, and therefore of exclusively legislative, concern, with which other departments cannot interfere without invading the legislative domain."

As likewise sustaining the doctrine of local self-government, see *Lexington v. Thompson*, 113 Ky. 540, 57 L.R.A. 775, 101 Am. St. Rep. 361, 68 S. W. 477. But these cases, as well as a few others that may be found, are unquestionably against the great weight of judicial decision in this country, and are unsound in principle. Judge Dillon, a distinguished judge, as well as teacher

and writer of law, and of whose great work on *Municipal Corporations* it was said by the American Bar Association, in a resolution, passed at its annual meeting in 1909, accepting the author's dedication of his fifth edition, "His great work on *Municipal Corporations* will live after many of the municipal corporations themselves shall have perished," says (vol. 1, § 98): "It must now be conceded that the great weight of authority denies in toto the existence, in the absence of special constitutional provisions, of any inherent right of local self-government which is beyond legislative control."

In discussing the powers of the legislature, in that most excellent work of his (*Constitutional Limitations*, 7th ed. p. 126), Judge Cooley himself declares the true principle. He there lays down the following as one of the fundamental rules by which to measure the extent of legislative authority in the state: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion."

Nothing that is a proper subject for legislation can properly be said to have been reserved to the people by implication. The Constitution passed all sovereign power not expressly retained or guaranteed by the Constitution of the United States. We have carefully examined many of the decisions bearing on this most interesting topic, and will now quote from some of the cases denying the doctrine of implied reservation of local self-government.

In *Americus v. Perry*, 114 Ga. 871, 878, 57 L.R.A. 230, 40 S. E. 1007, speaking for the court, Justice Cobb says: "There is not in the Constitution of this state any express guaranty of local self-government for municipal corporations. There is nothing in the Constitution from which this right can be legitimately inferred. How far a community shall be allowed to control its own affairs is left to the judgment and discretion of the general assembly."

He also quotes approvingly from the dissenting opinion of Justice Mitchell, in *State ex rel. Jameson v. Denny*, supra.

The legislature of Texas passed an act rechartering the city of Galveston, changing its form of government, providing for a

government by a commission consisting of five members, as in the case at bar, and further provided that two of them should be elected by the voters of the city and three should be appointed by the governor. The act was assailed as unconstitutional, on the ground that it denied to the people of Galveston the right of self-government. The supreme court of that state upheld the act, and in its opinion declares that no right of local self-government, based on history or tradition, exists in a city, whereby the legislature is precluded from making the members of the governing body gubernatorial appointees. *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488.

Philadelphia v. Fox, 64 Pa. 169, holds that "the legislature may modify the internal arrangement of a municipal corporation or destroy it," and that it may "continue the existence of a municipal corporation and assume the appointment of all its officers."

Notwithstanding there is more reason for supposing that local self-government was impliedly reserved by the people of Rhode Island than by the people of most other states, owing to the peculiar manner in which the settlements in Providence, Portsmouth, and Newport were made, the people having purchased the lands from the Indians and established governments without a charter of any kind from the Crown, yet it was said by the highest court of that state, in discussing the question of local self-government, in *Newport v. Horton*. 22 R. I. at page 203, 50 L.R.A. 330, 47 Atl. 314: "While this subject is more historical than legal, we have considered it to this length simply to show that the broad claim made and so urgently pressed by the petitioners cannot be sustained to the extent of holding that the Constitution of the state must be interpreted according to an unwritten theory of local self-government, which so entered into its provisions as to make it controlling in construing those provisions."

The legislature of Ohio passed an act establishing boards of public affairs for cities of first grade of the first class, and authorized the governor to appoint the members of said boards. The supreme court held the act to be constitutional. *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.

In 1892 the legislature of North Carolina passed an act amending the charter of the city of Wilmington, providing for the election, by the people, of one alderman from each ward, and the appointment of one alderman in each ward by the governor. The constitutionality of the act was upheld L.R.A.1917A.

by the court. *Harriss v. Wright*, 121 N. O. 172, 28 S. E. 269.

In addition to the foregoing, we cite the following authorities, some of which decide that no inherent right of local self-government exists, independent of express constitutional guaranty; and others determine principles which are at variance with the doctrine contended for: *Redell v. Moores*, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243, overruling the earlier case of *State ex rel. Atty. Gen. v. Moores*, 55 Neb. 480, 41 L.R.A. 624, 76 N. W. 175, in which, by a divided court, the opposite view was taken; *Com. v. Plaisted*, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207; *Coyle v. Gray*, 7 Houst. (Del.) 44, 40 Am. St. Rep. 109, 30 Atl. 728; *President etc. of Revenue v. State*, 45 Ala. 399; *Hunter v. Pittsburg*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102; *State ex rel. Rosenstock v. Swift*, 11 Nev. 128; *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174; *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637, 48 Atl. 1100; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L.R.A. 465, 35 Atl. 24, 421.

We do not wish to be understood as saying that it is impossible for the legislature to exceed its legitimate powers, unless expressly restrained by the Constitution. It is not omnipotent. It cannot, for instance, reverse a judicial decision, although it may repeal the law supporting such decision; neither can it take a citizen's property, or levy taxes, for purposes purely private. Because those things do not fall within the legitimate sphere of government. That the legislature has not exceeded its power in passing the act in question, we think, is clear. But, if we entertained a doubt on the question, it would still be our duty to uphold the act. A court exercises a very great power when it declares a law passed by the legislature to be void, and although its power to do so, in proper cases, is conceded, still it is a grave responsibility, which the courts discharge with much delicacy. When the constitutionality of an act is a doubtful question, the rule is to uphold the act. Speaking for the court in *State ex rel. Dillon v. County Ct.* 60 W. Va. at page 351, 55 S. E. 387, Judge Poffenbarger says: "Statutes cannot be overthrown by courts as unauthorized, unless the want of power in the legislature to pass them is beyond doubt."

See also *Woodall v. Darst*, 71 W. Va. 350, 44 L.R.A.(N.S.) 83, 77 S. E. 264, 80 S. E. 367, Ann. Cas. 1914B, 1278.

With the wisdom or propriety of the act we have nothing to do. Those are matters for the legislature alone to consider; it determines the public policy. Our jurisdiction ends when we have determined the legislative power to exist. If the legislature has made a mistake, it is a political one; and it alone can correct it. It is the proper guardian of political rights; and the right to administer municipal government, as well as to create it, is purely a political right, not a natural one.

The privilege of electing their municipal officers is withheld from the citizens of Williamson for a limited time only. Relators are appointed to hold for a period of two years, and until the first election, provided for by the act, takes place. Their appointment may therefore well be regarded as provisional. Having made the appointments, the governor's power to make further appointments is exhausted. No purpose is shown by the act to further withhold from the people of the city the privileges usually granted to the citizens of municipalities. Hence, even though we were of the opinion that the legislature could not withhold from the citizens the privilege of electing their officers indefinitely, still it would be our duty to uphold the act, and the governor's appointments made thereunder, as being provisional. In this view we are supported by the opinion of Judge Cooley in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, who held that the act, in that case, did not unduly take from the people the right of local self-government, which he asserted as an inherent right in the people of Detroit.

Our conclusion leads to an affirmance of the judgments and decrees appealed from, and it will be so ordered.

Poffenbarger, P., dissenting:

My dissent in these cases is founded upon the rules universally observed in the solution of constitutional questions other than the one now under consideration, but recklessly cast aside and ignored, I think, in every case in which the constitutional guaranty to municipal corporations of the right of self-government, respecting matters primarily or peculiarly local, has been denied. Much of the argument relied upon for justification of the holding merely combats propositions not set up in support of the claim of the guaranty, nor at all necessary to maintenance thereof.

For instance, there is found in the opinions labored contention against the suggestion of inherent right of self-government. Nobody denies the power to clothe the legislature with unlimited authority over municipal corporations or the territory within L.R.A.1917A.

their boundaries. Certain natural rights, life, liberty, and the pursuit of happiness, are regarded as being inherent and inalienable. To sustain the right of local self-government, under the Constitutions of the states (and, as concerns this question, they are all alike in substance), it is wholly unnecessary to put it in that class. It suffices to ascertain that the people, in adopting the Constitution, intended to secure it to the inhabitants of the territory incorporated. The question is, not what power the people could have vested in the legislature, but the nature and extent of the power they did actually vest in it. Such a right is not one naturally or divinely inherent. Nobody predicates any naturally inherent right of public corporations as an attribute. Nobody denies the artificial character and qualities of these organizations. Nobody asserts the right of local self-government is essential to a republican form of government. Likely it is not. All of these considerations lie beyond the borders of our inquiries; namely, the intent of the people in the adoption of the Constitution, the general nature and basic elements of a municipal corporation as contemplated by them, and the nature, elements, and powers of a legislature, according to their knowledge and conception of it at that time. These terms in the Constitution mean now what they meant then; and their meaning at that time was, for the purposes of interpretation and construction, just what the masses understood it to be. The contemporaneous common knowledge of the subject, derived from tradition, history, literature, science, and law, is the universally recognized test. On this phase of the discussion, the conclusion of the Supreme Court of the United States ought to be received anywhere as satisfactory authority. In *Gibbons v. Ogden*, 9 Wheat. 188, 6 L. ed. 68, Mr. Chief Justice Marshall stated the proposition in these words: "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

The state courts, including our own, declare and enforce the rule with equal emphasis and vigor. *List v. Wheeling*, 7 W. Va. 519; *Chesapeake & O. R. Co. v. Miller*, 19 W. Va. 418; *State v. Harden*, 62 W. Va. 323, 58 S. E. 715, 60 S. E. 394; *Capito v. Topping*, 65 W. Va. 594, 23 L.R.A.(N.S.) 1089, 64 S. E. 845; *May v. Topping*, 65 W. Va. 660, 64 S. E. 848; *Daniel v. Simms*, 40 W. Va. 563, 39 S. E. 690; *State ex rel.*

Mays v. Brown, 71 W. Va. 523, 45 L.R.A. (N.S.) 996, 77 S. E. 243, Ann. Cas. 1914C, 1; *Re Jones*, 71 W. Va. 594, 45 L.R.A. (N.S.) 1030, 77 S. E. 1029, Ann. Cas. 1914C, 31; *State v. Mace*, 5 Md. 350; *Manly v. State*, 7 Md. 147; *Hills v. Chicago*, 60 Ill. 90; *Beardstown v. Virginia*, 76 Ill. 41.

Advocacy of the guaranty invokes nothing beyond the benefit of this universally recognized rule. Assertions of inherent right, occasionally found in the course of argument, mean no more than that, as municipal corporations were known, at the date of the adoption of the Constitution, local self-government was an invariable attribute or element thereof, just as a piston and a steam chest are now known to be parts of steam engines, wheels necessary elements of wagons, and foundations essential parts of houses. In that sense, it was literally and indisputably inherent. But nobody, I repeat, has ever so much as intimated lack of power in the people to have provided in their Constitution for the creation of public corporations without such right.

The protest, found in some of the decisions, particularly *Redell v. Moores*, 63 Neb. 219, 55 L.R.A. 740, 93 Am. St. Rep. 431, 88 N. W. 243, against resort to unwritten matter or principles for aid in constitutional construction, there denounced as the introduction of an undefined test, "an elusive something, elastic and uncertain as an unwritten Constitution," is equally fallacious. Nobody affirms the existence of an unwritten Constitution. Nevertheless, it is impossible truthfully to assert that the Constitution defines the terms "legislature" or "municipal corporation," or specifically sets forth or prescribes the powers, functions, or attributes of either. Nor can that instrument or any other be read intelligently, without application to its words of the common knowledge of their meaning, disclosed by tradition, history, literature, science, and law. No instrument is fully written. Under its terms, a mass of common knowledge which, if fully written, would multiply its length, sometimes into volumes, necessarily comes in for purposes of definition. The Constitution, like every legal instrument, is written only in the sense that its words generally and indefinitely cover its subject-matter, but it is unwritten in the sense that its words must be defined by resort to common knowledge. In the latter sense, no Constitution nor any other instrument is written. For the definitions of words and the nature of things the courts must draw upon the great reservoir of judicial knowledge, of which they take notice, derived from human experience

and witnessed by tradition and books, which form no part of the instrument itself.

The implications, inferences, and deductions drawn from the language and provisions of the Constitution for support of the guaranty of local self-government, as defined by the Michigan supreme court and others, are not different in character from those made use of upon other occasions of inquiry for the meaning or intent of the Constitution. Nor do they differ in nature an iota from those upon which the assertion of unlimited legislative power stands. Legislatures have such powers as bodies of that kind have always possessed and exercised. In providing a legislature, by their constitution, the people are presumed to have intended to sanction and ordain a body with such powers as they historically knew the Parliament of England and all other national legislatures possessed, and to have it exercise those powers for them, except in so far as they saw fit, in that instrument, to limit or curtail that inherent power. This presumption is the sole basis of plenary power in the legislature. A denial of its power to do any ordinary legislative act, made at the bar of this or any other court, can be legally answered in no other way. A search of the Constitution would reveal no provision specifically granting the power. To say the legislature has all legislative power not withheld from it by the Constitution, without giving the reason for the assertion, would be as unsatisfactory as a mere declaration of the existence of the guaranty in question, unaccompanied by reason or authority for it. Like all other elements of civil government, legislative jurisdiction and authority are artificial. It is inherent in the lawmaking body, not by force of any natural law, but because it is historically known to have been conceded or assigned to it, by mankind, throughout all the ages of civilized and enlightened government. For the definition of the legislature or the enumeration of its powers, the people, in adopting the Constitution providing for it, did not resort to that instrument, but to their common knowledge of these subjects, derived from sources above mentioned; and the courts must likewise go outside of the instrument for the same information, when called upon to ascertain and declare the nature and extent of legislative authority. The meaning of the Constitution, respecting these matters as well as all others, is the intention of the people of the state in the adoption thereof. In construing the Constitution as a whole, or any provision of it, as to any matter not made plain and certain by its terms, the courts must look beyond it and take into consideration,

as guides to the intention, all of that common knowledge of the subject in the light of which the people framed and adopted the provision in question, just as in the case of the construction of any other instrument.

That which makes it necessary to go beyond the specific provisions of the Constitution to find legislative power amply justifies resort to extrinsic evidence for the definition and meaning of express terms, provisions, and purposes that may, when properly understood, that is, as the people understood them, restrain or limit powers expressly or impliedly conferred upon the legislature, or regulate the exercise thereof. No provision of our Constitution expressly authorizes the legislature to charter a municipal corporation. To get it at all, we must go beyond the letter of the instrument, as I have suggested. If, when found, it has a limitation fixed upon it by terms in the Constitution, defined by extrinsic evidence of the same character as that by which the existence of the power itself is disclosed, there can be no justification for allowance of the one without the other. They are of equal dignity and force. Neither is fully or specifically written in the Constitution. Both are, in a legal sense, sufficiently written in it,—written in the manner and to the extent characteristic of statutes, contracts, wills, treaties, and all other instruments. Sound rules work both ways. A Constitution disallowing such operation warps and misuses the rule. Legislatures are no older nor better defined, legally, historically, or scientifically, than municipal corporations. Each has its vital and distinctive characteristics and functions. Each is an agency of the state. Neither is the state.

Nor is the corporation any more a legislative agent than is a court the legislature has constitutional power to create. Each has governmental functions,—that of the legislature being general, and that of the municipal corporation local. One wields the lawmaking power of the state, the other the power of local government, under legislative regulation. From the earliest dawn of Anglo-Saxon civilization and English jurisprudence, municipal corporations have had the power of local self-government. Deprivations of that right by English Kings were regarded by the English people and Parliament as acts of tyranny and despotism, and constituted, in part, the basis of a revolution which dethroned King James. No authority in the legislature beyond that of creation, regulation, and abrogation had ever been asserted in England or America, prior to the adoption of the Constitution of this state. As municipal corporations were then known, the right of

self-government was historically, politically, and economically inherent in them. As a legislature was then known, it had like inherent power, among other innumerable things, to charter, regulate, and abolish corporations having the right of local self-government. To say it had any kind of power to charter, regulate, and abrogate corporations not having such right is mere assumption, unsustained by anything in common knowledge. Not found in the words of the Constitution, nor in common knowledge, there is no basis for the assertion that it is inherent in the legislature. It had no existence, wherefore the people could not have known it, when they adopted the Constitution, and, for the same reason, it has no place, as an element or factor, in the inquiry for the popular intent. On the other hand, they knew no legislature had ever assumed authority to create a corporation without power of self-government, and that no existing corporation lacked such power. Presumptively, therefore, in saying, "The legislature may, by law, authorize the corporate authorities of cities, towns, and villages, for corporate purposes, to assess and collect taxes," and, in limiting the legislative power respecting the mode and manner of incorporating cities, towns, and villages, and amending their charters, by a clause of § 39 of art. 6, the people assumed the corporate authorities would have the essential character of existing corporate authorities, and that the cities, towns, and villages to be incorporated would be such in general character as had up to that time been created, not things lacking the historically, politically, and economically vital and basic elements of a municipal corporation. Of course, this view rests upon implication to some extent; but the implication has root and basis in the terms of the Constitution. Almost every other conclusion, as to constitutional intent, has a like basis. That this one depends upon implication in a larger degree or to a greater extent than do some others can make no difference. That one man distributes more of his weight to his heels, in walking, than another, is consistent with the view that each walks on his feet. Regardless of detail results, the principle rules in all cases. Just here it may be truthfully repeated that the particular power here claimed for the legislature does not have even so much as a partial foundation in implication. It stands solely upon judicial assertion.

It is the province of the people, not of the courts, nor the legislatures, to make Constitutions, and, after they have been made, they are not to be construed according to mere legislative or judicial notions or con-

ceptions of right or policy. The test of meaning is the popular intent at the date of the adoption of the instrument, not some other date. An unwritten Constitution may grow, expand, and contract; but a written Constitution cannot. It means the same always. For its meaning, we must go to the time of its adoption. Knowing what a West Virginia municipal corporation was in 1872, we know what kind the people intended to intrust with the exercise of the power of taxation. Their intention then is the law of the Constitution now. Hence it is wholly immaterial that a few state courts have recently voiced a different conception of the nature and functions of such organizations. That conception did not enter into or influence the conduct of the makers of our Constitution, wherefore it should not be allowed to influence us upon the inquiry for its true meaning.

Speaking of the Federal Constitution, in *Scott v. Sanford*, 19 How. 393, 15 L. ed. 691, Mr. Chief Justice Taney said: "It is not only the same in words, but the same in meaning, and delegates the same power to the government, and reserves and secures the same rights and privileges to the citizens; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day."

In *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737, Mr. Justice Brewer, citing the *Scott Case*, and quoting the language here taken from it, reiterated the doctrine in these terms: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government, its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded."

Read in the light of the firmly established L.R.A.1917A.

rules giving paramount force to the intention of the people and determining methods of ascertaining it, the arguments of the judges of the Michigan court, in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, are unanswerable. At page 88 of 24 Mich. Chief Justice Campbell said: "Incorporated cities and boroughs have always, both in England and in America, been self-governing communities within such scope of jurisdiction as their charters vest in the corporate body. According to the doctrine of the common law, a corporation aggregate for municipal purposes is nothing more or less than 'investing the people of the place with the local government thereof.' *Cuddon v. Eastwick*, 1 Salk. 193, 91 Eng. Reprint, 174. In the absence of any provision in the charter creating a representative common council, the whole body of freemen make the common council, and act for the corporation at their meetings. Comyns's Dig. 'Franchise,' F. 25. It is agreed by historians that originally all boroughs acted in popular assembly, and that the select common council was an innovation, which may have been of convenience or by encroachment. In modern times cities have generally acted in ordinary matters by such a select body. But townships still act by vote at town meetings, and for many purposes connected with taxation the people of cities usually have the same privilege. But whether acting directly or by their representatives, the corporation is, in law, the community, and its acts are their acts, and its officers their officers. The doctrine is elementary that all corporation officers must derive office from the corporation. *Kyd, Corp. chap. 3, § 8*. This has been from time immemorial settled law. By articles 15 and 16 of the Great Charter, it was stipulated that the liberties and free customs of London and all other cities, boroughs, towns, and ports should be preserved. Those liberties were all connected with and dependent upon the right to choose their own officers and regulate their own local concerns. The sole motive of the infamous proceedings of Charles II. to procure the forfeiture of these corporate charters was to enable him to interfere in the selection of corporate officers. When he had secured a decision against the city of London adjudging the charter forfeited on trumped-up charges of sedition and illegal tolls, he offered, through Lord Keeper North, to respite the judgment, if the city would give him such a right of control over its election of officers as to enable him to exclude persons not acceptable to the Crown. 8 How. St. Tr. 1281; *Lives of Lord Chancellors*, vol. 4, pp. 318, 319. These inferences with both the English and American colonial charters

were always regarded as legal outrages, and contrary to all constitutional principles, and one of the first acts of Parliament, after the Revolution of 1688, was passed to prevent any future action of that kind."

In those jurisdictions in which the right of self-government is recognized and placed beyond legislative abrogation, the courts carefully mark the distinction between corporate jurisdiction over purely local matters and such jurisdiction over matters of a general public nature, conceding legislative power to commit the latter to the care of officers and boards not selected by the inhabitants of the corporation, and some of the decisions relied upon as authority so to treat matters of purely local concern go no further than the divestiture of corporate control of police and fire officers and tribunals. Such is the character of the decision in *Newport v. Horton*, 22 R. I. 196, 50 L.R.A. 330, 47 Atl. 312, which involved only a police officer. In its opinion the court indicated its entire satisfaction with the doctrine of the Michigan cases. The following excerpts from the opinion disclose the court's attitude: "Towns and cities are recognized in the Constitution, and doubtless they have rights which cannot be infringed. . . . We assume that the towns and cities in this state have the same rights which towns and cities have in other states under the prevalent form of state government. Our inquiry, therefore, is whether the establishment of police authorities by the state infringes the rights of self-government. . . . The clear weight of authority sustains the right of the legislature to control police, and equally is it sustained by sound reason."

The opinion concludes with this quotation from the opinion of Judge Staples in *Burch v. Hardwicke*, 30 Gratt. 38, 32 Am. Rep. 640: "The distinction recognized in all of them is between officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature. When they are of the latter character they are state officers, whether the legislature itself makes the appointment or delegates its authority to the municipality. The state, as a political society, is interested in the suppression of crime, and in the preservation of peace and good order, and in protecting the rights of persons and property. No duty is more general and all-pervading than this. It extends alike to towns and cities as to the country. It looks to the preservation of order and security in the state, at elections, and at all public places; the protection of citizens . . . at railway stations, at steamboat landings; the enforcement of the laws

against intemperance, gambling, lotteries, violations of the Sabbath, and, in fine, the suppression of all those disorders which affect the peace and dignity of the state and the security of the citizen. The instrumentalities by which these objects are effected, however appointed, by whatever name called, are agencies of the state, and not of the municipalities for which they are appointed or elected. The whole machinery of civil and criminal justice, says a learned judge, has been so generally confided to local agencies that it is not strange if it has sometimes been considered as of local concern. But there is a clear distinction in principle between what concerns the state and that which does not concern more than one locality."

The larger number of cases cited in support of the majority opinion fall far short of the proposition accepted by it, in so far as they actually decide anything. *Baltimore v. Howard*, 15 Md. 376, 74 Am. Dec. 572, involved only state control of the police. *Gooch v. Exeter*, 70 N. H. 413, 85 Am. St. Rep. 637, 48 Atl. 1100, involved the same question. *President etc. of Revenue v. State*, 45 Ala. 407, involved only the state's power of taxation. *Com. v. Plaisted*, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224, involved only a police regulation prescribed by a police board appointed by the governor. *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40, merely denies the existence of any Federal question in a contest between the legislature and a municipal corporation. *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207, *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174, *Harriss v. Wright*, 121 N. C. 172, 28 S. E. 269, *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488, *Americus v. Perry*, 114 Ga. 871, 37 L.R.A. 230, 40 S. E. 1004, *Philadelphia v. Fox*, 64 Pa. 169, and *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829, all support the opinion. Against it stand express decisions in *Indiana*, *Iowa*, *Michigan*, *Alabama*, *Illinois*, *Kentucky*, *Tennessee*, and *North Dakota*. The weight of authority, therefore, seems clearly to be against the assumption of right in the legislature to deprive public corporations of the right of local self-government, notwithstanding Judge Dillon's view of the situation. His great ability I cheerfully confess, but I cannot ascribe to him legal infallibility as an attribute.

The conclusion adopted by the court leaves the legislature wholly unrestrained. It may turn over to appointees of the governor every municipal corporation in the state, if it sees fit to do so, and such appointees need not be residents of the corpo-

rations they are to govern. Citizens of Huntington may be made rulers of Charleston, and citizens of Charleston rulers of Huntington. The government of all the cities may be intrusted to citizens of the rural sections. None of these things are likely to happen, of course, but a construction making them possible is violative of the rules of interpretation. An absurd or ridiculous possibility of results always condemns the construction. "But, as in the case of statutes, this rule [that plain provisions must be allowed full effect, without regard to consequences] extends only so far as the language of a constitutional provision is plain and unambiguous, . . . and where, understood in that sense, it raises no conflict with other provisions in the same instrument, and gives occasion to no absurd effect. An intention to produce such results cannot, of course, be imputed to the framers of a Constitution, or to the people adopting it, any more than to the legislature in passing a statute. And hence, to avoid them, aids in the construction of constitutional provisions are recognized as permissible, analogous to those allowed in the construction of statutes." Endlich, *Interpretation of Statutes*, § 509.

See *Hasson v. Chester*, 67 W. Va. 278, 67 S. E. 731, *Re Jones*, 71 W. Va. 567, 605, 45 L.R.A.(N.S.) 1030, 77 S. E. 1029, *Ann. Cas.* 1914C, 31, and *Peyton v. Holley*, 72 W. Va. 540, 542, 78 S. E. 666.

Can anything be more obvious, as a matter of reason, than that the people would have provided safeguards against such results as are here suggested as being possible, if they had realized that, in adopting the Constitution, they were clothing the legislature with power to take away from the people of the cities, towns, and villages the right of self-government they then held? The omission thereof proves lack of intent to give such power. Of course, this invokes the force of implication; but it is utterly impossible to interpret the Constitution without resort to implications. What prevents the legislature from providing appointed commissioners to govern the counties and districts? Words of express prohibition thereof cannot be found in the Constitution. It comes only from implication. Almost all of the restraints upon legislative power are implied, just as almost all the power it has rests upon implication. Of course, some implications are stronger than others; but that does not affect the principle. To uphold a particular view in a particular line of policy, the courts which deny right of corporate local self-government are forced wholly to disregard the principle in one aspect, and to stand upon L.R.A.1917A.

it in another. Such construction cannot be sound.

The legislature is entitled to the benefit of all doubts as to the extent of its authority; but whether there is a doubt, in a given instance, depends upon the result of the application of the settled rules of interpretation, in the quest for the meaning of the Constitution. A doubt arising from failure to apply the rules is legally no doubt at all, and does not bring the court within the protection of the doubt rule. Observance of the rules, upon this inquiry, leads to an absolute certainty of lack of the power the legislature has assumed.

Nor can the act be upheld as one authorizing provisional appointments. It puts the appointees in for two years, if it puts them in at all. If they should be admitted, they cannot retire, after having organized the new government, without creating vacancies for the filling of which the act makes no provision. There is no local appointing power, nor anybody authorized to call an election. The only ground of justification of provisional appointments suggested by any authority, is the possible necessity, under conceivable conditions, of intrusting the preliminary work of organization or installation to men peculiarly qualified for it. In such cases the legislature has no power to put them in by appointment for a longer period than is necessary to the performance of such work. They must get out the moment it is completed. Such was the opinion of Judges Cooley and Christiancy in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103. The other two judges denied legislative authority to make provisional appointments at all. The terms specified in the act held unconstitutional in the Michigan case were two, four, six, and eight years. No member of the court thought any of the officers could serve throughout the specified time. Judge Cooley said: "The excess of authority was only in providing that the appointments made should continue for two, four, six, and eight years. . . . If the exact period for the cessation of their official functions was not named, we must suppose the legislative purpose to have been that the common council, to whom had been given the power to fill vacancies, should proceed to do so whenever in their view the functions of the provisional board had been fulfilled. From that time the provisional incumbents could rightfully occupy only till appointees were named by the board possessing the general power to appoint. I think the position of this case is precisely the same that it would have been if the act were as I have supposed."

By this he meant the appointees were

legally in the same situation as if no terms had been prescribed. A later Michigan case, *Moreland v. Millen*, 126 Mich. 381, 85 N. W. 882, held unconstitutional a statute providing for an appointment to the office of superintendent of public works for a period of about a year, and expressly declaring it to be provisional. These are the only decisions found that discuss at any length the suggestion of provisional appointments, and they are squarely contradictory of the position taken in the majority opinion. Aside from authority, we know, as a matter of common knowledge, there was no exigency requiring these appointments to be made for two years. Except as to the number and official titles of the governing officers and their terms of office, the new form of

government is not radically different from the old. The corporate powers are substantially the same. Williamson had been governing itself for years. Municipal government was not a new or intricate problem for its citizens. Moreover, there was abundant time between the passage of the act and July 1, 1915, for the election of the commissioners. The legislature could not make occasion for a provisional government by its own failure to provide for a preliminary election, in the manner in which it has so often done that. As the act took effect May 8th, there was ample time between that date and July 1st for an election.

Petition for rehearing denied.

Annotation—Constitutionality of commission form of government for municipalities.

The earlier cases on the constitutionality of the commission form of government for municipalities are discussed in the notes to *State ex rel. Hunt v. Tausiek*, 35 L.R.A.(N.S.) 802; *State ex rel. Simpson v. Mankato*, 41 L.R.A.(N.S.) 111, and that to *Munn v. Finger*, 51 L.R.A.(N.S.) 631.

While, as pointed out in the note to *State ex rel. Simpson v. Mankato*, these notes have not been confined strictly to a discussion of the constitutionality of the commission idea in government, that is, to the constitutionality of such a government as distinguished from one containing the usual department of municipal government, and matters which are not peculiar to the commission form of government have been touched upon, the notes are not exhaustive as to such matters.

The constitutionality of the commission form of government has been sustained generally. See earlier notes above referred to and cases to which these notes are appended. It is stated in *Barnes v. Kirksville* (1915) 266 Mo. 270, 180 S. W. 545, that the union in the hands of commissioners of quasi judicial as well as administrative authority does not violate the Constitution of the various states; since the municipalities so governed are not in any sense sovereignities, and hence do not fall within the provisions of the Constitution which apportion the powers of sovereign states.

A commission form of government which placed the school affairs and libraries of the municipality in control of the mayor and six councilmen, one of

which latter was to be known as the commissioner of education, and had general charge of the schools and libraries, and which was adopted solely by the male voters of the municipality, was sustained as against the objection that women who by a constitutional provision were authorized to vote for school officers and members of library board, and were eligible to hold any office pertaining to the management of schools or libraries, were barred from voting thereon. *State ex rel. Smith v. St. Paul* (1914) 128 Minn. 82, 150 N. W. 389.

It is held in *Morris v. Fagan* (1914) 85 N. J. L. 617, 90 Atl. 267, that whether a commission form of government for a municipality has received the requisite number of votes at an election to determine whether or not it should be adopted cannot be raised by a private individual, and that only the attorney general acting as a representative of the state can call into question the legality of the existence of the commission form of government.

A provision in a municipal commission government act that makes the commissioners judges of their own election contest has been held not unconstitutional as being in violation of the due process of law clause, on the theory that no officer has a vested right in an office, and therefore the doctrine of due process of law has no application. *Lyons v. Becker* (1916) 272 Ill. 333, 111 N. E. 980; *Bowen v. Russell* (1916) 272 Ill. 313, 111 N. E. 978.

The provision in an act amending the commission government act for municipi-

palities, creating a board of public safety for such municipalities, and vesting in such board certain powers, was sustained as against the objection that this provision was not clearly expressed in the title to the act, in *State ex rel. Gunter v. Thompson* (1915) 193 Ala. 561, 69 So. 461. The act was also sustained as against the objection that it was a local law, since it was drawn so that only one

municipality fell within the class as designated.

See *Jacksonville v. Bowden* (1914) 67 Fla. 181, L.R.A.1916D, 913, 64 So. 769, Ann. Cas. 1915D, 99, and note appended to this case as reported in L.R.A.1916D, at page 921, on statutes conferring powers upon municipalities or counties in respect to their officers as the delegation of legislative power. W. A. E.

IOWA SUPREME COURT.

SLOAN STATE BANK

v.

B. M. STODDARD & SON et al., Appts.

(— Iowa, —, 159 N. W. 636.)

Mortgage — acceptance — proceeds — waiver of claim.

1. A chattel mortgagee waives the lien of his mortgage by accepting the proceeds of the mortgaged property to apply upon his claim with knowledge of their source.

For other cases, see *Chattel Mortgage, V. in Dig. 1-52 N. S.*

Trover — conversion of mortgaged property — claim against purchaser.

2. A chattel mortgagee does not per se waive its claim against a purchaser of the mortgaged property by accepting proceeds of the sale, where, after the property had been mingled with other property of the purchaser, so that the lien could not be enforced, and it had notified the purchaser that it would hold him personally liable, the purchaser notified the mortgagor to settle with the mortgagee, and he in response paid over the proceeds of the sale which remained in his possession.

For other cases, see *Chattel Mortgage, V. in Dig. 1-52 N. S.*

(October 21, 1916.)

APPEAL by defendants from a judgment of the District Court for Woodbury County in plaintiff's favor in an action brought to recover the value of certain corn covered by chattel mortgages which had been executed by the mortgagor to plaintiff and sold by the former to defendants. Affirmed.

Statement by Ladd, J.:

Action for the value of certain corn covered by two chattel mortgages executed by F. A. Godsey and wife to plaintiff and sold by said Godsey to defendants resulted in judgment as prayed. The defendants appeal.

Note.—As to waiver of lien of chattel mortgage by accepting proceeds of sale of property, see annotation following this case, post, 1262.
L.R.A.1917A.

Messrs. C. N. Jepson and J. F. Stecker for appellants.

Messrs. Henderson & Fribourg and Buckley & Calderhead for appellee:

Ladd, J., delivered the opinion of the court:

F. A. Godsey and wife executed their promissory note dated August 17, 1912, to plaintiff for \$1,000 payable February 1, 1914, with interest at the rate of 8 per cent per annum, and also a chattel mortgage securing payment thereof, covering designated personal property and "all crops grown during 1913" on a quarter section of land therein described. Later on they executed another promissory note for \$320 dated September 23, 1913, and payable February 2, 1914, with interest at the same rate as the previous note. A chattel mortgage was executed at the same time, covering all the crop of corn then in the field on the farm. About November 21, 1913, defendants purchased corn raised on said premises during the season of 1913, valued at \$558.77. Plaintiff learned of this a day or two afterwards and notified defendants that they would be held for the corn. Thereupon defendants telephoned Godsey to "come in and settle" with plaintiff. They had mentioned obligations to the bank when paying Godsey for the corn, and he had promised to take care of them as far as he could; but he used a part for other purposes and paid plaintiff \$120 on November 24th following. The cashier of plaintiff testified that nothing was said concerning the source of this money, and he did not know, though he surmised that it was a part of the proceeds of the corn, as Godsey had no other source from which to draw it. The latter testified that when he took the money in, plaintiff's cashier "was a little bit miffed. I told him I had to pay some debts that I had. He was a little angry because I did not fetch it all over to him." Thereafter, by an arrangement between plaintiff and Godsey, all other property covered by the chattel mortgages was sold at auction and the proceeds applied on the notes, leaving a balance unpaid of some-

thing over \$200. Plaintiff, assisted by one of defendants, undertook to secure payment of this by inducing Godsey's father to sign his note therefor, including some other outstanding debts, but failed, and in this action sought to recover judgment therefor against defendants.

Several errors are assigned, but in argument appellants reduced these to two, one of which, that relating to the consent to the sale of mortgaged property where and when the best price could be obtained, is disposed of by omission to file written exceptions to instructions 5 and 6 submitting that issue to the jury. The other presents the only debatable question in the case; i. e., whether plaintiff in receiving the \$120 payment ratified the sale of the corn to defendants? Counsel for appellants requested the court to instruct the jury in substance that, if Godsey paid plaintiff a portion of the proceeds of the sale of the corn, and plaintiff knew that money so paid was derived from such source and with such knowledge applied the same on the notes secured, this had the effect of ratifying the sale and waived the lien of the mortgages on the corn. The court refused to so instruct and instead advised the jury that the evidence failed to sustain the claim of ratification and waiver. The bank, as mortgagee in receiving money in part payment of the indebtedness owing it, did only that which it had the right to do. But if, in so doing, it was aware that such money was the proceeds of the sale of the mortgaged corn, in the absence of other circumstances, it might not receive and retain the money as the proceeds of the sale of said corn without in effect ratifying the sale. It might not take the proceeds of the sale and at the same time insist on its lien on the property sold. Upon the tender of the proceeds of the corn by the debtor, the bank was put to its election of accepting the money so tendered by Godsey or of rejecting this and asserting the lien of its mortgage. Such is the rule laid down by several courts where property burdened with mortgage or landlord's liens has been sold by the debtor with the knowledge of the lienholder. *McCollum v. Woods*, — Tex. Civ. App. —, 33 S. W. 1087; *Planters' Compress Co. v. Howard*, 41 Tex. Civ. App. 285, 92 S. W. 44; *Noe v. Layton*, 69 Ark. 551, 64 S. W. 880.

Surely a lien holder may not knowingly accept the proceeds of the sale and at the same time lay claim to the property sold. But this was not all that happened. Upon the purchase of the corn, defendants mingled it with their own, thereby putting it beyond the reach of the lien holder. The bank then could not have asserted its mortgage lien against the specific property. It must have relied on damages consequent on the conversion of the property covered by its mortgage. Upon ascertaining that defendants had appropriated the corn, it promptly advised them that it would hold them liable. Both the mortgagor, Godsey, and defendants as the purchasers of the mortgaged property, then were liable to the bank; the former on the indebtedness evidenced by the notes, and the latter because of the conversion of property pledged for their security. This was the situation when defendants telephoned to Godsey to "come in and settle" with the bank, and later, when the bank received the money.

The rights and liabilities of the parties had become fixed. Receipt of the payment satisfied the obligation of the debtor pro tanto, and to that extent reduced the liability of defendants. The course of the bank was beneficial to them and within its right to receive anything owing it. Ratification of the unauthorized sale might not be inferred from acquiescence therein or assent thereto, for the bank previously had expressly repudiated it by advising defendants that they would be held for the conversion of the mortgaged property. As against such repudiation, the subsequent receipt of money, though derived from the sale of the corn converted by defendants, cannot and ought not to be construed as an acquiescence therein or ratification thereof, but rather by way of satisfaction pro tanto of the claims against both the debtor and those having converted the mortgaged property. All done thereafter was in the interest of defendants, and did not constitute a defense. The court rightly ruled that the evidence was such as to carry the issue of ratification to the jury.

Affirmed.

Evans, Ch. J., and Gaynor and Salinger, JJ., concur.

Annotation—Waiver of lien of chattel mortgage by accepting proceeds of sale of property.

For consent to sale by mortgagor of mortgaged chattels as waiver of lien, see the note to *Carr v. Brawley*, 43 L.R.A. (N.S.) 302. L.R.A.1917A.

As to waiver of lien of chattel mortgage by attachment or execution, see the notes to *Dix v. Smith*, 50 L.R.A. 714, and *Kansas City Live Stock Com-*

mission Co. v. Bank of Hamlin, 24 L.R.A.(N.S.) 490, and Ex parte Logan, 51 L.R.A.(N.S.) 1068.

As to sale of mortgaged chattels by, or with consent of, mortgagor, and application of proceeds to payment of mortgage, as a foreclosure cutting off intervening liens, see the note to Platte Valley Cattle Co. v. Bosserman-Gates Live Stock & Loan Co. 45 L.R.A.(N.S.) 1137.

A mortgagee waives the lien of his chattel mortgage upon property sold by the mortgagor by receiving all or a part of the proceeds with knowledge of their source. Ayres v. McConahey (1902) 65 Neb. 588, 91 N. W. 494; Thompson v. Perryman (1911) — Tex. Civ. App. —, 141 S. W. 184; Field v. Doyon (1885) 64 Wis. 560, 25 N. W. 653. See also SLOAN STATE BANK v. STODDARD, ante, 1261.

Thus a mortgagee holding two mortgages against a cattle owner who receives the proceeds of sale from part of the cattle, knowing the source covered by each mortgage, cannot credit it part to the first mortgage and part to unsecured claims against the mortgagor, and then sue the purchaser to recover the cattle. Ayres v. McConahey (Neb.) supra.

So where the mortgagee, with knowledge that his mortgagor had sold for its full value, some of the property mortgaged, accepted the money received on such sale and credited the amount on his mortgage debt, he was estopped from asserting any right under the mortgage to the property so sold. Field v. Doyon (Wis.) supra.

So where the mortgagee has acquiesced in a sale of part of the property by the mortgagor by settling with him for the proceeds of such part, he has waived his lien on the part sold. Thompson v. Perryman (1911) — Tex. Civ. App. —, 141 S. W. 184.

And acceptance of the money received from the sale of the mortgaged chattels, the mortgagee knowing of the sale, together with a release of the mortgage of record, will ratify the sale. Wade v. Cornish (1909) 23 Okla. 40, 99 Pac. 643.

Where a mortgagee of crops instructed the mortgagor to prepare and house the crops for market, and he, having no other means, sold part of the crop and used the proceeds for the purpose so directed, the mortgagee thus had the benefit and could not sue the mortgagor's selling agent for the said proceeds. Etheridge v. Hilliard (1888) 100 N. C. 250, 6 S. E. 571.

Where the mortgagor of a safe exchanged it for another treated as of equal value and mortgaged the new safe to the same mortgagee to secure the same debt, and the mortgagee and the mortgagor's husband sold the new safe, the mortgagee, having received the purchase price, could not attack the title of the holders of the old safe. Sheldon v. McFee (1913) 156 App. Div. 877, 140 N. Y. Supp. 818.

It was held in Hicks v. Ross (1888) 71 Tex. 358, 9 S. W. 315, where mortgagees received and credited on the mortgage debt property exchanged by the mortgagor for part of the mortgaged property of much less value, that they could not, after learning the facts, retain the new property and proceed to foreclose the lien against the old. The court observed that they were "not bona fide purchasers, so as to conclude a prior equity," and that receiving the consideration of a contract made without their authority was a ratification equivalent to a previous consent.

It is sufficient to prove that the mortgagee "was possessed of facts sufficient from which it could be reasonably inferred that it knew whence came the money," and it is error to instruct the jury that the money must have been received with intent to ratify the sale. Lafayette County Bank v. Metcalf (1888) 29 Mo. App. 384.

In Lafayette County Bank v. Metcalf (1890) 40 Mo. App. 494, where judgment was for the mortgagee, it was held that the jury were properly instructed that in order to find a ratification they must believe that the mortgagee knew of the sale and that the money paid it arose from said sale.

A mere unaccepted tender is insufficient. Thus if the mortgagor sells a portion of the property without the mortgagee's consent, a mere tender of the proceeds, not accepted, will not charge the mortgagee with a waiver of his rights. Holloway v. Arnold (1887) 92 Mo. 293, 5 S. W. 277.

Application to another debt—later discovery of source of money.

In Gosnell v. Webster (1904) 70 Neb. 705, 97 N. W. 1060, a check given by the purchaser for a part of mortgaged cattle was sent by the mortgagor to the mortgagee as payment of another debt due by the mortgagor to him and was so received and applied, and it was held that

the fact that, after the mortgagee began an action to recover the cattle from the purchaser's vendees, he was informed of the sale and the source of the check, would not require him to refund the money in order to succeed.

Georgia statute.

Under the Georgia statute providing that one half of the fine imposed upon the mortgagor of personalty as a punishment for fraudulently selling the mortgaged property be paid to the mortgagee, and that "the payment shall extinguish the debt to secure which the mortgage was executed," it was held that the term "debt" as used in the statute embraces interest as well as principal; and the mortgagee cannot accept any of the proceeds of the criminal sentence without submitting to have his whole debt thereby extinguished, whether his share of the proceeds in fact equals the aggregate of principal and interest or not. *Conley v. Maher* (1894) 93 Ga. 781, 20 S. E. 647.

While it is not designed to include other cases than those of chattel mortgages, the landlord lien cases cited by the

court in *SLOAN STATE BANK v. STODDARD*, ante, 1261, are briefly referred to below.

In *McCollum v. Wood* (1896) — *Tex. Civ. App.* —, 33 S. W. 1087, it was held that a receipt by the landlord knowingly of part of the proceeds of the sale of cotton subject to a landlord's lien is a waiver of the lien.

In *Noe v. Layton* (1901) 69 Ark. 551, 64 S. W. 880, the landlord did not know that the money accepted was part of the proceeds of the property covered by the lien, and it was held that his lien remained.

Where a landlord furnished his tenant certain supplies to enable him to make a crop, and by the terms of the rental contract was entitled to one fourth of the cotton as rent, and the tenant from time to time made a number of sales, reporting these to his landlord and paying him one fourth, it was held that the landlord could not follow the cotton of subsequent sales to the same purchaser, as his action amounted to an original authority in the tenant to sell. *Planters' Compress Co. v. Howard* (1906) 41 *Tex. Civ. App.* 285, 92 S. W. 44. B. B. B.

LOUISIANA SUPREME COURT.

RE SUCCESSION OF MARY PERCIVAL.

DR. JOHN T. O'FERRALL, Appt.

(— La. —, 72 So. 467.)

Physician — amount of fee.

A physician has the right, in the absence of a custom of his own, to charge for his visits by day or night at least the fee sanctioned by the custom of the community in which he lives; nor is he obliged, in so doing, to rate himself below the class to which, in his opinion, he properly belongs; and in such case the burden rests upon the patient who refuses to pay, to show a better reason for such refusal than that the physician is comparatively fresh from the seats of learning.

For other cases, see *Physicians and Surgeons, II. in Dig. 1-52 N. 8.*

(June 30, 1916.)

A PPEAL by opponent from a judgment of the Civil District Court for the Parish of Orleans sustaining his objection in part only, to the executor's account, in a pro-

Headnote by **MONROE, Ch. J.**

Note. — As to amount of compensation for professional services of physician or surgeon, see annotation following this case, post, 1267.
L.R.A.1917A.

ceeding for the settlement of the estate of *Mary Percival*, deceased. Amended and affirmed.

The facts are stated in the opinion.

Messrs. *John Dymond, Jr.*, and *A. Giffen Levy*, for appellant.

Messrs. *Carleton Hunt* and *M. D. Dimitry* for appellee.

Monroe, Ch. J., delivered the opinion of the court:

The decedent appears to have had no forced heirs and to have died unmarried. She left an estate which was appraised at \$264,056.33, of which she bequeathed property valued at \$150,000 to the church of which she was a member, and the balance to various legatees. *Percival's Succession*, 137 La. 203, 68 So. 409. For some time prior to April 20, 1914, she had been attended professionally by an eminent neurologist; but, not being altogether satisfied with his treatment, she requested Dr. John T. O'Ferrall to take charge of her case, and requested a friend who had been her legal adviser to inform the attending physician of her wishes, which request having been complied with, the visits of the attending physician ceased, and Dr. O'Ferrall took charge on the date above mentioned, and continued in charge until June 20, 1914, when the patient died. Thereafter Dr.

O'Ferrall presented a bill of \$1,500 for his services, which the dative executor declined to acknowledge, and the doctor thereupon filed an opposition to the executor's account, which opposition the trial judge sustained to the extent of allowing the opponent \$262, and, from that judgment, the opponent prosecutes this appeal.

It appears from the evidence that opponent, as a boy, had been a member of decedent's Sunday school class, and that she had been, and continued to be, much attached to him; that, at a later period, he had become a doctor of medicine, had spent much of his time elsewhere than in New Orleans, and had but recently returned to the city when decedent employed him. He testified, without contradiction, that he was graduated from the medical department of Tulane University of Louisiana, in 1908; that he attended the Army Medical School in Washington city, from which he was graduated in 1909; after which he paid a short visit to New Orleans, and then served four or five months in Bellevue Hospital, in New York; that he then returned here and served five or six months as the assistant of Dr. Van Wart of this city, and then went to Wisner, Mississippi, where he was engaged in the general practice of his profession for two years and a half, with the idea, however, of specializing in orthopedics; that he went from Wisner to Boston, Massachusetts, where he entered the Massachusetts General Hospital, in which he remained for a year, when he was graduated from the orthopedic department; and that he then spent four months visiting the important orthopedic clinics in Italy, Germany, France, and England, following which he returned to this country, and came to New Orleans in April, 1914. When first spoken to by the decedent upon the subject of his employment, opponent expressed some hesitation about accepting it, because, as he states, the case appeared to be on the "border line," and it was not altogether clear that it fell within the limits of his specialty. Beyond that, there was some friendly discussion upon the subject of his compensation, he expressing his objection to making any charge against his old friend, and she insisting that he should make the same charge as against any other patient, otherwise she would be unable to accept his services, and requesting that he take her case in hand and endeavor to discover the nature of her trouble, and, if it proved to be not within his specialty, that he see to it that she obtained necessary medical treatment; and he took the case with that understanding and treated it exclusively and most assiduously from April 20 to May 22, 1914, during which period he made two or three

visits a day, varying in length from half an hour to several hours, made a number of mechanical appliances, known as "Thomas collars," which afforded his patient considerable relief, took a blood test, accompanied his patient to see an X-ray specialist, and generally devoted himself to the case. Being then unable to determine whether the disease was orthopedic or neurological, or both, he advised that Dr. Hummell, another eminent neurologist, be called, and, his advice having been accepted, Dr. Hummell began his treatment on May 22d and continued it until say, June 9th, when he and opponent, in consultation, agreed that it would be advisable to call a surgeon in order that an operation might be performed for the relief of some trouble, or supposed trouble, with the brain, and, the surgeon having been summoned and having recommended that the patient be removed to the Touro Infirmiry, opponent made the necessary arrangements therefor, and she was taken to that institution on June 10th, after which the surgeon removed portions of her skull by two operations performed with an interval of about a week between them, and, on June 20th, after the second operation, the patient died, and then followed and autopsy which left still in doubt the question whether the disease with which she was afflicted was orthopedic or neurological, or otherwise, in its origin. It had been originally diagnosed as spasmodic torticollis (otherwise stiff, or wry neck) and treated accordingly.

Dr. Hummell gives the following testimony on that subject, and some others; to wit:

In the beginning, I thought it was spasmodic torticollis. I had no means of determining otherwise, and the conditions expressed themselves that way; but, in speaking of the case later, to Dr. O'Ferrall, we both admitted that there were unusual features about the case, but that was tentative only.

Q. Spasmodic torticollis is a complication, or disease, that would naturally follow under Dr. O'Ferrall's specialty?

A. It might, because spasmodic torticollis is a sympathetic affair, and several things may cause it. Some disease of the bone at the base of the neck might cause it. Some disease of the articular process of the cervical vertebrae might cause it.

Q. As I understand it, this was a complicated case, and could be classed as a border line case, which might be treated by an orthopedist or by a neurologist.

A. I have just made a statement to that effect, that the orthopedic condition might

underlie the torticollic condition; I did not know that I would say otherwise.

The doctor had previously testified as follows:

Q. Do you know what Miss Percival died from?

A. We assigned the cause of her death as tubercular meningitis, after a post mortem.

Q. That was the finding of the autopsy?

A. Miss Percival's case was most extraordinary in every step. Even the post mortem did not exactly clear away every doubt in the case. The post mortem showed that she had a subacute meningitis, but a microscopic examination of the spinal bacilli did not show any bacilli which would be expected under such conditions. However, in certain instances, tubercular meningitis shows tubercular bacilli; but frequently that is (not) the case in real tubercular meningitis, considering the chronic symptoms in the latter stages of the case and the naked eye appearance. At the post mortem, I, myself, assisted. It was found that tubercular meningitis was the cause of death. I thought that the most probable cause, without being able to confirm it conclusively.

We are not sure that the learned doctor has been accurately reported, and have inserted the word "not" (in the parentheses) at a venture; but the excerpt is, at least, sufficiently intelligible to show that the cause of death was not conclusively established, and hence that the time never arrived when the opponent, or anyone else, was able to say that the case was not within the limits of opponent's specialty, or, still less, that opponent had been discharged, whether by the calling of the neurologist or the surgeon, of his obligation to see that his patient obtained all necessary medical treatment.

Dr. Matas, the distinguished surgeon in the case, testified, in part, as follows, concerning the services rendered by him and opponent's relation thereto, to wit: "I looked upon that as a critical operation. It was done under desperate circumstances, in order to see if it was possible to restore the patient. I will state that I first saw Miss Percival, on June 9th then on June 10th, from that date continually, several times during the day and at night, by myself or in consultation with Drs. Hummell and O'Ferrall, until June 20th," on which last-mentioned date she died.

It was not to have been expected that opponent, after calling in Dr. Hummell, would have continued actually to have treated the case whilst Dr. Hummell was in immediate charge of it. Hence his visits were, L.R.A.1917A.

no doubt, less frequent during that period than before, but he still bore the responsibility that he had assumed, and kept himself so informed in regard to the condition of the patient as to be able to advise with Dr. Hummell concerning the employment of Dr. Matas, after which both he and Dr. Hummell continued their visits and consulted with Dr. Matas until the end; the visits paid by them to the patient after her removal to the infirmary having been very numerous, and both of them having devoted practically the two entire days upon which the operations were performed to that service. The bill of Dr. Hummell, amounting to \$1,875, and that of Dr. Matas amounting to \$1,250 were paid without objection. Our learned brother of the district court found the testimony as to the number of visits paid by the opponent to be unsatisfactory, and reached the conclusion that opponent was entitled to nothing for his services rendered after the employment of Dr. Hummell; his view being that the case was then turned over to Dr. Hummell, and that the services subsequently rendered were friendly merely, for which it was understood that no charge would be made. We agree with our learned brother that the testimony as to the number of visits paid by opponent is unsatisfactory, but in our view, opponent was employed to find out what was the matter with decedent, and to treat her disease himself, if it proved to be within the range of his specialty; otherwise, to secure for her competent treatment by other specialists or general practitioners, and his obligation required his attention during the life of the patient, and was faithfully discharged. It is true there was some testimony to the effect that opponent had stated to Mr. Chambers that it was not his intention to make any charge at all, and that the decedent, after the employment of Dr. Hummell, requested him to continue to call upon her as a friend; but the original employment of opponent upon a business basis is proved beyond dispute, and the testimony to which we have thus referred, and which is at variance with his understanding of the situation, fails to satisfy us that any change was made in the conditions upon which he was originally employed. Our learned brother was also of opinion that a young practitioner has no right to charge, or expect to be paid, the fees charged by those who are older and whose reputations have been established, and hence he allowed opponent but \$3 each, for day visits, and \$6 for night visits, although, according to the evidence, the customary charges by specialists appear to be \$5 and \$10, respectively. It may happen, however, that the knowledge of the schools goes beyond that upon

which reputations have been founded, and that the later graduate, bringing, with his diploma, the latest discoveries, is more competent to deal with a particular case than the earlier, with the experience of a past generation. However that may be, any physician has the right, in the absence of a custom of his own, to charge for his visits, day or night, at least the fee sanctioned by the custom of the community in which he lives; nor is he obliged, in so doing, to rate himself below the class to

which, in his opinion, he properly belongs; and in such a case the burden rests upon the patient who refuses to pay to show a better reason for such refusal than that the physician is comparatively fresh from the seats of learning. It is therefore ordered that the judgment appealed from be amended by increasing the amount to be allowed to the opponent to \$1,500, and, as thus amended, affirmed, at the cost of the succession.

Annotation—Physician and surgeon: amount of compensation for professional services.

I. In absence of contract, 1267.

II. Under contract, 1268.

III. Estimation of amount:

- a. Customary charge, 1269.*
- b. Nature of disease or injury, 1270.*
- c. Professional standing, 1270.*
- d. Skill and learning, 1270.*
- e. Income, 1271.*
- f. Loss of practice, 1271.*
- g. Financial condition of patient, 1272.*
- h. Benefit to patient, 1274.*
- i. Character of medicine, 1274.*
- j. Miscellaneous, 1275.*

I. In absence of contract.

The question under annotation presupposes that the defendant is liable for some amount, and the note is therefore not concerned with the facts or circum-

stances essential to create a liability express or implied, but only with the amount of that liability.¹

Where a physician performs services on request and in such circumstances as to create a liability on the part of defendant for some amount, but without an agreement being made as to the amount, the law raises an implied promise to pay what the services are reasonably worth.²

There is no presumption of law as to the value of a physician's services, and there is no presumption that a jury can ascertain such value without testimony of some kind from persons knowing something about it.³

The question of what is reasonable is peculiarly within the province of the jury;⁴ but there is no rule allowing them to entirely ignore the testimony

¹ Some phases of that question are treated in notes that may be found by consulting L.R.A. Index to Notes, under the title, "Physicians and surgeons."

² *Henderson v. Hall* (1908) 87 Ark. 1, 25 L.R.A.(N.S.) 70, 112 S. W. 171; *Sayles v. Fitz Gerald* (1899) 72 Conn. 391, 44 Atl. 733; *Marshall v. Bahnsen* (1907) 1 Ga. App. 485, 57 S. E. 1006; *Chicago & N. W. R. Co. v. Friend* (1899) 86 Ill. App. 157; *Chicago Consol. Traction Co. v. Mathews* (1904) 117 Ill. App. 174; *Peck v. Martin* (1861) 17 Ind. 115; *Marion County v. Chambers* (1881) 75 Ind. 409; *Johnson v. Jones* (1916) — Ind. —, 112 N. E. 830; *Morreil v. Lawrence* (1907) 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650; *Short's Succession* (1893) 45 La. Ann. 1485, 14 So. 184; *Crumrine v. Austin* (1903) 133 Mich. 283, 94 N. W. 1057; *Forbes v. Kennedy* (1894) 76 Hun (N. Y.) 39, 27 N. Y. Supp. 590; *Schoenberg v. Rose* (1914) 145 N. Y. Supp. 831; *Imperial v. Alexandre* (1909) 14 Philippine, 203; *Sprissler v. McFetridge* (1908) 37 Pa. Super. Ct. 607.

In *Henderson v. Hall* (1908) 87 Ark. 1, 25 L.R.A.(N.S.) 70, 112 S. W. 171, it was held that there could be a recovery on a L.R.A.1917A.

quantum meruit for the value of the services, where the defendant admitted the contract for the services alleged, but convinced the jury that no amount was agreed upon, notwithstanding that the action was brought on an alleged contract for a specified amount.

³ *Wood v. Barker* (1882) 49 Mich. 295, 13 N. W. 597.

⁴ *Marshall v. Bahnsen* (1907) 1 Ga. App. 485, 57 S. E. 1006; *Hutchinson v. Nettleton* (1912) 175 Ill. App. 277; *Crumrine v. Austin* (1903) 133 Mich. 283, 94 N. W. 1067.

Where a physician claimed that his services were reasonably worth the amount stated, and offered testimony in support thereof, but the defendant denied his claim of value, a failure to leave the question of the value of plaintiff's services to the jury, even though plaintiff's evidence was not disputed, was held erroneous in *Tedrow v. Johnson* (1914) 107 Iowa, 513, 149 N. W. 645.

In the absence of an express agreement, states the court in *Johnson v. Jones* (1916) — Ind. App. —, 112 N. E. 830, one who brings to such a service as was rendered by him due care and skill can recover the rea-

and from an independent conclusion upon a matter requiring proof beyond their conjecture or opinion.⁵

II. Under contract.

Where a contract has been entered

sonable and customary price therefor; but such reasonable and customary fee must be shown by complaint evidence. Proof of the price charged by the complainant, without any proof of the value of the service performed, is not sufficient, and does not meet the test.

⁵ Wood v. Barker (1882) 49 Mich. 295, 13 N. W. 597; Ladd v. Witte (1902) 116 Wis. 35, 92 N. W. 365.

In McNamara v. McNamara (1901) 108 Wis. 613, 84 N. W. 901, an action by a physician against his father, also a physician, for services in consultation during a period of six years, the court failed to sustain a recovery reduced from \$11,000 to \$6,000, and granted a new trial. Plaintiff was unable to state what he did in any given case, had no memorandum or record from which he could determine the number of cases in any one week or month, in which he acted as counsel, and had no data or remembrance as to how much time he spent in his father's service. That the expert testimony, said the court was of no value in arriving at a correct conclusion, was evident from the fact that the hypothetical question propounded did not cover the material facts in the case. The parties were greatly embittered toward each other, and the verdict was perverse in the sense that prejudice was aroused against the defendant and that no proper foundation for the recovery allowed was found in the evidence.

⁶ In Madison v. Mangan (1898) 77 Ill. App. 651, a physician contracted to cure a patient for \$100, agreeing to furnish free treatment if the disease returned at any future time. After an operation was performed, the patient believed that he was cured and so informed the physician and paid him \$100. The terms of the contract required the patient to return to the physician for further treatment in case the cure proved to be incomplete. After the lapse of two years without notice or application for further treatment, the patient brought suit to recover back the \$100 he had paid, claiming he had continued to be and was then afflicted with the disease. It was held that there could be no recovery. The court found from the evidence, as facts in the case, that the patient failed on his part to perform the contract and for that reason he had no right to maintain a suit against the physician for the alleged breach on his part; and further that the physician had on his part performed all the terms of his contract that it was possible for him to perform in the absence of performance by the patient.

In Burgoon v. Johnson (1899) 194 Pa. 61, 46 Atl. 65, a physician entered into an agreement with another physician whereby L.R.A.1917A.

into respecting the compensation or charges of a physician or surgeon for professional services rendered, different questions have arisen.⁶ Sometimes the question is as to what services are comprehended by the agreement.⁷ In others

the former was to receive a certificate of his skill or \$5,000 if he cured the latter of a sore on his face. It was held that, on refusal of the latter to give the certificate, he was bound to pay, the court stating that he was not the ordinary patient calling upon a specialist, but a member himself of the medical profession, knowing, according to his own testimony, what his trouble was, and presumed to know what would be a proper charge for the services to be rendered; that the \$5,000 was an alternative mode of payment agreed upon by parties capable of intelligently entering into such a contract, and not a penalty.

A contract to pay a physician from \$200 to \$400 for the performance of a surgical operation was, in Doyle v. Edwards (1902) 15 S. D. 648, 91 N. W. 322, held binding and valid for \$200, and the value of the services up to \$400, upon proof of such value.

In Swift v. Kelly (1910) — Tex. Civ. App. —, 133 S. W. 901, evidence of an express contract, i. e., defendant's promissory note in plaintiff's favor for \$500 of the amounts sued for, and also letters and telegrams from defendant to plaintiff requesting an extension of time for its payment, was held inadmissible to prove the value of services rendered by a physician in a suit to recover the reasonable value of his services.

⁷ In Brown v. Murrell (1891) — Ark. —, 18 S. W. 478, a physician, after stating that his fee for treating a man's son would be \$250, advised a trip to New York to consult a specialist, informing the father by letter that, "of course, you may expect some considerable expense attached to the trip." The evidence showed that when a physician leaves his business and office, \$25 per day is not an unreasonable charge for time. The controversy was as to the \$250 charged for the trip, which was in addition to his fee of \$250, for which he proposed in his letter to the father to treat the son. The court was of the opinion that when the physician wrote that his fee would be \$250, he had in contemplation the treatment of the case at his office, and that it was not then contemplated by either party that the trip to New York would be made; that the payment for this trip, or for the time consumed in making it, was not covered by any contract between the parties, and, being outside the expectation or contemplation of either party when the physician stated what his fee would be, the physician was entitled to recover for the value of his time during the trip.

Where after a physician's bill had run up to \$100, which was paid, the question of agreeing upon a sum was broached with a view of limiting defendant's liability, and \$175 was agreed upon after the doctor had

the attempt has been to establish by facts and circumstances an agreement implied in part for a certain compensation.⁸

III. Estimation of amount.

a. Customary charge.

In suits upon quantum meruit for the value of professional services, a physician is entitled to recover the ordinary and reasonable charges usually made for such services by members of the same profession of similar standing.⁹

In this connection it has been declared that any physician has the right, in the absence of a custom of his own, to charge

for his visits, day or night, at least the fee sanctioned by the custom of the community in which he lives; and that he is not obliged, in so doing, to rate himself below the class to which, in his opinion, he properly belongs; and that in such a case the burden rests upon the patient who refuses to pay to show a better reason for such refusal than that the physician is comparatively fresh from the seats of learning.¹⁰

For the purpose of proving the real value of such services, or the fact that they were of no value, the customary charges of physicians in the same locality for like services may be shown,¹¹ but the reasonableness of a physician's

said that the treatment might continue "six, seven, or eight weeks,—quite indefinite," it was held in *Denenholz v. Kelly* (1906) 97 N. Y. Supp. 389, that, although the treatment, which continued for some weeks thereafter, did not continue for seven or eight weeks, the physician could recover the balance sued for, his statement as to the length of the treatment being indefinite and merely the expression of an opinion.

⁸ Where a physician sued a patient for professional services rendered at the rate of \$1.50 per visit, evidence "that previously and up to the commencement of the account in question said physician had been the family physician of said Sidener; and that he had settled with said Sidener, before the commencement of the account in suit, for the previous services rendered by him, and similar services and treatment, including medicines, at and for charges from 50 cents to not exceeding \$1.25 per visit; and that no new contract or agreement was made as to charges for services in this account," was admissible as tending to establish circumstances showing an implied contract or understanding in relation to the amount which should be charged for services of the character named. *Sidener v. Fetter* (1902) 19 Ind. 310.

A contract, states the court in *Burke v. Mulgrew* (1908) 127 App. Div. 733, 111 N. Y. Supp. 899, to pay more than the actual value of the services rendered, is quite unusual. Testimony, however, that the services of a particular physician were desired at such place and under such circumstances that compensation for the services would not be adequate remuneration for the loss of time or business, would tend to render probable testimony that an agreement was made to compensate the physician for both services and necessary loss of time or business; but such testimony should be construed as contemplating compensation for the full time or loss of business and for the services as well, for the former would embrace the latter. A construction which would give the physician double compensation should not be given to a contract, unless the language employed is susceptible L.R.A.1917A.

of no other construction, and in that event the extraordinary character of the promise would render the testimony improbable and require that it be well supported by facts and circumstances to sustain a recovery thereon. In this case there was a failure to prove any agreement to pay for anything further than the professional services rendered.

Where a patient complained of a physician's too frequent attendance at a time when he was calling as often as four or six times in twenty-four hours in the treatment of a case of melancholy and the physician promised that he would charge for only one visit per day, it was held in *Thomas's Estate* (1887) 6 Pa. Co. Ct. 642, that he could claim from the patient's estate the value of only one visit per day.

Where, in an action by a physician for services rendered, the evidence shows that plaintiff's attendance was as a family physician, not as a specialist in children's diseases, it was held in *Haas v. Read* (1909) 63 Misc. 342, 117 N. Y. Supp. 106, that plaintiff's charge for treating defendant should be limited to \$4 per visit, where by his previous charge he had established that as the fee per visit.

⁹ *Marshall v. Bahusen* (1907) 1 Ga. App. 485, 57 S. E. 1006.

¹⁰ *PERCIVAL'S SUCCESSION*, ante, 1264.

¹¹ *Jonas v. King* (1886) 81 Ala. 285, 1 So. 591; *Weinlander v. Volkman* (1910) 153 Ill. App. 137; *Best v. McAuslan* (1905) 27 R. I. 107, 60 Atl. 774.

But in an action to recover for professional services rendered to people injured in a wreck, evidence of what another physician received for his services on the same occasion was, in *McKnight v. Detroit & M. R. Co.* (1904) 135 Mich. 307, 97 N. W. 772, held inadmissible as bearing upon the reasonableness of plaintiff's charges, the court stating that such evidence would have opened the question as to how his services compared with plaintiff, and would have involved the trial of an additional case.

In an action by a physician and surgeon to recover for services in attending persons injured in a railroad collision and placed in a private hospital, the question propounded

charges cannot be established by proof of what he charged another person in a similar case.¹²

Testimony, however, that a physician's charges were according to the rates charged other persons in the vicinity, has been held admissible in connection with other proof that his rates were well understood and did in fact come to the knowledge of the defendant patient.¹³

b. Nature of disease or injury.

In order to fix the value of services rendered a patient, a physician may show the nature of the disease and character of the treatment.¹⁴

c. Professional standing.

A physician is not obliged to rate himself below the class to which, in his opinion, he properly belongs, because of his youth and comparative inexperience.¹⁵

In an action by a physician for the value of professional services rendered, he may show that his standing in the profession is high,¹⁶ or that he is busily engaged in the practice of his profession.¹⁷

Should a question arise as to the value of services in an action brought by a physician to recover fees, where the nature of the services performed makes the possession of certain qualifications constitute an important element in the value of those services, as in a case where the physician was called because of his peculiar skill as a diagnostician, evidence

of professional standing is clearly admissible, and is entitled to consideration.¹⁸

But in estimating the value of a physician's services, evidence as to his good reputation in the community,¹⁹ or as to his general character as a physician,²⁰ is admissible where his general professional reputation or character is not drawn in question.

d. Skill and learning.

It is stated in an early case²¹ that "the law allows a reasonable compensation, and permits the jury to take into consideration all the facts. The same rule of law decides the compensation to be made for services whether performed by a day laborer or by a mechanic or by a surgeon. It does not enter into distinctions so nice as to determine, as matter of law, that a mechanic who performs his services faithfully and with competent skill is not entitled to receive as much compensation therefor as another would be who had acquired much greater skill and had performed like services no better. Or that a surgeon who had performed an operation skillfully and faithfully would not be entitled to receive the same compensation as one more learned and skilful, who could perform the same operation no better. While the law does not act upon such distinctions, it permits jurors to take into consideration the exhausting studies, the time consumed, and the expenses incurred to acquire great pro-

to another physician and surgeon by defendant's counsel, "What is the usual and customary charge in this state for all necessary attendance, medical and other, to patients in hospitals received for treatment for wounds arising, for instance, from a railway collision?" was, in *Trenor v. Central P. R. Co.* (1875) 50 Cal. 222, held irrelevant, the court stating that this question did not relate to the value of services of the character of those charged in the complaint.

The question of conclusiveness of the testimony of experts as to the value of professional services is treated in notes to *Hull v. St. Louis*, 42 L.R.A. 753, and *Fowle v. Parsons*, 45 L.R.A.(N.S.) 181.

¹² *Collins v. Fowler* (1843) 4 Ala. 647; *Marshall v. Bahnson* (1907) 1 Ga. App. 485, 57 S. E. 1006.

¹³ *Paige v. Morgan* (1856) 28 Vt. 565.

¹⁴ *Kendall v. Grey* (1859) 2 Hilt. (N. Y.) 300.

¹⁵ *PERCIVAL'S SUCCESSION*, ante, 1264.

¹⁶ *Marshall v. Bahnson* (Ga.) supra; *Lange v. Kearney* (1889) 21 N. Y. S. R. 262, 4 N. Y. Supp. 14, affirmed without opinion in (1891) 127 N. Y. 676, 28 N. E. 255. L.R.A.1917A.

¹⁷ *Sills v. Cochems* (1906) 36 Colo. 524, 85 Pac. 1007.

¹⁸ *Sills v. Cochems* (Colo.) supra.

¹⁹ *Morrell v. Lawrence* (1907) 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650.

²⁰ *Jeffries v. Harris* (1824) 10 N. C. (3 Hawks) 105.

²¹ *Stockbridge v. Crooker* (1852) 34 Me. 349, 56 Am. Dec. 662.

In *Chicago & N. W. R. Co. v. Friend* (1899) 86 Ill. App. 157, the court said that a physician or surgeon cannot sustain a claim for larger compensation than an ordinary man would be entitled to for the same service, upon the ground alone that, as an expert in his profession, his time is more valuable than that of such ordinary man. The service voluntarily rendered is not in other words to be considered more valuable merely because of the greater value of the time of him who renders it, where no agreement is made beforehand as to the compensation to be paid. But this case merely involved compensation for preparing, for purposes of litigation, a report of the plaintiff's examination of a patient whom he had treated.

fessional knowledge and distinction or great mechanical or other skill. If the law made the compensation for services performed commensurate with the skill exhibited and the responsibility incurred, it would be necessary to admit testimony in each case to prove how much skill had been exhibited, and how great responsibility had been incurred. It would often be difficult, if not impossible, to receive such testimony in such a manner that a jury could safely act upon it. The rule stated would tend greatly to impair uniformity of compensation for professional and mechanical services of the same description, and to introduce a different rule of compensation for like services when performed by different individuals."

So far as this implies that a physician or surgeon cannot by reason of his superior learning and skill, justify a higher charge than would be reasonable in case of a man of less learning and skill, who could have performed the particular service equally well, it seems open

to question as a legal proposition, and contrary to the general understanding of the medical and surgical profession as well as the public generally. At all events it seems obvious that slight circumstances would be sufficient to justify an inference of an implied agreement on the part of the patient to pay the larger fee which the physician or surgeon of superior skill was accustomed to charge for his services.

In an action by a physician for the reasonable value of his services, his learning and skill are competent and should be taken as an element in estimating the value of the services rendered.²²

e. Income.

The average daily income of a physician may not be considered in estimating the value of his services.²³

f. Loss of practice.

If a physician agrees to devote himself exclusively to one patient, abandon-

²² *Heintz v. Cooper* (1896) 5 Cal. Unrep. 564, 47 Pac. 360; *Morrell v. Lawrence* (1907) 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650; *Millener v. Driggs* (1887) 10 N. Y. S. R. 237; *Langolf v. Pfrommer* (1856) 2 Phila. (Pa.) 17 (a recovery by a physician for services as such must necessarily depend on whether he possessed the requisite skill). See *PERCIVAL'S SUCCESSION*, ante, 1264.

It was contended in *Heintz v. Cooper* (Cal.) supra, that "the usual price at the time and place of performance is the rule" for determining the reasonable value of services rendered in reducing and attending a compound fracture of the leg. The court said, however, that "the cases cited in support of this proposition relate to ordinary services as to which there is a reasonably uniform established rate of compensation, and not to professional services where the skill and learning of the person, as well as the almost infinite variety in the character and circumstances of the subject upon which he devotes his services, preclude the establishment of any fixed rate of compensation which could be applied to more than a very restrictive class of cases and the more common class of services. Besides the defendant's witnesses testified that no medical society existed in Monterey county, and no fee, bill, or scale of charges had been fixed, but each charged according to his ideals of what was proper."

Where a physician was an operating surgeon of great skill, but owing to his fatigue he did not operate upon his patient, the operation being performed by another surgeon, it was held in *Prentice v. Ladinski* (1913) 81 Misc. 42, 141 N. Y. Supp. 1005, that for his attendance upon the patient he should be compensated rather upon the scale of L.R.A.1917A.

charges for services of a family physician than the much higher scale of services of an operating surgeon.

In assumpsit for medical and surgical services rendered, a failure to instruct that neither the plaintiff nor any number of physicians could fix upon an arbitrary fee was, in *McKnight v. Detroit & M. R. Co.* (1904) 135 Mich. 307, 97 N. W. 772, held not erroneous where the circuit judge charged the jury in substance that, in estimating the value of a physician's services, they should consider the professional skill and the experience of the physician, the nature and character of the services rendered, the difficulties and the nature of the case, and the amount of services rendered, and clearly limited the recovery to such a sum as, upon the evidence, the jury should find would compensate the plaintiff for the services rendered in the case.

Where, in an action by a physician to recover for professional services rendered, the defendant requested the judge to charge the jury "that the plaintiff was not entitled to recover unless he proved, to their satisfaction, that he was a regular physician," and the judge used the words "skillful and efficient" instead of the word "regular," it was held in *Mays v. Hogan* (1849) 4 Tex. 26, that there was no error.

²³ *Marion County v. Chambers* (1881) 75 Ind. 409, holding that the value of a physician's services in conducting post mortem examinations is not determinable by the average daily income of such physician from his profession.

Thomas v. Caulkett (1885) 57 Mich. 303, 58 Am. Rep. 369, 24 N. W. 154, stating that it cannot be held, as matter of law, that the value of scientific services depends on a man's actual average daily receipts. If

ing his other practice, and renders unusual service in the performance of the contract, he is not restricted to the usual charges of practising physicians, but, in estimating what would be reasonable compensation, it is proper to consider the nature of the contracts and the fact that by such an arrangement he would probably lose largely in his other practice, although the extent of the injury to his other practice is not a proper subject of inquiry.²⁴

that were so, there could be no room for advancement. A physician's services may be worth much more than this.

It is stated in *Burke v. Mulgrew* (1908) 127 App. Div. 733, 111 N. Y. Supp. 899, appeal dismissed without opinion in (1909) 197 N. Y. 521, 90 N. E. 1156, that evidence with respect to the plaintiff physician's annual income prior to the time of employment by decedent "was doubtless proper as tending to show the value of his time, which might be considered by the jury in estimating the compensation to be made for his services and time when absent from the city, particularly on the journey to Cuba; but on no theory of the case do we think the evidence of the plaintiff's receipts from his practice during the period of the rendition of those services showing a falling off in business which may have been due to other causes, was admissible."

²⁴ *Maddin v. Head* (1878) 1 Lea (Tenn.) 664.

Dickey's Succession (1880) 41 La. Ann. 1010, 6 So. 798, holding that, where a physician was summoned to Atlanta to attend his aunt, not in a professional capacity, but as an adviser in business matters, and on his arrival he rendered valuable professional services which were accepted by the aunt, he is entitled to compensation; but, not having been summoned professionally in the first instance, he cannot, in estimating his services, claim for loss of home practice.

²⁵ *Haley's Succession* (1898) 50 La. Ann. 840, 24 So. 285, holding that, in fixing the value of fees due by a succession for professional services of physician, the court is justified in taking into consideration the value of the succession.

Czarnowski v. Zeyer (1883) 35 La. Ann. 796, holding that the amount of the patient's estate and his consequent ability to pay enter into the calculation, and influence the charges of a physician for services.

So, in *Schoenberg v. Rose* (1914) 145 N. Y. Supp. 831, the court said: "The deceased left a very large estate, evidence as to the value of which was received over the objection of the defendants' counsel. I am of the opinion that, while the financial condition of a patient does not alone affect the abstract question of the value of a physician's services, it is a proper element entering into the question as to what charge or what reduction in the charge shall be made by him by reason of such financial

g. Financial condition of patient.

There seems to be a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services were rendered, or the financial condition of the person receiving such services, in estimating the value of a physician's services in the absence of an express contract. Some favor the admission of such evidence.²⁵

condition. Lange v. Kearney (1889) 21 N. Y. S. R. 262, 4 N. Y. Supp. 14, affirmed in (1891) 127 N. Y. 676, 23 N. E. 255. So a patient of no means, or of limited means, may prove that his circumstances and station in life are such as to render a physician's charge exorbitant and out of all reason and proportion to the patient's ability to pay, while the same charge to a person of large means would not be considered unreasonable. The financial condition of a patient is an element that it may be assumed is considered by both physician and patient when the services are contracted for, rendered, and accepted, and may also be considered by the court in determining the reasonableness of the charge; and that element should apply to a case where there is and was no contract, but a mere fiction of the law creating one, else, in a case where services are rendered to an unconscious man who never recovers, the charge against his estate might be so great and unreasonable as to be out of all proportion to the value of the estate. This charge a man who recovers could resist and successfully defend by showing his limited means, and, in the case of an unconscious man who does not recover, such value is an aid to the court in fixing the reasonableness of the claim, whether made against a large or a small estate. Therefore, the evidence as to the value of the deceased's estate was properly allowed and properly taken into consideration, and that, together with the experience of the physician as such, and the nature and difficulty or easiness of the case, and what is considered by him and by other physicians an ordinary or reasonable charge for the services, are the proper elements upon which a judge or jury may act in fixing the value of the services. But the services performed here were not difficult. They did not require any special degree of skill or knowledge, nor were they of such a character that it required a physician of years of experience or study to perform them properly. They consisted of what a medical student could perform as well as a physician of years of experience. It is not uncommon to find laymen experienced in giving prompt or what is called 'first' aid to the injured, who can do this work as well as a physician. The plaintiff testified that the treatment described by him, which he gave, was the usual and well-known method. There is some dispute as to the exact

In other jurisdictions, however, such evidence may not be considered.²⁶

In determining the value of professional services rendered, testimony as to the value of a deceased patient's estate has been held inadmissible in the absence of a recognized usage obtaining to graduate professional charges with reference to the financial condition of the person for whom such services are rendered, which had been so long established and so universally acted upon as to have ripened into a custom of such character that it might be considered

that the services were rendered and accepted in contemplation of it.²⁷

So it has been held that a physician may not show to the jury the defendant's wealth as an element to be taken into the account in the measurement of the value of his services, unless it is in rebuttal of evidence from the other side attempting to show the custom of a lower standard.²⁸

Whatever may be the true principle governing this matter in contracts, the court, in one case at least, is of the opinion that the financial condition of a

minute that Mr. Bernheimer died, and consequently the plaintiff's claim that he treated the deceased between thirty and forty-five minutes is also disputed. It is not necessary to measure the plaintiff's services by the fraction of a minute, but I should say, from the evidence, he was engaged in the manner testified to by him fifteen to twenty minutes. Dr. Shook, who also presented a bill for \$500 for his services, and another physician, testified for the plaintiff that \$500 was the value of plaintiff's services, while experts called for defendants placed the value at from \$10 to \$15; one stating that a fair charge would be from nothing up to a maximum of \$15."

²⁶ *Robinson v. Campbell* (1878) 47 Iowa, 625, where it is stated that "there is no more reason why this charge should be enhanced on account of the ability of the defendants to pay than that the merchant should charge them more for a yard of cloth or the druggist for filling a prescription or a laborer for a day's work. It is true a physician in general practice will often be called upon to treat indigent persons from whom he will not be able to recover the value of his services. He may take this into account and regulate his charges with reference to that fact, just as a merchant may take into account probable bad debts in fixing his per centum of profit upon his goods; but the value of a service depends upon the difficulty of rendering it and the skill required in its performance, and sometimes upon the results accomplished, and not upon the riches or the poverty of the person for whom the service is performed. If the ability to pay determines the reasonableness of a charge, then the richer a man is the more he should pay for any service. No such rule of charge can be recognized or countenanced by the law."

²⁷ *In Swift v. Kelly* (1910) — Tex. Civ. App., 133 S. W. 901, an action to recover the reasonable value of professional services rendered it was held erroneous to permit plaintiff to show the reasonable value of his services by proof that defendant was wealthy, coupled with further proof of a custom among physicians to graduate their charges according to the financial condition of the patient, and to charge a wealthy person a higher fee by reason of his super-

ior ability to pay. The court stated that in *Robinson v. Campbell* (Iowa) supra, it was held that such testimony was not admissible, and that the reasoning there advanced seemed sound. Certainly no court would hold that the value of ordinary labor could be determined by such a test, and upon principle there seems to be no distinction between such a claim and one of the character now under discussion. If the recovery sought in this suit for professional services had been upon an alleged implied contract by defendant to pay such fees as are customarily charged for the same character of services performed for a patient of like financial ability to pay a fee therefor, then a different question would be presented.

²⁷ *Morrisett v. Wood* (1898) 123 Ala. 384, 82 Am. St. Rep. 127, 26 So. 307.

On the question of the value of services rendered by a physician, it is stated by the court in *Lange v. Kearney* (1889) 21 N. Y. S. R. 262, 4 N. Y. Supp. 14, affirmed without opinion in (1891) 127 N. Y. 676, 28 N. E. 255, that "there is also evidence tending to establish a custom or rule of guidance as to charges of physicians for services rendered, and which makes the amount dependent upon the means of the patient, his financial ability or condition but this is a benevolent practice which does not affect the abstract question of value, or impose any legal obligation to adopt it, and cannot be said to be universal on the evidence. Indeed, there does not seem to exist any standard by which, in the application of the rule, the amount to be paid can be ascertained."

²⁸ *Morrell v. Lawrence* (1907) 203 Mo. 363, 120 Am. St. Rep. 660, 101 S. W. 571, 11 Ann. Cas. 650. This is an action on an alleged implied contract of a father to pay a physician the reasonable value of services rendered a son on the father's request. The court said that if the defendant should introduce evidence to show that the plaintiff for similar services was accustomed to charge smaller fees than those sued for, the plaintiff would have a right to show, if such was the fact, that the smaller fees were charged to poor men because of their poverty, but that the defendant's financial condition justified a charge for fair and reasonable compensation. In this case there was no effort on the part of defendant to

patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires.²⁰

h. Benefit to patient.

Where a surgical operation is performed with due skill and care, the price to be paid therefor does not depend on the result. The event so generally lies with the forces of nature that all intelligent men know and understand that the surgeon is not responsible. In the absence of express agreement, the surgeon who brings to such service due skill and care earns the reasonable and

prove that the plaintiff or other physicians were in the habit of charging smaller fees for like services. Hence there was no occasion for rebuttal evidence to show that smaller fees were charged out of consideration for the poverty of the patients, and that defendant's financial condition did not entitle him to that indulgence.

²⁰ *Cotnam v. Wisdom* (1907) 83 Ark. 601, 12 L.R.A. (N.S.) 1090, 119 Am. St. Rep. 157, 104 S. W. 164, 13 Ann. Cas. 25, holding that in an action by a surgeon to recover for services to a stranger who had been rendered unconscious by an accident, and who died without recovering consciousness, evidence is not admissible of the financial ability of the patient. In this case the court said: "There was evidence in this case proving that it was customary for physicians to graduate their charges by the ability of the patient to pay; and hence, in regard to that element, this case differs from the Alabama case [*Morrisett v. Wood* (Ala.) *supra*]. But the value of the Alabama decision is the reason given which may admit such evidence: viz., because the custom would render the financial condition of the patient a factor to be contemplated by both parties when the services were rendered and accepted. The same thought differently expressed is found in *Lane v. Kearney* (N. Y.) *supra*. This could not apply to a physician called in an emergency by some bystander to attend a stricken man whom he never saw or heard of before; and certainly the unconscious patient could not, in fact or in law, be held to have contemplated what charges the physician might properly bring against him. In order to admit such testimony, it must be assumed that the surgeon and patient each had in contemplation that the means of the patient would be one factor in determining the amount of the charge for the services rendered. While the law may admit such evidence as throwing light upon the contract and indicating what was really in contemplation when it was made, yet a different question is presented when there is no contract to be ascertained or construed, but a mere fiction L.R.A.1917A.

customary price therefor, whether the outcome be beneficial to the patient or the reverse.²⁰

In an action by a physician to recover for medical services, proof that they were of no value has been held to constitute a defense.²¹

i. Character of medicine.

It has been held that it is relevant to prove that the medicine used by a physician was worthless and possessed no efficacy in producing the results for which it was used; and that, in order to do this, the defendant could prove the ingredients and nature of the medicine.²²

of law creating a contract where none existed in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered. The services are the same be the patient prince or pauper, and for them the surgeon is entitled to fair compensation for his time, service, and skill. It was therefore error to admit this evidence, and to instruct the jury in the second instruction that, in determining what was a reasonable charge, they could consider the 'ability to pay of the person operated upon.' It was improper to let it go to the jury that Mr. Harrison was a bachelor and that his estate was left to nieces and nephews. This was relevant to no issue in the case and its effect might well have been prejudicial. While this verdict is no higher than some of the evidence would justify, yet it is much higher than some of the other evidence would justify; and hence it is impossible to say that this was a harmless error."

²⁰ *Ladd v. Witte* (1902) 116 Wis. 35, 92 N. W. 365; *Styles v. Tyler* (1894) 64 Conn. 432, 30 Atl. 165 (while a physician is bound to prove the value of his services, he is not bound to prove the value of the services to the defendant).

²¹ *De Tarnowsky v. Walker* (1915) 191 Ill. App. 610.

Where, in an action for professional services by a physician and surgeon, there was no dispute as to the number of visits or items of charges, and plaintiff testified as to the value of his services and the nature of his treatment, and stated that they were worth the amount charged, a refusal to permit defendant to cross-examine him as to the amount charged for particular visits, and what they were worth, was in *Wurde-mann v. Barnes* (1896) 92 Wis. 206, 66 N. W. 111, held not error, where the court offered to permit defendant to examine him as to what he had done, and show that his services were not worth anything.

²² *Jonas v. King* (1886) 81 Ala. 285, 1 So. 591 (action by physician to recover fee under "no cure, no pay" contract).

J. Miscellaneous.

Certain cases which do not admit of a

distinct classification have been brought together under this head.³³

³³ In an action by a physician for services rendered a lawyer in examining a client who claimed a right of action for personal injuries, which claim was settled before the action for services is brought, plaintiff is not entitled to more than ordinary fees on the theory that his services were extraordinary, and he might have been compelled to attend court as a witness. *Henderson v. Hall* (1908) 87 Ark. 1, 25 L.R.A.(N.S.) 70, 112 S. W. 171. See note to this case, 25 L.R.A.(N.S.) 70, as to measure of compensation to physician employed to examine and report on physical condition of one who contemplates bringing action for personal injuries.

It was stated in *Henderson v. Hall* (Ark.) supra, that the physicians were called to render professional services in the physical examination of a woman, and were entitled to pay for the value of those services, and not for any speculative incident that might or might not have followed from this service.

A rule of the county board fixing a fee of \$1 a visit for medical aid furnished paupers in all cases, whether the illness with which the patient is afflicted or suffering is slight or serious, infectious or noninfectious, or one requiring surgical attention and assistance, or otherwise, is held unreasonable in *Dieffenbacher v. Mason County* (1904) 117 Ill. App. 103. Many cases might arise, said the court, so serious, dangerous, or disagreeable in their nature that no physician, of whatever skill or experience, would be willing to undertake them, because of the inadequacy of the compensation fixed. It is obvious that the result of restricting or limiting the authority of the overseer, as is done by the rule in question, would be frequently to render him powerless to afford proper care and attention to afflicted unfortunates, whereby unnecessary suffering and perchance death might ensue. The beneficent purpose of the statute would thus be nullified.

In *Sayles v. Fitz Gerald* (1899) 72 Conn. 391, 44 Atl. 733, testimony by the defense that the cellar, from its condition and contents, was an unfit place for the performance of the surgical operation in question, was pertinent to the question of the reasonableness of plaintiff's charge for services on that occasion. See also *Piper v. Menifee* (1851) 12 B. Mon. (Ky.) 465, 54 Am. Dec. 547, where it is held proper, for the purpose of reducing recovery for services, to consider violation of a promise and consequent damage.

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In *Duclos's Succession* (1856) 11 La. Ann. 406, there was considerable discrepancy between the witnesses as to the value of the medical attendance proved. One taxed the ordinary visits of physicians to a patient at \$2 for the first visit, and \$1 for each subsequent one. By another such visits were taxed at \$3 each, without distinction. For consultations one allowed \$10 for the first, and \$5 for each subsequent consultation, to each physician assisting. Another allowed \$10 for each consultation. It was held that, where witnesses differ as to the charges made by physicians, the correct rule is to allow the lowest estimate.

So, in *Collins v. Graves* (1868) 13 La. Ann. 95, the testimony as to the usual price of physicians in a certain parish during yellow fever epidemics was contradictory. A part of the evidence showed that the price for a visit was double what it was in ordinary cases; other testimony established that the price was \$100 for heads of the family and \$50 for each other member thereof. The court was of the opinion that the lowest estimate was a reasonable compensation for the services of the plaintiff.

A physician cannot, because he was a brother of decedent, recover from the latter's estate for services rendered as a physician more than the usual rates of practising physicians. *Re Moffett* (1875) 32 Phila. Leg. Int. (Pa.) 218. In the above case the court said: "While the fact that the claimant was a brother of decedent would be immaterial in determining his compensation for purely professional services, yet in connection with other testimony upon the subject it has an important bearing. The testimony shows that the claimant, while he attended his brother, the decedent, did not devote all his time and attention to his patient, but that he acted as a member of the family, sleeping and taking his meals in the house, going out and returning at his pleasure; and though no doubt he rendered many kind, thoughtful, and affectionate attentions to his suffering brother, yet they formed no part of his duty as a physician, and cannot after the death of that brother, be made the basis of pecuniary compensation. The most the claimant is entitled to is to be paid for the professional visits made and the number of operations performed by him at the usual rate of practising physicians. This we are unable to determine from the testimony, as the number of visits, etc., is not stated."

J. D. C.

OKLAHOMA SUPREME COURT.

WARREN F. STEWART et al., Plffs. in
Err.,
v.

W. T. RAWLEIGH MEDICAL COMPANY.

(— Okla. —, 159 Pac. 1187.)

Contracts — constitutional right.

1. The constitutional guaranty of liberty of the individual to enter into private contracts does not limit the power of Congress so as to prevent it from legislating upon the subject of contracts in restraint of interstate or foreign commerce.

For other cases, see Constitutional Law, II. b, 4, b, in Dig. 1-52 N. S.

Monopoly — fixing price.

2. A contract of absolute sale, made by a manufacturer of its various manufactured preparations, in which the purchaser agrees to sell the goods purchased "at regular retail prices to be indicated by it [the manufacturer]," where its entire product is sold throughout the country only by means of like restrictive contracts, operates as a "restraint of trade," unlawful as to interstate commerce under the Anti-trust Act of July 2, 1890.

For other cases, see Monopoly and Combinations, II. b, in Dig. 1-52 N. S.

Same — source of article.

3. Where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to fix and control the price paid therefor by the consumer is not determined by the circumstances whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The manufacturer having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

For other cases, see Monopoly and Combinations, II. b, in Dig. 1-52 N. S.

Contract — defense — monopoly.

4. The defense that a contract is in violation of the Act of Congress of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, which makes illegal every contract violative of its

Headnotes by SHARP, J.

Note. — As to validity of contract provision seeking to control price at which an article shall be resold, see annotation following this case, post, 1285.

As to when agreements otherwise presumably valid as being in reasonable and partial restraint of trade fall within the inhibition imposed by modern anti-trust acts, see note to Baird v. Smith, L.R.A. 1917A, 379, and the earlier notes to which reference is therein made, and to which it is supplemental.

As to validity of agreement to patronize particular concern exclusively, see annotation L.R.A. 1917A.

provisions, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action.

For other cases, see Contracts, III. g, 1, in Dig. 1-52 N. S.

(June 6, 1916.)

ERROR to the District Court for Grady County to review a judgment in plaintiffs' favor in an action brought to recover a balance due for certain merchandise sold to defendant Minette under a written contract with plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Blanton & Andrews, Albert Rennie, and Bond, Melton & Melton, for plaintiffs in error:

The question of the validity or invalidity of the contract should have been submitted to the jury, where reasonable men might draw different conclusions from the testimony.

De Mary v. Burtenshaw, 131 Mich. 326, 91 N. W. 647; *Detroit Salt Co. v. National Salt Co.* 134 Mich. 103, 96 N. W. 1; *Obenchain v. Ransome-Crummey Co.* 69 Or. 547, 138 Pac. 1078, 139 Pac. 920.

If the contract is void under the anti-trust laws of the state, the same will not be enforced, regardless of where it was entered into. Courts will not enforce contracts contrary to the public policy of the state in which they are sitting.

Standard Fashion Co. v. Grant, 165 N. C. 453, 81 S. E. 606; *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Continental Wall Paper Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Northern Securities Co. v. United States*, 193 U. S. 375, 48 L. ed. 715, 24 Sup. Ct. Rep. 436; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct.

tion to Peerless Pattern Co. v. Gauntlett Dry Goods Co. 42 L.R.A. (N.S.) 843, and the later case of *Rippy v. Art Wall Paper Mills*, 51 L.R.A. (N.S.) 33.

On validity of contracts giving one an exclusive right to handle goods in a given locality, see note to *Walter A. Wood Mowing & Reaping Machine Co. v. Greenwood Hardware Co.* 9 L.R.A. (N.S.) 501.

As to legality of combination by dealers not to patronize wholesalers who sell to undesirable persons, see note to *Retail Lumber Dealers' Asso. v. State*, 35 L.R.A. (N.S.) 1054.

Rep. 379; *United States v. Jellico Mountain Coal & Coke Co.* 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; *Byrne v. Kansas City, Ft. S. & M. R. Co.* 24 L.R.A. 603, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 610; *National Harrow Co. v. Hench*, 39 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 38; *United States v. Coal Dealers' Assn.* 85 Fed. 252; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 485; *Brent v. Thornton*, 45 C. C. A. 214, 106 Fed. 36; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610; *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assn.* 10 L.R.A.(N.S.) 972, 81 C. C. A. 658, 152 Fed. 864; *McConnell v. Camors-McConnell Co.* 152 Fed. 321; *Finck v. Schneider Granite Co.* 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.* 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 Ann. Cas. 667; *Hastings Industrial Co. v. Baxter*, 125 Mo. App. 494, 102 S. W. 1075; *Cummings v. Union Blue Stone Co.* 164 N. Y. 404, 52 L.R.A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; *Detroit Salt Co. v. National Salt Co.* 124 Mich. 103, 96 N. W. 1; *Straus v. American Publishers' Assn.* 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 60 N. E. 1107; *Beechley v. Mulville*, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; *Bailey v. Master Plumbers' Assn.* 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; *Citizens' Nat. Bank v. Mitchell*, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371; *Wagner v. Minnie Harvester Co.* 25 Okla. 558, 106 Pac. 969; *Stewart v. Thayer*, 170 Mass. 562, 49 N. E. 1020; *Troewert v. Decker*, 51 Wis. 47, 37 Am. Rep. 808, 8 N. W. 26; *Smith v. Albany*, 61 N. Y. 444; *Berka v. Woodward*, 125 Cal. 120, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; *Kohn v. Milcher*, 10 L.R.A. 439, 43 Fed. 641; *Sprott v. United States*, 20 Wall. 459, 22 L. ed. 371; *Hanauer v. Doane*, 12 Wall. 342, 20 L. ed. 439; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Fuqua v. Pabst Brewing Co.* 90 Tex. 298, 35 L.R.A. 241, 38 S. W. 29, 750; *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. ed. 468; *Coppell v. Hall*, 7 Wall. 542, 19 L. ed. 244; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36.

The contract restricts the liberty of the trader to engage in business, in that it prevents his handling any goods save those of the vendor, or having any other business and employment.

Nester v. Continental Brewing Co. 161 L.R.A.1917A.

Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 479; *Straus v. American Publishers' Assn.* 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 60 N. E. 1107; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Cummings v. Union Blue Stone Co.* 164 N. Y. 404, 52 L.R.A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; *Ford v. Chicago Milk Shippers' Assn.* 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651; *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.* 60 W. Va. 508, 10 L.R.A.(N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 Ann. Cas. 667.

A contract in restraint of trade need not be unreasonable in its restraint to be illegal and void.

United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assn.* 10 L.R.A.(N.S.) 972, 81 C. C. A. 658, 152 Fed. 864.

It is the duty of the court, when the illegality of the contract appears, to dismiss the action.

Patterson v. Imperial Window Glass Co. 91 Kan. 201, 137 Pac. 955.

Mr. Marion Henderson also for plaintiffs in error.

Messrs. Swan C. Burnette, C. E. Crulkshank, and I. P. Gassman, for defendant in error:

Plaintiff is engaged in interstate commerce, and is entitled to use the courts of Oklahoma for the purpose of maintaining this suit.

Sioux Remedy Co. v. Cope, 235 U. S. 197, 59 L. ed. 193, 35 Sup. Ct. Rep. 57; *Freeman-Sipes Co. v. Corticello Silk Co.* 34 Okla. 229, 124 Pac. 972; *Harrell v. Peters Cartridge Co.* 36 Okla. 684, 44 L.R.A.(N.S.) 1094, 129 Pac. 872; *Dr. Koch Vegetable Tea Co. v. Shumann*, 42 Okla. 60, 139 Pac. 1133.

The contract is one of sale.

W. T. Rawleigh Medical Co. v. Laurssen, 25 N. D. 63, 48 L.R.A.(N.S.) 198, 141 N. W. 64; *W. T. Rawleigh Medical Co. v. Tillman*, 158 Wis. 354, 148 N. W. 875; *Reese v. W. T. Rawleigh Medical Co.* — Ark. —, 172 S. W. 820.

The contract is not in violation of either the laws of the state of Illinois, where it was made and performed, nor is it in violation of the Federal statutes or Anti-trust Laws.

Southern Fire Brick & Clay Co. v. Garden City Sand Co. 223 Ill. 616, 9 L.R.A.(N.S.) 446, 79 N. E. 313, 7 Ann. Cas. 50; *Brown v. Rounsavell*, 78 Ill. 589.

It was not unreasonable for the company

to indicate, as provided in the contract, the customary prices at which the party purchasing its goods should sell them in order to make a fair margin of profit; nor could it be held unreasonable for the company to indicate such prices on its report sheets for accounting purposes.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A.(N.S.) 395, 105 Pac. 745; D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 Pac. 1041; Walter A. Wood Mowing & Reaping Co. v. Greenwood Hard-Ware Co. 75 S. C. 378, 9 L.R.A.(N.S.) 501, 55 S. E. 973, 9 Ann. Cas. 002.

Where the provisions of the contract are separable, that part of the contract not illegal will be sustained.

McCall Co. v. Hughes, 102 Miss. 375, 42 L.R.A.(N.S.) 63, 59 So. 794; Packard v. Byrd, 73 S. C. 1, 6 L.R.A.(N.S.) 547, 51 S. E. 678; Central New York Teleph. & Teleg. Co. v. Averill, 199 N. Y. 128, 32 L.R.A.(N.S.) 494, 139 Am. St. Rep. 878, 92 N. E. 206.

Sharp, J., delivered the opinion of the court:

For convenience the W. T. Rawleigh Medical Company will hereinafter be referred to as the plaintiff, and the plaintiffs in error as defendants. Plaintiff's action was to recover of Henry Minette as principal, and of the other defendants as guarantors, a balance of \$1,212.22, on account of certain bills of merchandise sold Minette pursuant to a written contract between said Minette and the plaintiff, the performance of which, it was charged, was guaranteed by the defendants, Stewart, Alexander, Henson and Sparks. The contract is in part as follows:

"Whereas Henry Minette, of Pauls Valley, Oklahoma, desires to purchase of the W. T. Rawleigh Medical Company, of Freeport, Illinois, on credit and at wholesale prices, to sell again to consumers, medicines, extracts, spices, soaps, stock food, and other goods manufactured and put up by it, paying his account for such goods in instalments as hereinafter provided: Therefore he hereby agrees to sell no other goods than those sold him by said company, to sell all such goods at regular retail prices to be indicated by it, and to have no other business or employment."

Another clause in the contract provides that the company should notify Minette promptly of any change in the wholesale or retail prices.

Among other defenses interposed by the defendants was that the contract was void, in that the same was made for the sole purpose of maintaining a monopoly in the L.R.A.1917A.

articles prepared, manufactured, and sold by plaintiff, and that the provisions of said contract and all other contracts made by said plaintiff throughout the different states of the Union, other than the state of its domicile, constituted an unreasonable restraint upon trade and interstate commerce. Under the issues as joined by the pleadings, the defendants assumed the burden of proof, and having introduced their evidence, and rested their case, the plaintiff demurred thereto, and the amount in controversy not being disputed, the court instructed the jury to return a verdict in favor of plaintiff in the sum of \$1,212.22, and for interest.

It appears that the plaintiff at the time was the manufacturer of certain medicines, extracts, spices, soaps, perfumes, toilet articles, stock food, and other wares, about 65 in number. The manufactured articles it sold only through contracts similar to that made with the defendant Minette. These contracts were made with numerous parties designated as salesmen or agents for certain exclusive territory, consisting in the present case of three townships in Grady county. At the trial it was agreed that the contracts made by plaintiff in the sale of its goods were identical with the Minette contract, and that it sold its products solely by means of such contracts. That the business carried on constituted interstate commerce is admitted. Counsel rely largely for a reversal of the judgment upon the following cases: Dr. Miles Medical Co. v. John D. Park & Sons Co. 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376; John D. Park & Sons Co. v. Hartman, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24. Although a number of other authorities are cited in their brief, upon the authority of these cases, it is insisted that the stipulation restricting the price at which sales might be made by Minette and other contract holders was in violation of the Act of Congress of July 2, 1890 (26 Stat. at L. 209, chap. 647. Comp. Stat. 1913, § 8820), upon the subject of trusts and restraints of interstate trade. Said act, in § 1, declares illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, and also declares it to be a misdemeanor, punishable by fine or imprisonment, or both, for anyone to make any such contract, or to engage in any such combination or conspiracy. By § 2 it is also made a misdemeanor, punishable by fine or imprisonment, or both, for anyone to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade

or commerce among the several states or with foreign nations.

The general rule is well settled that a system of contracts between manufacturers, jobbers, and retailers, by which the manufacturers attempt to control the prices for all sales by all dealers, at wholesale or retail, whether purchasers or subpurchasers, eliminating all competition, and fixing the amount which the consumer shall pay, amounts to restraint of trade, and is invalid both at common law, and, so far as it affects interstate commerce, under the Sherman Anti-Trust Act. *United States v. Kellogg Toasted Corn Flake Co.* (D. C.) 222 Fed. 725, Ann. Cas. 1916A, 78. No rights are claimed for the plaintiff in the present case, other than those of a manufacturer. Cases, therefore, arising under the patent or copyright statutes, during the term of the lawful monopoly, are not in point, and have no application. The opinion in *John D. Park & Sons Co. v. Hartman*, supra, by Judge Lurton, followed by the decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* supra, by Justice Hughes, it would seem announces a rule which forbids a recovery by plaintiff on its contract. The opinion in the Hartman Case is a comprehensive review of the decisions respecting the common-law rules against monopoly and restraint of trade, as well as the Federal Anti-Trust Act, and gives the highest evidence of a painstaking and careful examination of the authorities both at common law and under the statute. Hartman was a manufacturer of certain proprietary medicines, the chief of which was the well-known article called "Peruna." This, with other preparations, Hartman put on the market through a system of contracts intended to maintain prices. Each jobber was required to sign a written agreement to sell only to retailers whose names should be furnished by the complainant, and who had signed a retailer's agreement with him, obligating them to sell only to consumers at a price named by the complainant, or found on his labels and wrappers. It was charged that there had grown up a very large demand for Peruna, and that such contracts had been made with jobbers and wholesalers throughout the United States, and that a majority of the retail druggists of the country had executed such contracts. In the suit brought against Park & Sons, it was sought to enjoin the latter from causing a breach of its sales with its customers, and from procuring from such customers, whether wholesaler or retailer, any of plaintiff's remedies and medicines, and from advertising, selling, or offering for sale said remedies and medicines obtained in or by any L.R.A.1917A.

of the means charged at prices less than the established retail price thereof. The inquiry was made by the court in the course of the opinion: "Assuming that these contracts operate only as a partial and not a general restraint,—a question which we do not concede,—and that they are properly to be considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the plaintiff in his retained business, or to protect him from an unjust use of the articles by the purchaser?"—and was answered as follows: "In the first place, we are to consider that we are not here dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might, in no way, affect the public interest, when a large number might: So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal, rather than the ancillary, matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenantee to every other, and the 'system' is to be construed as 'one piece,' in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme. The question here is therefore one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee"—citing *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* 19 L.R.A. (N.S.) 143, 78 C. C. A. 567, 148 Fed. 939; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 275; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

Further, in discussing the plaintiff's plan of business, the opinion reads: "The plain effect of the 'system of contracts,' the proposed relation of each to every other being confessed by the very description of the method of carrying on business stated in

the bill, is, first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price, and to only such persons as will sign one of his system of contracts. The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition, has been brought about."

It was held that, *prima facie*, the contracts were plainly in restraint of trade, and that it was for the complainant to show that the covenants were not larger than necessary for his protection against an unjust use to the injury of complainant's retained business, and that, unless he could do this, he could not ask equitable relief under such covenants. It was noted that the whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation; that a partial restraint of competition may be upheld, when one sells a business or other property, provided that it is no greater than necessary to enable a vendor to realize the value of his good will, or to secure to the buyer the enjoyment of his purchase, or to prevent the use of the property to the prejudice of the seller. Attention was called to the fact that the only competition which the contracts there in question tend to suppress was competition between those who bought his goods to sell again. That the suppression of competition between his vendees and subvendees secured to him the enjoyment of the legitimate fruits of his sale, to which the restrictive covenants were supposed to be ancillary, or to protect him against the unjust competition, it was said, was not clear, and that the bill failed to state facts from which the court could

say whether the covenants were necessary and reasonable. Looking to the averments of the bill as a whole, and to the scheme of the business as disclosed by the contracts themselves, it was said the court could not escape the conclusion that the covenants restricting sales and resales had as their prime object the suppression of competition between those who bought to sell again, and that any benefit to the retained business to result from them was manifestly but an incident of the main purpose, which was to benefit his vendees and subvendees by breaking down their competition with each other. It was said, further, that restraints which might be upheld if ancillary to some principal contract could not be enforced if, when unmasked, they appear to be the main purpose of the contract, and not subordinate, and that in that case the covenants in the contract signed by the retailers were not even collateral to any sales by the complainant, but to sales by the wholesalers, and that their prime purpose was neither the protection of the retained business of the complainant, nor of the wholesaler, but only to prevent competition between retailers. Covenants, it was observed, protecting the seller of the property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business. The conclusion of the court was that the complainant's system of contracts were not enforceable, and that their direct effect was to limit and restrain the right of each wholesaler and each retailer to transact business in the ordinary way.

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, it was held that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made; that a total suppression of the trade in a commodity is not necessary in order to render the combination one in restraint of trade; that it is the effect of the combination in limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded.

The Hartman Case was followed by the Supreme Court of the United States in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U. S. 373, 55 L. ed. 502, 31 Sup. Ct. Rep. 376. In that case, the complainant, a manufacturer of proprietary medicines prepared in accordance with secret formulas, presented by its bill a system, carefully devised, by which it sought to maintain certain prices fixed by it for all the sales of its products, both at wholesale and retail. Its purpose was to establish minimum prices at which sales should be made by its vendees, and by all subsequent purchasers who trafficked in its remedies. Its plan was thus to govern directly the entire trade in the medicines it manufactured, embracing interstate commerce as well as commerce within the state, respectively. The defendant was a wholesale drug concern, which had refused to enter into the required contract, and was procuring medicines for sale at "cut prices" by inducing those who had made the contracts to violate the restrictions. The complainant invoked the established doctrine that an actionable wrong was committed by one who maliciously interfered with the contract between two parties, and induced one of them to break that contract to the injury of the other; and that, is the absence of an adequate remedy at law, equitable relief would be granted. The principal question, as stated by the court, was the validity of the restrictive agreements. It was said of the bill that it presented a system of interlocking restrictions by which the complainant sought to control, not merely the prices at which its agents might sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer should pay, eliminating all competition. It was said: "That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with 'most of the jobbers and wholesale druggists and a majority of the retail druggists of the country,' and having for their purpose the control of the entire trade, they relate directly to interstate, as well as intrastate, trade, and operate to restrain trade or commerce among the several states, is also clear."

It was insisted that the restrictions were not invalid, either at common law or under the Act of Congress of July 2, 1890, upon the following grounds: (1) That the restrictions were valid because they relate to proprietary medicines manufactured under a secret process; and (2) that apart from this, a manufacturer is entitled to control the prices on all sales of his own product. We dismiss the first contention as L.R.A.1917A.

not in the present case, but note in passing that it was there expressly decided that a restraint of trade which would be unlawful as to other manufactured articles could not be justified because the article in question is a proprietary medicine, made under a secret formula. To the second, it was urged that as the manufacturer may make and sell or not, as he chooses, he may affix conditions as to the use of the article, or as to the prices at which purchasers may dispose of it; that the propriety of the restraint is sought to be derived from the liberty of the producer. But it was observed by the court that it did not follow, in case of sales actually made, that the manufacturer may impose upon purchasers every sort of restriction. Thus, it was said, a general restraint upon alienation is one of the essential incidents of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom in traffic in such things as pass from hand to hand. Quoting from *Lord Coke* (2 Co. Litt. ¶ 360) the court said: "If a man be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against the trade and traffic, and bargaining and contracting between man and man."

Proceeding further in the opinion, it is said: "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy." *Gibbs v. Consolidated Gas Co.* 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553.

It was said that the case was not unlike that of a sale of good will, or of any interest in business, or of a grant of the right to use a process of manufacture; that complainant had not parted with any interest in its business or instrumentalities of production. It had conferred no right by virtue of which purchasers of its products might compete with it. It retained complete control over the business in which it was engaged, manufacturing what it

pleased, and fixing such prices for its own sales as it desired. Attention was called to the fact that the court was not dealing with a single transaction, conceivably unrelated to the public interest, but: "The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them."

Continuing, the court said: "But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer,"—citing *People v. Sheldon*, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *People v. Milk Exchange*, 145 N. Y. 267, 27 L.R.A. 437, 45 Am. St. Rep. 609, 39 N. E. 1062; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, on appeal, *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L.R.A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *W. H. Hill Co. v. Gray & Worcester*, 163 Mich. 12, 30 L.R.A. (N.S.) 327, 127 N. W. 803.

In conclusion it was held that the complainant's plan fell within the principle which condemns contracts of its class; that it in effect created a combination for prohibited purposes; and that no distinction could properly be made by reason of the particular character of the commodity in question, and that it was an article of commerce entitled to no special privilege or immunity, and that the rules concerning the freedom of trade must be held to apply to it; that where commodities have passed into the channels of trade, and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstances, whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many; that, the complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

We have reviewed at length the foregoing opinions because of their lucid exposition of the law, and on account of the fact that they involve the construction of a L.R.A.1917A.

Federal statute, and are controlling upon this court. *Missouri, K. & T. R. Co. v. Walston*, 37 Okla. 517, 133 Pac. 42. Recurring to the facts of the case at hand, it will be seen that plaintiff's plan or scheme of sale of its manufactured products eliminated all form of competition therein. Its goods were sold only to those who entered into a contract to sell to the consumer at the prices fixed by plaintiff. While but a single contract is involved here, it was admitted that the plaintiff transacted business only in pursuance of like contracts. It was shown that the medical company had a capital and surplus of over \$1,000,000 invested in its business, and that an "army of Rawleigh men" was engaged in selling its products throughout the United States. There was no competition in its products between its so-called agents and others, for its sales were confined to those who entered into its restrictive contracts. There was, or could be, no competition between its so-called salesmen, and in no other means than through a purchase from such salesmen could the consumer buy its products. The contracts left no room for the usual competition between the dealers in the products sold by plaintiff; and this was the obvious purpose of the plan. It was not shown, nor can we conceive it to be the case, that the restraints fixed by the manufacturer upon the price to be paid by the consumer were necessary to its retained business, and therefore ancillary to the principal purpose of the agreement; but, on the other hand, the plain effect of its system of contracts was to destroy all competition in the sale of its manufactured products. Well may we in this connection use the language of the court in the *Hartman Case*: "Now, in what way is only a fair protection afforded the interests of complainant by stifling all competition between the jobbers of the United States who deal in complainant's preparations? In what way are the covenants which forbid them to resell to anyone who will buy 'necessary,' to use Judge Taft's phrase, to protect the covenantee in the enjoyment of the legitimate fruits of the contract or to protect him from the dangers of an unjust use of those fruits by the other party?" In what way are covenants which compel retailers to maintain prices, to quote Chief Justice Tindal, 'such only, as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public?' *Horner v. Graves*, 7 Bing. 735, 131 Eng. Reprint, 284."

To sustain the validity of the restrictive agreements of plaintiff would be to give effect to a system of doing business by which all the sales of all its products would

be, under all circumstances, controlled by it. Applied to modern conditions, the public interest is of first importance in determining the validity of contracts in restraint of trade. If the restraint is sustained, it can only be in cases where it is found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary in the circumstances of the particular case, for the protection of the covenantee. The fact that here there was no agreement between different manufacturers, wholesalers, jobbers, or others, to fix and maintain a selling price, is, in the language of Justice Hughes in the *Dr. Miles Case*, unimportant. In that case it was said: "The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of the dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system."

As we read the decisions principally relied on, the plaintiff's plan of selling its products comes within the inhibition of the statute. Contracts which by reason of the intent, or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade, are within the act. *United States v. American Tobacco Co.* 221 U. S. 179, 55 L. ed. 693, 31 Sup. Ct. Rep. 632; *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780.

But may the defendants avail themselves of the statute in an action to recover for goods sold *Minette*? Plaintiff's recovery is predicated upon the illegal agreement. The L.R.A.1917A.

contract is referred to and made the basis of its cause of action. Aside from the contract, there was no liability on the part of the guarantors. Against them, plaintiff had no claim, except through the medium of an illegal agreement. In short, the account sued on was made up in execution of the agreement that constituted the illegal restraint upon trade and commerce, and was not, therefore, as in some of the reported cases, collateral to and independent of the agreement under which the combination or restraint was effected. Plaintiff could not enforce its contract without bringing under review all its parts; for it is well settled that where it is necessary to prove an illegal contract in order to maintain an action, courts will not enforce it, nor will they enforce alleged rights directly springing from such contract. As stated in *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839: "Upon the point as to the ability of the plaintiff to make out his cause of action without referring to the illegal contract, it may be stated that the plaintiff for such purpose cannot refer to one portion only of the contract upon which he proposes to found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal,"—citing *Booth v. Hodgson*, 6 T. R. 405, 408, 101 Eng. Reprint, 619; *Thompson v. Thompson*, 7 Ves. Jr. 470, 32 Eng. Reprint, 190, 6 Revised Rep. 151; *Embrey v. Jemison*, 131 U. S. 336, 348, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776.

Turning to the authorities declaring when the statute may be set up in defense of an action to recover for goods sold, it appears that in *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, there was no necessary legal connection between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as held by the court, collateral to the arrangement for the combination referred to, and the action was not one to enforce the terms of such an arrangement. In *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747, the court, after referring to that section of the act of Congress relating to suits by the Attorney General and by persons injured in their business or property, said: "Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon the contract may set up as a defense that it is a violation of

the act of Congress, and if found to be so, that fact will constitute a good defense to the action. . . . As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court."

A leading authority giving to the purchaser the right to defend, under the statute, on account of the unlawful nature of the contract, is *Continental Wall Paper Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280. In that case the action was brought to recover for wall paper sold by the representative of a combination or trust formed for the purpose of restraining and monopolizing trade and commerce among the several states in the manufacturing, buying, selling, and dealing in wall paper. The defendant, who was engaged in buying and selling wall paper in Ohio and other states, was a party to the illegal combination; and the account in suit was made up, as to the prices and terms of sale, not upon the basis of an independent collateral contract, for goods sold and delivered, but with direct reference to, in conformity with, and for the object of enforcing the agreement that constituted, or out of which came, the illegal combination, whose business was carried on under the name of the Continental Wall Paper Company, and that a judgment against the defendant upon the account in suit would, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act to be a crime. The Connolly Case is reviewed at length by Justice Harlan, who wrote both opinions, and the cases distinguished. Of the case there at hand, it was said: "The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff, the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination."

The last expression of the Supreme Court of the United States upon the question is *Wilder Mfg. Co. v. Corn Products Ref. Co.* 236 U. S. 165, 59 L. ed. 520, 35 Sup. Ct. Rep. 398, Ann. Cas. 1916A, 118, in which

the court reviews both its earlier holdings in the Connolly and Continental Wall Paper Co. Cases. The primary question there decided was that the defendant could not set up in defense the illegal organization of the seller, the contract being otherwise inherently legal. Having dealt with the refining company as an existing concern, possessing the capacity to sell, speaking generally, the assertion that it had no legal existence because it was an unlawful combination in violation of the Anti-trust Act was irrelevant to the question of the liability of the manufacturing company to pay for the goods; since such defense was a mere collateral attack on the organization, which could not lawfully be made.

In *Ripy v. Art Wall Paper Mills*, 41 Okla. 20, 51 L.R.A.(N.S.) 33, 136 Pac. 1080, the contract under review did not undertake to fix the price at which the defendants might sell the goods purchased; neither did it restrict the plaintiff from selling goods to others, nor was either party restricted from selling goods to any other person or class of persons. And it was observed that it could not be seen wherein the public would be injuriously affected by the enforcement of the contract.

The fact that in a few isolated cases *Minette* varied slightly from the selling price fixed by the plaintiff does not serve to render enforceable the contract, following which the bill of goods was made up, and for which the action is brought to recover the value. Plaintiff may not avail itself of its patron's infraction of his contract in order to give character to its illegal undertaking.

From the facts proved and without further citation of authorities, we conclude that the contract entered into between the parties was illegal under the Anti-trust Act of 1890, that it is to be taken as one intended, and which if enforced would have the effect, directly to restrain and monopolize trade and commerce among the several states, and that plaintiff cannot have a judgment for the amount of the account sued on, because, for the reasons we have already stated, such a judgment would, in effect, aid the execution of the agreements which constituted the illegal combination.

The judgment of the trial court is therefore reversed.

All the Justices concur.

Petition for rehearing denied October 3, 1916.

Annotation—Validity of contract provision seeking to control price at which an article shall be resold.

The question above stated is discussed in the note to *Grogan v. Chaffee*, 27 L.R.A.(N.S.) 395, and in a note to *Fisher Flouring Mills Co. v. Swanson*, 51 L.R.A.(N.S.) 522, containing the decisions handed down since the compilation of the earlier note; to which notes the present annotation is supplementary.

The novel suggestion is made in *W. T. Rawleigh Medical Co. v. Osborne* (1916) — *Iowa*, —, 158 N. W. 566, a case involving a contract similar to that held illegal in *STEWART v. W. T. RAWLEIGH MEDICAL CO.* ante, 1276, that where by the contract the seller undertakes to sell an unlimited quantity of goods and extends credit therefor, and the amount of the respective instalments to be paid is to be measured by an aliquot part of the sales made during the previous period, the provision for the maintenance of a fixed retail price, the limitation of the territory within which the goods are to be resold, and the stipulation that the buyer shall devote his time and attention exclusively to the sale of such goods, may be considered as tending to operate as security for the payment of the purchase price, and, as affording merely a reasonable protection to the seller, not to be illegal and void as being in unreasonable restraint of trade.

In *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.* (1915) 224 Fed. 566, it was held that the manufacturer may lawfully refuse to sell to a dealer who refuses to maintain a fixed retail price; and this decision is affirmed in (1915) 141 C. C. A. 594, 227 Fed. 46.

In *Locker v. American Tobacco Co.* (1914) 134 C. C. A. 247, 218 Fed. 447, it was held that an agreement whereby a manufacturer made a certain jobber its sole agent in certain territory on condition that it should not sell the manufacturer's product at more than list prices did not violate the Federal Anti-trust Law.

In *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78 (a suit in equity charging a violation of the Sherman Act), it was held that a manufacturer selling to jobbers, who were not merely the agents, but the vendees, of the manufacturer, sales not being conditional, but absolute, violated the Federal Anti-trust Act in exacting from the jobber an agreement to charge the retailer a specified price, under a penalty of discontinuance of L.R.A.1917A.

future dealings, and in seeking, by a notice printed on the carton, to fix the price at which the goods should be resold at retail, notwithstanding such notices did not constitute a legally effective and enforceable contract between the manufacturer and the retailer; the court saying: "The general rule is well settled that a system of contracts between manufacturers, jobbers, and retailers, by which the manufacturers attempt to control the prices for all sales by all dealers, at wholesale or retail, whether purchasers or subpurchasers, eliminating all competition and fixing the amount which the consumer shall pay, amounts to restraint of trade, and is invalid both at common law and, so far as it affects interstate commerce, under the Sherman Anti-trust Act."

In *Munter v. Eastman Kodak Co.* (1915) 28 Cal. App. 660, 153 Pac. 737, an action brought by a retail dealer under the Cartwright Act (Cal. Stat. 1907, pp. 984, 987) for damages for refusal to sell to the plaintiff at the prices at which and the conditions upon which the defendant sold goods to other retail dealers, it was held that a manufacturer or wholesaler not only has the right to fix his own price, but also the right to establish the price at which his goods are to be sold by retail dealers to whom such goods are sold for retail sale, so long as those acts are not the direct effect or result of a combination formed and maintained for himself and others to create restrictions in trade or commerce, or to maintain a monopoly of the trade.

In *J. R. Watkins Medical Co. v. Johnson* (1913) — *Tex. Civ. App.* —, 162 S. W. 394, it was held that a contract by which a manufacturer agreed to furnish the other party thereto its medicines at the usual wholesale prices, to be sold by him at the regular retail prices in certain territory, he agreeing that he would sell no other goods or articles during the term of the contract except those purchased by him from the manufacturer, and that he would sell them only to customers at their residences in the prescribed district, was to be treated as a contract for the sale of goods and as such violative of the Texas Anti-trust Law (Rev. Stat. 1911, title 30, chap. 1, arts. 7796 and 7798), it clearly showing by its terms an intention to combine the capital, skill, and acts of the parties to

fix and maintain the standard of prices upon a certain commodity and to prevent competition in a given territory.

And in *W. T. Rawleigh Medical Co. v. Gunn* (1916) — *Tex. Civ. App.* —, 186 S. W. 385; *W. T. Rawleigh Medical Co. v. Fitzpatrick* (1916) — *Tex. Civ. App.* —, 184 S. W. 549, and *Armstrong v. W. T. Rawleigh Medical Co.* (1915) — *Tex. Civ. App.* —, 178 S. W. 582, it was held that provisions in a contract similar to that involved in *STEWART v. W. T. RAWLEIGH MEDICAL CO.* ante, 1276, rendered the contract void as in violation of the Texas Anti-trust Law.

In *Segal v. McCall Co.* (1916) — *Tex.* —, 184 S. W. 188, a contract for the purchase of patterns by a retailer, with no reservation of title or restrictions on the sale thereof except a provision fixing the retail price and a provision prohibiting the purchaser from selling other than the goods of his vendor, was held to be in plain violation of the Texas Anti-trust Act (Acts 20th Leg. chap. 94) as an agreement in restraint of trade.

In *Pictorial Review Co. v. Pate Bros.* (1916) — *Tex. Civ. App.* —, 185 S. W. 309, a contract by which the purchaser of a stock of patterns and fashion books agreed not to sell them at less than catalogue prices, and not to deal in any other such publications, was held violative of the Anti-trust Laws of the state, especially §§ 1, 2, 4, and 5 of art. 7796, Vernon's Sayles's Civ. Stat. (Tex.)

Goods patented or copyrighted.

The patentee of an article may sell it to whom he pleases, or may refuse to sell it at all. He may stipulate the retail price at which the purchaser from him may sell the article, and may lawfully obligate a special agent appointed by him, to sell his article to the exclusion of other articles of a like character. *Butterick Pub. Co. v. Rose* (1910) 141 Wis. 533, 124 N. W. 647.

That the owner of a patent may fix the price at which the patented article shall be sold by his licensee, without violating the Sherman Law, is held in *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.* (1907) 83 C. C. A. 343, 154 Fed. 365.

In *United States v. Keystone Watch Case Co.* (1915) 218 Fed. 502 (which was a bill in equity filed by the government charging a violation of the Sherman Act), it was held that while the manufacturer of a patented article may, by agreement with the wholesaler or job-

ber, restrict the price at which the latter may sell to retailers, in doing so the owner of the patent has fully exercised his right to vend, and has no right, by mere notice to the retailer accompanying the goods, to control the price at which the retailer may sell to the consumer; and accordingly that the defendant had in this respect violated the act. This decision appears to be attributable to a misinterpretation of the case of *Bauer v. O'Donnell* (1913) 229 U. S. 1, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185, 33 Sup. Ct. Rep. 616, Ann. Cas. 1915A, 150, cited as authority therefor. This case does not hold an agreement in the retailer to maintain the selling price to be illegal per se or under the Sherman Act, but only that no charge of contributory infringement can be based upon its violation. While it is true that the fact that the making of such an agreement is not within the rights conferred by the patent laws will expose the agreement to the operation of the common-law rule against agreements in undue restraint of trade, or of the anti-trust laws, it does not necessarily follow that such an agreement constitutes a violation of such rule or statutes; but its validity in this respect constitutes a question for further determination.

In the *United States v. Kellogg Toasted Corn Flake Co.* (1915) 222 Fed. 725, Ann. Cas. 1916A, 78, it is said that when it is once established that the monopoly of the patent does not continue after the right of sale has once been exercised, the case is to be considered as if there were no patent.

The fact that the article sold is packed in a patented container does not prevent contracts controlling the price of resale from being violative of the Federal anti-trust Act, whether the value of the container is negligible as compared with the value of the contents and its purchase is a mere incident in the contract of sale, or whether the carton itself has a substantial value, where the sales are not conditional, but absolute, and the container was not sold for use with subsequent purchases of the article. *Ibid.*

That a combination otherwise within the denunciation of the Sherman Act is not exempted therefrom by the fact that its object is to maintain the retail price of copyrighted productions, see *Straus v. American Publishers' Assn.* (1913) 231 U. S. 222, 58 L. ed. 192, L.R.A. 1915A, 1099, 34 Sup. Ct. Rep. 84, Ann. Cas. 1915A, 369.

E. S. O.

OKLAHOMA CRIMINAL COURT OF APPEALS.

J. H. CHOATE, Plff. in Err.,
v.
STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 160 Pac. 34.)

Criminal law — admissions — corpus delicti.

1. A conviction cannot be had upon a defendant's extrajudicial admissions alone, unless the state proves in some way the corpus delicti, independent of the defendant's admission. Direct and positive proof is not essential to establish the corpus delicti, but it may be proved by circumstantial evidence. And when it is proved by circumstantial evidence, the question should be submitted to the jury along with the other questions of fact in the case, as to whether or not the state has established the corpus delicti beyond a reasonable doubt.

(a) The danger which this rule is supposed to guard against is greatly exaggerated in common thought. Yet there are rare instances of morbid minds that need to be protected by this rule against their own perversity and morbid imagination.

(b) To prove the corpus delicti is a simple matter. If a dead body is found with marks of violence upon it, or other circumstances that indicate that deceased came to his or her death by unnatural or violent means, proof of such fact, independent of defendant's confession, establishes the corpus delicti in a murder case. And to prove the corpus delicti in a charge against a guardian for embezzlement, it is only necessary to prove the relation of guardian and ward, that the guardian received certain funds belonging to the ward's estate, and to show by some fact or circumstance, independent of the defendant's admission, that he did not have the funds, or that they had been dissipated or fraudulently misappropriated.

For other cases, see Evidence, XII. 1, in Dig. 1-52 N. S.

Evidence — confession — subpoena.

2. The fact that one is brought into court by process to give his testimony by no means renders the statements made in such testimony involuntary.

For other cases, see Evidence, VIII. in Dig. 1-52 N. S.

Embezzlement — good faith — effect.

3. A claim that one charged with embezzlement appropriated the funds alleged to have been embezzled in good faith, believing the owner of the funds was indebted to him in the amount appropriated or more, is, under our statute, no excuse or defense whatever. And to all intents and purposes

such a claim made in open court would amount to a plea of guilty.

For other cases, see Criminal Law, I. c; Embezzlement, in Dig. 1-52 N. S.

(October 14, 1916.)

ERROR to the District Court for Garvin County to review a judgment convicting defendant of embezzlement. Reversed.

The facts are stated in the opinion.

Messrs. Blanton & Andrews, W. H. Lasater, and Carr & Field for plaintiff in error.

Messrs. S. P. Freeling, Attorney General, and Smith C. Matson, Assistant Attorney General, for the State:

It is not necessary, independently of the confession, to prove that the defendant committed the crime; such proof may come from the confession alone and be sufficient.

Sam v. State, 33 Miss. 347; *People v. Badgley*, 16 Wend. 53; *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676.

If defendant had claimed his immunity, the county judge was powerless to compel the giving of any incriminating testimony in such proceeding.

Faucett v. State, 10 Okla. Crim. Rep. 111, L.R.A.—, —, 134 Pac. 839; *Scribner v. State*, 9 Okla. Crim. Rep. 465, L.R.A.—, —, 132 Pac. 933, Ann. Cas. 1915B, 381.

The fact that the appropriation was made without any attempt at concealment is no defense of itself.

People v. Connelly, 4 Cal. Unrep. 858, 38 Pac. 42.

The claim must have been asserted in good faith, else it is no defense.

State v. Reilly, 4 Mo. App. 392; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

Brett, J., delivered the opinion of the court:

The defendant (plaintiff in error) in this case is a full-blood Indian, and was appointed guardian of his minor children, and was subsequently prosecuted and convicted of embezzling \$1,463.82 belonging to the estate of Phelix N. Choate, one of his wards.

The defendant did not go upon the witness stand in this trial, and complains that he was convicted solely upon admissions made by him in the county court at a hearing in the guardianship matter of Phelix N. Choate and others, and that there was no evidence offered by the state to prove the corpus delicti before these admissions were admitted in evidence, and that these admissions could not be used in evidence against him until the state had first proved by evidence, independent of his admissions, the corpus delicti.

The letters of guardianship, the proceedings in the sale of real estate, including the

Headnotes by BRETT, J.

Note. — As to proof of corpus delicti in embezzlement, see annotation following this case, post, 1289.
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order of confirmation, and the guardian's report acknowledging receipt of the funds charged to have been embezzled, were all introduced in evidence, which properly established the relation of guardian and ward, and charged the guardian with the funds alleged to have been misappropriated. But there was no evidence that he had misappropriated the money, or that he did not have the total amount in hand, offered by the state before introducing in evidence his admissions at the hearing in the county court; and the fact that the funds had been misappropriated was an essential of the corpus delicti in this case. To show that the relation of guardian and ward existed, and that certain funds belonging to the ward's estate had been received by the guardian, did not prove that a crime had been committed. And to prove that fact, or the corpus delicti of the offense charged, the state should have gone one step farther, and shown in some way, independent of the defendant's admissions, that he did not have the funds, or that they had been dissipated or fraudulently misappropriated. Direct and positive proof is not essential to establish the corpus delicti, but it may be proved by circumstantial evidence. And when it is proved by circumstantial evidence, the question should be submitted to the jury along with other questions of fact in the case as to whether or not the state has established the corpus delicti beyond a reasonable doubt. But it is an old and well-established rule of law that the fact must in some way be established, independent of the defendant's admissions, that the crime has been committed, before the court will permit a conviction on the extrajudicial statement of the party charged, that he committed the crime.

(a) As stated by Mr. Wigmore (3 Wigmore, Ev. § 2070), the danger which this rule is supposed to guard against is greatly exaggerated in common thought. Yet there are rare instances of morbid minds that need to be protected by this rule against their own perversity and morbid imaginations. A notable case of this kind occurred in England in 1660, where one of two brothers confessed that he, his brother, and his mother murdered his master. They were all executed for the crime. And two years later his master returned home, and explained that he had been kidnapped by the Turks. *Perry's Case*, 14 How. St. Tr. 1312. Other similar, though not numerous, cases are on record. Hence appellate courts, which not only deal with individual cases, but must declare rules broad enough to protect the substantial rights of every citizen, even the most unfortunate, as well as society, have guarded against the recurrence

of such cases as the one above cited by requiring the state to first prove, by evidence independent of the confession, that the crime charged has been committed, before receiving the confession of the accused that he committed it. And this works no hardship on the state; for it certainly should have some tangible evidence in hand that a crime has been committed before it accuses one of its citizens of its commission. We might cite numerous authorities in support of this position, but this court is committed to the doctrine, and it is almost universal. *Shires v. State*, 2 Okla. Crim. Rep. 80, 99 Pac. 1100; *Frazier v. United States*, 2 Okla. Crim. Rep. 657, 103 Pac. 373; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Eldridge*, 3 Cal. App. 648, 86 Pac. 832; *People v. Grill*, 3 Cal. App. 514, 86 Pac. 613; *People v. Frey*, 165 Cal. 140, 131 Pac. 127; *People v. Spencer*, 16 Cal. App. 756, 117 Pac. 1039; *Ashby v. State*, 124 Tenn. 684, 139 S. W. 872; *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *People v. Vertrees*, 169 Cal. 404, 146 Pac. 890.

(b) To prove the corpus delicti is a very simple matter. If a dead body is found with marks of violence upon it, or other circumstances that indicate that deceased came to his or her death by unnatural or violent means, the proof of such fact established the corpus delicti in a murder case. And to prove the corpus delicti in the case at bar, it was not only necessary to prove the relation of guardian and ward, that the guardian received certain funds belonging to the ward's estate, and to show by some fact or circumstance, independent of the defendant's admission, that he did not have the funds, or that they had been dissipated or fraudulently misappropriated. But there was no evidence in this case of a demand on the defendant to pay the money into court, or to his successor, as guardian, and that he did not do so. Not even a circumstance, independent of his admissions, to show that he did not have the money, or had misappropriated it, was offered in evidence by the state to establish the corpus delicti before offering the admissions made by the defendant at the hearing in the county court. And in failing to do this the state did not comply with the requirements of the law before offering these admissions.

2. The defendant next contends that the statements made by him at the hearing in the county court were obtained by force, threats, intimidation, and duress, and therefore could not be used against him. But we think this claim is without merit. He freely and voluntarily and without any objection made these statements at this hearing in the county court. And the fact that he

was brought into court by legal process to give his testimony by no means renders it involuntary. The county court had a right to inquire into and to know how he was handling his ward's estate; and the process by which he was called into court to give this information was only a means of informing him that the court desired to inquire into the condition of the estate and his manner of handling it. And no reasonable construction can render the statements made at that hearing involuntary. *Scribner v. State*, 9 Okla. Crim. Rep. 465, L.R.A.—, —, 132 Pac. 933, Ann. Cas. 1915B, 381; *Faucett v. State*, 10 Okla. Crim. Rep. 111, L.R.A.—, —, 134 Pac. 839.

3. Again, it is argued that the defendant claims "he appropriated the money in good faith, believing that the ward was indebted to him in this amount or more." And counsel ask: "Can any reason be given why § 2678, Rev. Laws 1910, should not apply in a case of this character, where it is provided, 'That in any prosecution for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim was untenable?'"

Our answer to this question is that, under § 2678, Revised Laws 1910, quoted in part by defendant, such a claim amounts to no defense or excuse whatever. That section, in addition to the portion quoted by

defendant, provides that "upon any prosecution for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision shall not excuse the retention of the property of another, to offset or pay demand held against him."

Consequently, the excuse suggested by counsel is specifically legislated against, and declared to be "no excuse for the retention of the property of another;" and to all intents and purposes such an excuse would amount to a plea of guilt. But the defendant did not take the witness stand, or offer any such excuse, or make any such admission at the trial of this case, either in person or by counsel; if he had, such a judicial admission would have presented an entirely different situation to that disclosed by the record.

There are other errors assigned, but, as the judgment must be reversed on the ground that a conviction cannot be had upon the defendant's admissions alone without some semblance of proof of the corpus delicti, independent of the defendant's admissions, we deem it unnecessary to pursue the matter further.

The judgment is reversed.

Doyle, P. J., and Armstrong, JJ., concur.

Annotation—Proof of corpus delicti in embezzlement.

The present note is supplementary, as to the particular offense of embezzlement, to the note to *Bines v. State*, 68 L.R.A. 33, which deals with the general subject of proof corpus delicti in criminal cases.

For proof of corpus delicti in larceny, see *Bines v. State*, supra; *Sanders v. State*, 28 L.R.A. (N.S.) 536, and *State v. Scott*, L.R.A. 1916B, 844.

While it is the general rule that mere proof of defendant's connection with the crime is not sufficient to establish the corpus delicti, and that it is not necessary, in order to establish the essential elements of the crime, to prove the defendant's connection with it, the rule does not go so far as to exclude proof of the defendant's connection with the crime where the circumstances of the case are such that proof of the crime, of necessity, involves proof of defendant's guilt. *People v. Rowland* (1909) 12 Cal. App. 6, 106 Pac. 428.

In *Secor v. State* (1903) 118 Wis. 621, 95 N. W. 942, it is held that, under a statute making it sufficient to allege

generally in an indictment or information for embezzlement, "an embezzlement of money to a certain amount or of property to a certain value without specifying any particulars of any such embezzlement, and on the trial evidence may be given of any such embezzlement committed within six months after the time stated in the indictment or information; and it shall be sufficient to maintain the charge, . . . and shall not be deemed a variance, if it shall be proved that any money or property of whatever amount was fraudulently embezzled by the defendant within the said period of six months," the corpus delicti of embezzlement was shown by proof of a general shortage in accounts, without proving the conversion of a specific item. See also *State v. Holmes* (1896) 65 Minn. 230, 68 N. W. 11, to the same effect.

Evidence that the books of defendant showed a shortage of \$17,000 during the year; that monthly balances were taken and the shortage concealed by a system of throwing forward re-

ceipts into the next month and entering expenses among the expenses of the previous month; that the receipts consisted of cash, checks, and drafts, and no attempt was made to specify the nature or amount of each; that defendant made false trial balances; that at one time during the year he borrowed money to repay money which he had abstracted and said he had lost by speculation; and that, after he left the employ of the company, he went to New York and was there found living under an assumed name, was sufficient to establish the corpus delicti of embezzlement. *Secor v. State (Wis.) supra.*

Where the testimony tended to show that defendant was the agent, trustee, and attorney for a certain woman in handling her property, and that, when called upon to turn over all property and money in his hands belonging to her, he should have had in his charge money or securities to an amount upwards of \$35,000, but that he turned over securities to an amount less than \$5,000, and that a short time thereafter, when again asked by persons authorized to make the demand, to turn over all securities and money in his charge belonging to her, he replied that there were no securities and the money was all gone, the corpus delicti of embezzlement was established. *People v. Hatch (1912) 163 Cal. 368, 125 Pac. 907.*

In *People v. Rowland (Cal.) supra*, it was held that the corpus delicti of larceny was proved by evidence that there was a general shortage in the funds of the bank; that the defendant, who was its cashier, had practically full charge of the affairs of the bank; that although the books were kept by clerks they were under the exclusive control and supervision of defendant; that under the system upon which the defendant conducted the business of the bank, the mere counting of the cash on hand by any person other than himself did not necessarily give an opportunity to learn

whether there was in fact any shortage in the cash accounts or not; that each transaction was entered on a tag, from which tags the books were made up; that a certain loan of \$1,000 was paid by check to defendant and the note given therefor canceled, but that defendant failed to make out a tag showing the transaction, so that apparently the note remained as an asset of the bank; and that, according to the testimony of the bank commissioner who discovered the shortage and made a detailed examination into the affairs of the bank, the method by which defendant handled this transaction was the same as was used in other transactions which made up the total shortage in the accounts of the bank.

Full proof of the corpus delicti, independent of the confession of defendant, is not required. *State v. Knowles (1904) 185 Mo. 141, 83 S. W. 1083.*

Thus, where there was much evidence tending to show the embezzlement of money belonging to the grand lodge of a fraternal organization, by the financial officer of one of the subordinate lodges, such evidence, together with the confessions of such officers, made without threats or promise of immunity, afforded ample basis for a verdict of guilty. *Ibid.*

The rule that the corpus delicti must be proved by evidence outside the declarations and admissions of defendant does not require that the evidence, other than such admissions, establish the commission of the offense beyond all reasonable doubt. *People v. Hatch (Cal.) supra.*

Where there was ample evidence properly received showing that the crime of embezzlement had been committed by someone, the admissions and confessions of defendant, made voluntarily, were properly received in evidence. *People v. Carlson (1908) 8 Cal. App. 730, 97 Pac. 827.*

R. L. S.

OKLAHOMA SUPREME COURT.

FOLSOM-MORRIS COAL MINING COMPANY, Plff. in Err.,
v.

JOHN DE VORK, by Next Friend.

(— Okla. —, 160 Pac. 64.)

Negligence — exposed powder — injury to child.

F.-M. was engaged in mining coal, and in

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connection therewith, maintained an unclosed powder house in which it stored in cans blasting powder. When the powder was practically removed from said cans, the cans containing small quantities of powder were thrown on the ground near said powder house, where infants had access to such cans. From said cans, D. and J., infants,

Note. — As to liability for injury to children from explosives left accessible to them, see annotation following this case, post, 1295.

gathered a quantity of powder which D. and J. carried in cans to about 300 yards from where said powder was obtained. J. strewed the powder carried by him upon the ground, struck a match and applied it to said train of powder about the time that D. attempted to pick up some of said powder upon the ground. The powder upon the ground exploded and ignited the powder in the can carried by D., which also exploded and severely burned and permanently injured D. Held, that, although such injuries be immediately brought about by the intervening cause of the striking of the match by J., such intervening cause was set in motion by the original wrongdoing of F.-M. in throwing out said cans containing said small portions of powder in a place accessible to D. and J., and F.-M. is liable for the resulting damages caused by said explosion of powder. Held, further, that the "powder monkey" employed by F.-M. at said powder house, being present, and not objecting to the removal of said powder by said D. and J. from said cans, his action in so doing must be regarded as the negligent act of F.-M. Held, further, that under the facts of this case a verdict of \$5,000 is not excessive.

For other cases, see *Explosions and Explosives*, II. b; *Negligence*, I. c, 2, b, in Dig. 1-52 N. S.

(February 15, 1916.)

ERROR to the District Court for Coal County to review a judgment in plaintiff's favor, overruling a motion for a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. J. G. Ralls for plaintiff in error.

Messrs. Fooshee & Brunson and C. M. Threadgill, for defendant in error.

It was for the jury to say whether or not the plaintiff was a young boy of tender years, of immature judgment and discretion, and without knowledge of the danger of black blasting powder.

Biggs v. Consolidated Barb-Wire Co. 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4, 5 Am. Neg. Rep. 335.

It was the jury to say whether or not the defendant was negligent, and the court did right in submitting the testimony to the jury on this issue, and it would have been error to do otherwise.

Tully v. Philadelphia, W. & B. R. Co. 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019; *Foley v. California Horseshoe Co.* 115 Cal. 184, 56 Am. St. Rep. 87, 47 Pac. 42; *Biggs v. Consolidated Barb-Wire Co.* supra; *Mason v. Southern R. Co.* 58 S. C. 70, 53 L.R.A. 913, 79 Am. St. Rep. 826, 30 S. E. 440; *Price v. Atchison Water Co.* 58 L.R.A. 1917A.

Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450, 3 Am. Neg. Rep. 392; *Sullivan v. Boston Elev. R. Co.* 192 Mass. 37, 78 N. E. 382, 20 Am. Neg. Rep. 561; *Snare & T. Co. v. Friedman*, 40 L.R.A. (N.S.) 367, 94 C. C. A. 369, 169 Fed. 1, 21 Am. Neg. Rep. 311; *Peirce v. Lyden*, 95 C. C. A. 312, 157 Fed. 552; 1 *Thomp. Neg.* § 161; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134, 3 Am. Neg. Cas. 667; *Nelson v. McLellan*, 31 Wash. 208, 60 L.R.A. 793, 96 Am. St. Rep. 902, 71 Pac. 747, 13 Am. Neg. Rep. 627; *Dutton v. Greenwood Cemetery Co.* 80 App. Div. 352, 80 N. Y. Supp. 780, 13 Am. Neg. Rep. 589; *Consolidated Electric Light & P. Co. v. Healy*, 65 Kan. 798, 70 Pac. 884, 13 Am. Neg. Rep. 71; *Augusta R. & Electric Co. v. Smith*, 121 Ga. 29, 48 S. E. 681, 17 Am. Neg. Rep. 33.

If there had been a lack of knowledge on the part of the defendant, this would not excuse its negligence in the management and control of the powder house and premises.

Tissue v. Baltimore & O. R. Co. 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 667; *Gates v. Northern P. R. Co.* 37 Mont. 103, 94 Pac. 751; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Biggs v. Consolidated Barb-Wire Co.* 60 Kan. 217, 44 L.R.A. 655, 56 Pac. 4, 5 Am. Neg. Rep. 335; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511; *Travell v. Bannerman*, 71 App. Div. 439, 75 N. Y. Supp. 866, reversed on ground of insufficient evidence in 174 N. Y. 47, 66 N. E. 583.

The damages are not excessive and the judgment should stand.

Kentucky Wagon Co. v. Shake, 187 Ky. 742, 126 S. W. 1095; *Gibbs v. Poplar Bluff Light & P. Co.* 142 Mo. App. 19, 125 S. W. 840; *A. Bentley & Sons Co. v. Bryant*, 148 Ky. 634, 147 S. W. 402; *Kentucky Distilleries & Warehouse Co. v. Wells*, 149 Ky. 275, 148 S. W. 375; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34; *Williamson v. Brooklyn Heights R. Co.* 53 App. Div. 399, 65 N. Y. Supp. 1054, 8 Am. Neg. Rep. 311.

Collier, C., filed the following opinion:

This is an action commenced by defendant in error to recover damages in the sum of \$15,000 against plaintiff in error for personal injuries. Hereinafter the parties will be designated as they were in the trial court.

The material evidence in the case shows that defendant was engaged in coal mining, and in connection therewith maintained

a powder magazine or powder house located on the premises of defendant within a few hundred feet from the mouth of the coal mine, in which was kept and stored large quantities of blasting powder from which defendant furnished its employees or coal diggers; that said powder was inclosed in large black cans, each of which contained about 25 pounds of powder; that said cans were opened by defendant and the powder partially emptied therefrom and furnished to its employees; that said cans, still containing small quantities of powder, were thrown out on the ground near and around said powder house; that the place where said cans were thrown after being emptied was unfenced, unprotected, and unguarded; that plaintiff, who was at the time about twelve years of age, together with other small boys, obtained from said powder cans small quantities of powder which had been left in the cans by defendant, its agents and employees, and thereby obtained a quantity of powder which was placed in two cans respectively by said plaintiff and one of the other boys, and on the same day, and shortly after the boys had secured the powder, the plaintiff and one of said small boys took said powder so obtained from said powder cans, from where they obtained it to a distance of about 300 yards; that plaintiff carried one of the cans containing said powder in his arms, and one of the other boys carried another can containing a large quantity of powder obtained as aforesaid, and emptied said powder on the ground, stringing it along for some distance, at which time plaintiff was standing close to said powder being emptied on the ground, and attempted to pick up some of said powder so emptied upon the ground to put it in the can carried by him; and that while so doing, the other boy struck a match and stuck it to said powder so emptied on the ground, and said powder instantly ignited and then and there instantly exploded, and a flash of the fire therefrom entered said powder contained in the can held by plaintiff in his arms, which said powder instantly exploded. The evidence further shows that, as a result of said explosion, plaintiff was burned about the neck, arms, face, down on the side of his chest, on both arms, and from the forearm down through the palm of his hand; that said burns were deep and very severe; that plaintiff was burned through the skin and into what is known as the "deeper structures;" that practically all the skin was burned off; that his left hand was burned worse than the right; that the burns on the left hand were heavy enough to cause the contraction of the left wrist; that his hand was drawn almost to a right angle; that said burns

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were severe enough to cause the contraction of his muscles, and may have burned the muscles, ligaments, and tendons; that the skin had to be taken out of the palm of his hand and off his fingers, and on the back of his hand and arm; that the burns commenced about even with the nipple; that plaintiff's entire face was burned; that he was confined to his bed for five months from the effects of the burns; and that said injuries were permanent. Thereupon plaintiff was exhibited to the jury to be examined as to the scars caused by said burns.

The evidence of defendant shows that it had been in control of the mine for about a month and a few days, and that some of the cans in which powder was left had been thrown out by the former company, and that was the usual way to dispose of said cans; during the time it had control of the mine, it had used and thrown out about twenty powder cans a day; that defendant had a person employed at the powder house, known as a "powder monkey," whose duties were to deliver the powder to the miners; that people had been accustomed to carrying off the cans for various purposes, and that said "powder monkey" in charge of said powder house, as agent of said defendant, saw plaintiff and the other boys on the day of the accident getting powder, and did not in any way attempt to prevent them from so doing.

Upon conclusion of the evidence of plaintiff, defendant demurred thereto, which was overruled and excepted to. Defendant requested eleven instructions, which were refused by the court. The court instructed the jury as follows:

"(4) The plaintiff must make out his case by a fair preponderance of the evidence. If he fails to do this, or if the evidence is equally balanced, your verdict should be for the defendant. "(5) If you believe from a fair preponderance of the evidence in this case that the defendant, the Folsom-Morris Coal Mining Company, negligently and carelessly threw out its powder cans with small quantities of powder therein, and negligently permitted them to remain there unprotected, and you further believe that the plaintiff, John De Vork, was a young boy not of mature years and discretion, and did not understand or appreciate the dangerous condition of the powder, and that the negligence of the defendant company, if you find that it was negligent, was the proximate cause of the plaintiff's injuries, that is, that the plaintiff's injuries were directly caused as a result of said negligence, you will find for the plaintiff; otherwise you will find for the defendant.

"(6) The fact that the plaintiff was injured does not presume negligence on the part of the defendant; but you are to determine from all the evidence in the case whether or not the defendant was negligent.

"(7) Negligence is the failure to do what a reasonably prudent man, under the circumstances, would have done, or doing what a reasonably prudent man would not have done under the circumstances.

"(8) In the event you find for the plaintiff, in arriving at the amount of his recovery you may take into consideration, and allow him reasonable compensation for, mental and physical suffering, if you find that he suffered any, and you may take into consideration the reasonable and probable effects in the future upon the health of the plaintiff, and the effect, if any, upon his ability to earn a living after he reaches the age of twenty-one years.

"(9) If you believe that any witness has knowingly and wilfully testified falsely to any material fact in issue, you may disregard said witness's testimony in whole or in part, or you may give it such weight and value as you deem proper.

"(10) You are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony. In determining as to the credit you will give a witness, and the weight and value you will attach to a witness's testimony, you may take into consideration the conduct and appearance of the witness upon the stand; the interest of the witness, if any, in the results of the trial; the motives of the witness, if any, in testifying; the opportunity the witness had to observe or to be informed as to the matters respecting which the witness gives testimony, and the inclination of the witness to speak the truth, or otherwise, as to the matters within the knowledge of the said witness.

"(11) All these matters being taken into account, together with all the facts and circumstances in evidence, it is your province to give to each witness such credit, and the testimony of each witness such weight and value, as you deem proper."

The jury returned a verdict in favor of plaintiff for \$5,000, to which defendant duly excepted. Motion for new trial was filed by defendant, which was overruled and excepted to, and an appeal perfected to this court.

There are many errors assigned, a large majority of which are predicated upon instructions refused, which we deem unnecessary to set out; the material errors, from our view point, being the action of the court in overruling defendant's demurrer to plaintiff's evidence, and in refusing to grant a new trial.

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The material evidence shows beyond question that the cans thrown out by defendant containing the parcels of powder were accessible to plaintiff and other boys, and therefore the first material proposition with which we are met is whether or not such action on the part of defendant was actionable negligence. We are unable to agree with defendant that under the facts in this case no liability attached to defendants; or, that the case of *Pollard v. Oklahoma City R. Co.* 36 Okla. 96, 128 Pac. 300, Ann. Cas. 1915A, 140, 4 N. C. C. A. 349, in which the facts as to the intervening causes are entirely different from those in this case, supports its contention. In that case it is said: 'It is a well-settled rule of law that requires each person to use such care for the safety and well-being of others in and about the keeping of his property as an ordinarily prudent person would have used under all the facts and circumstances of the case, and the failure to use such care is negligence; and he who does or permits a wrongful act is liable for the consequences which ensue in the ordinary and natural course of events, although such consequences be immediately and directly brought about by intervening causes, if such intervening causes were set in motion by the first or original wrongdoer.'

In *Peirce v. Lyden*, 85 C. O. A. 312, 157 Fed. 552, it is held: 'Defendant maintained a shed in a railroad yard of about 2 acres near a schoolhouse in a city, in which he kept open barrels of oil. During the daytime the shed was left unlocked, and for several months children living in the vicinity who played in the yard had been in the habit of stealing oil from the barrels in old cans and making fires with it in the yard, which fact was known to defendant's watchman. On one such occasion plaintiff, who was an infant, was burned and injured. Held, that defendant was chargeable with notice of such practice of the children from its long continuance and the knowledge of his watchman, and that the question of his negligence in keeping the place in such condition, in view of the danger of their injury therefrom, was for the jury.'

In *Miller v. Boston & N. Street R. Co.* 197 Mass. 535, 83 N. E. 990, it is held: 'In an action for personal injuries, where defendant's negligence is the proximate cause of the injury, the fact that there are other concurring culpable causes will not preclude recovery.'

In *Mattson v. Minnesota & N. W. R. Co.* 95 Minn. 477, 70 L.R.A. 503, 111 Am. St. Rep. 483, 104 N. W. 443, 5 Ann. Cas. 498, 18 Am. Neg. Rep. 511, it is said: 'The dangerous instrumentality here involved

(dynamite) is an extremely hazardous article in the hands of mature persons, and a hundredfold more so in the hands of young children. The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article (Keasbey, *Electric Wires*, 2d ed. 269, 270), and is greater and more exacting as respects young children. As to such, the care required to be exercised is measured by the maturity and capacity of the child. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745. What would constitute reasonable care with respect to adults might be gross negligence as applied to a young child. 7 Am. & Eng. Enc. Law, 2d ed. p. 441, and cases cited. The case at bar, within these rules, is even stronger than the so-called 'Turntable Cases.' There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced therefrom, the greater the attraction. As compared with an ordinary turntable, dynamite is vastly more attractive, and far more dangerous. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. In view of these considerations, the rule of law imposed upon him who possesses such dangerous articles should be more exacting than in the case of a turntable; and, applying the rule to the facts before us, it is clear that the jury was justified in finding negligence upon the part of defendant. It failed to take proper care of dynamite brought into this vicinity, and left it exposed upon the premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves. . . . In the case of *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, it appeared that the railway company had been operating a coal mine near one of its stations, and was in the habit of depositing the slack upon an open lot between the mine and the station in such quantities that it took fire from the spontaneous combustion and remained in that condition, constantly burning. Plaintiff, a young boy, visited the coal mine in company with another boy, and became frightened by threats of other boys who preceded them to the mine, and, in an effort to escape from them, fell into the burning slack, and was severely injured. L.R.A.1917A.

The company was held guilty of negligence in not properly guarding the pit of slack, and that, under the circumstances disclosed, the plaintiff was not a trespasser. It appeared that people in general visited the mine at pleasure, including boys of the age of plaintiff. There was nothing particularly attractive about the mine, either to adults or children, and certainly nothing attractive in the burning pit of slack. The court in that case cited and commented favorably upon the leading English case of *Lynch v. Nurdin*, 1 Q. B. 29, 113 Eng. Reprint, 1041, 4 Perry & D. 672, 10 L. J. Q. B. N. S. 73, 5 Jur. 797. In that case it appeared that defendant's servant left the horse and cart he was driving for his master unhitched in the street and unattended, while he entered a house on some business errand. Plaintiff, a boy of seven years, and other children, discovering the horse unhitched, began playing about the cart. Some of the boys got into the cart, while another led the horse down the street. Plaintiff, in attempting to get out of the cart, fell between the wheels, the cart passing over and breaking one of his legs. Defendant, the master, was held liable for the neglect of its servant in leaving the horse in the manner stated, and that his responsibility was not overcome by the fact that the boys were trespassers."

The contention that the plaintiff was a trespasser is not well taken. In *Shawnee v. Cheek*, 41 Okla. 227, 51 L.R.A.(N.S.) 672, 137 Pac. 724, Ann. Cas. 1915C, 290, it is held: "A child under seven years of age, or, in the absence of evidence of capacity, between seven and fourteen years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting question of duty of owner in respect to dangerous condition of premises.

The question of whether or not plaintiff, at the time of the accident, was so matured as to appreciate the danger of handling the powder, was, under proper instructions of the court, submitted to the jury; and the verdict found was a finding by the jury that plaintiff was not so matured as to understand, and did not understand, the danger incident to the handling of said powder.

Whether or not there was evidence sufficient to show liability on the part of defendant was a question for the jury; and this question, we think, was submitted to the jury under proper instructions of the court. In *Littlejohn v. Midland Valley R. Co.* — Okla. —, 148 Pac. 120, it is held: "In an action for damages for personal injury charged to have been caused by negligence, the court should not sustain a demurrer to the evidence and withdraw the

case from the jury, unless, as a matter of law, no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

We are therefore of the opinion that, in permitting the cans containing the powder to be thrown out, as they were, defendant was liable for such negligence; especially in view of the fact that the "powder monkey" in charge of the powder house was cognizant of the action of the boys in taking the powder, which knowledge of the "powder monkey" must be imputed to defendant, and did not attempt to prevent them from taking the powder. It is true that the injury complained of was brought about by an intervening cause, but such intervening cause was set in motion by the wrongdoing of defendant in throwing out the cans containing the powder. *Pollard v. Oklahoma City R. Co.* 36 Okla. 96, 128 Pac. 300, Ann. Cas. 1915A, 140, 4 N. C. C. A. 349, *supra*. We are therefore of the opinion that the court did not err in overruling the demurrer to plaintiff's evidence.

The very many requested instructions refused were, where they assert correct rules of law, covered by the general instructions of the court. We therefore do not deem it necessary to specifically point out the vice of the several requested instructions properly refused by the court.

In view of the fact that the injuries received by plaintiff are permanent, and that necessarily he must have suffered extreme pain, and must go through life terribly disfigured, we are unwilling to say that a verdict of \$5,000 is excessive. Upon a most careful consideration of the entire record, we are of the opinion that the court did not err in overruling the motion for new trial.

This cause should be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied October 10, 1916.

Annotation—Liability for injury to children from explosives left accessible to them.

Earlier cases on this subject will be found in notes to *Akin v. Bradley Engineering & Min. Co.* 14 L.R.A.(N.S.) 586; *Finkbeiner v. Solomon*, 24 L.R.A.(N.S.) 1257, and *Juntti v. Oliver Iron Min. Co.* 42 L.R.A.(N.S.) 840.

As to intervening acts of third persons affecting proximate cause in case of injury by explosives, see note to *Clark v. E. I. Du Pont de Nemours Powder Co.* L.R.A.1915E, 479.

And, generally, as to whether the intervening act of a child may break the causal connection between the defendant's negligence and the injury, see note to *United States Natural Gas Co. v. Hicks*, 23 L.R.A.(N.S.) 249.

Many other questions of negligence and liability as affected by the youthfulness of the person injured are treated in notes referred to in the Indexes to L.R.A. Notes, under the title, "Negligence," subtitles, "Liability to trespassers and licensees" and "Children;" and also under the title, "Infants," subtitle "Liability for killing or injuring child," and other titles there referred to.

The leaving of nitroglycerin caps on the ground or in an uncovered box in a place not inclosed and much used by the public, including children, is such negligence as would be the proximate cause of injury to a child eleven while he was exploding a cap which he found in such L.R.A.1917A.

place. *Barnett v. Cliffside Mills* (1914) 167 N. C. 576, 83 S. E. 826.

And one who places dynamite caps in a receptacle in a barn on his premises, and leaves them there upon sale of the premises, is guilty of such negligence as would make him liable for injury to a minor child of the purchaser of such premises, who was given one of the caps by a younger brother who had found it near the barn while playing, and who was injured by the exploding of the cap while endeavoring to clean out what he thought was dirt in the bottom. *Eckart v. Kiel* (1913) 123 Minn. 114, 143 N. W. 122, 4 N. C. C. A. 311.

So, also, a city engaged through its own employees, in construction work in a public street will be liable for injuries to a small boy caused by the exploding of a dynamite cap which he had taken from an untied sack which had been negligently left on the parking strip near the boy's home by one of the city's employees after his work for the day was done. *Davis v. Wenatchee* (1915) 86 Wash. 13, 149 Pac. 337. The court stated that the city authorities knew that explosives were necessary and were actually being used for the prosecution of the work, and so it was its positive duty to exercise reasonable care not only to avoid negligent use, but negligent abandonment of the explosives upon the street during the progress of the work.

And in *Victor v. Smilanich* (1913) 54 Colo. 479, 131 Pac. 392, a verdict against a city for injuries to a boy four and a half years old, caused by his exploding a dynamite cap alleged to have been left accessible to children by city employees engaged in the construction of a ditch, was affirmed, the court holding that there was sufficient evidence to go to the jury on the question as to whether the dynamite caps had been left negligently, as alleged.

The owner of fireworks who deposited them on a lot containing a pecan grove, situated near a public highway, to which small children were known to resort in search of pecans, cannot escape liability for injury to a boy sustained from the exploding of such fireworks, on the ground that the chief attraction which induced the boy to visit the inclosure was the pecans, which led to the discovery by him of the fireworks. *Little v. James McCord Co.* (1912) — Tex. Civ. App. —, 151 S. W. 835. The court said: "It is true that the evidence does show that up to the time of the appellant's first visit to that place the pecans were the only attraction, and that on that occasion he went inside only in response to an invitation from Cowen's boy. But it is also true that large numbers of children did visit that grove in search of pecans and did so without any permission from anyone. This created a condition which even the owner of the premises could not wholly ignore in casting away or depositing thereon dangerous objects possessing special or unusual attractions to such children. Certainly the right to so encumber the premises with such dangerous and attractive objects would be still less available to one who had no legal right to so use such premises. The proof in this case does show that on the occasion when those explosives were obtained and carried away by the appellant and his companions, they were attracted to that place by these objects alone. If the conduct of the appellee in depositing them in that particular place should not here be held as tantamount to an implied invitation to enter the inclosure, it must be due to the fact that appellee had no authority to extend such an invitation. It did, however, extend an invitation, in so far as one may be implied from casting away such toys and playthings, to all children who might be upon those premises from any motive or purpose. There can be no hard and fast rule laid down by the courts for determining common-law liability resulting from personal

negligence. Each case must be determined by its own facts. The question presented is, Would a person of ordinary prudence have deposited such objects at such a place under the circumstances detailed by the evidence in this case? We adhere to the holding that the evidence presented a question which the court should have submitted to the jury." The court in this case, it will be seen, reached a different conclusion than that of the court in the *Carpenter Case*, which was very similar as to facts, cited in note in 42 L.R.A.(N.S.) 840, and referred to in the *Loughlin Case* (1913) 240 Pa. 174, 87 Atl. 294.

In *Mathis v. Granger Brick & Tile Co.* (1915) 85 Wash. 634, 149 Pac. 3, an action for injuries to a young child caused by the exploding of dynamite caps, predicated upon negligence of employees in leaving such caps easily accessible to small children, it was held that judgment of nonsuit on the ground that there was no showing of negligence was improper, as there was clear and ample evidence that explosives were habitually kept in a most careless manner in a clay pit guarded by nothing more substantial than a wooden door which was never locked.

So, also, in *Wallace v. Matthewson* (1915) 143 Ga. 236, 84 S. E. 450, an action for injuries to a boy nine, caused by his exploding a dynamite cap which he had picked up on the premises, to which the public were invited, it was held error to dismiss the petition on general demurrer, where the petition alleged in effect that defendant, the owner of such premises, through her agents and servants, caused a box of dynamite caps to be left upon such premises in such manner as to invite children to look into it and play with its contents.

And in *Mills v. Central of Georgia R. Co.* (1913) 140 Ga. 181, 78 S. E. 816, Ann. Cas. 1914C, 1098, an action for the death of a boy, caused by the explosion of a railway signal torpedo by another boy, which they had picked up on the railroad right of way, it was held that the petition made a case sufficient to withstand a demurrer, where it was alleged in effect that the torpedo was carelessly and wantonly placed and left on the roadway, where it was known that the public were accustomed to walk, and not placed there for signal purposes.

And it was also held in the *Mills Case*, sufficient to withstand demurrer to allege that the torpedo was wantonly, carelessly, and negligently placed there by the servants and employees of the

railroad company, without giving the names of such servants or employees.

In *Weeks v. McDowell Constr. Co.* (1913) 153 Ky. 691, 156 S. W. 127, it was held that as the theory of the plaintiff was that employees of the construction company negligently placed the caps where they were found, although there was no direct evidence to that effect, evidence to the effect that the employees knew that it was dangerous to place such caps where they were found, and that, so far as known, none of the employees entertained any ill-will towards the company or had any motive for putting the caps there, was admissible for the purpose of rendering less probable the inference that some employees of the company, either negligently or maliciously, placed the caps there.

But it is not negligence on the part of a landlord to temporarily store dynamite caps tied in sacks in an unfrequented loft of a tool house situated near a house occupied by a tenant who had small children, there being no steps or ladder to the loft, so as to make him liable for an injury to the 8-year-old child of the tenant caused by the exploding of a cap which he had taken from the loft after he had climbed thereto by a way provided by himself. *Miller v. Chandler* (1915) 163 Ky. 301, 173 S. W. 779. And this although the landlord knew that the children played in the lot where the tool house was situated. The court stated that the landlord was within his rights in having the dynamite on his farm, and that it may well be doubted whether there was any place on his whole farm where he could have temporarily stored the explosive where it would have been less liable to be molested by children or others; that he not only tied up the explosive so it would not be attractive to children, but took rather unusual precaution in placing it where in all probability it would not be disturbed.

However, on a later appeal in *Miller v. Chandler* (1915) 168 Ky. 606, 182 S. W. 833, defendant was held liable for the injury on the ground of having failed to exercise ordinary care, as on a new trial it was shown that he knew that the children of his tenant were accustomed to go often to such loft in search of eggs and for the purpose of playing, and also it appeared that he had informed the children of the presence of the dynamite in the loft, and had warned them against touching it.

A railroad company is not negligent in L.R.A.1917A.

leaving an empty alcohol barrel on the platform at destination, although it has a caution notice upon it, if the notice was put on it when full, and its rules do not require such notices on empty packages, so as to render it liable for injuries to a child who removes the stopper and places a lighted match at the vent, causing an explosion of gas formed from the small amount of liquid left in it. *St. Louis, I. M. & S. R. Co. v. Waggoner* (1914) 112 Ark. 593, 52 L.R.A.(N.S.) 181, 166 S. W. 948. The court denied the contention of the company that the lighting of the match and the placing of it over the barrel was the proximate cause of the injury, and stated that, if the railway company was negligent in leaving the empty alcohol barrel upon the platform of the station, such negligence would be the proximate cause of the injury. In basing its decision on the absence of negligence on the part of the railroad company, the court stated that the mere fact that there was posted on the end of the barrel a caution notice would not of itself be sufficient to establish negligence against the company, as shipments of empty alcohol barrels under the rules of the company were not required to have caution tags placed upon them, and a tag placed upon such a barrel was no notice that such barrel was dangerous. Nor were the employees of the company expected to have knowledge that by exposure to the sun, through chemical processes, explosives would be produced, and that such barrel would therefore be dangerous when exposed to children who might be in the habit of frequenting the station platform. Nor, the court added, could it be reasonably anticipated that such dangerous agencies would be created under such circumstances, or that children who were in the habit of frequenting the station platform would extract the stopper from the barrel and place a lighted match upon it or within it, as there is nothing in the appearance or structure of an empty barrel which is closed up at both ends that is calculated to attract the attention of children at play.

The owners of a dredge, the motor power of which was a naphtha engine, were not guilty of negligence in leaving a quart can of naphtha used for priming the engine on a shelf back of the engine when the crew left the dredge for a meal, so as to be liable for injuries to trespassing children who obtained possession of the naphtha pot and threw it on a fire, where it did not appear that anyone had ever previously meddled with

the pot, or that the owners had any reason to anticipate that the particular children injured or anyone else might do so. *Dahl v. Valley Dredging Co.* (1914) 125 Minn. 90, 52 L.R.A.(N.S.) 1173, 145 N. W. 796.

And the mere failure of the owner of a dredge to guard naphtha which is kept at a proper place, where there is no reason to anticipate that it will be meddled with, so that trespassing children cannot get possession of it, does not of itself constitute actionable negligence under either the doctrine of the *Turntable Cases* or the rule applying to explosives. *Ibid.*

Nor does the leaving of a bottle of denatured alcohol beside the road, after completing work in connection with which it has been used, render one liable for injury to a child who finds it and is burned in attempting to set it afire, since such result could not have reasonably been expected. *Hall v. New York Teleph. Co.* (1915) 214 N. Y. 49, L.R.A. 1915E, 191, 108 N. E. 182.

Negligence of a Fourth of July celebration committee who had selected a place for the exhibition of fireworks, so as to make it liable for injuries to a seven-year-old boy caused by the exploding of an aerial bomb sent up by the committee's agent, which had fallen unexploded on private property outside the exhibition grounds, and was allowed to remain there and was later found by such boy, was held a question for the jury in *Sroka v. Halliday* (1916) — R. L. —, 97 Atl. 965.

And in *Loughlin v. Pennsylvania R. Co.* (1913) 240 Pa. 174, 87 Atl. 294, an action for injuries to a child nine years of age, sustained while an attempt was being made to open a railway signal torpedo which had been found by children lying loose on a rail where it had been placed by railway employees to warn trains in foggy weather, at a place where the railroad tracks ran along a public highway and where hundreds of children were accustomed to pass and repass, the questions of negligence and proximate cause of the injuries were held to be for the jury. The court said that "it seems to us that the connection was natural between the act of leaving the dynamite caps upon the street and the injurious consequences which followed from their being found by the children and shortly afterwards exploded by them through ignorance of their dangerous character. The result of the negligent act was not remote or unnatural, but was one which might reasonably have L.R.A.1917A.

been anticipated, and the duty of guarding against any such result from the use of the dynamite caps therefore arose." This case will be seen to be somewhat at variance with *Carpenter v. Miller* (1911) 232 Pa. 362, 36 L.R.A.(N.S.) 932, 81 Atl. 439, cited in the note in 42 L.R.A.(N.S.) 840, which held that the deposit by the owner of unexploded fireworks on a public dumping ground was not the proximate cause of injury to a boy who picked up some of the fireworks from the dump and carried them to his home and was injured by an explosion in the lighting of the same.

In *Birnbaum v. Philadelphia & R. R. Co.* (1915) 249 Pa. 238, 94 Atl. 925, an action for injuries to a child seven, sustained in exploding dynamite caps which he had found between the tracks of a railroad company which were laid along a public street, it was held that an instruction to render a verdict for the defendant was proper, as there was no evidence which in any way tended to connect the railroad company with the placing of the dynamite caps in the street.

Also, in *John v. Birmingham Realty Co.* (1911) 172 Ala. 63, 55 So. 801, an action for injury to a boy ten as a result of the explosion of a dynamite cap which he had picked up in a public street, which was alleged to have been placed there by defendant and left exposed and unguarded, the court stated that the only theory upon which a recovery could be had was upon proof, positive or circumstantial, that the cap found by him was placed or left there by the defendant or its agent or servant, and so a general charge in favor of defendant was warranted where there was no direct evidence that the cap ever belonged to defendant or that it had placed it where it was found, and from the evidence it was just as reasonable to infer that the cap was dropped by others or belonged to others as it was to infer that it belonged to defendant and got to the place where it was found through the negligence of such defendant or its agent or servant.

And in *Gralka v. Worth Bros. Co.* (1914) 245 Pa. 467, 91 Atl. 860, an action for injuries to a child seven as the result of the exploding of dynamite alleged to have been negligently left in an open shanty which had formerly been occupied by a construction company while it was engaged in constructing a road, it was held that there was insufficient evidence to go to the jury, where it was alleged that the dynamite was found by children in a paper box, and the only

evidence in support of the allegation that defendant had left such dynamite in the shanty was that several months previously the construction company had used dynamite for blasting purposes in the vicinity of the shanty, and that seven months before the children went into it one of its employees had seen in it a little wooden box containing dynamite, and it was shown that the shanty for months, with its doors and windows at all times open, had been frequented by all sorts of people, and there was the further testimony of the boy who found it, who was fifteen years of age, given less than a year afterward, that he had never seen the box before that day, although he had been in the shanty only the day before, and that if it had been in the shanty on the previous day he would have seen it.

In *Price v. Goldsboro Twp.* (1916) — N. C. —, ante, 992, 89 S. E. 1066, employees of a township engaged in blasting a portion of a public highway in said township sought refuge during a storm in a barn, and upon leaving negligently and carelessly left on a sill in the barn, in easy reach and plain view, a box of dynamite cartridges; a minor child of the owner later found the box and distributed the cartridges among his playmates who were present with him at the time, one of whom, a child of ten, was injured by the explosion of one of the cartridges which he was endeavoring to open with a pin. It was held that the township was not liable, as the wrong complained of was a tort pure and simple perpetrated by defendant's agents and employees, if at all, while engaged in the performance of duties governmental in their nature, which were imposed upon and undertaken by defendant corporation entirely for the public benefit.

The intervening conduct of boys who unlawfully took dynamite from a box and used it for the amusement of themselves and their companions, and not the negligence of the agents of the town in leaving the dynamite in an unlocked and unguarded tool chest within the limits of a highway, in violation of police regulations, was held in *Horan v. Watertown* (1914) 217 Mass. 185, 104 N. E. 464, to be the proximate cause of an accident to a seven-year-old child through an explosion of the dynamite caused by the act of such child's companions, from seven to fourteen years of age, who, while playing near the highway, took the dynamite out of the chest and threw it upon a bonfire which they had built in a field. The rule applicable to this case, L.R.A.1917A.

the court stated, was that, where the original negligence of the defendant is followed by the independent acts of third persons directly resulting in injurious consequences to plaintiff, the defendant's earlier negligence may be found to be the direct and proximate cause of all injurious consequences, if, according to human experience and in the natural and ordinary course of events, the defendant ought to have seen that the intervening act was likely to happen. But if such is not the case, if the intervening act which was the immediate cause of the injury complained of was one which it was not incumbent upon the defendant to have anticipated as reasonably likely to happen, even though a high degree of caution would have shown him that it was possible, then he was owed no duty to the plaintiff to anticipate such further acts; the chain of causation was broken, and the original negligence cannot be said to have been the proximate cause of the final injury. And so, in the instant case, the court said that, while the dynamite and the other contents of the box were left in such a way that a thief might not find it very difficult to steal them, it could not be said that the defendant was bound to anticipate that this might be done, and to guard against the consequences that might follow if a thief should steal the dynamite and so use it as to do injury to others; and there was less reason to anticipate a series of thefts under the circumstances shown, or to believe that such thefts would be committed in daylight in so public a place, nor was there any reason why defendant should be held bound to have anticipated that at such a place and at such a time a gathering of boys, after some of them had stolen the dynamite, should engage in the dangerous sport shown by the testimony.

And leaving an open chest in a public place, in which were stored nitroglycerin caps, without permit and in violation of ordinance, was held in *Perry v. Rochester Lime Co.* (1916) — N. Y. —, L.R.A. —, —, 113 N. E. 529, not to be the proximate cause of the death of a boy eight by the explosion of one of the caps, where the caps, which were in tin boxes which were packed in wooden boxes, had been stolen therefrom the day previous and taken to their home a half a mile distant by two boys, one thirteen and the other twelve, companions of deceased, one of whom exploded the cap.

So, also, neither the negligent storage of dynamite caps nor the attractive character of the premises was held in *Bot-*

torff v. South Constr. Co. (1916) — *Ind.* —, 110 N. E. 977, to be the proximate cause of injury to a boy twelve who was injured while exploding a dynamite cap, where such cap had been given to him by another boy, fourteen years old, who was *sui juris*, who had taken the cap from the shed wherein it was stored.

And the owners of a quarry upon which was stored blasting powder used in operating the quarry were held in *Dudley v. Hawkins* (1916) — *Tex. Civ. App.* —, 183 S. W. 776, not to be liable for an injury to a boy fourteen as the result of exploding powder taken from the premises, as the evidence showed that the injured boy went to the quarry with companions for the sole purpose of purloining the powder, which was done after watching for a favorable opportunity when the watchman and workmen were not looking, and also, as the boy himself testified, that he had never before been in the vicinity of the quarry, and would not have gone this time if he had not been solicited to go by his companions for the purpose of stealing the powder. The court, while approving the doctrine of the *Turntable Cases*, stated that this doctrine was not applicable to this case, as it was clear the boy was not allured there by the powder, and as it also clearly appeared that the quarry owners were using ordinary care to protect from harm anyone who came upon the premises, as, from plaintiff's own evidence, it appeared that a watchman was employed to live upon the premises and that the employees, except Sundays, worked there until possibly 5 o'clock. And further, the court stated, the powder causing the injury was in large sealed cans, two 25-pound cans tied together with wire, and the premises were blocks away from any public highway, with no path or road leading to them used as a public highway, and were upon the mountain side, and so under such circumstances it could not be said that even the watchman would contemplate that it was necessary to keep his eye upon the powder at all times in the fear that some child might burn himself with it.

So, also, a normal ten-year old boy who takes dynamite caps from a contractor's tool box, which is left open in a public highway, is a trespasser, and cannot hold the contractor liable for an injury caused by the explosion of a cap, although he might have been negligent in leaving the caps so exposed. *Nicolosi v. Clark* (1915) 169 *Cal.* 746, *L.R.A.* 1915F, 638, 147 *Pac.* 971.

The act of a railroad company en-
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gaged in extending its line, in permitting cans containing small quantities of blasting powder to remain on or near its right of way, where they had been carelessly thrown by employees, was held in *Pollard v. Oklahoma City R. Co.* (1912) 36 *Okl.* 96, 128 *Pac.* 300, *Ann. Cas.* 1915A, 140, 4 *N. C. A.* 349, not to be the proximate cause of an injury sustained by a boy thirteen while he was attempting, with a companion, to explode some of the powder, as the evidence showed that the boy so injured had not been near the place where the cans were thrown, nor taken any part in gathering the powder, but that his companion, having several weeks prior thereto discovered the cans, from time to time gathered the small quantity in each can into one can, which he had hidden back of his home, against the remonstrance of his parents, who, however, did not take it from him, and that on the day of the accident the boys had taken a quantity of the powder so hidden for the purpose of exploding the same. The court said: "The leaving of the powder cans along the right of way of the defendant company in and near the cut referred to in the pleadings and the evidence, even though being a negligent act on the part of the defendant company, certainly cannot be said to be the primary or proximate cause of plaintiff's injury. Much has been said by counsel for plaintiff in their brief about the doctrine of attractive nuisances; but we fail to see how that doctrine can apply in this case, for plaintiff was not attracted to the right of way nor to the powder cans by reason of any such nuisance. It must be borne in mind that he at no time was at or near the defendant's right of way; neither did he see the powder cans scattered along the right of way, nor did he have any part in the gathering of the powder from the various cans into one bulk. The accident occurred at a point far distant from the defendant company's right of way, and the injury could have occurred as easily, and the results been as severe, had the powder been obtained from any other source. The Justes boy being past fourteen years of age, and a trespasser on the company's premises, was, judging solely from his testimony as shown by the record, not entitled to the protection of that law which requires owners of premises to use care in keeping the same in a safe condition on account of the unreasoning and natural impulses of children of immature years who may happen to enter thereon either as trespassers or invitees. But even though he were a

child of tender years acting under the unreasoning and natural impulses of childhood, and entitled to the protection of the doctrine of 'attractive nuisances' that doctrine could not be invoked in behalf of the plaintiff under the facts of this case. . . . Plaintiff, of course, was not a trespasser, and the doctrine that the company owed him a duty in regard to keeping its right of way in a safe condition can have no place in the consideration of this case, for the injury occurred at a place far removed from defendant's premises, and plaintiff, so far as the record in this case shows, was never on defendant's right of way at any time. The leaving of the powder cans on the right of way of defendant company in itself could not therefore have been the proximate cause of the injury complained of; neither was it a concurrent cause, for a concurrent cause is one that acts contemporaneously or independently with some other or primary cause which occasions or results in the injury, and which result or injury would not have occurred had one or the other causes been absent. The entry of the Justes boy on the right of way of the defendant company, either as a trespasser or as an invitee, and the taking of the powder by him and the carrying of the same away and the hiding thereof in different places; the knowledge on the part of the parents that he was in possession of the powder, and the scoldings and advice given by the parents to him concerning the dangerous qualities of the powder; the taking of the powder out of the can from behind the house where it had been hidden for more than three weeks, and the carrying of the same in their pockets by the boys to the creek and the lighting of the same by the Justes boy,— all present to our mind such independent, intervening, efficient causes that any of which might well be considered as the real, primary, proximate cause of the injury, and the original negligence of the company in leaving the cans on the right of way, conceding such act to be negligent, is altogether too remote to hold it liable for the injury complained of, for the reason, as above stated, that the chain of events is so broken that they became independent, and cannot be said to be the natural and probable consequences of the original or primary negligence."

The court added, however, and this distinguishes it from *FOLSOM-MORRIS COAL MIN. Co. v. DE VORK*, ante, 1290, that, "had the explosion occurred on the right of way and the injury to the plain-

tiff resulted therefrom, then the leaving of the cans as described in the pleadings and as shown by the evidence would doubtless have constituted a nuisance, and had plaintiff, either by himself or with others, gathered the powder from the cans, after having been attracted to the right of way by them or by any other sufficient cause, then the doctrine of attractive nuisance would probably apply so far as plaintiff was concerned, and the company would have been liable for the resulting damages."

And in *Weeks v. McDowell Constr. Co.* (1913) 153 Ky. 691, 156 S. W. 127, an action for injuries to a child as the result of the explosion of a dynamite cap found by him, and alleged to have been negligently left in an exposed and unguarded place, evidence to the effect that the magazine in which the explosives were stored, and the chest in which they were kept while blasting was in operation, were on several occasions broken into and dynamite caps and other explosives taken therefrom, was held admissible for the purpose of establishing the fact that the caps in question were not in the possession of the employees alone, but were in the possession of others who had an equal opportunity to place them where they were found by the boys.

But the act of a workman unskilled in the use of high explosives, in removing a quart of solidified glycerin left lying near a well by the agent of a powder company after shooting the well, and in placing it in a near-by stone fence to prevent injury to himself and his fellow workmen, was held in *Clark v. E. I. Du Pont de Nemours Powder Co.* (1915) 94 Kan. 268, L.R.A.1915E, 479, 146 Pac. 320, not to amount to an unrelated, intervening, and efficient cause, so as to excuse the powder company from its liability for damages to children who, about two years after, find the solidified glycerin and are injured by it.

So, also, the action of a mother in taking from the pocket of her child a dynamite cap, the dangerous character of which she had no knowledge of, and placing it so that the child could easily get it again, was held in *Mathis v. Granger Brick & Tile Co.* (1915) 85 Wash. 634, 149 Pac. 3, not to be an independent, intelligent, intervening cause between the exploding of such cap to the injury of the child, and the negligence of the original owners of the caps in leaving them easily accessible to children.

In the Mathis Case it further appeared

that the dynamite cap had been picked up by two boys, respectively fourteen and thirteen, and that later, while they were playing around the school grounds, one of the caps dropped from the pocket of one of the boys and was picked up by the boy injured, and it was held to be a question for the jury under the evidence L.R.A.1917A.

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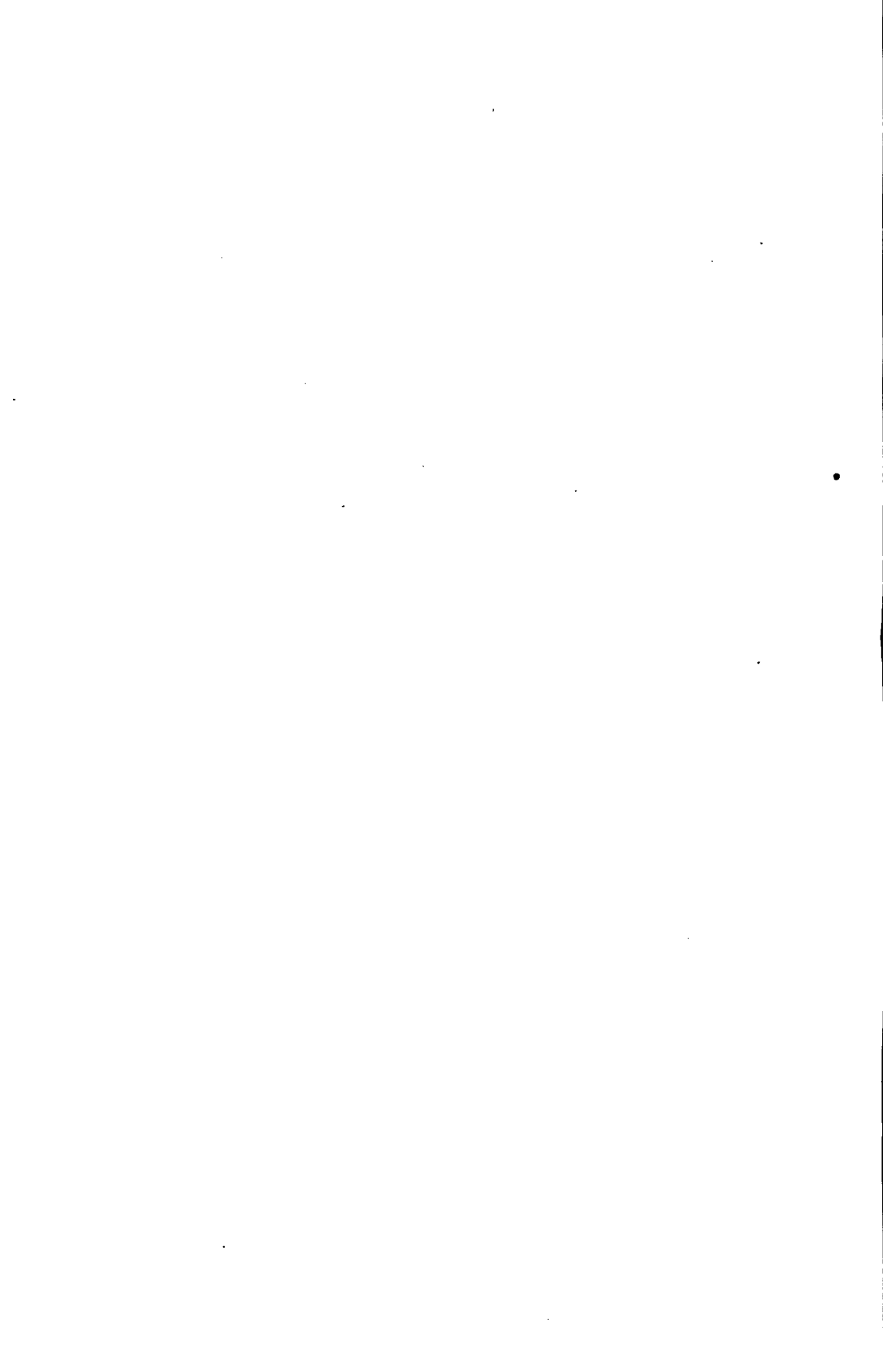
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